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

11525 Edwin Cruz, etc., Index 26699/16E
Plaintiff-Respondent,

-against-

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

Simpson Street Development Association, Inc.,
Defendant-Appellant-Respondent,

Johan A. Vargas-Paulino,
Defendant.

_____

Lewis Brisbois Bisgaard & Smith LLP, New York (Nicholas P. Hurzeler of counsel), for appellant-respondent.

Schnader Harrison Segal & Lewis LLP, New York (Carl J. Schaerf of counsel), for respondents-appellants.

McMahon & McCarthy, Bronx (Daniel C. Murphy of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (John R. Higgitt, J.), entered May 13, 2019, which, to the extent appealed from as limited by the briefs, denied defendant Simpson Street Development Association, Inc.'s (SSDA) and defendants City of New York and New York City Board/Department of Education's (collectively, the City) motions for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

The infant was injured after he was released from an after-school program run by defendant SSDA at a City middle school in the Bronx through an exit onto Fox Street. He and his brother and a few friends began playing a game involving chasing people

and giving them bear hugs; to avoid hugging a certain friend, the infant ran across Fox Street and was struck by a vehicle.

Defendants established that the infant had been released from the school before the accident happened, but they failed to demonstrate as a matter of law that Fox Street was a safe spot or was not a foreseeably hazardous setting (*see Ernest v Red Cr. Cent. School Dist.*, 93 NY2d 664, 671-672 [1999]; *Donofrio v Rockville Ctr. Union Free Sch. Dist.*, 149 AD3d 805, 806 [2d Dept 2017]; *Diaz v Brentwood Union Free Sch. Dist.*, 141 AD3d 556, 558 [2d Dept 2016]). Contrary to SSDA's contention, plaintiff is not required to establish that the allegedly hazardous situation resulted from the violation of a statute or regulation (*see Ernest* at 671; *see also Deng v Young*, 163 AD3d 1469, 1470 [4th Dept 2018]).

Defendants failed to demonstrate as a matter of law that the infant and his brother were provided with a safe alternative exit on another street. An affidavit and documents submitted with SSDA's motion indicate that the exit had been changed to Fox Street from a street that had signs, a lower speed limit, and speed bumps, and that the infant was escorted to the Fox Street exit by SSDA personnel. The statements contained in an affidavit by one of SSDA's employees, that the City alone was responsible for changing the exits, is, on this record, conclusory (*see Sirico v F.G.G. Prods., Inc.*, 71 AD3d 429, 434 [1st Dept 2010]).

Defendants failed to demonstrate as a matter of law that the

infant's own actions in entering the street were the sole proximate cause of the accident (*see generally Hain v Jamison*, 28 NY3d 524, 530 [2016]). One of the factors relevant in assessing cause is the spacial and temporal proximity between the alleged negligent act and the accident (*id.*). In addition, the use of multiple different safety measures at the other exit location is evidence that the type of accident that occurred in this case was foreseeable (*see id.*; *Ernst*, 93 NY2d at 672; *see also Mamadou S. v Feliciano*, 123 AD3d 610 [1st Dept 2014]).

The court providently exercised its discretion in denying the motions in part because they were premature, having been filed while defendants' depositions and other discovery remained outstanding (*see generally Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 102-103 [1st Dept 2006], *lv denied* 8 NY3d 804 [2007]; *see also Brewster v Skiba*, 22 AD3d 426, 426 [1st Dept 2005]).

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

ENTERED: MAY 14, 2020

CLERK

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

8076 The People of the State of New York, Index 4844/14
Plaintiff-Respondent,

-against-

Jawawn Fraser,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Alexandra L. Mitter of counsel), for appellant.

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

_____

Appeal from judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered January 13, 2016, which convicted defendant, after a jury trial, of robbery in the third degree, and sentenced him to a term of two to six years, unanimously dismissed, as moot.

By decision and order entered on December 24, 2019, the Supreme Court, New York County (Robert Stolz, J.), vacated defendant's conviction pursuant to CPL 440.10 and ordered a new

trial be held. As such, the appeal is rendered moot.

The Decision and Order of this Court entered herein on February 13, 2020 (__ AD3d __, 2020 NY Slip Op 01037 [1st Dept 2020]) is hereby recalled and vacated (*see* M-973 decided simultaneously herewith).

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

ENTERED: MAY 14, 2020

CLERK

Richter, J.P., Gische, Gesmer, Kern, González, JJ.

10747 The People of the State of New York, Respondent, Ind. 5253/14 1947/15

-against-

Rony George, Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Abraham L. Clott, J.), entered on or about May 23, 2019, which denied defendant's CPL 440.10 motion to vacate a judgment rendered June 29, 2016, unanimously reversed, on the law, and the matter remanded for a hearing on defendant's claim of ineffective assistance of counsel.

The motion court abused its discretion by denying defendant's CPL 440.10 motion without a hearing, where his motion was supported by adequate allegations of fact to support his claim of ineffective assistance of counsel.

Defendant pled guilty to two counts of criminal sale of a controlled substance in the third degree and one count of conspiracy in the fourth degree in satisfaction of two indictments, and was sentenced to an aggregate term of one year in prison and one year of post-release supervision. The crime to which defendant pled is categorized as an "aggravated felony" for

immigration purposes (*see* 8 USC § 1101[a][43][B]). As a result, he was subject to mandatory deportation and was ineligible to seek asylum (*see* 8 USC § 1227[a][2][A][iii] and 8 USC § 1158[b][2][B][i]). He completed serving his sentence in late 2016. In April 2018, he was arrested by ICE and has been in immigration detention since then, while fighting his deportation.

In his CPL article 440 motion to vacate his judgment, defendant alleged that he was denied effective assistance of counsel because his counsel failed to make any effort to negotiate a plea with less severe immigration consequences (*People v Richards*, 177 AD3d 469, 471 [1st Dept 2019], *lv denied* 34 NY3d 1132 [2020]; *People v Guzman*, 150 AD3d 1259 [2d Dept 2017]; *People v Moore*, 141 AD3d 604 [2d Dept 2016]; *Lafler v Cooper*, 566 US 156, 162 [2012]; *Padilla v Kentucky*, 559 US 356, 373 [2010]).[1] The motion court denied defendant's motion without conducting a hearing (*see* CPL 440.30[4]).

A court must conduct a hearing before denying a CPL article 440 motion unless "[a]n allegation of fact essential to support the motion (i) is contradicted by a court record or other official document, or is made solely by the defendant and is unsupported by any other affidavit or evidence, and (ii) under these and all the other circumstances attending the case, there is no reasonable possibility that such allegation is true" (CPL

[1] Defendant also makes other arguments as to why his counsel was ineffective which we reject.

440.30[4][d]; *see also People v Caldavado*, 26 NY3d 1034 [2015]). Neither of these circumstances was present here.

In fact, the affidavits submitted in support of defendant's motion were uncontradicted and demonstrated a reasonable possibility that his plea counsel was ineffective. In the affirmation submitted by defendant's appellate counsel, she set out the substance of what defendant's plea counsel had told her: that he did not consider immigration consequences either during his negotiation of defendant's plea nor in the ultimate disposition of his case. Defendant also submitted his own affidavit stating that plea counsel never discussed with him the possibility of seeking a plea with less severe immigration consequences, and that, had he known that plea counsel could have done so, he would have rejected the offered plea. Defendant also set forth in detail the reasons why it was important for him to avoid being deported to the Dominican Republic, and why he would have been willing to accept a longer sentence to avoid deportation.

Where the basis of a claim for ineffective counsel is counsel's failure to attempt to negotiate an immigration friendly plea, defendant has to show that there is a reasonable probability that the People would have made such an offer (*People v Young*, 150 AD3d 429 [1st Dept 2017], *lv denied* 29 NY3d 1136 [2017]). If the likelihood that the People would have made such an offer is speculative, then the motion may be denied without a

hearing (*People v Olivero*, 130 AD3d 479 [1st Dept 2015], *lv denied* 26 NY3d 1042 [2015]). Here, however, defendant's motion shows that there was a reasonable possibility that his plea counsel could have secured a plea deal with less severe immigration consequences. For example, instead of pleading guilty to two counts of criminal sale of a controlled substance in the third degree, a class B felony, he could have offered to plead guilty to two counts of criminal possession of a controlled substance in the fifth degree (*see* Penal Law § 220.06[5]), a class D felony.

Defendant has adequately alleged that there was a reasonable possibility that the People would have offered defendant such a plea, despite the fact that the drug possession charge is a lesser-included offense to the drug sale charge. First, the People agreed to a sentence of one year in prison and one year of post-release supervision in order to cover defendant's drug offenses. This suggests that there was a reasonable possibility that the People would have agreed to a different, immigration-favorable disposition resulting in the same aggregate prison time (*Richards*, 177 AD3d at 471, citing *Lafler*, 566 US at 163-164]). Since the drug possession offense carries a sentencing range between one and two and a half years in prison (Penal Law § 70.70[2][a][iii]), followed by one year of post-conviction relief (Penal law § 70.45[2][a]), if defendant had pled guilty to that charge, the People could have offered defendant the same sentence

he ultimately received.

Second, both offenses subject defendant to equally enhanced sentences if he were to be convicted of another felony within 10 years (Penal Law § 70.06).

Third, if the People had only been willing to offer the lesser-included offense together with a longer sentence, defendant might well have been willing to agree to that. As defendant stated in his affidavit, he would have accepted a plea with less severe immigration consequences even if it meant more jail time *(see People v Mebuin*, 158 AD3d 121, 129 [1st Dept 2017] ["Since deportation is a serious consequence, the equivalent of banishment or exile, we have recognized that a noncitizen defendant may be willing to forgo an otherwise very beneficial deal if it carries the consequence of deportation"] [internal citations and quotation marks omitted]).

Finally, there is no evidence that the People specifically sought a conviction on the drug sales offense in order to secure a harsher immigration consequence for defendant (*see Richards*, 177 AD3d at 471 [lack of evidence that the People actively sought the defendant's deportation supports a reasonable probability that the People would have agreed to a plea resulting in the same prison time but with less severe immigration consequences]). Although the drug possession offense would still render defendant deportable (*see* 8 USC § 1227[a][2][B][i]), the offense is not considered an "aggravated felony" for immigration purposes and

would not prevent defendant from seeking asylum to avoid deportation (*see* 8 USC § 1158). Therefore, defendant raises sufficient issues to warrant a hearing as to whether the People would have offered a plea with a less severe immigration consequence had his plea counsel sought one.

Moreover, defendant demonstrated a reasonable possibility that he would have rejected his plea had he known that he could have obtained a sentence that had less harsh immigration consequences. In his affidavit, defendant, now 24, stated that he came to the United States as a teenager from the Dominican Republic to escape from his mother's ex-boyfriend who had physically abused his mother and him, and threatened to kill them. He has since learned that his mother's ex-boyfriend burned down their family home in the Dominican Republic, so that he has neither relatives there nor a place to live. Moreover, he fears that his mother's ex-boyfriend would kill him if he ever returned to the Dominican Republic. Defendant also attached to his motion 10 letters of support written by his friends and family, all of whom reside in the United States, to demonstrate his attachment to his community and his relationships with community members here. This record credibly demonstrated that defendant placed paramount importance on avoiding deportation and remaining in the United States, and therefore would not have pled guilty if he had known that his plea counsel could have sought a plea with less severe immigration consequences (*see People v Martinez*, 180 AD3d

190, 194 [1st Dept 2020][the defendant's long history in the United States, his family circumstances and his gainful employment demonstrated that he placed paramount importance on avoiding deportation]).

Defendant established a "reasonable possibility" that the allegations set forth in his CPL article 440 motion are true (CPL 440.30[4][d]). In other words, when the motion "court advised defendant that his guilty plea would subject him to deportation, and defendant then agreed to plead guilty, he did not know there was a way in which a disposition involving the same offenses and aggregate term could be structured to avoid deportation" (*Richards*, 177 AD3d at 471).

Therefore, the motion court abused its discretion in denying defendant's CPL 440.10 motion without first holding a hearing on his claim that his counsel was ineffective because of his failure to negotiate a plea with less severe potential immigration consequences (CPL 440.30[4][d]*; see Richards*, 177 AD3d at 471*; Mebuin*, 158 AD3d at 126).

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

ENTERED: MAY 14, 2020

CLERK

Richter, J.P., Oing, Singh, Moulton, JJ.

11486 The People of the State of New York, Respondent, Ind. 4082/12

-against-

Santo Valenzuela, Defendant-Appellant.

_____

Janet E. Sabel, The Legal Aid Society, New York (Steven R. Berko of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Richard D. Carruthers, J. at speedy trial motion; Abraham L. Clott, J. at jury trial and sentencing), rendered July 9, 2015, convicting defendant of robbery in the first and second degrees, and sentencing him to concurrent prison terms of five years, unanimously affirmed.

The court properly denied defendant's speedy trial motion. The court correctly ruled that the sole period at issue on appeal was excludable time under CPL 30.30(4)(b), because defense counsel was on trial in another case (*see e.g. People v Brown*, 149 AD3d 584 [1st Dept 2017], *lv denied* 20 NY3d 1124 [2017]). There is nothing in the record to suggest that the colleague of defense counsel who appeared in court was available to try the case instead of the assigned attorney.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9

NY3d 342, 348-349 [2007]). The totality of the evidence supports the inference of defendant's accessorial liability (*see* Penal Law § 20.00). There is no reasonable explanation for defendant's behavior except that he was an intentional participant in the crime, and not a spectator.

The court properly declined to permit defendant to introduce a portion of the grand jury testimony of a prosecution witness who was unavailable at trial, and there was no violation of defendant's constitutional right to present a defense. The probative value of this testimony depended on the resolution of a critical ambiguity that was never clarified during the grand jury proceeding. Accordingly, the court correctly determined that the testimony lacked "sufficient indicia of reliability" (*People v Robinson*, 89 NY2d 648, 650 [1997]). The prosecutor's "mere opportunity to examine" its witness before the Grand Jury did not establish reliability under the particular circumstances (*id.* at 655). In any event, any error regarding the denial of defendant's request to introduce grand jury minutes was harmless. There is no reasonable possibility that introduction of these minutes would have affected the verdict.

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

ENTERED: MAY 14, 2020

CLERK

Richter, J.P., Oing, Singh, Moulton, JJ.

11487 Anthony Newell, Index 302650/15
Plaintiff-Appellant, 20478/14E

-against-

Tina D. Bronston, et al.,
Defendants-Respondents.

- - - - -

Tina Bronston,
Plaintiff-Appellant,

-against-

Jose A. Javier,
Defendant-Respondent,

Anthony Newell, et al.,
Defendants.

_____

G. Wesley Simpson, P.C., Brooklyn (G. Wesley Simpson of counsel), for Anthony Newell, appellant.

Cheven Keely & Hatzis, New York (Thomas Torto of counsel), and O'Dwyer & Bernstien, LLP, New York (Steven Aripotch of counsel), for Tina D. Bronston, respondent/appellant.

Saretsky Katz & Dranoff, L.L.P., New York (Sam Tarasowsky of counsel), for Jose A. Javier, respondent.

_____

Order, Supreme Court, Bronx County (Robert T. Johnson, J.), entered on or about June 1, 2018, which granted defendants Bronston's and Javier's motions for summary judgment dismissing Newell's complaint as against them, unanimously modified, on the law, to deny Javier's motion, and otherwise affirmed, without costs.

These actions arise from a three-car motor vehicle accident. Defendant Javier was driving his livery cab, followed by defendant Bronston and plaintiff Newell, when he stopped short to

pick up a passenger. Bronston stopped without hitting Javier's cab, but Newell rear-ended Bronston's vehicle.

Issues of fact as to Javier's comparative negligence preclude the summary dismissal of Newell's complaint as against him. A jury could rationally find that Javier's conduct was a "substantial cause" of the accident, i.e., that his sudden stop in the unobstructed moving lane of traffic created a foreseeable chain of events that resulted in the rear-end collision between Bronston and Newell (*see Tutrani v County of Suffolk*, 10 NY3d 906 [2008]; *Baez-Pena v MM Truck & Body Repair, Inc.*, 151 AD3d 473, 477 [1st Dept 2017]).

The court correctly dismissed Newell's complaint as against Bronston. Newell's rear-ending of Bronston's stopped vehicle establishes a prima facie case of negligence on his part, and he failed to provide a nonnegligent explanation for the accident (*see Morgan v Browner*, 138 AD3d 560 [1st Dept 2016]; *Padilla v Zulu Servs., Inc.*, 132 AD3d 522, 523 [1st Dept 2015]). As the motion court found, there is no evidence of negligence on Bronston's part.

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

ENTERED: MAY 14, 2020

CLERK

Richter, J.P., Oing, Singh, Moulton, JJ.

11489 Jhon Spencer, Index 154446/16
Plaintiff-Appellant,

-against-

Term Fulton Realty Corp., et al.,
Defendants-Respondents.

_____

Gorayeb & Associates, P.C., New York (John M. Shaw of counsel), for appellant.

Ingram Yuzek Gainen Carroll & Bertolotti, LLP, New York (Jessica L. Rothman of counsel), for respondents.

_____

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered November 21, 2018, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing the Labor Law § 200 and common-law negligence claims as against defendant Bravo Builders, LLC (Bravo) and the Labor Law § 241(6) claim, unanimously modified, on the law, to deny the motion as to the Labor Law § 200 and common-law negligence claims, and otherwise affirmed, without costs.

Plaintiff alleges that he was injured while working as a carpenter for a subcontractor performing construction work. Plaintiff states that iron rods were scattered on the ground along with debris. Plaintiff was directed to pass iron rods to workers above him so that the iron rods could be installed as part of the building's concrete superstructure. To retrieve the iron rods, plaintiff and a coworker had to move a cart loaded with dozens of iron jacks. After moving the cart a couple of

feet, the cart's wheels got stuck. When plaintiff's coworker continued to pull it, the cart pinned plaintiff's hand against an iron jack, severing the tip of his index finger.

