

SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 2, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Friedman, J.P., Andrias, Saxe, Richter, JJ.

630- Index 101559/13

631 In re Talib W. Abdur-Rashid,
Petitioner-Appellant,

-against-

New York City Police Department, et al.,
Respondents-Respondents.

- - - - -

In re Samir Hashmi,
Petitioner-Respondent,

-against-

New York City Police Department, et al.,
Respondents-Appellants.

- - - - -

New York Civil Liberties Union, Brennan Center
for Justice, Reporters Committee for Freedom of the
Press, Advance Publications, Inc., American Society of
News Editors, AOL-Huffington Post, Association of
Alternative Newsmedia, Association of American
Publishers, Inc., Bloomberg L.P., BuzzFeed, Daily News,
LP, the E.W. Scripps Company, First Look Media, Inc.,
Hearst Corporation, Investigative Reporting Workshop at
American University, the National Press Club, National
Press Photographers Association, the New York Times
Company, North Jersey Media Group, Inc., Online News
Association, the Seattle Times Company, Society for
Professional Journalists and Tully Center for Free
Speech,
Amici Curiae.

Law Firm of Omar T. Mohammedi, LLC, New York (Omar T. Mohammedi of counsel), for Talib W. Adbur-Rashid and Samir Hashmi, for appellant/respondent.

Zachary W. Carter, Corporation Counsel, New York (Devin Slack of counsel), for New York City Police Department and Raymond Kelly, respondents/appellants.

Mariko Hirose, New York, Jordan Wells, New York, and Christopher Dunn, New York, for New York Civil Liberties Union, amicus curiae.

Michael Price, New York, for Brennan Center for Justice, amicus curiae.

Davis Wright Tremaine LLP, New York (Alison Schary of counsel), for Reporters Committee for Freedom of the Press, Advance Publications, Inc., American Society of News Editors, AOL-Huffington Post, Association of Alternative Newsmedia, Association of American Publishers, Inc., Bloomberg L.P., BuzzFeed, Daily News, LP, the E.W. Scripps Company, First Look Media, Inc., Hearst Corporation, Investigative Reporting Workshop at American University, the National Press Club, National Press Photographers Association, the New York Times Company, North Jersey Media Group, Inc., Online News Association, the Seattle Times Company, Society for Professional Journalists and Tully Center for Free Speech, amici curiae.

Judgment, Supreme Court, New York County (Alexander W. Hunter, J.), entered September 25, 2014, denying the petition brought pursuant to CPLR article 78 seeking to compel respondents New York City Police Department (NYPD) and NYPD Commissioner Raymond Kelly to disclose documents requested by petitioner Talib W. Abdur-Rashid pursuant to the Freedom of Information Law (FOIL) (Public Officers Law § 84 et seq.), and granting respondents'

motion to dismiss the proceeding, unanimously affirmed, without costs. Order, same court (Peter H. Moulton, J.), entered on or about November 17, 2014, which denied respondents' motion to dismiss the petition brought pursuant to CPLR article 78 seeking to compel them to disclose documents requested by petitioner Samir Hashmi pursuant to FOIL, and ordered respondents to submit an answer to the petition, unanimously reversed, on the law, without costs, the motion to dismiss granted, and the order to submit an answer vacated. The Clerk is directed to enter judgment dismissing the proceeding brought by petitioner Samir Hashmi.

FOIL does not prohibit respondents from giving a Glomar response to a FOIL request – that is, a response “refus[ing] to confirm or deny the existence of records” where, as here, respondents have shown that such confirmation or denial would cause harm cognizable under a FOIL exception (*Wilner v Natl. Sec. Agency*, 592 F3d 60, 68 [2d Cir 2009], *cert denied* 562 US 828 [2010] [interpreting the Freedom of Information Act [FOIA])). Although petitioners contend that such a response is impermissible in the absence of express statutory authorization, the Glomar doctrine is “consistent with the legislative intent and with the general purpose and manifest policy underlying FOIL”

(*Matter of Hanig v State of N.Y. Dept. of Motor Vehs.*, 79 NY2d 106, 110 [1992] [internal quotation marks omitted]), since it allows an agency to safeguard information that falls under a FOIL exemption.

Although federal case law regarding FOIA is not binding on this Court, it is "instructive" when interpreting FOIL provisions (*Matter of Leshner v Hynes*, 19 NY3d 57, 64 [2012] [internal quotation marks omitted]), and the application of the Glomar doctrine to FOIA requests has been widely approved by federal circuit courts (see *Wilner*, 592 F3d at 68 [citing decisions of four other circuit courts upholding or endorsing the Glomar doctrine as applied to FOIA requests]). We have considered the differences between the two statutes, as identified by petitioners, amici curiae, and the *Hashmi* court (46 Misc 3d 712, 722-724 [Sup Ct, NY County 2014]), but find that they do not justify rejecting the Glomar doctrine in the context of FOIL.