The court correctly dismissed plaintiff's Labor Law § 241(6) claim insofar as it was predicated on Industrial Code (12 NYCRR) § 23-1.7(e)(1) because neither plaintiff nor the cart that he was pushing actually tripped or slipped (*see Serrano v Consolidated Edison Co. of N.Y. Inc.*, 146 AD3d 405 [1st Dept 2017]). The court also correctly determined that the rods were integral to plaintiff's work, thus requiring dismissal of his Labor Law § 241(6) claim insofar as it was predicated on 12 NYCRR 23-1.7(e)(2) (*see Zieris v City of New York*, 93 AD3d 479, 479-480 [1st Dept 2012]). The Labor Law § 241(6) claim was correctly dismissed insofar as it was predicated on 12 NYCRR 23-1.28(a) and (b), because the cart that plaintiff was pushing became stuck on the rods underneath it, and not because of any problem with its wheels (*see Ali v Sloan-Kettering Inst. for Cancer Research*, 176 AD3d 561, 562 [1st Dept 2019]).

The Labor Law § 200 and common-law negligence claims based on a dangerous premises condition should not be dismissed as against Bravo, because defendants failed to establish prima facie Bravo's lack of constructive notice of the dangerous condition (*see Pereira v New Sch.*, 148 AD3d 410, 412-413 [1st Dept 2017]).

A defendant may be held liable for an injury cased by a dangerous condition at the worksite (*Cappabianca v Skanska USA*

Bldg. Inc., 99 AD3d 139, 143-144 [1st Dept 2012]). A defendant will be found to have "failed to establish that they lacked constructive notice of the dangerous condition that caused plaintiff's injury, [if] they submitted no evidence of the cleaning schedule for the work site or when the site had last been inspected before the accident" (*Pereira*, 148 AD3d at 412-413).

Here, plaintiff alleges that there was "garbage" as well as rods on the floor that impeded the cart's movement. Bravo's contract explicitly required it to look for dangerous and hazardous conditions on a daily basis, and to keep the workplace safe. However, since Bravo submitted no evidence as to its inspection and cleaning schedule of the worksite, this claim must be reinstated.

It is not relevant whether the rods on which the cart got stuck were an open and obvious condition that plaintiff could have seen, since that issue raises a question of plaintiff's comparative negligence and does not bear on defendant's own liability (*see Gonzalez v G. Fazio Constr. Co., Inc.*, 176 AD3d 610, 611 [1st Dept 2019]).

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

ENTERED: MAY 14, 2020

CLERK

Richter, J.P., Oing, Singh, Moulton, JJ.

11490 Eddy Rafael Fernandez, Index 300764/17
Plaintiff-Appellant,

-against-

Jason H. Ortiz, et al.,
Defendants-Respondents.

_____

Altagracia Nunez & Associates, P.C., New York (Jason A. Richman of counsel), for appellant.

Cozen O'Connor, New York (Eric J. Berger of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (John R. Higgitt, J.), entered on or about March 20, 2019, which denied plaintiff's motion for partial summary judgment on the issue of liability, unanimously reversed, on the law, without costs, and the motion granted.

Plaintiff established prima facie entitlement to judgment on liability as a matter of law, in this action where plaintiff was injured when, while riding a bicycle, he was struck by a truck driven by defendant Ortiz and owned by defendant Danella Construction of New York, Inc. The video footage taken from inside defendants' truck shows plaintiff bicycling on the right side of the lane in front of Ortiz before being struck (*see Higashi v M&R Scarsdale Rest., LLC*, 176 AD3d 788, 790 [2d Dept 2019]; *see also Bermeo v Time Warner Entertainment Co.*, 162 AD3d 404 [1st Dept 2018]). Ortiz thus failed to exercise due care to avoid colliding with a bicyclist (Vehicle and Traffic Law §

1146[a]), and breached his duty "to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident" (*Johnson v Phillips*, 261 AD2d 269, 271 [1st Dept 1999] [internal quotation marks omitted]; *see Martinez v WE Transp. Inc.*, 161 AD3d 458 [1st Dept 2018]). Moreover, plaintiff was not required to demonstrate his own freedom from comparative negligence nor to show that defendants' negligence was the sole proximate cause of the accident to be entitled to summary judgment (*see Rodriguez v City of New York*, 31 NY3d 312 [2018]).

In opposition, defendants failed raise a triable issue of fact. Ortiz's belief that plaintiff suddenly entered the roadway from the sidewalk near the parked cars, giving him no time to avoid hitting plaintiff, is speculative and contradicted by the video footage (*see Guerrero v Milla*, 135 AD3d 635 [1st Dept 2016]). Furthermore, Ortiz's statement that he did not see the bicycle with any reflective equipment is insufficient to raise triable issues of fact. The statement is contradicted by the video and, in any event, relates to the issue of plaintiff's comparative negligence (*see Rodriguez* at 324-325).

The motion is not premature, since defendants would have knowledge of any nonnegligent reason for the collision (*see Maynard v Vandyke*, 69 AD3d 515 [1st Dept 2010]).

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

ENTERED: MAY 14, 2020

CLERK

Richter, J.P., Oing, Singh, Moulton, JJ.

11491 The People of the State of New York, Ind. 2068/15
Respondent,

-against-

Shakim Brunson,
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 (Brent Ferguson 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 (Juan M. Merchan, J.), rendered June 2, 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: MAY 14, 2020

CLERK

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

Richter, J.P., Oing, Singh, Moulton, JJ.

11492 In re BMW of North America, LLC, Index 656215/18
Petitioner-Appellant,

-against-

Ioannis Leonidou,
Respondent-Respondent.

_____

Biedermann Hoenig Semprevivo, P.C., New York (Philip C. Semprevivo of counsel), for appellant.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered January 31, 2019, which denied the petition of BMW of North America (BMW) to vacate an arbitration award dated October 30, 2018 in favor of respondent Leonidou in the amount of $62,716.31, and granted Leonidou's cross petition to confirm the arbitration award, unanimously reversed, on the law, without costs, the petition granted, the cross petition denied, the award vacated and the proceeding dismissed.

Respondent Leonidou filed for arbitration against BMW pursuant to New York's Lemon Law alleging that his recurrent complaints of noises emanating from his leased vehicle remained unresolved and that it substantially impaired the value of the vehicle to him. The arbitrator found in favor of Leonidou. BMW then petitioned to vacate the arbitration award. Supreme Court denied the petition. BMW appealed. We reverse.

In a compulsory arbitration proceeding, an arbitrator must abide by the statutory standards, or an award will be vacated for exceeding the legislative grant of authority (*see Motor Veh.*

Mfrs. Assn. of U.S. v State of New York, 75 NY2d 175, 186 [1990] ["Inasmuch as compulsory arbitration is involved, judicial review under CPLR article 75 is broad, requiring that the award be in accord with due process and supported by adequate evidence in the record"]).

The Lemon Law applies to defects in car parts and workmanship that are expressly warrantied from defect by the manufacturer/dealer (*see* General Business Law § 198-a[b][1]). Under the statute, when a manufacturer is unable to correct a defect or condition that "substantially impairs" the value of the motor vehicle after a reasonable number of attempts, the manufacturer, at the option of the consumer, is required either to (1) replace the motor vehicle with a comparable motor vehicle or (2) accept return of the vehicle and refund the full purchase price to the consumer (General Business Law § 198-a[c][1]). It is undisputed that Leonidou was offered a replacement vehicle by BMW and the dealership in accordance with General Business Law § 198-a (c)(1). Leonidou exercised his option not to replace his vehicle.

Leonidou failed to present any evidence to show a defect in materials or workmanship that was covered by an express warranty (see *Matter of BMW of N. Am., LLC v Riina*, 149 AD3d 420 [1st Dept 2017]). Leonidou acknowledged that the noise issues did not affect the car's safety or operation. He admitted that other drivers he knew, driving the same vehicle type, experienced

similar noises, and BMW's witnesses, who testified to their technical experience in repairing such vehicles, attested that the noises at issue were inherent in the SUV design due to its, inter alia, stiffer suspension for off-road conditions. There was no basis in this record to find that the noises otherwise substantially impaired the value of the vehicle to Leonidou (*see generally* General Business Law § 198-a[c][1]; *Matter of DaimlerChrysler Corp. v Spitzer*, 7 NY3d 653, 658 [2006]).

The arbitration award lacks a rational basis, as it is not supported by adequate evidence in the record (*see Matter of BMW of N. Am., LLC v Riina*, 149 AD3d at 420).

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

ENTERED: MAY 14, 2020

CLERK

Richter, J.P., Oing, Singh, Moulton, JJ.

11493-
11494 Index 653182/16

Seth R. Rotter,
Plaintiff-Respondent,

-against-

Alan S. Ripka,
Defendant-Appellant,

Paul J. Napoli, et al.,
Defendants.

_____

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

Law Offices of Frederick J. Martorell, P.C., Brooklyn (Frederick J. Martorell of counsel), for respondent.

_____

Judgment, Supreme Court New York County (Arthur F. Engoron, J.), entered December 11, 2018, in favor of plaintiff and against defendant in the amount of $452,498.63, and bringing up for review, an order, same court and Justice, entered November 20, 2018, which granted plaintiff's motion for summary judgment, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered on or about June 25, 2019, which denied defendant's motion for reargument of the summary judgment motion, unanimously dismissed, without costs, as taken from an nonappealable order.

The IAS court properly determined that plaintiff established that the fees at issue were earned in connection with a matter identified on the parties' prior stipulation of settlement, and, therefore, he was entitled to half of the fees.

Defendant is correct that he is not bound by statements in the court's prior orders on the motion for summary judgment by two co-defendants, as he had no interest in those motions (*see Roddy v Nederlander Producing Co. of Am., Inc.*, 15 NY3d 944, 946 [2010]). Moreover, because the prior orders were by the same Justice, law of the case did not apply (*see People v Evans*, 94 NY2d 499, 503 [2000]). Nevertheless, the record, including the complaint in the prior action and the stipulation, dispositively establish that defendant was sued in his personal capacity.

Finally, defendant's argument on reargument that the fee was improperly divided was directly contradicted by the express terms of the stipulation of settlement.

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

ENTERED: MAY 14, 2020

CLERK

Richter, J.P., Oing, Singh, Moulton, JJ.

11495 The People of the State of New York, Ind. 3818/16
Respondent,

-against-

Nari Davis,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Alan Gadlin 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 (Gregory Carro, J.), rendered April 5, 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: MAY 14, 2020

CLERK

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

Richter, J.P., Oing, Singh, Moulton, JJ.

11496 Juan Alvarado, Index 21518/15E
Plaintiff-Respondent,

-against-

Justin Grocery,
Defendant-Appellant.

_____

Devitt Spellman Barrett, LLP, Smithtown (Christi M. Kunzig and John M. Denby of counsel), for appellant.

The Sullivan Law Firm, New York (James A. Domini of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered June 21, 2019, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Summary judgment was properly denied in this action where plaintiff was injured when he fell down the stairs while making a delivery to defendant. Plaintiff stated that he believed that the handtruck he was using became stuck in a hole or crack that was on the first or second stair from the top of the cement stairway, and that he did not see the defect before he fell because "it was a little bit dark" and he was pushing the hand truck ahead of him. Such testimony provides a sufficient nexus between the condition of the stairway and the circumstances of his fall to establish causation (*see Cherry v Daytop Vil., Inc.*, 41 AD3d 130, 131 [1st Dept 2007). Any inconsistencies between plaintiff's and his coworker's deposition testimony and

plaintiff's Workers' Compensation form as to how the accident happened is a matter of credibility for the finder of fact to determine (*see Silva v 81st St. & Ave. A Corp.*, 169 AD2d 402, 404 [1st Dept 1991], *lv denied* 77 NY2d 810 [1991]).

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

ENTERED: MAY 14, 2020

CLERK

Richter, J.P., Oing, Singh, Moulton, JJ.

11497 In re D. P., Dkt. V-28262/17
Petitioner-Appellant,

-against-

N. T.,
Respondent-Respondent.

_____

Larry S. Bachner, New York, for appellant.

Bruce A. Young, New York, for respondent.

The Children's Law Center, Brooklyn (Janet Neustaetter of counsel), attorney for the child.

_____

Order, Family Court, Bronx County (Aija Tingling, J.), entered on or about May 31, 2019, which denied the father's petition for court-ordered visitation with the subject child, unanimously affirmed, without costs.

There is a sound and substantial basis in the record for the court's determination that visitation with petitioner would not be in the child's best interests (*see Matter of Brandy V. v Michael P.*, 151 AD3d 618 [1st Dept 2017]; *Matter of Johnson v Williams*, 59 AD3d 445, 445 [2d Dept 2009]). The record shows that petitioner and the 14-year-old child have never lived together and that when petitioner visited respondent mother, with whom he was in an on-and-off relationship for years, he and the child generally kept their distance from each another. Petitioner admitted that he never took the child out in the community, and there was little one-on-one time. Both respondent and the Children's Law Center visit supervisor testified that

petitioner was angry, verbally aggressive, repeatedly demanded answers to his questions from the child, and raised inappropriate topics with the child on numerous occasions, all of which made the child uncomfortable and fearful. Moreover, while the expressed wishes of a child are not determinative in a visitation case (*see Matter of Ronald C. v Sherry B.*, 144 AD3d 545, 547 [1st Dept 2016], *lv dismissed* 29 NY3d 965 [2017]), the court properly considered the wishes of this child, who demonstrated maturity during the in camera interview (*see Matter of Melissa G. v John W.*, 143 AD3d 406 [1st Dept 2016]; *see also Matter of Mera v Rodriguez*, 73 AD3d 1069, 1070 [2d Dept 2010], *lv denied* 15 NY3d 705 [2010]). The record also supports the determination of the court that respondent did not engage in parental alienation.

We have considered petitioner's remaining arguments, including that he received ineffective assistance of counsel, and find them unavailing.

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

ENTERED: MAY 14, 2020

CLERK

Richter, J.P., Oing, Singh, Moulton, JJ.

11498 The People of the State of New York, Ind. 1184/13
Respondent,

-against-

Larry Ramos,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Daniel Young 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 (Michael A. Gross, J.), rendered October 11, 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: MAY 14, 2020

CLERK

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

Richter, J.P., Oing, Singh, Moulton, JJ.

11499 W54-7 LLC, Index 161212/18
Plaintiff-Appellant,

-against-

Christopher Scott Perrin also known as Scott Perrin, et al.,
Defendants-Respondents,

John Doe, et al.,
Defendants.

_____

Hertz, Cherson & Rosenthal, P.C., Forest Hills, (Jeffrey M. Steinitz of counsel), for appellant.

David Ng & Associates, PLLC, New York (David Ng of counsel), for respondents.

_____

Order, Supreme Court, New York County (Lynn R. Kotler, J.) entered August 1, 2019, which granted defendants' motion for summary judgment, unanimously affirmed, with costs.

The motion court properly determined that plaintiff's claims were precluded under principles of res judicata and collateral estoppel by the 1984 order of the New York City Civil Court, New York County (Emily Jane Goodman, J.), in which it was determined that defendant Scott Perrin's father, Forrest Perrin, was the tenant of both apartments, which were intended to be occupied jointly as a single residence, and because the factors for determining whether nonadjacent apartments may be occupied as a single residence were otherwise satisfied (*see Sharp v Melendez*,139 AD2d 262 [1st Dept 1988], *lv denied* 73 NY2d 707 [1989]).

Contrary to plaintiff's contentions, there were no facts presented to the motion court that would constitute a change in circumstances or a basis for holding that plaintiff was not in privity with the prior landlord to bar "redundant litigation" under the doctrine of res judicata (*Gramatan Home Invs. Corp. v Lopez*, 46 NY2d 481, 485 [1979]) or collateral estoppel (*52 Riverside Realty Co. v Ebenhart*, 119 AD2d 452, 453 [1st Dept 1986]). Similarly, plaintiff cannot deny constructive notice of Scott Perrin's rights as an occupant of the apartments from before plaintiff purchased the building in 1995, particularly given that plaintiff recognized that Perrin properly succeeded to the tenancy of both apartments in 2014 (*id.* at 453; *see also Stasyszyn v Sutton E. Assoc.*, 161 AD2d 269, 272 [1st Dept 1990]).

Although plaintiff suggests that discovery of a multitude of public records is necessary to the disposition of this case, it fails to identify how any of these records would affect the right of a statutory tenant to occupy the joint apartments with his wife and her sister under Real Property Law (RPL) § 235-f.

The motion court properly awarded defendants their legal fees as the prevailing parties under the reciprocal provisions of RPL § 234. Although styled as a declaratory judgment action, plaintiff specifically seeks the right to bring summary eviction proceedings and to collect its own attorneys' fees in the action,

and we do not view the choice of forum as a basis to deny a right under the lease (*see Matter of Duell v Condon*, 84 NY2d 773, 780 [1995]).

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

ENTERED: MAY 14, 2020

CLERK

Richter, J.P., Oing, Singh, Moulton, JJ.

11501 Dorothy DeCongelio, Index 158851/14
Plaintiff-Appellant,

-against-

Metro Fund, LLC, etc., et al.,
Defendants-Respondents,

1177 Avenue of the Americas, L.P.,
Defendant.

_____

Pillinger Miller Tarallo, LLP, Elmsford (Patrice M. Coleman of counsel), for appellant.

Harrington, Ocko & Monk, LLP, White Plains (Matthew Bremner of counsel), for Metro Fund, LLC, Silverstein Properties, Inc., California State Teachers' Retirement System, 1177 Avenue of the Americas Acquisition, LLC, 1177 Avenue of the Americas Holdings, LLC, and Silverstein Metro Fund, LLC, respondents.

McGiff Halverson Dooley LLP, Patchogue (Daniel J. O'Connell of counsel), for ABM Janitorial Services-Northeast, respondent.

_____

Order, Supreme Court, New York County (Barbara Jaffe, J.), entered February 25, 2019, which granted defendants-respondents' motions for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Defendants made a prima facie showing that they took reasonable measures to prevent a slippery condition from developing due to moisture tracked into their building on the snowy and rainy day of plaintiff's slip and fall in the lobby (*see O'Sullivan v 7-Eleven, Inc.*, 151 AD3d 658 [1st Dept 2017]; *see also Kelly v Roza 14W LLC*, 153 AD3d 1187, 1188 [1st Dept 2017]). They submitted evidence that the entire lobby floor between two entrances and the security gates was covered by 80 to

100 feet of thick mats to absorb wetness tracked in by pedestrian traffic, that plaintiff did not observe water on the floor between the security gates and the elevators when she entered the building, that the on-site manager inspected the entire lobby and elevator bank about an hour before plaintiff slipped and did not observe a wet and slippery condition, and that porters in the lobby were assigned to inspect the lobby regularly and mop up water from the floor.

Plaintiff failed to raise an issue of fact as to whether defendants had constructive notice of a dangerously wet floor, since she submitted no evidence of how long the condition had existed before she slipped (*see Garcia v Delgado Travel Agency*, 4 AD3d 204, 204 [1st Dept 2004]). The affidavit by defendant ABM Janitorial Services' former employee, to the extent it may properly be considered (*see Ravagnan v One Ninety Realty Co.*, 64 AD3d 481, 482 [1st Dept 2009]), fails to demonstrate that defendants routinely left unaddressed an ongoing and recurring dangerous condition in the area of the accident (*see Irizarry v 15 Mosholu Four, LLC*, 24 AD3d 373, 373 [1st Dept 2005]). The affidavit by plaintiff's proffered expert only described general conditions on rainy days in other areas of the lobby, did not mention the date of plaintiff's accident, and otherwise corroborated defendants' evidence that they followed a "reasonable cleaning routine" on days when the weather was inclement (*Kelly*, 153 AD3d at 1188). "[A] 'general awareness'

that a dangerous condition may be present is legally insufficient to constitute notice of the particular condition that caused plaintiff's fall" (*Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969 [1994]; *see also Keum Choi v Olympia & York Water St. Co.*, 278 AD2d 106, 107 [1st Dept 2000]).

Plaintiff's expert affidvit failed to raise an issue of fact because it is speculative; the expert never examined the lobby floor but only reviewed photographs and testimony, "from which it would be impossible to conclude how slippery the floor was" (*Kalish v HEI Hospitality, LLC*, 114 AD3d 444, 446 [1st Dept 2014]; *see also Tarrabocchia v 245 Park Ave. Co.*, 285 AD2d 388, 389 [1st Dept 2001]).

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

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

ENTERED: MAY 14, 2020

CLERK

Richter, J.P., Oing, Singh, Moulton, JJ.

11502- 11502A	The People of the State of New York, Respondent,	Ind. 249/14 3732/14

-against-

Dominique Nobles,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Waleska Suero Garcia of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Ralph Fabrizio, J.), rendered February 24, 2017, convicting defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree and bail jumping in the third degree, and sentencing him, as a second felony offender, to an aggregate term of four years, and order (same court and Justice) entered on or about March 7, 2019, which denied defendant's CPL 440.20 motion to set aside the sentence, unanimously affirmed.

Defendant was properly sentenced as a second felony offender based on a Pennsylvania drug conviction, and the court properly denied defendant's CPL 440.20 motion challenging that adjudication. We adhere to our prior holdings that the statute at issue (35 Pa Cons Stat § 780-113[a][30]) criminalizes several discrete acts, so that it is permissible to determine, based on the accusatory instrument, that the conviction involved heroin and was the equivalent of a New York felony (*see People v Ivey*,

138 AD3d 574 [1st Dept 2016], *lv denied* 28 NY3d 931 [2016]; *People v Diaz*, 115 AD3d 483 [1st Dept 2014], *lv denied* 23 NY3d 1036 [2014]). Defendant's claim that the mens rea element of the statute is broader than its New York counterpart is unpreserved because it was not raised either at sentencing or in the CPL 440.20 motion, and we decline to review it in the interest of justice. In any event, we have previously found the necessary equivalency with regard to the statute at issue (*see People v Mulero*, 251 AD2d 252 [1st Dept 1998], *lv denied* 92 NY2d 928 [1998]).

Defendant made a valid waiver of his right to appeal (*see People v Thomas*, __ NY3d __, 2019 NY Slip Op 08545 [2019]; *People v Bryant*, 28 NY3d 1094, 1096 [2016]), which forecloses review of his excessive sentence claim. Regardless of whether defendant

validly waived his right to appeal, we perceive no basis for reducing the sentence.

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

ENTERED: MAY 14, 2020

CLERK

Richter, J.P., Oing, Singh, Moulton, JJ.

11503 Jose Delcid Orellana, Index 303001/16
Plaintiff-Respondent,

-against-

Mo-Hak Associates, LLC,
Defendant-Appellant.

_____

Mauro Lilling Naparty, Woodbury (Seth M. Weinberg of counsel), for appellant.

Gorayeb & Associates, P.C., New York (John M. Shaw of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Donna M. Mills, J.), entered on or about April 16, 2019, which granted plaintiff's motion for partial summary judgment on the issue of liability on his Labor Law § 240(1) claim, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff was injured when he fell from a ladder while painting an apartment in a building owned by defendant. The testimony of plaintiff's employer, that he had specifically instructed plaintiff only to paint areas he could reach and not to use the ladder, raises triable issues as to whether plaintiff's duties were expressly limited to work that did not expose him to an elevation-related hazard within the purview of

Labor Law § 240(1) (*see McCue v Cablevision Sys. Corp.*, 160 AD3d 595 [1st Dept 2018]; *Simoes v City of New York*, 81 AD3d 514 [1st Dept 2011]; *Vega v Renaissance 632 Broadway, LLC*, 103 AD3d 883, 884-885 [2d Dept 2013]).

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

ENTERED: MAY 14, 2020

CLERK

Richter, J.P., Oing, Singh, Moulton, JJ.

11504 Harold Louallen, Index 151342/16
Plaintiff-Respondent,

-against-

The New York City Housing Authority,
Defendant-Appellant,

The City of New York,
Defendant.

_____

Herzfeld & Rubin, P.C., New York (Sharyn Rootenberg of counsel), for appellant.

Friedman Sanchez, LLP, Brooklyn (Fabien Robley of counsel), for respondent.

_____

Order, Supreme Court, New York County (Gerald Lebovits, J.), entered on or about June 10, 2019, which denied the motion of defendant New York City Housing Authority (NYCHA) for summary judgment dismissing the complaint, unanimously affirmed, without costs.

NYCHA failed to establish prima facie entitlement to summary judgment in this action where plaintiff was injured when a tree branch fell and struck him while he was on NYCHA's premises. NYCHA failed to show that it had no actual or constructive notice of the defective condition of the tree that injured plaintiff (*see generally Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]; *compare Pagan v Jordan*, 163 AD3d 978 [2d Dept 2018]). Rather, the evidence suggests that NYCHA had notice of a recurring condition of falling branches near where plaintiff's

accident occurred, had enough time to inspect and remedy the condition before plaintiff's accident, and failed to take such action (*see Irizarry v 15 Mosholu Four, LLC*, 24 AD3d 373 [1st Dept 2005]). The conclusion of NYCHA's tree expert, based on examination nearly three years after the accident, that the trees on the subject premises were healthy does not eliminate all triable issues of fact, since NYCHA's groundskeeper's logbook and plaintiff's testimony conflict directly with this conclusion. Furthermore, even if the trees appeared healthy, the evidence of repeatedly falling branches serves as some "other basis for inferring that defendant should have realized that a potentially dangerous condition existed" (*Clarke v New York City Hous. Auth.*, 282 AD2d 202, 203 [1st Dept 2001]).

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

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

ENTERED: MAY 14, 2020

CLERK

Richter, J.P., Oing, Singh, Moulton, JJ.

11505 The People of the State of New York, Ind. 907/17
Respondent,

-against-

Ricky Torres,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Daniel Young 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 (Albert Lorenzo, J.), rendered March 15, 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: MAY 14, 2020

CLERK

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

Richter, J.P., Oing, Singh, Moulton, JJ.

11506 East of Hudson Rail Freight Task Force, Inc., Plaintiff-Appellant, Index 654271/16

-against-

Port Authority of New York and New Jersey, Defendant-Respondent.

Law Office of John McHugh, New York (John F. McHugh of counsel), for appellant.

Port Authority Law Department, New York (Allen F. Acosta of counsel), for respondent.

Order, Supreme Court, New York County (David B. Cohen, J.), entered November 30, 2018, which, insofar appealed from as limited by the briefs, granted defendant's motion to dismiss the first cause of action (breach of fiduciary duty) pursuant to CPLR 3211, unanimously affirmed, without costs.

The motion court properly found, as a matter of law, that defendant did not owe a fiduciary duty to plaintiff. Defendant never held funds belonging to plaintiff; rather, it was supposed to enter into a contract with plaintiff so that plaintiff could submit bills to defendant. This does not create a fiduciary relationship (*see Waldman v Englishtown Sportswear,* 92 AD2d 833, 836 [1st Dept 1983]).

Since plaintiff does not have a valid claim, it is unnecessary to consider whether it accrued within one year before the instant action was commenced, as required by Unconsolidated

Laws § 7107, or whether defendant is estopped from enforcing the requirements of that statute.

We have considered plaintiff's argument that defendant's motion was premature because discovery was incomplete, and find it unavailing.

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

ENTERED: MAY 14, 2020

CLERK

Richter, J.P., Oing, Singh, Moulton, JJ.

11507 U.S. Bank National Association, etc., Index 850260/18
Plaintiff-Respondent,

-against-

John M. Beymer also known as John Beymer, et al.,
Defendants-Appellants,

Board of Managers of 50 Pine Street Condominium, et al.,
Defendants.

_____

Sanders Gutman & Brodie, P.C., Hartsdale (Jordan Brodie of counsel), for appellants.

Parker Ibrahim & Berg LLP, New York (Brian A. Turetsky of counsel), for respondent.

_____

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered on or about May 22, 2019, which denied defendants' motion to dismiss the complaint in this foreclosure action, unanimously affirmed, without costs.

RPAPL 1301(3) provides that "[w]hile [an] action is pending or after final judgment for the plaintiff therein, no other action shall be commenced or maintained to recover any part of the mortgage debt, without leave of the court in which the former action was brought." The purpose of this statute is to protect the mortgagor "from the expense and annoyance of two independent actions at the same time with reference to the same debt" (*Central Trust Co. v Dann*, 85 NY2d 767, 772 [1995][emphasis omitted]). Since the 2013 foreclosure action was dismissed against defendants Beymer and Bruno, and there was no judgment in

favor of plaintiff, RPAPL 1301(3), a statute "which must be strictly construed" was not applicable to this action (*Hometown Bank of Hudson Val. v Belardinelli*, 127 AD3d 700, 702 [2d Dept 2015]).

Even if the 2013 foreclosure action was not formally discontinued when it was disposed of in 2013, defendants are not facing "the expense and annoyance of two independent actions at the same time with reference to the same debt," and thus, any failure on the part of plaintiff to comply with RPAPL 1301(3) could also be "properly disregarded as a mere irregularity" (*Bosco Credit V Trust Series 2012-1 v Johnson*, 177 AD3d 561, 562 [1st Dept 2019]). Under the circumstances of this case, where defendants were not prejudiced by any failure to comply with RPAPL 1301(3), since they were not in the position of having to defend against more than one lawsuit to recover the same mortgage debt, granting dismissal of the complaint in the 2018 action would "afford[] the defendants more relief than is contemplated by RPAPL 1301(3)" (*Wells Fargo Bank, N.A. v Irizarry*, 142 AD3d 610, 611 [2d Dept 2016]).

Supreme Court did not improvidently exercise its discretion

in denying the motion to dismiss pursuant to CPLR 3211(a)(4) on the ground that there is another action pending (*Aurora Loan Servs., LLC v Reid*, 132 AD3d 788, 788-789 [2d Dept 2015]; *see also Whitney v Whitney*, 57 NY2d 731, 732 [1982]).

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

ENTERED: MAY 14, 2020

CLERK

Richter, J.P., Oing, Singh, Moulton, JJ.

11508N Joseph P. Ritorto, Index 653483/18
Plaintiff-Appellant,

-against-

Larry A. Silverstein, et al.,
Defendants-Respondents.

_____

Emery Celli Brinckerhoff & Abady LLP, New York (Daniel J. Kornstein of counsel), for appellant.

Friedman Kaplan Seiler & Adelman LLP, New York (Jeffrey R. Wang of counsel), for respondents.

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered on or about March 13, 2019, which granted defendants' motion to stay the action pending arbitration of the issue, and denied plaintiff's cross motion to stay the arbitration, unanimously affirmed, with costs.

This action, asserting claims to cash distributions from plaintiff's beneficial interest in defendant Silverstein Development Corporation's interest in 7 World Trade Center Company, requires interpretation and enforcement of a 2005 settlement agreement between the parties, which includes a

provision mandating arbitration of "[a]ny action to enforce any provision" of the agreement. Accordingly, the court correctly found that the dispute is governed by the arbitration provision.

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

ENTERED: MAY 14, 2020

CLERK

Renwick, J.P., Oing, Singh, Moulton, JJ.

11509N Matthew Maurice, etc., Index 21084/14E
Plaintiff-Appellant,

-against-

Irene D. Maurice also known as
Irene D. Bachtler, et al.,
Defendants-Respondents.

_____

Law offices of Mitchell I. Weingarden, PLLC, White Plains (Mitchell I. Weingarden of counsel), for appellant.

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

_____

Order, Supreme Court, Bronx County (Rubén Franco, J.), entered March 14, 2019, which granted defendants' motion to vacate the default judgment entered against them, unanimously affirmed, without costs.

A motion to vacate a default may be granted if the movant establishes that its default was excusable and that it has a meritorious defense to the action (*Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.*, 67 NY2d 138, 141 [1986]). Further, a client will not be deprived of his day in court on account of his attorney's "neglect or inadvertent error, especially where the other party cannot show prejudice and his position has merit" (*Chelli v Kelly Group, P.C.*, 63 AD3d 632, 633-634 [1st Dept 2009]). The IAS court did not abuse its discretion in granting defendants' motion to vacate here (*Di Lorenzo*, 61 NY2d at 143).

Plaintiff challenges only the "meritorious defense" prong of the IAS court's ruling, and has thus abandoned any argument

relating to defendants' reasonable excuse of law office failure (*Furlender v Sichenzia Ross Friedman Ference LLP*, 79 AD3d 470, 470 [1st Dept 2010]). Plaintiff has also failed to show that the IAS court abused its discretion in determining that defendants demonstrated a meritorious defense. Defendants' moving papers cited to a pending e-filed summary judgment motion that had been submitted to the IAS court, as well as an upcoming "with-clients" settlement conference that showed their entitlement to a resolution on the merits. Defendants were not required to attach their pending summary judgment motion to the motion to vacate, as it had already been e-filed with the court (*Keech v 30 E. 85 St. Co., LLC*, 154 AD3d 504, 504 [1st Dept 2017]; CPLR 2214[c]).

In keeping with the strong public policy in this State for resolving disputes on the merits, the order is affirmed.

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

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

ENTERED: MAY 14, 2020

CLERK

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

11510 The People of the State of New York, Ind. 2238/17
Respondent,

-against-

Neil R. Phillips,
Defendant-Appellant.

_____

Neil R. Phillips, appellant pro se.

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

_____

Judgment, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered March 28, 2018, convicting defendant, after a jury trial, of grand larceny in the fourth degree and criminal possession of stolen property in the fourth degree, and sentencing him, as a second felony offender, to concurrent terms of 1½ to 3 years, unanimously affirmed.

The court properly determined that defendant did not establish a foundation for the admissibility of certain photographs (*see People v Price*, 29 NY3d 472, 476 [2017]). Defendant's remaining arguments are unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

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

ENTERED: MAY 14, 2020

_____
CLERK

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

11511 Natisha Morrison, Index 303662/16
Plaintiff-Appellant,

-against-

Juan Santana,
Defendant-Respondent.

_____

Krentsel & Guzman, LLP, New York (Marcia K. Raicus of counsel), for appellant.

Marjorie E. Bornes, Brooklyn, for respondent.

_____

Order, Supreme Court, Bronx County (John R. Higgitt, J.), entered April 11, 2019, which granted defendant's motion for summary judgment dismissing the complaint due to plaintiff's inability to demonstrate that she sustained a serious injury to her right knee within the meaning of Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendant satisfied his prima facie burden of showing that plaintiff did not sustain a serious injury to her right knee by submitting the report of his orthopaedic surgeon, who found that plaintiff's knee had normal range of motion (*see Diakite v PSAJA Corp.*, 173 AD3d 535 [1st Dept 2019]; *Mendoza v L. Two Go, Inc.*, 171 AD3d 462 [1st Dept 2019]), and opined that her emergency room records were inconsistent with her claimed right knee injury (*see Streety v Toure*, 173 AD3d 462 [1st Dept 2019]). Defendant also demonstrated that the claimed knee injury was not causally related to the accident based on the orthopaedic surgeon's finding that the operative report showed degenerative conditions

not related to the accident (*see Jenkins v Livo Car Inc.*, 176 AD3d 568, 569 [1st Dept 2019]; *Santos v Manga*, 152 AD3d 416, 416 [1st Dept 2017]).

In opposition, plaintiff failed to raise an issue of fact, since the uncertified and unaffirmed medical report of her expert could not be considered (*see Luetto v Abreu*, 105 AD3d 558, 558 [1st Dept 2013]). In any event, plaintiff's expert's last measurement of only about an eight-degree deficit in range of motion was too minor for purposes of Insurance Law § 5102(d) (*see Cabrera v Apple Provisions, Inc.*, 151 AD3d 594, 596 [1st Dept 2017]; *Aflalo v Alvarez*, 140 AD3d 434, 435 [1st Dept 2016]). Plaintiff's expert also did not address the degenerative conditions he found during surgery or explain why plaintiff's current symptoms were not related to preexisting conditions (*see Auquilla v Singh*, 162 AD3d 463, 464 [1st Dept 2018]; *Acosta v Traore*, 136 AD3d 533, 534 [1st Dept 2016]).