Respondents' invocations of the Glomar doctrine were not affected by an error of law (see *Mulgrew v Board of Educ. of the City School Dist. of the City of N.Y.*, 87 AD3d 506, 507 [1st Dept 2011], *lv denied* 18 NY3d 806 [2012]). Respondents met their burden to "articulate particularized and specific justification" for declining to confirm or deny the existence of the requested

records, which sought information related to NYPD investigations and surveillance activities (*Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 275 [1996] [internal quotation marks omitted]). In particular, respondents showed that answering petitioners' inquiries would cause harm cognizable under the law enforcement and public safety exemptions of Public Officers Law § 87(2) (see § 87(2)[e], [f]; see generally *Gould*, 89 NY2d at 274-275).

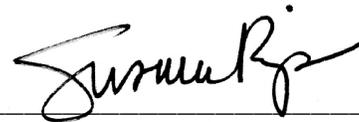
The affidavits submitted by NYPD's Chief of Intelligence establish that confirming or denying the existence of the records would reveal whether petitioners or certain locations or organizations were the targets of surveillance, and would jeopardize NYPD investigations and counterterrorism efforts. The records sought here are a subset of the records found properly exempt under FOIL in *Matter of Asian Am. Legal Defense & Educ. Fund v New York City Police Dept.* (125 AD3d 531, 532 [1st Dept 2015], *lv denied* 26 NY3d 919 [2016]). We see no reason to depart from this recent precedent.

By this decision, we do not suggest that any FOIL request for NYPD records would justify a Glomar response. "An agency resisting disclosure of the requested records has the burden of proving the applicability of [a FOIL] exemption" and must

submit "a detailed affidavit showing that the information logically falls within the claimed exemptions" and "the basis for [the agency's] claim that it can be required neither to confirm nor to deny the existence of the requested records" (*Wilner*, 592 F3d at 68 [internal quotation marks omitted]). In view of the heightened law enforcement and public safety concerns identified in the affidavits of NYPD's intelligence chief, Glomar responses were appropriate here.

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

ENTERED: JUNE 2, 2016

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CLERK

Mazzarelli, J.P., Moskowitz, Manzanet-Daniels, Gesmer, JJ.

1153- Ind. 2680/13
1154 The People of the State of New York
Respondent,

-against-

Daniel Powell,
Defendant-Appellant.

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

Darcel D. Clark, District Attorney, Bronx (Ryan P. Mansell of
counsel), for respondent.

Judgment, Supreme Court, Bronx County (Troy K. Webber, J.),
rendered April 30, 2014, as amended June 10, 2014, convicting
defendant, upon his plea of guilty, of attempted promotion of
prison contraband in the first degree, and sentencing him, as a
second felony offender, to a term of 1½ to 3 years, unanimously
affirmed.

The written waiver of appeal signed by defendant, insofar as
it expressly "waives any and all rights to appeal *including the
right to file a notice of appeal*" (emphasis added) is
unenforceable (*see People v Santiago*, 119 AD3d 484 [1st Dept
2014], *lv denied* 24 NY3d 964 [2014]). Even though the waiver
permits the filing of a notice of appeal for constitutional

speedy trial claims or challenges to the legality of the sentence, it still “discourages defendants from filing notices of appeal even when they have claims that cannot be waived, such as one concerning the lawfulness of the waiver or the plea agreement itself” (*id.* at 485-486).

We find that the court properly denied, without a hearing, defendant’s motion to suppress contraband found in his waistband while he was a Rikers Island inmate awaiting trial. Given the limited privacy rights of inmates, including pretrial detainees (*see Florence v Board of Chosen Freeholders of County of Burlington*, 566 US ___, 132 S Ct 1510 [2012]; *Bell v Wolfish*, 441 US 520, 557 [1979]), defendant did not set forth any basis for suppression (*see People v Mendoza*, 50 AD3d 478 [1st Dept 2008], *lv denied* 11 NY3d 739 [2008]). This was the fair import of the court’s decision (*see People v Nicholson*, 26 NY3d 813 [2016]), and we reject defendant’s arguments concerning the scope of our review.

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

ENTERED: JUNE 2, 2016



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Tom, J.P., Saxe, Richter, Gische, Webber, JJ.

1211 Violet Idehen,
Plaintiff-Appellant,

Index 652469/13

-against-

Teachers College Columbia
University, et al.,
Defendants-Respondents.

Law Offices of K.C. Okoli, P.C., New York (Kenechukwu C. Okoli of
counsel), for appellant.

Nixon Peabody LLP, Jericho (Tara E. Daub of counsel), for
respondents.

Order, Supreme Court, New York County, (Joan A. Madden, J.),
entered November 8, 2014, which granted defendants' motion to
dismiss the complaint, and denied plaintiff's cross motion to
amend the complaint, unanimously affirmed, without costs, for the
reasons stated by Madden, J.