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

ENTERED: MAY 14, 2020

CLERK

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

11512 In re Matthew C., and Others, Dkt. NN 17182-85/15

Children Under Eighteen Years
of Age, etc.,

Joshua L.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Steven N. Feinman, White Plains, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Mackenzie Fillow of counsel), for respondent.

Larry S. Bachner, New York, attorney for the child Cecily J.

Kenneth M. Tuccillo, Hastings on Hudson, attorney for the children Xavier C. and Matthew C.

_____

Order of fact-finding, Family Court, Bronx County (Valerie A. Pels, J.), entered on or about March 2, 2017, which determined, after a hearing, that respondent was a person legally responsible for the subject children, neglected the oldest child, and derivatively neglected her three siblings, unanimously affirmed, without costs.

The record supports the Family Court's determination that at the relevant times, respondent was a person legally responsible for the children, because he had resided in the home with them for a year, cared for them and assumed other household and parental duties (*see Matter of Yolanda D.*, 88 NY2d 790 [1996]; *Matter of Keoni Daquan A. [Brandon W.- April A.]*, 91 AD3d 414 [1st Dept 2012]). His contention that he had no relationship

with the children was rebutted not only by the mother's testimony, which the court found credible, but by respondent's own testimony that he visited the children after he and the mother had stopped living together and received family pictures from the oldest child.

The determination that respondent neglected the eldest child is supported by a preponderance of the evidence (*see* Family Ct Act §§ 1046[b][i]; 1012[e][iii][A]; *Matter of Jayden C. [Luisanny A.]*, 126 AD3d 433 [1st Dept 2015]). The court was in the best position to observe the witnesses and assess their demeanor, and there is no basis to disturb its credibility determinations (*see Matter of Ricardo M.J. [Kiomara A.]*, 143 AD3d 503 [1st Dept 2016]). The evidence supports the finding that respondent neglected the eldest child by requesting her to send him photos of her exposed breasts, which she did, thereby placing her emotional well-being at imminent risk of harm. Contrary to respondent's argument, the court properly found that the child's out-of-court statements were sufficiently corroborated by the testimony of her mother, who saw the photo on the child's phone and recognized respondent's phone number as its recipient (*see Matter of David R. [Carmen R.]*, 123 AD3d 483, 484 [1st Dept 2014]).

The findings of derivative neglect against respondent as to

the other children were supported by the record since his behavior evinced such an impaired level of judgment as to create a substantial risk of harm to the other children (*see Matter of Ashley M.V. [Victor V.]*, 106 AD3d 659, 660 [1st Dept 2013]).

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

ENTERED: MAY 14, 2020

CLERK

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

11513 Alpha Capital Anstalt, Index 650918/19
Plaintiff-Appellant,

-against-

Generex Biotechnology Corporation, et al.,
Defendants-Respondents.

_____

Hoffner PLLC, New York (David S. Hoffner of counsel), for appellant.

Barket Epstein Kearon Aldea & LoTurco, LLP, Garden City (Donna Aldea of counsel), for respondents.

_____

Order, Supreme Court, New York County (Barry R. Ostrager, J.), entered on or about May 30, 2019, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for summary judgment in lieu of complaint, pursuant to CPLR 3213, unanimously affirmed, without costs.

The note upon which plaintiff sues does not qualify as an instrument for the payment of money only (CPLR 3213; *see PDL Biopharma, Inc. v Wohlstadter*, 147 AD3d 494 [1st Dept 2017]). Insofar as it required defendant Generex to become listed on a NASDAQ exchange (the failure to do so triggering Generex's alleged default and this litigation), it "required something in addition to the defendant's explicit promise to pay a sum of

money" (*Interman Indus. Prods. v R.S.M. Electron Power*, 37 NY2d 151, 155 [1975]).

In view of our finding that the note does not qualify for CPLR 3213 treatment, we do not reach the other issues raised.

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

ENTERED: MAY 14, 2020

CLERK

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

11514 The People of the State of New York, Ind. 1228/16
Respondent,

-against-

Terrell Sumpter,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (John L. Palmer of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Michael J. Obus, J.), rendered October 6, 2017, convicting defendant, after a jury trial, of two counts of robbery in the second degree, and sentencing him to concurrent terms of seven years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of vacating the provision of the order of protection that directed that it remain in effect until October 5, 2032 and remanding the matter for a new determination of the duration of the order, and otherwise affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence supports the conclusions that defendant used force with an intent to steal, and actually stole property from the victim.

The victim testified that the attack was the culmination of a long-standing dispute regarding payment of a drug debt and that he was arguing about the money with defendant and his accomplice

just before defendant punched him. This warranted an inference of contemporaneous intent to steal (*see People v Gajadhar*, 38 AD3d 127, 135-36 [1st Dept 2007], *affd* 9 NY3d 438 [2007]; *People v Robinson*, 239 AD2d 258, 258-59 [1st Dept 1997]).

The victim also testified that defendant took items from his pockets and that defendant's accomplice threw some of the victim's items into a trash chute. A surveillance tape, while not clear, did not contradict this testimony. This conduct was sufficient to constitute a deprivation of property (*see* Penal Law § 155.00[3]; *People v Collado*, 146 AD3d 708 [1st Dept 2017], *lv denied* 29 NY3d 996 [2017]; *People v Kirnon*, 39 AD2d 666, 667 [1972], *affd* 31 NY2d 877 [1972]).

Defendant's challenges to the People's summation are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-120 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]).

We perceive no basis for reducing the sentence. However, as

the People concede, the order of protection's expiration date is incorrect because it did not take into account the jail time credit to which defendant is entitled (*see e.g. People v Jackson*, 121 AD3d 434 [1st Dept 2014]).

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

ENTERED: MAY 14, 2020

CLERK

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

11515-
11516 Safe Haven Properties LLC, formerly known as Safe Haven Properties Ltd., et al.,
Plaintiffs-Appellants,

-against-

Madison Green Condominium, et al.,
Defendants-Respondents.

- - - - -

[And a Third Party Action]

Index 150242/17

_____

Cyruli Shanks Hart & Zizmor LLP, New York (James E. Schwartz of counsel), for appellants.

Gartner + Bloom, P.C., New York (Arthur P. Xanthos of counsel), for respondents.

_____

Order, Supreme Court, New York County (Robert R. Reed, J.), entered July 11, 2019, which granted defendants Madison Green Condominium, Julieta V. Lozano, President, and Board of Managers of the Madison Green Condominium's motion for summary judgment dismissing the complaint against Lozano, unanimously reversed, on the law, without costs, and the motion denied. Order, Supreme Court, New York County (Robert R. Reed, J.), entered October 23, 2019, which denied plaintiffs' motion for summary judgment on liability, unanimously affirmed, without costs.

Plaintiffs properly named Lozano as a party to this action in her capacity as representative of Madison Green Condominium (Condo), an unincorporated association (*see* CPLR 1025; General Associations Law § 13; *Martin v Curran*, 303 NY 276, 280-281 [1951]).

Defendants argue that Lozano was not a necessary party because they have not challenged the court's jurisdiction. However, whether or not defendants would have elected to contest jurisdiction if Lozano had not been named is speculative, and plaintiffs' decision to make her a defendant in a representative capacity was proper.

Defendants contend that the business judgment rule protects Lozano from liability. However, the business judgment rule is inapplicable to Lozano in this context because she was named only in a representative capacity and her personal assets are not subject to a judgment rendered against Condo (General Associations Law § 13).

The court correctly determined that plaintiffs failed to establish prima facie that the damage to their condominium unit was the natural and proximate result of defendants Madison Green Condominium and Board of Managers of the Madison Green Condominium's failure to fulfill their contractual obligations. Pursuant to the condominium bylaws, plaintiffs were responsible for repairs to the interior of their unit, and the Board of Managers had the power to make all decisions concerning maintenance and repairs to the common elements. Plaintiffs did not show that the contractual provisions limiting the Board's responsibility for damage to the interior of their unit were inapplicable as a defense as a matter of law, and they did not show that the water damage was caused by the Board's failure to

make necessary repairs or resulted from improper repairs to the common elements. Plaintiffs submitted no expert opinion as to the ultimate source of the water infiltration, the determination of which requires professional expertise (*see Ali v Effron*, 106 AD3d 560 [1st Dept 2013]).

The court providently exercised its discretion in declining to consider the unauthenticated hearsay reports submitted by plaintiffs (*see Frees v Frank & Walter Eberhart L.P. No. 1*, 71 AD3d 491, 492 [1st Dept 2010]). Although plaintiffs' reply papers provide the necessary foundation for those documents, the court providently exercised its discretion in declining to consider the reply papers because plaintiffs had not met their initial burden.

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

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

ENTERED: MAY 14, 2020

CLERK

Friedman, Gische, Kapnick, González, JJ.

11517 The People of the State of New York, Ind. 4118/16
Respondent,

-against-

Daniel Still,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Ruth Pickholz, J.), rendered April 4, 2017, unanimously affirmed.

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

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

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

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

ENTERED: MAY 14, 2020

CLERK

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

11518 Jorge Parra, Index 24965/17E
Plaintiff-Appellant,

-against-

Juan Jose Cardenas,
Defendant-Respondent.

_____

Oresky & Associates, PLLC, Bronx (Payne Tatich of counsel), for appellant.

Gallo Vitucci & Klar LLP, New York (Yolanda L. Ayala of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered June 20, 2019, which denied plaintiff's motion for partial summary judgment on his Labor Law § 240(1) claim, unanimously affirmed, without costs.

Plaintiff was working on the roof above the residential garage of defendant, who was his friend, when weakened plywood collapsed under him, causing him to partially fall through the roof before catching himself with his arms. Plaintiff claims that defendant had directed him to go onto the roof to assist the roofing contractors with the demolition work. Defendant claims that he paid plaintiff only to clean up debris at ground level and that he had directed plaintiff not to go onto the roof but that plaintiff ignored his instructions.

Plaintiff was engaged in activity that placed him within the special class protected by Labor Law § 240(1). Regardless of whether defendant hired him to perform clean-up work only or to

assist with the demolition work, he was employed as part of a "larger construction project" and a member of "a team that undertook an enumerated activity" (*Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 881-882 [2003]; *see also Hill v Acies Group, LLC*, 122 AD3d 428 [1st Dept 2014]; *Aguilar v Henry Mar. Serv., Inc.*, 12 AD3d 542, 544 [2d Dept 2004]). That plaintiff was hired not by the roofing contractor but by defendant does not bar him from recovery (*see Campisi v Epos Contr. Corp.*, 299 AD2d 4, 7 [1st Dept 2002] [inspector hired by City was within class of persons protected by section 240(1) because he "performed work that was 'part of' the construction project"]; *Longo v Metro-North Commuter R.R.*, 275 AD2d 238, 239 [1st Dept 2000] [plaintiff, assigned by defendant, his employer, to act as "conductor with flagging duties" was entitled to recover for injuries sustained during rebuilding of railroad station platform]).

Defendant's failure to plead as an affirmative defense the "one and two-family dwelling[]" homeowner exemption (Labor Law § 240[1]) is not fatal to his assertion of the defense, as plaintiff was not surprised by the defense and had an opportunity to oppose it (*see Bautista v Archdiocese of N.Y.*, 164 AD3d 450 [1st Dept 2018]).

However, defendant's deposition errata sheet should have been rejected as untimely (*see* CPLR 3116[a]). Although plaintiff submitted the transcript to defendant for examination on

September 11, 2018, defendant did not return the errata sheet to plaintiff within 60 days, as required, but rather submitted it on April 25, 2019, more than 7 months later, and more than 8 months after the deposition, in opposition to plaintiff's motion, without demonstrating good cause for the delay (*see Zamir v Hilton Hotels Corp.*, 304 AD2d 493 [1st Dept 2003]). Nothing barred defendant from submitting his affidavit, which contains the same assertions as are contained in the errata sheet. To the extent plaintiff argues that the affidavit is defective due to lack of a certification of conformity (*see* CPLR 2309[c]), we direct defendant to correct the defect nunc pro tunc by providing a new conforming affidavit (*see Bank of N.Y. v Singh*, 139 AD3d 486, 487 [1st Dept 2016]).

However, a triable issue of fact exists as to whether defendant is entitled to the homeowner exemption. The record does not permit us to determine whether the building was a two- or three-family dwelling at the time of the accident. While plaintiff claims that defendant testified that he had tenants in his upstairs apartment and the basement at the time of the accident, he submitted an incomplete transcript of defendant's testimony related to the nature of the occupancy of the basement. Similarly, while defendant claims that his affidavit was submitted not to contradict his testimony but to clarify that the

basement tenant was a family friend who did not pay rent and had moved out before the date of the accident, he failed to submit the page of the transcript that would support this claim.

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

ENTERED: MAY 14, 2020

CLERK

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

11519 In re Jacob Frydman, et al., Index 652796/18
Petitioners-Respondents,

John Does 1-5,
Petitioners,

-against-

EVUNP Holdings LLC, et al.,
Respondents-Appellants.

_____

Asher C. Gulko, Cedarhurst, for appellants.

Daniel C. Edelman, New York, for respondents.

_____

Appeal from order, Supreme Court, New York County (W. Franc Perry, J.), entered on or about October 17, 2018, which granted the petition to confirm an arbitration award dated April 23, 2018, unanimously dismissed, without costs.

Any right of direct appeal from the October 17, 2018 order terminated with the entry of the October 31, 2018 judgment (*see Matter of Aho,* 39 NY2d 241, 248 [1976]). Thus, as of November 12, 2018, when respondents filed their notice of appeal, they could no longer appeal from the order; they could only appeal

from the judgment.

We have considered respondents' arguments as to why their appeal should not be dismissed and find them unavailing.

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

ENTERED: MAY 14, 2020

CLERK

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

11520-
11521 In re Nevaeh W., Dkt. B-16280/14
V-1390/16

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

Richard W.,
Respondent-Appellant,

Shaniece F.,
Respondent-Appellant,

Heartshare St. Vincent's Services,
et al.,
Petitioners-Respondents.

_____

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

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

Wingate Kearney & Cullen, LLP, Brooklyn (Kristin L. Williams of counsel, for Heartshare St. Vincent's Services and Commissioner of Social Services of the City of New York, respondents.

Larry S. Bachner, New York, and Kenneth M. Tuccillo, Hastings on Hudson, attorneys for the child.

_____

Order of disposition, Family Court, Bronx County (Elenor C. Reid, J.), entered on or about October 17, 2018, which, upon a finding of permanent neglect, terminated respondent mother's parental rights to the subject child and transferred custody of the child to petitioner Heartshare St. Vincent's Services and the Commissioner of Social Services of the City of New York for purposes of adoption, and found that respondent father was a notice-only father; and order, same court and Judge, entered on or about September 13, 2018, which dismissed respondent father's

petition for custody of the subject child, unanimously affirmed, without costs.

Petitioner demonstrated, by clear and convincing evidence, that the child was "permanently neglected" within the meaning of Social Services Law § 384-b(7)(a). We reject the mother's contention that petitioner improvidently exercised its discretion in focusing on the statutory time period, from the child's placement in foster care, mere days after she was born, for the purpose of establishing permanent neglect, and that the agency failed to make diligent efforts to strengthen and encourage the parent-child relationship (*see* § 384-b[7][f]; *Matter of Star Leslie W.*, 63 NY2d 136, 140 [1984]). To the contrary, petitioner formulated a service plan which included parenting skills and anger management classes, individual counseling, submission to mental health evaluations, as well as regular visitation with the child (*see e.g. Matter of Justina Rose D.*, 28 AD3d 659, 659-660 [2d Dept 2006]). Notwithstanding the agency's efforts, the mother failed to complete her service plan or visit consistently with the child, and failed to reasonably and feasibly plan for the child's return (*see Matter of Justin I.B. [Natalie B.]*, 99 AD3d 897 [2d Dept 2012]). The mother's partial compliance with her service plan was insufficient to preclude a finding of permanent neglect (*see Matter of Diana L.*, 299 AD2d 359 [2d Dept 2002]).

At the time of the dispositional hearing, the child had been

residing in her long-term foster home for more than eight years, the entirety of her life, with her foster parents, the only family she had ever known. The child was bonded to her foster family, and they had met all of her needs (*see e.g. Matter of Jazmin Marva B. [Cecile Marva B.]*, 72 AD3d 569 [1st Dept 2010]). On the other hand, the mother put forth no evidence to demonstrate that she was in any way able to care for the child, whom she has never cared for, and visited only inconsistently, having not seen the child for a year at the time of disposition. There was no evidence that the mother addressed the issues that led to the child's placement in care; thus, a suspended judgment was not appropriate (*see Matter of Christopher T.[Margarita V.]*, 94 AD3d 900, 901 [2d Dept 2012], *lv denied* 20 NY3d 858 [2013]). The court properly, in the child's best interests, terminated her parental rights and freed the child for adoption.

The father failed to prove that he both supported the child within his means and maintained either regular contact or communication with the child or the child's custodian (*Matter of Matter of Charle Chiedu E. [Chiedu E.]*, 87 AD3d 1140 [2d Dept

2011]). Thus, his consent for the child's adoption was not required, and it was in the child's best interests to be freed for adoption.

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: MAY 14, 2020

CLERK

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

11522 The People of the State of New York, Ind. 4727/14
Respondent,

-against-

Victor Jones,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Jonathon Krois 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 (Melissa Jackson, J. at plea and sentencing), rendered February 4, 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: MAY 14, 2020

CLERK

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

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

11523 Roc-Lafayette Associates, LLC, Index 652181/18
Plaintiff-Appellant,

-against-

John Benjamin Reuter,
Defendant-Respondent.

_____

Sternbach, Lawlor & Rella LLP, New York (Anthony Rella of counsel), for appellant.

Bronster LLP, New York (Don Abraham of counsel), for respondent.

_____

Order, Supreme Court, New York County (Melissa A. Crane, J.), entered April 26, 2019, which denied plaintiff's motion for summary judgment in lieu of complaint and granted defendant's cross motion to dismiss the complaint, unanimously affirmed, without costs.

The record shows that the process server only attempted to effectuate service of process twice at an address which was not defendant's "actual place of business, dwelling place or usual place of abode within the state" (CPLR 308[4]). Under the circumstances presented, including that defendant had moved to Mexico almost a year before service was attempted, and that

defendant had no contractual obligation to notify plaintiff that his address changed, plaintiff failed to satisfy the due diligence requirement of CPLR 308(4) (*see e.g. Feinstein v Bergner*, 48 NY2d 234, 241 [1979]).

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

ENTERED: MAY 14, 2020

CLERK

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

11524 104 Second Realty, LLC, Index 152095/18
Plaintiff-Appellant,

-against-

Beer Factory LLC, et al.,
Defendants-Respondents,

Sakis Pitsionas,
Defendant.

_____

Cutler Minikes & Adelman LLP, New York (Jonathan Z. Minikes of counsel), for appellant.

Andrew B. Schultz, Astoria, for respondents.

_____

Order, Supreme Court, New York County (Louis L. Nock, J.), entered September 27, 2019, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for summary judgment and a default judgment, unanimously affirmed, without costs.

Given the allegation of a lockout in November 2017, the evidence submitted by defendants that their property remained inside the premises, and defendants' counterclaim for unjust enrichment, summary judgment in plaintiff's favor is precluded by a triable issue of fact as to whether plaintiff prevented defendants from carrying out the surrender obligations under the lease and guaranties (*see Insurance Corp. of N.Y. v Central Mut. Ins. Co.*, 47 AD3d 469, 472 [1st Dept 2008]). This result extends to plaintiff's motion for a default judgment against defendant

Pitsionas, the non-appearing defendant-guarantor, against whom the identical allegations are asserted (*see* CPLR 3215[f]).

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

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

ENTERED: MAY 14, 2020

CLERK

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

11526 The People of the State of New York, Ind. 2806/16
Respondent,

-against-

Pedro Diaz,
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 (Aaron Zucker 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 (Ellen Biben, J.), rendered March 7, 2017,

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

It is unanimously ordered that the 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: MAY 14, 2020

CLERK

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

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

11527 Maria Gil, Index 25788/18E
Plaintiff-Appellant,

-against-

Jewish Board of Family and Children's Services, Inc., et al.,
Defendants-Respondents.

_____

Reid B. Wissner, New York, for appellant.

Havkins Rosenfeld Ritzert & Varriale, LLP, Mineola (Gail L. Ritzert of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (John R. Higgitt, J.), entered December 2, 2019, which, inter alia, denied plaintiff's motion for partial summary judgment as to the liability of defendants Jewish Board of Family and Children's Services, Inc. (JBFCS) and Haley Claiborne, and to dismiss the affirmative defenses alleging plaintiff's comparative fault, unanimously affirmed, without costs.

Plaintiff was injured when, while walking in a mall parking lot, she was struck by a vehicle owned by JBFCS and driven by Claiborne in the course of her employment. The record presents triable issues of fact as to whether Claiborne exercised due care while operating the vehicle to avoid the accident. Claiborne testified that before backing the vehicle out of its parking spot, she looked to her right and left and then looked in the rear-view camera to assure that nobody was behind her (*see* Vehicle & Traffic Law § 1146[a]; *Rodriguez v CMB Collision Inc.*,

112 AD3d 473 [1st Dept 2013]; *Wein v Robinson*, 92 AD3d 578 [1st Dept 2012]). Plaintiff does not address her failure to allege that Claiborne violated Vehicle & Traffic Law § 1211(a) until her reply, and plaintiff may not be awarded partial summary judgment based upon an unpleaded statutory violation.

Furthermore, plaintiff's deposition testimony demonstrates that there is a triable issue of fact as to whether she was comparatively negligent in the happening of the accident. She testified that immediately before being struck by defendants' vehicle, she turned her head to look behind her and stopped observing the surrounding traffic conditions (*see Dunajski v Kirillov*, 148 AD3d 991, 992-993 [2d Dept 2017]).

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

ENTERED: MAY 14, 2020

CLERK

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

11528 Luke Nash, Index 100274/16
Plaintiff-Appellant,

-against-

Martin Druyan,
Defendant-Respondent.

_____

Luke Nash, appellant pro se.

Traub Liberman Straus & Shrewsberry LLP, Hawthorne (Christopher Russo of counsel), for respondent.

_____

Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered on or about February 25, 2019, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Summary judgment was properly granted in this legal malpractice action, as plaintiff failed to raise an issue of fact as to proximate causation (*see Global Bus. Inst. v Rivkin Radler LLP*, 101 AD3d 651, 651 [1st Dept 2012]; *Brooks v Lewin*, 21 AD3d 731, 734 [1st Dept 2005], *lv denied* 6 NY3d 713 [2006]). Plaintiff claims that but for defendant's legal malpractice, witnesses related to the corporal punishment charge asserted against him by the New York City Board of Education (BOE) would have testified at a 2013 hearing, he would have been represented by his union at that hearing, and the hearing would have been invalidated on procedural grounds. However, plaintiff failed to submit evidence showing that the witnesses' testimony would have exonerated him of the charge, or that his teaching licences would

not have been revoked absent a finding that he engaged in corporal punishment.

Plaintiff also failed to submit evidence showing that invalidation of the 2013 hearing would have barred the BOE from terminating his teaching licenses. Assuming that the 2013 hearing was deemed invalid and the resulting termination of the teaching licenses was vacated, there is no basis to find that plaintiff's case would not have been remitted, again, to the BOE for a proper de novo hearing. For the reasons discussed above, plaintiff failed to show that if his case had been remitted for a new hearing, his teaching licenses would not have been terminated.

We decline to consider plaintiff's arguments raised for the first time on appeal. Were we to reach the arguments, we would find them unavailing.

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

ENTERED: MAY 14, 2020

CLERK

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

11529 The People of the State of New York, Ind. 586/18
Respondent,

-against-

Xavier Blount,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Rafael Curbelo of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Robert Neary, J.), rendered March 6, 2019,

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: MAY 14, 2020

CLERK

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

Gische, J.P., Kapnick, Oing, González, JJ.

11530N Jose Silverio, Index 302990/12
Plaintiff-Appellant,

-against-

Ford Motor Company, et al.,
Defendants-Respondents.

_____

Alexander J. Wulwick, New York, for appellant.

Aaronson Rappaport Feinstein & Deutsch, LLP, New York (Elliott J. Zucker of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Doris M. Gonzalez, J.), entered on or about October 15, 2019, which granted defendants' motion to vacate a judgment, same court and Justice, entered July 5, 2019, apportioning 100% liability to defendants based on a prior order of this Court that granted plaintiff partial summary judgment on liability, unanimously affirmed, without costs.

The IAS court providently exercised its discretion in granting defendants' motion to vacate a judgment, apportioning 100% liability to them before a trial on the issue of comparative negligence (*see Woodson v Mendon Leasing Corp.*, 100 NY2d 62 [2003]). Contrary to plaintiff's reading of this Court's decision in *Silverio v Ford Motor Co.* (168 AD3d 608 [1st Dept 2019]), this Court did not make a finding on plaintiff's comparative negligence or lack thereof, but held only that plaintiff had established defendants' liability in connection with the motor vehicle accident. The Court also stated that plaintiff did not need to prove that he was not comparatively

negligent in order to obtain partial summary judgment on the issue of defendants' liability, based on *Rodriguez v City of New York* (31 NY3d 312 [2018]). Plaintiff's interpretation of this Court's decision in *Silverio* (168 AD3d 608) would require finding that he was not comparatively negligent, despite the fact that he never moved for summary judgment on defendant's affirmative defense of comparative negligence or introduced evidence to support his contention that he did not contribute to the accident (*see Poon v Nisanov*, 162 AD3d 804 [2d Dept 2018]; *see also Wray v Galella*, 172 AD3d 1446, 1448 [2d Dept 2019]).

The issue of comparative fault should have been left to a jury in determining damages (*see Cutaia v Board of Mgrs. of the Varick St. Condominium*, 172 AD3d 424 [1st Dept 2019]; *Bokum v Sera Sec. Servs., LLC*, 165 AD3d 535 [1st Dept 2018]). Thus, the IAS court properly vacated the judgment apportioning all liability to defendants before a trial on comparative negligence.

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: MAY 14, 2020

CLERK

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

11531N In re Shawn Browne, Index 656133/17
Petitioner-Respondent,

-against-

New York City Department of Education,
Respondent-Appellant.

_____

James E. Johnson, Corporation Counsel, New York (Jamison Davies of counsel), for appellant.

Gulko Schwed LLP, Cedarhurst (Yitzchok Kotkes of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Alexander M. Tisch, J.), entered December 5, 2018, in this proceeding brought pursuant to Education Law § 3020-a and CPLR article 75, to the extent appealed from as limited by the briefs, vacating the arbitration award's penalty dismissing petitioner from employment as a classroom teacher, and remanding the matter for a new penalty determination before another hearing officer, unanimously reversed, on the law, without costs, and the penalty reinstated.

Contrary to Supreme Court's finding, the penalty of termination of petitioner's employment was not so disproportionate to his offense as to shock one's sense of fairness (*see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 233 [1974]). Petitioner does not contest that he punched a student twice in the head or face while physically removing him from the classroom. The removal

was otherwise found to be justified. The record demonstrates that the hearing officer considered all the circumstances, including the fast-developing situation necessitating the student's removal, and generally credited petitioner's testimony (*compare Matter of Principe v New York City Dept. of Educ.*, 94 AD3d 431, 432-433 [1st Dept 2012] ["the Hearing Officer had an apparent bias against petitioner when he discredited petitioner's entire testimony," and, by doing so, failed to consider all the circumstances], *affd* 20 NY3d 963 [2012]). Whether or not the hearing officer erred in finding that petitioner's denial of having thrown punches precluded a finding of remorse, although apparently based on a failure of memory (*see id.* at 434), the record showing minor injuries to the student, and the separate finding that petitioner's actions put the student at serious risk of harm, supports dismissal based on the use of excessive force

(*see e.g. Matter of Ebner v Board of Educ. of E. Williston Union Free School Dist. No. 2, N. Hempstead*, 42 NY2d 938 [1977]; *Matter of Saunders v Rockland Bd. of Coop. Educ. Servs.*, 62 AD3d 1012, 1013 [2d Dept 2009]; *Matter of Giles v Schuyler-Chemung-Tioga Bd. of Coop. Educ. Servs.*, 199 AD2d 613, 615 [3d Dept 1993]).

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

ENTERED: MAY 14, 2020

CLERK

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

9472 MMA Meadows At Green, LLC, et al, Index 653943/13
Plaintiffs-Respondents,

-against-

Millrun Apartments, LLC, et al.,
Defendants-Appellants.

_____

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Shirley W. Kornreich, J.), entered on or about March 29, 2018,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated September 3, 2019,

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

ENTERED: MAY 14, 2020

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
Dianne T. Renwick
Barbara R. Kapnick
Ellen Gesmer
Cynthia S. Kern, JJ.

10097-10098-10099
Index 651026/18

_____x

Westchester Fire Insurance Co.,
Plaintiff-Appellant,

-against-

Nicholas S. Schorsch, et. al.,
Defendants-Respondents,

Aspen American Insurance Co., et al.,
Defendants-Appellants.
_____x

Appeals from the orders of the Supreme Court, New York County (O. Peter Sherwood, J.), entered May 16, 2019 and June 11, 2019, which, to the extent appealed from, granted the motions of defendants-respondents Nicholas S. Schorsch, Edward M. Weil, Jr., William Kahane, Peter M. Budko, and Brian S. Block (defendants insureds) for partial summary judgment on their first counterclaim alleging breach of contract with respect to the insurance coverage obligations of plaintiff-appellant Westchester Fire Insurance Co., defendant-appellant Aspen American Insurance Co., and defendant-appellant RSUI Indemnity Co. (collectively, Excess Insurers), declared Excess Insurers obligated to pay for all defense and indemnity costs incurred in an action pending

in Delaware, and found defendants insureds entitled to attorneys' fees incurred in defending against the instant declaratory judgment action, and denied Excess Insurers' motions to dismiss defendant insureds' counterclaim for breach of contract.

Melveny & Myers LLP, Washington, DC (Jonathan D. Hacker of the bar of the State of Maryland and District of Columbia, admitted pro hac vice, Allen W. Burton and Gerard A. Savaresse of counsel), for Westchester Fire Insurance Co., appellant.

Tressler LLP, New York (Kevin G. Mikulaninec, Courtney E. Scoot and Kiera Fitzpatrick of counsel), for RSUI Indemnity Co., appellant.

Kranz & Berman, LLP, New York (Hugh Sandler and Marjorie E. Berman of counsel), for Brian S. Block, respondent.

McKool Smith P.C., New York (Ornie A. Levy and Robin L. Cohen of counsel), for Nicholas S. Schorsch, Edward M. Weil, Jr., William Kahane and Peter M. Budko, respondents.

RENWICK, J.

Plaintiff Westchester Fire Insurance Co. (Westchester) commenced this action seeking a declaration that it has no coverage obligations to defendants insureds, arguing primarily that the "insured versus insured" exclusion of a Directors and Officers (D&O) liability insurance policy, procured by RCS Capital Corporation (RCAP), bars coverage of claims asserted against defendants,[1] RCAP's former directors and officers. Defendants insureds contend, among other things, that coverage exists under the bankruptcy exception to the insured vs. insured exclusion. The claims, herein, arose after RCAP's bankruptcy.

During the bankruptcy process, negotiations between RCAP and the company's creditors resulted in the bankruptcy court's approval of RCAP's Chapter 11 reorganization plan creating a litigation trust, labeled "Creditor Trust." The Creditor Trust was formed, pursuant to the reorganization plan, to pursue the bankruptcy estate's legal claims on behalf of the unsecured creditors, after RCAP's emergence from bankruptcy.[2] Thus, post-

[1]The individual defendants are Nicholas S. Schorsch, Edward M. Weil, Jr., William Kahane, Peter M. Budko, and Brian S. Block. They will be referred to collectively throughout the opinion as defendants insureds.

[2]The "Creditor Trust" is a type of post-confirmation litigation trust created to pursue a bankruptcy estate's causes of action prosecuted for the benefit of creditors after a

confirmation the Creditor Trust sued RCAP's directors and officers alleging they had breached their fiduciary duties to the company. The directors and officers sought coverage under RCAP's D&O liability policy with Westchester. Westchester commenced this action in response, seeking a declaratory judgment that it has no coverage obligations.

This appeal raises an issue of apparent first impression of whether a D&O liability policy's bankruptcy exception, which allows claims asserted by the "bankruptcy trustee" or "comparable authority," applies to claims raised by a Creditor Trust, as a post-confirmation litigation trust, to restore D&O coverage removed by the insured vs. insured exclusion. For the reasons that follow, we find that the bankruptcy exception, to the insured vs. insured exclusion, applies to restore coverage. Specifically, we interpret the broad language "comparable authority" to encompass a Creditor Trust that functions as a post-confirmation litigation trust, given that such a Creditor Trust is an authority comparable to a "bankruptcy trustee" or other bankruptcy-related or "comparable authority" listed in the

---

debtor's reorganization plan has been accepted by the bankruptcy court. As here, bankruptcy-related parties often prefer to postpone litigation of such claims until after approval or confirmation of a Chapter 11 reorganization plan, thus, preserving such claims, held by the bankruptcy estate, for post-confirmation litigation.

bankruptcy exception.

Factual Background

RCAP is a wholesale broker-dealer and investment banking and advisory business with significant revenues generated during the relevant time period from services provided to AR Capital LLC. Directors and officers of RCAP formed AR Capital LLC to create and manage non-traded investment vehicles, primarily REITs.[3] RCAP, through subsidiaries, was responsible for marketing and distributing, and providing other services, in connection with AR Capital LLC's investment products. At one point, AR Capital LLC was the largest creator and sponsor of REITs in the United States (*see RCS Creditor Trust v Chorsch, 2017* Wl 5904716, 2017 Del Ch LEXIS 820 [Del Ch 2017]).

Bankruptcy Proceedings

In 2014, a financial scandal, involving an entity connected to RCAP and AR Capital LLC, decimated their businesses, causing the value of RCAP's stock to plummet. Like many companies facing bankruptcy, RCAP recognized that a contentious and prolonged bankruptcy proceeding could result in significant losses to its business. As a result, RCAP negotiated a restructuring support

[3] A REIT (Real Estate Investment Trust) is a professionally managed company that mainly owns and operates income-producing real estate (*see* Theodore S. Lynn et al., Real Estate Investment Trusts 1011 [1991]).

agreement (RSA) with its unsecured creditors, including its largest creditor Luxor Capital Partners. In March 2016, RCAP filed for Chapter 11 bankruptcy in the Bankruptcy Court of Delaware, pursuant to the RSA. The RSA provided for the creation of a Creditor Trust that would be governed by a Creditor Trust Agreement (CTA).

On May 19, 2016, the bankruptcy court issued an order confirming the bankruptcy plan. The "Confirmation Order" incorporated the CTA and distinguished between different types of litigation assets. In relevant part, the Confirmation Order provided that the Creditor Trust, with respect to litigation assets, in accordance with Section 1123(b) of the Bankruptcy Code, shall retain and "may enforce, sue on, settle, or compromise . . . all Claims, rights, Causes of Action, suits, and proceedings . . . against any Person without the approval of the Bankruptcy Court [and] the Reorganized Debtors[]." The Confirmation Order further provided that based on the "totality of the circumstances," including "extensive, arm's-length negotiations," the bankruptcy plan was "proposed with the legitimate and honest purpose of accomplishing [a] successful reorganization[] and maximizing recoveries available to creditors."

Pursuant to the CTA, rather than all of RCAP's assets

remaining with RCAP as the bankruptcy debtor or debtor-in-possession (DIP),[4] under the default provisions of Section 1141 of the Bankruptcy Code, certain assets were held free and clear of any creditor claims in the bankruptcy and vested in the Creditor Trust.[5] The Creditor Trust, as a representative of the bankruptcy estate, was charged with liquidating and distributing those assets, outside of the bankruptcy proceeding, on behalf of the trust, and, importantly, for the benefit of RCAP's unsecured creditors. The CTA also provided that the Creditor Trust would be administered by a Trust Administrator, who would take direction from a Creditor Trust Board consisting of three Trustees chosen by creditors of RCAP.

Directors' and Officers' Primary and Excess Policies

Westchester issued an excess liability D&O policy to RCAP

[4]A debtor-in-possession (DIP) is an entity or corporation that has filed for Chapter 11 bankruptcy protection, but still holds property to which creditors have a legal claim under a lien or other security interest. A DIP may continue to do business using those assets, but is required to seek court approval for any actions that fall outside of the scope of regular business activities *see* 11 USC § 1107[a] ([rights, powers, and duties of debtor in possession]; (*see also In re International Yacht and Tennis, Inc*. v Wasserman, 922 F2d 659 [11th Cir 1991]; *Zilkha Energy Co. v Leighton*, 920 F2d 1520 [10th Cir 1990]).

[5]Specifically, RCAP assigned to the Creditor Trust certain of its litigation claims, including the claim in *RCS Creditor Trust v Chorsch, 2017 Wl 5904716, 2017 Del Ch LEXIS 820* [Del Ch 2017], for which defendant insureds now seek coverage from plaintiff Westchester.

for the relevant period, April 2014 through April 2015. The policy is the seventh layer of policies over the primary policy issued by XL Specialty Insurance Company. The D&O policy provides $5 million of coverage in excess of $35 million of coverage in the primary policy and other levels of excess coverage, subject to applicable retention limits.

The primary policy insures RCAP as well as the individual defendants, since they were officers and directors of RCAP. As relevant here, the primary policy includes an insured vs. insured exclusion, eliminating coverage for "any Claim made against an Insured Person . . . by, on behalf of, or at the direction of the Company or Insured Person." An "Insured Person" is defined as "any past, present, or future director or officer . . . of the Company" and the term "Insured" includes the Company (RCAP) as the debtor. However, the insured vs. insured exclusion has a bankruptcy trustee exception, which restores coverage excluded under the insured vs. insured exclusion, for claims "brought by the Bankruptcy Trustee or Examiner of the Company or any assignee of such Trustee or Examiner, or any Receiver, Conservator, Rehabilitator, or Liquidator or comparable authority of the Company." There is also a similar exception for claims brought by a "creditors committee"of the Company. Finally, the policy provides coverage for "Loss," defined as "damages, judgments,

settlements ... or other amounts . . . and Defense Expenses in excess of the Retention that the Insured is legally obligated to pay," and the policy covers "wrongful acts," defined as "any actual or alleged act, error, omission, misstatement, misleading statement, neglect, or breach of duty by any Insured Person while acting in his or her capacity as an . . . Insured Person of the Company."

Creditor Trust Action and Denial of D&O Coverage

In March 2017, as aforementioned, the Creditor Trust brought suit in the Delaware Chancery Court against numerous parties, including defendants insureds, former directors and officers of RCAP, alleging they breached their fiduciary duty to RCAP for the benefit of AR Capital LLC (Creditor Trust Action) (*see RCS Creditor Trust v Chorsch*, 2017 *Wl 5904716, 2017 Del Ch LEXIS 820* [Del Ch 2017]. The complaint primarily challenges defendants insureds' use of their dual control of AR Capital LLC and RCAP to enrich themselves and their affiliate entities at the expense of RCAP's public stockholders (*id.*). After being named in the Creditor Trust Action, defendants insureds sought coverage and indemnification under RCAP's D&O liability insurance policy which, as indicated above, consisted of a primary policy issued by XL Speciality Insurance Company and numerous layers of

similar, or follow form,[6] excess policies subject to the terms and conditions of the primary policy. Once the primary policy and the first-through-fifth layer excess policies were exhausted through settlements in other cases, the sixth layer excess insurer (Scottsdale Indemnity Company) began advancing defense costs in the Creditor Trust Action.

In March 2018, as the sixth layer policy neared exhaustion, Westchester, the seventh layer insurer, issued a denial letter asserting that coverage for the Creditor Trust Action was barred on various grounds. Westchester claimed that because the Creditor Trust Action was brought on behalf of RCAP, coverage was barred under the insured vs. insured exclusion, excluding claims brought by or on behalf of one insured (here RCAP) against another insured (RCAP's own directors and officers). Westchester contended that none of the exceptions to the exclusion applied, including the bankruptcy exception. Westchester further claimed that the policy did not apply because defendants insureds in the Creditor Trust Action had acted in capacities other than their

[6]Where an insured purchases a primary insurance policy and "follow form" excess insurance policy, the follow form excess policy generally will contain the same basic provisions as the primary policy with the exception of those provisions that are inconsistent with the terms of the primary policy to which it follows form (Scott M. Seaman and Charlene Kittredge, *Excess Liability Insurance: Law and Litigation*, 32 Tort & Ins L J 653 [1997]).

RCAP director and officer capacities.

Insurer's Declaratory Judgment Action and Insureds' Counterclaim

Shortly after issuing its denial of coverage letter, Westchester initiated the instant action, seeking a declaration that it had no coverage obligations, because of the insured vs. insured exclusion or, alternatively, other policy exclusions. It subsequently amended the complaint to include the remaining excess insurers, Aspen (issuer of the eighth layer policy) and RSUI (issuer of the ninth layer). RSUI asserted crossclaims against defendants insureds, raising the same coverage defenses as Westchester. Defendants insureds answered and asserted counterclaims against Westchester and RSUI, asserting a first counterclaim for breach of contract with respect to the excess insurers' coverage obligations, a second counterclaim based on their bad faith breach, and a third counterclaim seeking a declaration of coverage and defense, as well as attorneys' fees.

In May 2018, Westchester and RSUI moved to dismiss, as relevant here, the first counterclaim, for breach of contract, pursuant to CPLR 3211(a)(1) and (a)(7). They argued that the court could determine, as a matter of law, that coverage was barred by the insured vs. insured exclusion, because the Creditor Trust Action is a claim brought "on behalf of" RCAP, by its assignee, against RCAP directors and officers, and the bankruptcy

exception did not apply.

Defendants insureds opposed the motions, contending that the insured vs. insured exclusion did not apply to the claims brought by the Creditor Trust on behalf of the bankruptcy estate for the benefit of RCAP's creditors and, alternatively, that the Creditor Trust fit into the bankruptcy exception to the insured vs. insured exclusion providing coverage for claims brought by certain bankruptcy-related entities. Additionally, defendants insureds moved for partial summary judgment to dismiss Westchester's and RSUI's complaint asserting coverage defenses, for a declaratory judgment on the insurers' coverage and defense obligations, and for a judgment on their counterclaim for breach of contract.

Supreme Court denied plaintiffs excess insurers' motions to dismiss the counterclaims for breach of contract. Instead, Supreme Court granted partial summary judgment to defendants insureds on their counterclaim for breach of contract regarding defense, liability coverage, attorneys' fees, and costs of defense. This appeal ensued.

Discussion

In this case, whether Supreme Court correctly granted defendants insureds partial summary judgment on their counterclaim for breach of contract, on the coverage obligations,

depends on whether the court correctly determined, as as matter law, that plaintiffs insurers have no viable defense against providing coverage. As a threshold consideration, we examine Supreme Court's determination that the insured vs. insured exclusion did not bar coverage in the underlying Creditor Trust Action, based on its finding that the bankruptcy exception, for claims brought by a bankruptcy trustee or a similar authority, applied to the claims bought by the Creditor Trust.

In an action for a judgment declaring the parties' rights under an insurance policy, this Court must be guided by rules of contract interpretation because "[a]n insurance policy is a contract between the insurer and the insured" *(Bovis Lend Lease LMB, Inc. v Great Am. Ins. Co.*, 53 AD3d 140, 145 [1st Dept 2008]). Contract interpretation or construction is usually a court function (*Hartford Acc. & Indep. Co. v Wesolowski*, 33 NY2d 169, 172 [1973]; *Broad St., LLC v Gulf Ins. Co.*, 37 AD3d 126, 130-131 [1st Dept 2006]). In attempting to resolve the parties' dispute regarding the proper interpretation of the term "comparable authorities" of the bankruptcy exception to the insured vs. insured exclusion, the court's initial task is to attempt to ascertain the parties' intent from the language of the insurance contract itself (*State of New York v Home Indem. Co.*, 66 NY2d 669, 671 [1985]; *see also* 11 Richard A. Lord, Williston

on Contracts § 32.2 [4th ed 1999]). In that context, the court must construe the policy as a whole; all pertinent provisions of the policy should be given meaning, with due regard to the subject matter that is being insured and the purpose of the entire contract (*County of Columbia v Continental Ins. Co.*, 83 NY2d 618, 628 [1994]).

A provision in an insurance policy is ambiguous if it is subject to more than one reasonable interpretation (*State of New York v Home Indem. Co.*, 66 NY2d at 671; *Breed v Insurance Co. of N. AM.*, 46 NY2d 351, 355 [1978]). However, a court should read policy provisions to avoid ambiguities if the plain language of the contract permits (*id.*). Thus, ambiguity in policy language will not be found to exist merely because two conflicting interpretations may be suggested *(see Broad St., LLC v Gulf Ins. Co,* 37 AD3d at 131 ["A court [should not] disregard the provisions of an insurance contract which are clear and unequivocal or accord a policy a strained construction merely because that interpretation is possible"]; *see also Maurice Goldman & Son, Inc. v Hanover Ins. Co.*, 80 NY2d 986, 987 [1992]). Rather, where the parties differ concerning the meaning of an insurance contract, the court will be guided by a reasonable reading of the plain language of the policy (*id; see also Automobile Ins. Co. of Hartford v Cook*, 7 NY3d 131, 138 [2006]

["a reasonable insured under these circumstances would have expected coverage under the policy"]).

Applying these principles to the D&O policy here, we find that the exception for "the Bankruptcy Trustee or . . . comparable authority. . ." applies here to restore coverage removed by the insured vs. insured exclusion. Initially, we reject defendants insureds' argument that we do not need to address the bankruptcy exception, because the excess insurers have not established their burden that the insured vs. insured exclusion is implicated as a threshold consideration to whether the exception restores D&O liability coverage. To the contrary, the presence of a provision in the D&O policy that the pre-petition debtor company, here RCAP, is an "insured" covered by the D&O liability policy's insured vs. insured exclusion, and the presence of an exception to the exclusion for claims brought on behalf of the estate by bankruptcy-related entities (bankruptcy trustee and comparable authorities), clearly indicates that in the absence of such a specific exception, the listed bankruptcy-related constituents would fall within the scope of the insured vs. insured exclusion and bar coverage for claims brought by successors-in-interest to the pre-petition debtor, such as RCAP here *(see Indian Harbor Ins. Co. v Zucker*, 860 F3d 373, 375 [6th Cir 2017]; *Biltmore Assoc. LLC v Twin City Fire Ins. Co.*, 572 F3d

663, 670 [9th Cir 2009]).

Turning to the question of whether the exception for bankruptcy trustees and comparable authorities applies here to restore coverage removed by the insured vs. insured exclusion, we find that the pertinent clauses of the insured vs. insured exclusion and the bankruptcy exception, when read together, are unambiguous. Their plain language indicates no intent to bar coverage for D&O claims brought by the Creditor Trust, as a post-confirmation litigation trust. To begin, the policy included the crucial language "brought by" or "on behalf of" in the insured vs. insured exclusion and the bankruptcy exception. Thus, the exclusion and exception both focused on the identity of the party asserting the claim, not on the nature of the claim being brought. Moreover, the policy included the debtor corporation, or DIP, as an insured under the insured vs. insured exclusion, but did not to include the DIP under the bankruptcy trustee and comparable authorities exception. Thus, when read together, the bankruptcy exception restores coverage for bankruptcy-related constituents, such as the bankruptcy trustees and comparable authorities, and the insured vs. insured exclusion precludes the possibility of a lawsuit by a company as DIP, or by individuals acting as proxies for the board or the company.

In other words, because the D&O policy covers the debtor in

the insured vs. insured exclusion even in the advent of bankruptcy, the D&O policy allows the company when transformed into a DIP or debtor corporation upon the filing of the petition to retain its factual identity as far as the insured vs. insured exclusion is concerned. This is because, "[l]iterally, the debtor's management remains in possession of the estate's property [including cause of action against officers and directors] and remains responsible for managing the estate's financial affairs while the case is pending."[7] Thus, the DIP is one and the same with the debtor corporation and necessarily acts in concert therewith.

The D&O claims here, however, are not prosecuted by the debtor corporation or by individuals acting as proxies for the board or the company. On the contrary, the D&O claims are prosecuted by the post-confirmation Creditor Trust, a separate entity.

In fact, pursuant to Bankruptcy Code 11 USC § 1123(b), the specific terms of the Chapter 11 plan and Creditor Trust Agreement both provide that the claims against the directors and officers will inure to the benefit of the corporation's unsecured

[7]Jeff Ferriell & Edward J. Janger, Understanding Bankruptcy 143-150 [2007]; *see also* Michael D. Sousa, *Making Sense of the Bramble-Filled Thicket: The "Insured vs. insured" Exclusion in the Bankruptcy Context*, 23 Emory Bankr Dev J 365, 404 (2007).

creditors and exclude the debtor company from recovery of any benefit from the lawsuit. Furthermore, even though the D&O claims are transferred to a Creditor Trust pursuant to the debtor's proposed plan, the creditors selected the Creditor Trustees, which is comprised of the oversight creditor's committee. To be sure, the excess insurers are correct to assert that once a company is in bankruptcy, virtually any claim can be understood as asserted for the creditors. However, what makes a Creditor Trust "comparable" to a bankruptcy-related entity, seeking to recover funds for the creditors, is that the Trust is not merely a creditor. Rather, it is an entity and authority created as part and parcel of the bankruptcy reorganization proceeding, empowered by the bankruptcy court's order of confirmation to file D&O claims.

That the Creditor Trust must be viewed as a separate entity from the debtor finds support in the fact that such a litigation trust has standing to pursue post-confirmation D&O claims explicitly pursuant to the Bankruptcy Code. The authority to establish a post-confirmation litigation trust or estate representative to pursue causes of action is found in Section 1123(b)(3)(B) of the Bankruptcy Code. Although not a mandatory provision in a chapter 11 plan, a plan may nevertheless provide for "the retention and enforcement by the debtor, by the trustee,

or by a representative of the estate appointed for such purpose" of any claim or interest belonging to the debtor or to the estate (11 USC § 1123[b][3][B]). Under 11 USC § 1123(b)(3)(B), a party other than the debtor or trustee (such as Creditor Trust here) that seeks to enforce a claim must show that (i) it has been appointed under a chapter 11 plan; and ii) it is a representative of the estate (*see McFarland v Leyh [In re Tex. as Gen. Petroleum Corp.]*, 52 F3d 1330, 1335 [5th Cir 1995]).

Significantly, in determining whether, as the appointed party, the Creditor Trust's responsibilities qualified as a representative of the estate, the bankruptcy court's primary concern was whether a successful recovery by the appointed estate representative "'would benefit the debtor's estate and, particularly, the debtor's unsecured creditors'" (*Citicorp Acceptance Co. v Robison [In re Sweetwater]*, 884 F2d 1323, 1327 [10th Cir 1989] quoting *Temex Energy, Inc. v Hastie & Kirschner [In re Amarex, Inc.]*, 96 BR 330, 334 [WD Okla 1989]). Following such a finding and upon confirmation, RCAP, as the proponent of the plan, became merely a reorganized debtor (rather than a debtor-in-possession) and, as such, could not exercise the powers granted to debtors-in-possession and trustees under the Bankruptcy Code (*see* USC § 1141[b]); *Dynasty Oil & Gas, LLC v Citizens Bank* [In re United Operating, LLC]), 540 F3d 351, 355

[5th Cir 2008]). That power fell upon the Creditor Trust.

In addition to the plain language of the bankruptcy exception and the mandates of the Bankruptcy Code, there are other reasons informing our decision to reject the excess insurers' position in this case. First, we perceive no valid rationale for excluding D&O claims from D&O coverage when asserted by a post-confirmation litigation trust where coverage would otherwise exist for identical claims asserted by a Chapter 11 trustee, liquidator or creditors' committee. The main rationale offered by the excess insurers for excluding D&O claims when asserted by the Creditor Trust in this context is that ownership of such claims is the result of a voluntary assignment by the debtor company, which itself cannot assert D&O claims covered by the D&O policy. The excess insurers argue that this raises concerns of collusion. However, to hold that vesting estate assets in the Creditor Trust is a mere contractual assignment would ignore that the Creditor Trust Agreement was drafted and executed in a Chapter 11 Bankruptcy proceeding to obtain confirmation of a reorganization plan. In that context, it would be unreasonable to interpret the "assignment" of the D&O claims to the Creditor Trust as just a contractual assignment. On the contrary, the vesting of assets from one entity to another accomplishes the goal of filing for bankruptcy, which is to

automatically vest all properties of the estate in the DIP, until there is an order of the bankruptcy court confirming the reorganization plan of the debtor (see USC § 1141[b]).

Further, to hold that the bankruptcy exception does not apply to the Creditor Trust would ignore the rationale and purpose for the creation of a post-confirmation litigation trust. In a Chapter 11 reorganization plan, creation of a post-confirmation litigation trust allows an entity other than the debtor corporation to pursue the cause of action, and permits the reorganized debtor's management to focus on running its business, after emerging from bankruptcy. Often, "the claims transferred to the litigation trust are those that the existing management of the debtor is perceived as being reluctant to pursue."[8] Also, like here, customarily, "the claims transferred to the litigation trusts are those brought against former directors or officers, or persons with whom the current directors have close ties."[9]

Likewise, the excess insurers' narrow interpretation of the

---

[8]Paige Holden Montgomery and Casey A. Burton, An Introduction to Litigation Trusts, American Bar Association: https://www.americanbar.org/groups/litigation/committees/commercial-business/articles/ 2013/an-introduction-to-litigation-trusts [Last accessed April 23, 2020]

[9]*id.*

term "comparable authorities," within the bankruptcy exception, ignores the economic reality of insolvency. The alternative to assigning the D&O claims to a post-confirmation Creditor's Trust is to assign them to a bankruptcy trustee, or other type of estate representative so it can pursue such claims, or to abandon them. Of course, an assignment of the claims to a pre-confirmation bankruptcy trustee, or other type of estate representative, would not exclude them from D&O coverage under the broad bankruptcy exception here. Alternatively, pursuant to the Bankruptcy Code (11 USC § 554), an abandonment of the claims would require that the plan proponent demonstrate that such claims are of inconsequential value, or that retaining the same would be burdensome. This standard is unlikely to be satisfied here where the claims against the directors and officers have been deemed by the unsecured creditors to be of significant value, and derivative standing could be conferred upon a creditors committee, which would also not be excluded from D&O coverage.[10]

---

[10]As a party in interest, a creditor has the right to request authority to pursue causes of action on behalf of the estate (*see Louisiana World Exposition v Federal Ins. Co.*, 858 F2d 233 [5th Cir 1988]). A creditor may pursue claims on behalf of the estate when three requirements are satisfied: (1) the claim is colorable, (2) the debtor-in-possession has unjustifiably refused to pursue the claim, and (3) the creditor obtains approval to do so from the bankruptcy court (*id.* at 247).

Still, the excess insurers argue that if the parties intended a blanket exception, they would not have chosen the listed bankruptcy-related constituents. But the opposite is just as true. Had the parties intended that claims brought on behalf of creditors by the Creditor Trust be excluded from coverage by the insured vs. insured exclusion and not restored under the bankruptcy exception, they would have provided for that as a matter of contract. Instead, by including the undefined and open-ended phrase "comparable authority" into the D&O policy's bankruptcy exception, the parties created a broadly applicable exception with no clear limiting principles other than that there should be no coverage where the D&O claims are prosecuted by the DIP or by individuals acting as proxies for the board or the company. No amount of case law cited by the excess insurers can change the plain language of the D&O policy.

In any event, none of the cases relied upon by the excess insurers addressed the specific question here: whether the insured vs. insured exclusion bars coverage in the underlying D&O action given the exception applicable to bankruptcy trustees and comparable authorities. The excess insurers rely primarily upon *Indian Harbor Ins Company v Zucker* (860 F3d 373 [6th Cir 2017]), and its progeny. *Indian Harbor*, however, is easily distinguishable because that case involved an insured vs. insured

exclusion that contained no bankruptcy exception. *Indian Harbor* declined to read such an exception into the policy. In contrast, in this case, there is a bankruptcy exception explicitly applicable to bankruptcy trustees and comparable authorities, which we interpret to encompass a post-confirmation litigation trust pursuant to the broad "comparable authority" language of the exception.[11]

---

[11]Where, unlike here, a D&O policy does not explicitly contain a bankruptcy exception, there is a split of authority at the federal level regarding the effects of a bankruptcy proceeding on the exclusion. The split is along the lines of whether a lawsuit brought against officers and directors by the various successors-in-interest to the pre-petition debtor, namely bankruptcy trustees, creditors committees or post-confirmation trustees, serves to trigger the insured vs. insured exclusion in a D&O liability policy. In the First, Eighth and Eleventh Circuits, for instance, the insured vs. insured exclusion bars coverage for lawsuits against former officers and directors by a confirmation plan committee or bankruptcy trustee *(see e.g. Indian Harbor Ins. Co,* 860 F3d at 375; *Biltmore Assoc. LLC v Twin City Fire Ins. Co.*, 572 F3d at 670; *National Union Fire Ins. Co. v Olympia Holding Corp.*, 1996 WL 33415761, 1996 US Dist LEXIS 22806 [ND Ga June 4, 1996]; *Reliance Ins. Co. of Ill. v Weis*, 148 BR 575 [ED Mo 1992], affd, 5 F3d 532 [8th Cir. 1993], *cert. denied sub nom. Plan Comm. of Bank Bldg. & Equip. Corp. of Am. v Reliance Ins. Co. of* Ill., 510 US 1117 [1994]). On the other hand, courts in the Second, Third, Sixth and Ninth Circuits have concluded that the insured vs. insured exclusion was not triggered in lawsuits brought by a bankruptcy trustee or other successors-in-interest against the former directors and officers for breach of fiduciary duty *(see e.g. In re Palmaz Scientific, Inc.*, 2018 WL 3343597, *4-12 [Bankr WD Tex 2018]; *Alstrin v St. Paul Mercury Ins. Co.*, 179 F Supp 2d 376 [D. Del. 2002]; *Cohen v National Union Fire Ins. Co. [In re County Seat Stores. Inc.]*, 280 BR 319 [Bankr. SD NY 2002]; *Rieser v Baudendistel* [*In re Buckeye Countrymark, Inc.*], 251 BR 835 [Bankr SD Ohio 2000]; *Pintlar Corp. v Fidelity & Cas. Co. of N.Y. [In re Pintlar*

Finally, we reject the excess insurers' argument that a broad interpretation of the bankruptcy exception impermissibly renders the separate Creditor Committee exception meaningless. We recognize that both the Creditor Trust and Creditor Committee in a Chapter 11 proceeding could seek to obtain assets for creditors. However, the fact that the parties included a specific exception for the Creditor Committee and could have made it clear that the Creditor Trust was intended to be covered by the exception by using the broad "comparable authority" language in the Creditor Committee exception, does not mean that the Creditor Trust cannot be found to be encompassed by the broad "comparable authority" language as used in the bankruptcy exception.

While we agree with Supreme Court to the extent it determined that the insured vs. insured exclusion did not bar coverage in the underlying Creditor Trust Action, we find that Supreme Court should not have granted partial summary judgment to defendants insureds on their claim for breach of contract on the coverage obligations and in issuing the declaration of coverage. Material factual disputes remain as to the application of other coverage defenses. Specifically, the Creditor Trust Action may

---

Corp.], 205 BR 945 [Bankr D Idaho 1997]).

reveal that defendants insureds engaged in wrongdoing to benefit a separate entity, AR Capital LLC, while acting in their personal capacities, for which no coverage exists, rather than "solely" in their capacities as directors and officers (*see National Union Fire Ins. Co. of Pittsburgh, Pa. v Jordache Enters.*, 235 AD2d 333 [1st Dept 1997], *lv denied in part, dismissed in part,* 90 NY2d 931 [1997]). There are also issues of fact as to whether the sole remedy in the Creditor Trust Action is the disgorgement of ill-gotten gains, which would not be insurable (*see J.P. Morgan Sec. Inc. v Vigilant Ins. Co.*, 21 NY3d 324 [2013]). Under the circumstances, it was premature for the court to award defendant insureds attorneys' fees incurred in defending the declaratory judgment action.

Accordingly, the orders of the Supreme Court, New York County (O. Peter Sherwood, J.), entered May 16, 2019 and June 11, 2019, which, to the extent appealed from, granted the motions of defendants-respondents Nicholas S. Schorsch, Edward M. Weil, Jr., William Kahane, Peter M. Budko, and Brian S. Block (defendants insureds) for partial summary judgment on their first counterclaim alleging breach of contract with respect to the insurance coverage obligations of plaintiff-appellant Westchester Fire Insurance Co., defendant-appellant Aspen American Insurance Co., and defendant-appellant RSUI Indemnity Co. (collectively,

Excess Insurers), declared Excess Insurers obligated to pay for all defense and indemnity costs incurred in an action pending in Delaware, and found defendants insureds entitled to attorneys' fees incurred in defending against the instant declaratory judgment action, and denied Excess Insurers' motions to dismiss defendant insureds' counterclaim for breach of contract, should be modified, on the law, to deny defendant insureds' motion for partial summary judgment on their first counterclaim, to vacate the declaration that Excess Insurers are obligated to pay for all defense and indemnity costs incurred in the Creditor Trust Action, and to vacate the award of attorneys' fees incurred by defendant insureds in the instant action, and otherwise affirmed, without costs.

All concur.

Orders, Supreme Court, New York County (O. Peter Sherwood, J.), entered May 16, 2019, and June 11, 2019, modified, on the law, to deny defendant insureds' motion for partial summary judgment on their first counterclaim, to vacate the declaration that Excess Insurers are obligated to pay for all defense and indemnity costs incurred in the Creditor Trust Action, and to vacate the award of attorneys' fees incurred by defendant insureds in the instant action, and otherwise affirmed, without costs.

Opinion by Renwick, J. All concur.

Friedman, J.P., Renwick, Kapnick, Gesmer, Kern, JJ.

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

ENTERED: MAY 14, 2020

CLERK

Acosta, P.J., Richter, Manzanet-Daniels, Mazzarelli, Gesmer, JJ.

11603-
11604 In Rebecca Seawright,
Petitioner-Respondent,

-against-

The Board of Elections in the
City of New York,
Respondent-Appellant.

- - - - -

Louis Puliafito,
Intervenor-Appellant.

- - - - -

In re Louis Puliafito,
Petitioner-Appellant,

-against-

The Board of Elections in the
City of New York,
Respondent-Appellant,

Rebecca Seawright,
Respondent-Respondent.

Index 100432/20
100433/20
100435/20
100436/20

_____

James E. Johnson, Corporation Counsel, New York (Elina Druker of counsel), for the Board of Elections in the City of New York, appellant.

Eiseman Levine Lehrhaupt & Kakoyiannis PC, New York (Lawrence A. Mandelker of counsel), for Louis Puliafito, appellant.

Bedford Soumas LLP, New York (Gregory C. Soumas of counsel), for respondent.

_____

Orders, Supreme Court, New York County (Carol R. Edmead, J.), entered on or about May 8, 2020, which denied Louis Puliafito's petitions to invalidate the designating petitions of Rebecca Seawright seeking to be placed on the ballot for the Democratic Party and the Working Families Party primary elections to be held on June 23, 2020, and granted Seawright's petitions to

validate those designating petitions, unanimously affirmed, without costs.

These election law proceedings involve the belated filing of a cover sheet and a certificate of acceptance where the delay in filing is attributable to illness or quarantine because of the current COVID-19 pandemic. We hold that under the unique circumstances existing in New York City during the past few months, and the specific health challenges alleged here, the belated filing of these specific documents is not a fatal defect. In so holding, we note that no challenge has been presented to the number of signatures in the designating petitions and no claim of fraud has been alleged. Indeed, there is no evidence of specific actual prejudice presented. Although respondent Board of Elections contends that a cover sheet is necessary for administrative convenience, that cannot outweigh the right to ballot access in the current unique circumstances.

In other contexts, courts have recently recognized the difficulties presented by the pandemic and the need to suspend deadlines in light of the health crisis (*see e.g. People ex rel Mulry v Franchi*, — AD3d —, 2020 NY Slip Op 02387 [2d Dept 2020]; *People ex rel Nevins v Brann*, — Misc3d —, 2020 NY Slip Op 20083 [Sup Ct, Queens County, April 13, 2020]; *People ex rel Hamilton v Brann*, 2020 NY Slip Op 50392[U] [Sup Ct, Bronx County, April 2, 2020]; *see also* Governor Cuomo's Executive Order 202.8 [tolling deadlines for certain court proceedings]).

Matter of Hutson v Bass (54 NY2d 772 [1981]) and *Matter of Plunkett v Mahoney* (76 NY2d 848 [1990]) do not mandate a different result since the delay in filing in those cases did not occur in the unprecedented circumstance of a statewide health emergency. Nor is there any indication that the candidates there were quarantining to protect their own health or for public safety. Furthermore, both *Hutson* and *Plunkett* were decided before the passage of the Election Reform Act of 1992 and the Ballot Reform Act of 1996, which sought to alleviate overly harsh sanctions for technical violations of the election laws.

To the extent that the Second Department has reached a different result in *Matter of Jasikoff v Commissioners of the Westchester County Bd. of Elections* (— AD3d —, 2020 NY Slip Op 02742 [2d Dept 2020]), we decline to adopt that Court's analysis.

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

ENTERED: MAY 14, 2020

CLERK

Acosta, P.J, Richter, Mazzarelli, Gesmer, JJ.

11605 In re Ramona Ferreyra, Index 260201/2020
Petitioner-Appellant,

Amanda N. Septimo,
Petitioner-Appellant,

-against-

Carmen E. Arroyo,
Respondent-Respondent,

The Board of Elections in the
City of New York,
Respondent.

_____

Lichten & Bright, P.C., New York (Daniel R. Bright of counsel), for appellants.

Stanley Kalmon Schlein, Bronx, and Law Offices of Edmond J. Pryor, Bronx (Edmond J. Pryor of counsel), for Carmen E. Arroyo, respondent.

_____

Order, Supreme Court, Bronx County (John W. Carter, J.), entered on or about May 5, 2020, which confirmed the report of a Referee recommending the denial of petitioners' request for an order pursuant to article 16 of the Election Law declaring invalid the candidacy of respondent Carmen E. Arroyo for election to the State Assembly from the 84th Assembly District in the Bronx, affirmed, without costs.

The basis of petitioners' objection to the nominating petitions submitted by respondent Arroyo was that, although the campaign did not obtain blank petition sheets from their printer until February 27, 2020, 333 of the 576 signatures deemed valid

by the Board of Elections were dated February 25 or February 26; that is, that the signatures were improperly backdated. Petitioners concede that, even if those signatures were to be discarded, there would still be over 240 properly dated signatures. This number crosses the threshold of 150 required under the amendments to the Election Law embodied in the Governor's Executive Order 202.2, issued on March 14, 2020. Nevertheless, petitioners argue that all of the nominating petitions should be invalidated as being hopelessly permeated with fraud.

A finding that a candidate's petition is permeated with fraud must be established by clear and convincing evidence (*see Matter of Robinson v Edwards*, 54 AD3d 682, 683-684 [2d Dept 2008]). Petitioners had that burden and did not satisfy it. Importantly, there is no allegation that the signatures in question were themselves forged or otherwise improperly secured. In fact, it was conceded that they were not. As for the claim that many of the dates were backdated, for an improper purpose, there is a dearth of evidence to support it. Certainly, there is no evidence meeting the clear and convincing standard. Before the Referee, petitioners did not present a single witness. We defer to the court's finding that the documentary evidence, which consisted largely of the records before the Board of Elections and the affidavit of a representative of the printing company,

was insufficient to establish that respondent intended to commit a fraud. We further find that petitioners elicited insufficient proof to establish that the candidate herself was involved in any fraud.

We reject petitioners' argument that there is a sufficient basis to overturn the Referee's refusal to admit as evidence, under the declaration against interest exception to the hearsay rule, a conversation between petitioner Septimo and one of the subscribing witnesses. That person, who never appeared at the Referee's hearing, allegedly stated that he was instructed to leave blank the spaces next to the signatures at issue where the date of signature was supposed to be entered.

The dissent posits that petitioners' failure to produce any witnesses was not fatal to their ability to have shifted the burden at the hearing to respondent. Indeed, the Court of Appeals in *Matter of Aronson v Power* (22 NY2d 759 [1968]) reversed this Court's holding that the petitioner did not shift the burden on a claim of fraud (*Matter of Aronson v Power*, 30 AD2d 651 [1st Dept 1968]), even though the petitioner was unable to secure the testimony of material witnesses. However, in that case the Appellate Division made reference to actual "instances of fraudulent practices" having been established by the

petitioners (30 AD2d at 651). Here, one must resort to sheer speculation to conclude that there was a pattern of fraud.

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

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

GESMER, J. (dissenting)

I respectfully dissent. The record before us demonstrates that respondent Arroyo submitted a designating petition that is permeated with fraud and irregularities (*Matter of Proskin v May*, 40 NY2d 829, 830 [1976]), knowledge of which can be charged to her.[1] Accordingly, I would reverse and grant the petition to invalidate respondent candidate's designating petition.

Signatures on designating petitions are required to be dated and subscribed (Election Law § 6-132). "The substantive requirements of section 6-132 'are designed to facilitate the discovery of irregularities or fraud in designation petitions,'" and strict compliance is therefore required (*Matter of Alamo v Black*, 51 NY2d 716, 717 [1980] [invalidating petition where witness statement failed to declare that the signatories signed on the dates indicated], quoting *Matter of Rutter v Coveney*, 38 NY2d 993, 994 [1976]). Here, respondent candidate concedes that she did not obtain the blank petition sheets from the printer until February 27, 2020. Nonetheless, on 41 of the 78 pages she

---

[1]In my view, the record shows that knowledge of the fraud and irregularity in this case is chargeable to respondent candidate. However, I note that, in *Proskin*, the Court of Appeals affirmed Supreme Court's invalidation of a designating petition permeated with fraud, in which more than half of the signatures were improper but the remaining number of valid signatures exceeded the required number, even where Supreme Court specifically found that the candidate had no personal knowledge of the fraud (*Proskin*, 40 NY2d at 830).

submitted to the Board of Elections, the signatures were all dated February 25 or 26. Therefore, 512 out of 944 signatures submitted in the petition are backdated to dates preceding the candidate's receipt of the blank petition pages. Furthermore, 14 of the 28 subscribing witnesses, including the candidate's chief of staff, swore that signatures dated February 25 or 26 were placed on the petition in their presence on those dates. Therefore, each of those statements was materially false. Indeed, her chief of staff swore to nine backdated petition pages, one of which included the signature of the candidate herself. Significantly, the Board disqualified all but 576 of the signatures, which the candidate does not contest. Of the 576 not disqualified, 333 were backdated.

The remaining 243 signatures are not questioned, which exceeds the 150 required this year. Nevertheless, it is my view that petitioners have made out a prima facie case that the extent of the backdating, the flagrancy of the violation of the election law, and the participation of the candidate and her chief of staff establishes that the designating petition was so permeated with fraud that the candidate should be disqualified *(Matter of Buchanan v Espada*, 230 AD2d 676, 677 [1st Dept 1996], *affd* 88 NY2d 973 [1996]; *Matter of Tapper v Sampel*, 54 AD3d 435, 436 (2d

Dept 2008], *lv denied* 11 NY3d 701 [2008]).[2]

In response, respondent candidate failed to offer any explanation for the backdated signatures and false statements by subscribing witnesses. She neither submitted any affidavits in opposition to the petition, nor sought to call any witnesses.

Supreme Court found that the number of backdated signatures was "significant," and that the irregularities were "troublesome." It nevertheless denied the petition. I would reverse since there is no reasonable view of the record that can lead to any other conclusion than that the magnitude of backdated signatures, including the candidate's own, and the large number of false subscribing witness statements, including that of the candidate's chief of staff, were the result of intent.[3] This is

---

[2]In reaching this conclusion, I rely only on the documentary evidence. I agree with the majority that the motion court properly refused to consider the testimony of petitioner Septimo concerning her conversation with one of the subscribing witnesses.

[3]As petitioners point out, an incentive for backdating signatures can be found in Election Law § 6-134(3), which provides that, if a person signs two candidates' designating petitions on two different dates within the narrow time period for collecting signatures, the second-dated signature is not valid. Here, the statutory period for gathering signatures commenced on February 25, 2020 (New York State Board of Elections 2020 Political Calendar, available at https://www.elections.ny.gov/NYSBOE/law/2020Politica1Calendar0421.pdf. [last accessed May 13, 2020]). As petitioners' counsel noted at oral argument, the record contains 35 signatures dated February 25 or 26 on respondent candidate's petition by individuals who also signed the designating petition of petitioner Septimo.

not, as the majority states, speculation; rather it is the only logical inference to be drawn from the documentary evidence.[4] Certainly, if there were errors as to dates on a few petitions, it could be chalked up to human error. But it is difficult to imagine any scenario under which mere human error could account for more than half of the petitions being backdated and falsely sworn as to the date on which the signatures were collected. Given the brief and crucial timeframe for gathering signatures, it is virtually impossible to infer that respondent candidate and her chief of staff were unaware of the dates when the candidate signed and her chief of staff witnessed signatures, including the candidate's own signature. This is a case in which there was no testimonial evidence, and the documentary evidence before us is all that Supreme Court considered.[5] Our obligation to evaluate

---

[4] I disagree with the majority that we must defer to the findings of the motion court. The Appellate Division's "authority is as broad as that of the trial court," and deference is not warranted where, as here, the facts do not depend on the trial court's findings as to the credibility of witnesses (*DiLorenzo v Windermere Owners LLC*, 174 AD3d 102, 107 [1st Dept 2019] [internal quotation marks omitted]).

[5] Respondent candidate's argument that the lack of testimonial evidence precludes a finding that the designating petition is so permeated with fraud as to be invalid is contrary to governing case law. Specifically, the Court of Appeals affirmed Supreme Court's invalidation of a designating petition on this basis even where, as here, petitioner was unable "to secure the attendance of material witnesses" (*Aronson v Power*, 30 AD2d 651, 651 [1st Dept 1968], revd, 22 NY2d 759 [1968]).

the evidence in the record before us permits us to use common sense and to recognize that a pattern of false statements this flagrant could not be the result of anything other than intent.

I respectfully dissent.

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

ENTERED: MAY 14, 2020

CLERK

Acosta, P.J., Richter, Mazzarelli, Gesmer, JJ.

11606 In Joselin Mejia, et al., Index 260287/20
Petitioners-Appellants,

-against-

Board of Elections in the City of New York,
Respondent-Respondent.

_____

Maldonado & Cruz, PLLC, Bronx (Angel Cruz of counsel), for appellants.

James E. Johnson, Corporation Counsel, New York (Elina Druker of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (John W. Carter, J.), entered on or about May 4, 2020, which denied petitioners' petition to validate the designating petitions of Joselin Mejia and other candidates seeking to be placed on the ballot for the Democratic Party primary election to be held on June 23, 2020, unanimously reversed, on the law, without costs, and the petition granted.

This election law proceeding involves the belated filing of cover sheets where the delay in filing is attributable to illness or quarantine because of the current COVID-19 pandemic. We hold that under the unique circumstances existing in New York City during the past few months, and the specific health challenges alleged here, the belated filing of these specific documents is not a fatal defect. In so holding, we note that no challenge has been presented to the number of signatures in the designating petitions and no claim of fraud has been alleged. Indeed, there

is no evidence of specific actual prejudice presented. Although respondent Board of Elections contends that a cover sheet is necessary for administrative convenience, that cannot outweigh the right to ballot access in the current unique circumstances.

In other contexts, courts have recently recognized the difficulties presented by the pandemic and the need to suspend deadlines in light of the health crisis (*see e.g. People ex rel Mulry v Franchi*, __ AD3d __, 2020 NY Slip Op 02387 [2d Dept 2020]; *People ex rel Nevins v Brann*, — Misc 3d —, 2020 NY Slip Op 20083 [Sup Ct, Queens County, April 13, 2020]; *People ex rel Hamilton v Brann*, 2020 NY Slip Op 50392[U] [Sup Ct, Bronx County, April 2, 2020]; *see also* Governor Cuomo's Executive Order 202.8 [tolling deadlines for certain court proceedings]).

Matter of Hutson v Bass (54 NY2d 772 [1981]) does not mandate a different result since the delay in filing there did not occur in the unprecedented circumstance of a statewide health emergency. Nor is there any indication in that case that the individual appointed to file the cover sheets was quarantining to protect her own health or for public safety. Furthermore, *Hutson* was decided before the passage of the Election Reform Act of 1992 and the Ballot Reform Act of 1996, which sought to alleviate overly harsh sanctions for technical violations of the election laws.

To the extent that the Second Department has reached a different result in *Matter of Jasikoff v Commissioners of the Westchester County Bd. of Elections* (__ AD3d __, 2020 NY Slip Op 02742 [2d Dept 2020]), we decline to adopt that Court's analysis.

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

ENTERED: MAY 14, 2020

CLERK

Acosta, P.J., Richter, Mazzarelli, Gesmer, JJ.

11607 In Mohammed Mujumder, et al., Index 260286/20
Petitioners-Appellants,

-against-

The Board of Elections in the
City of New York,
Respondent-Respondent.

_____

Maldonado & Cruz, PLLC, Bronx (Angel Cruz of counsel), for appellants.

James E. Johnson, Corporation Counsel, New York (Elina Druker of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (John W. Carter, J.), entered on or about May 4, 2020, which denied petitioners' petition to validate the designating petitions of Mohammed Mujumder and other candidates seeking to be placed on the ballot for the Democratic Party primary election to be held on June 23, 2020, unanimously reversed, on the law and the facts, without costs, and the petition granted.

This election law proceeding involves the belated filing of cover sheets where the delay in filing is attributable to illness or quarantine because of the current COVID-19 pandemic. We hold that under the unique circumstances existing in New York City during the past few months, and the specific health challenges alleged here, the belated filing of these specific documents is not a fatal defect. In so holding, we note that no challenge has been presented to the number of signatures in the designating petitions and no claim of fraud has been alleged. Indeed, there

is no evidence of specific actual prejudice presented. Although respondent Board of Elections contends that a cover sheet is necessary for administrative convenience, that cannot outweigh the right to ballot access in the current unique circumstances.

In other contexts, courts have recently recognized the difficulties presented by the pandemic and the need to suspend deadlines in light of the health crisis (*see e.g. People ex rel Mulry v Franchi*, __ AD3d __, 2020 NY Slip Op 02387 [2d Dept 2020]; *People ex rel Nevins v Brann*, — Misc3d —, 2020 NY Slip Op 20083 [Sup Ct, Queens County, April 13, 2020]; *People ex rel Hamilton v Brann*, 2020 NY Slip Op 50392[U][Sup Ct, Bronx County, April 2, 2020]; *see also* Governor Cuomo's Executive Order 202.8 [tolling deadlines for certain court proceedings]).

Matter of Hutson v Bass (54 NY2d 772 [1981]) does not mandate a different result since the delay in filing there did not occur in the unprecedented circumstance of a statewide health emergency. Nor is there any indication in that case that the individual appointed to file the cover sheets was quarantining to protect her own health or for public safety. Furthermore, *Hutson* was decided before the passage of the Election Reform Act of 1992 and the Ballot Reform Act of 1996, which sought to alleviate overly harsh sanctions for technical violations of the election laws.

To the extent that the Second Department has reached a different result in *Matter of Jasikoff v Commissioners of the Westchester County Bd. of Elections* (__ AD3d __, 2020 NY Slip Op 02742 [2d Dept 2020]), we decline to adopt that Court's analysis.

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

ENTERED: MAY 14, 2020

CLERK

Acosta, P.J., Richter, Manzanet, Mazzarelli, Gesmer, JJ.

11608 In re Dan Quart, Ind. 100430/20
Petitioner-Respondent,

-against-

Cameron Koffman,
Respondent-Appellant,

The Board of Elections in
the City of New York,
Respondent.

_____

Kauff Laton Miller LLP, New York (Nicholas F. Joseph of counsel), for appellant.

Martin E. Connor, Wells, for respondent.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered on or about May 7, 2020, which granted petitioner's motion for summary judgment in an invalidation proceeding under Election Law seeking to disqualify respondent Koffman as a candidate for the office of Member of the Assembly in the Democratic primary election to be held on June 23, 2020, reversed, on the law, without costs, and the petition dismissed.

Petitioner is an Assemblyman from the 73rd Assembly District, County and State of New York. He was first elected in 2011 and has served continuously since then. Koffman, who was born and raised in Manhattan, attended Yale University in Connecticut as an undergraduate from August 2015 to graduation in May 2019, after which he returned to live in New York. Koffman arrived on campus and moved into one of Yale's dormitories on or about August 28, 2015. The majority of his belongings stayed at

141 E. 72nd Street, which remained his permanent address. While at Yale, he registered to vote in Connecticut in August 2015, indicating he lived at "Welch Hall, Yale." He presented his New York State driver's license as identification and listed the E. 72nd Street residence as his mailing address. In 2017, Koffman served jury duty in New York County and did not seek to be excused on the ground that he was no longer a resident of the State (*see* Judiciary Law § 510[1] [only New York residents may serve on a jury]). Koffman voted in person in the elections held in New Haven, Connecticut in 2015, 2016, 2017 and 2018. Koffman registered to vote in New York in October 2017 when he renewed his driver's license and voted in New York in the November 2019 election.

Petitioner alleges that Koffman chose Connecticut as his "electoral residency," disqualifying him from running for public office under the New York State Constitution. Petitioner moved for summary judgment in Supreme Court, New York County, and by order dated May 7, 2020 the court granted summary judgment to petitioner.

In moving for summary judgment, petitioner had the burden to establish by clear and convincing evidence that respondent does not meet the residency requirements established by the New York Constitution (*see Matter of Jones v Blake*, 120 AD3d 415, 416 [1st Dept 2014], *lv denied* 23 NY3d 908 [2014]; *Matter of Weiss v Teachout*, 120 AD3d 701, 702 [2d Dept 2014]). "Residence" is

defined by the Election Law as "that place where a person maintains a fixed, permanent and principal home and to which he [or she], wherever temporarily located, always intends to return" (Election Law § 1-104[22]; *Matter of Glickman v Laffin*, 27 NY3d 810, 815 [2016]).

Petitioner submitted proof that respondent had registered to vote and had voted in Connecticut from 2015 to 2018 instead of voting by absentee ballot in New York. In opposition to the summary judgment motion, respondent presented his affidavit and documentary evidence which demonstrated, among other things, that he was born and raised in New York; that he used his New York home as his permanent address; maintained his New York driver's license; paid New York taxes; completed New York jury service while he was a student at Yale; lived in New York when school was not in session; returned to New York to live and work after graduation, and always considered himself a New York resident.

The court found that petitioner was entitled to summary judgment because the material facts alleged in the petition were not disputed and that under the particular circumstances in this case, Koffman "lacked the requisite intent to establish 'electoral' residency in New York for the five years required by our Constitution." The court also observed that if Koffman had "intended to establish and maintain New York as his electoral residence, [he] could have voted by casting an absentee ballot for the New York elections" and that "by taking the affirmative

steps of registering to vote in Connecticut and casting votes there in 2015, 2016, 2017 and 2018, [he] effectively chose the state of Connecticut as his electoral residence." We now reverse and dismiss the petition.

To serve as a member of the state legislature, a person must have been "a resident of the state of New York for five years. . .immediately preceding his or her election" (NY Const art III, § 7; *Glickman*, 27 NY3d at 816. As noted, "residence" is "that place where a person maintains a fixed, permanent and principal home and to which he, wherever temporarily located, always intends to return" (Election Law § 1-104[22]). "The crucial determination for electoral residency purposes is that the individual must manifest an intent, coupled with physical presence without any aura of sham" (*Glickman*, 27 NY3d at 815 [internal quotation marks omitted]).

Petitioner asserts he can satisfy the heavy burden of clear and convincing evidence through just one fact, without regard to any other: that, while a college student, Koffman registered and voted in Connecticut. But there is no such bright-line rule. Rather, as the Court of Appeals has held, "[r]esidency is generally a factual question, dependent upon the particular circumstances presented" (*Glickman*, 27 NY3d at 815).

In *Glickman*, the petitioner was a candidate for the office of State Senator. Supreme Court held an evidentiary hearing at which there was evidence that Glickman had resided at his

father's house in Tonawanda, New York prior to leaving for Maryland to attend college and graduate school. In October 2013, he moved to Washington D.C. where he obtained employment and in November 2014 he registered to vote in Washington, D.C. In March 2015, he moved back to his father's home in Tonawanda where he registered to vote in May 2015. He then moved to Rochester where he registered to vote in January 2016. In a proceeding in which objectors sought to invalidate Glickman's designating petitions, the Court held that "based on the particular circumstances of this case, Glickman lacked the requisite intent to establish residency [in New York] for the five years required by our Constitution." In so ruling, the Court looked to Washington, D.C., law defining a "qualified elector." When Glickman registered to vote in Washington, D.C., he was required to attest that Washington, D.C., was his sole electoral residence and that he did not maintain another voting residence. The Court found that these factors demonstrated that Glickman "broke the chain of New York electoral residency," and could not claim New York residency for the preceding five years as required by the New York State Constitution (*Glickman*, at 816).

Respondent argues persuasively that were the act of registering in a different jurisdiction a choice of a new electoral residency all by itself, as petitioner asserts, the Court of Appeals would not have discussed the specifics of Washington, D.C. voter registration requirements or based its

holding on them.

In contrast to the voter registration law of Washington, D.C., Connecticut's voting laws did not require Koffman to abandon his New York electoral residence. To register in Connecticut, Koffman was required only to affirm that (i) he was a U.S. citizen; (ii) he lived at the Connecticut address he provided on the form; (iii) he was at least 17 years old; (iv) he had not been convicted of a felony; and (v) the information provided on the form was true. Koffman was never required to provide any additional evidence that he was a "resident" of Connecticut (*compare Matter of Notaristefano v Marcantonio,* 164 AD3d 721 [2d Dept 2018], *lv denied* 31 NY3d 1210 [2018] [granting an invalidation proceeding where the respondent registered to vote in North Carolina while attending Duke University School of Law; North Carolina's voter registration laws required cancellation of any prior registration as part of the application process; and the State of North Carolina had a policy of allowing out-of-state students to vote only where they could show, inter alia, that they had abandoned their prior home]).

Under the circumstances here, where there was ample proof that Koffman was a New York resident and that Koffman's presence in Connecticut as a college student was temporary, together with the fact that he was not required under Connecticut law to renounce any voter registration in another state (as was the case in *Glickman* and *Marcantonio*), petitioner fell short of

meeting his burden by clear and convincing evidence that respondent does not meet the residency requirement of the NY Constitution. Thus, it was error for the court to grant summary judgment to petitioner.

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

GESMER, J. (dissenting)

I respectfully dissent, and would affirm the decision of the motion court.

The sole question on this petition is whether the actions of appellant in registering to vote in New Haven, Connecticut and then voting there in each year from 2015 through 2018 "effectively severed his New York electoral residence" *(Matter of Notaristefano v Marcantonio*, 164 AD3d 721, 722 [2d Dept 2018], *lv denied* 31 NY3d 1210 [2018]). I do not disagree with the majority that he maintained his New York residency during this period, but that is not the dispositive question. "[A] person is permitted to have more than one residence, but is not permitted to have more than one electoral residence" *(Matter of Glickman v Laffin*, 27 NY3d 810, 816 [2016]). This becomes particularly critical when an individual decides to seek election to the state legislature, because the constitutional residency requirement for that position has been interpreted to require that the candidate has resided in this state for the five years immediately prior to the election (*Matter of Glickman* at 815, citing *Matter of Bourges v LeBlanc,* 98 NY2d 418, 420 [2002]).

In my view, the motion court correctly held that this case is governed by *Matter of Glickman* and *Matter of Notaristefano*. In those cases, on facts remarkably similar to those here, the candidate was disqualified by having registered and voted in another state during the five years preceding the election.

Unlike the majority, I do not believe that those cases can be distinguished from the one before us. In *Glickman*, the Court of Appeals noted that Washington D.C. required the individual to have sworn that he or she "does not claim voting residence or right to vote in any state or territory" (*Glickman* at 816 [internal quotation marks omitted]) Similarly, in *Notaristefano,* the court noted that North Carolina required a person registering to vote to cancel his or her prior registration. The majority points out that Connecticut does not have any similar statutory requirement. However, as the motion court pointed out, the Elections Enforcement Commission of the State of Connecticut has held that an individual with two residences may vote in either as it is up to the individual "alone to say whether his voting interest at the residence he selects exceed his voting interests elsewhere" (*see e.g. Complaint of James Cropsey*, File No. 2008-047, citing *Farley v Louzitis*, Superior Court New London County, No. 41032 [1972]). Thus, the individual registering to vote in Connecticut, just like the comparable individual in North Carolina or Washington, D.C., is stating his definite choice of Connecticut as his residence for electoral purposes. Certainly, once Mr. Koffman registered to vote in Connecticut, and voted there, he could not have voted absentee in New York for the same election cycle.

This result is not harsh, as Mr. Koffman could have chosen to vote absentee in New York, and retained his electoral

residence in the state that he had always called home. However, having chosen to register and vote in another state, he cannot satisfy the five year residency requirement at this time.

I respectfully dissent.

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

ENTERED: MAY 14, 2020

CLERK