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ENTERED: JUNE 2, 2016



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potential exculpatory or impeachment value from private parties (*People v Hayes*, 17 NY3d 46, 51 [2011], *cert denied* 565 US ___, 132 S Ct 844 [2011]; *People v Reedy*, 70 NY2d 826 [1987]), or to “prevent the destruction of [such] evidence” (*People v Banks*, 2 AD3d 226, 226 [1st Dept 2003], *lv denied* 2 NY3d 737 [2004]). In any event, defendant received suitable remedies by way of a stipulation that explained the circumstances to the jury, as well as the court’s offer of an opportunity for further cross-examination if desired.

The court also properly exercised its discretion in denying defendant’s mistrial motion based on the People’s delayed disclosure of their discussion with the victim of the possibility that she could improve her immigration situation through a special visa for certain types of crime victims. Defendant received a full opportunity during trial to exploit this information for whatever impeachment value it may have had (see *People v Brown*, 67 NY2d 555, 559 [1986], *cert denied* 479 US 1093 [1987]).

The evidence established the element of serious physical injury (Penal Law § 10.00 [10]). Defendant rendered the victim unconscious by choking her, and the People’s expert testified that choking capable of causing a loss of consciousness poses a

substantial risk of death (see *People v Abreu*, 283 AD2d 194, 194-195 [1st Dept 2001], *lv denied* 96 NY2d 898 [2001]).

Defendant did not preserve his contentions regarding his kidnapping conviction, his claim that the prosecutor constructively amended the indictment by arguing an improper theory of guilt, and his challenges to the prosecutor's summation, and we decline to review them in the interest of justice. As an alternative holding, we reject them on the merits.

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters not reflected in, or fully explained by, the record (see *People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (see *People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown that any

of counsel's alleged deficiencies fell below an objective standard of reasonableness, or that, viewed individually or collectively, they deprived defendant of a fair trial or affected the outcome of the case.

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 2, 2016

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Acosta, J.P., Saxe, Gische, Webber, Kahn, JJ.

1345 In re Lihanna A., etc.,

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

 Marcella H.,
 Respondent-Appellant,

 St. Dominic's Home,
 Petitioner-Respondent.

Dora M. Lassinger, East Rockaway, for appellant.

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

Tamara A. Steckler, The Legal Aid Society, New York (Raymond E. Rogers of counsel), attorney for the child.

Order, Family Court, New York County (Susan K. Knipps, J.), entered on or about March 23, 2015, which, upon a finding of permanent neglect, terminated respondent mother's parental rights to the subject child, and committed the custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

Respondent's contention that the proceeding to terminate her parental rights on the ground of permanent neglect could not be maintained, since the child had been directly placed in a

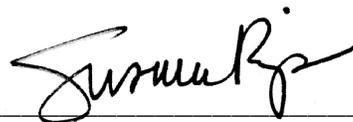
custodial home, rather than with an authorized agency, is unpreserved, as it is raised for the first time on appeal (see e.g. *Matter of Seth Jacob S. [Vincent S.]*, 134 AD3d 636 [1st Dept 2015]). In any event, the argument is unavailing (see *Matter of Dale P.*, 84 NY2d 72 [1994]; *Matter of Anthony Julius A.*, 231 AD2d 462 [1st Dept 1996]; *Matter of Hannah D.*, 292 AD2d 867 [4th Dept 2002]).

The finding of permanent neglect was supported by clear and convincing evidence. The record demonstrates that the agency exercised diligent efforts to encourage and strengthen respondent's relationship with the child by referring her to drug treatment programs and by scheduling regular supervised visitation (see *Matter of Senaya Simone J. [Andrea J.]*, 136 AD3d 434 [1st Dept 2016]; *Matter of Alexis Alexandria G. [Brandy H.]*, 134 AD3d 547, 548 [1st Dept 2015]). Despite these diligent efforts, respondent failed to meaningfully address the problems that led to the child's placement by failing to complete a drug treatment program and by relapsing on multiple occasions. She also failed to visit the child regularly (see *Matter of Jayden S. [Kim C.]*, 124 AD3d 488 [1st Dept 2015]; *Matter of Alford Isaiah B. [Alford B.]*, 107 AD3d 562 [1st Dept 2013]; *Matter of Jonathan M.*, 19 AD3d 197 [1st Dept 2005] *lv denied* 5 NY3d 798 [2005]).

The court's finding that it was in the child's best interest to be freed for adoption is supported by a preponderance of the evidence (*see generally Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). The child has been living in the custodial home since she was nine months old, is thriving in the home, and there is no evidence that respondent has planned for the child's future (*see Matter of Jaylin Elia G. [Jessica Enid G.]*, 115 AD3d 452 [1st Dept 2014]).

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

ENTERED: JUNE 2, 2016

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Acosta, J.P., Saxe, Gische, Webber, Kahn, JJ.

1346 Board of Managers of the South Index 159128/12
 Star,
 Plaintiff-Respondent,

-against-

WSA Equities, LLC, et al.,
 Defendants-Appellants,

Corcoran Group Marketing,
etc., et al.,
 Defendants.

Westerman Ball Ederer Miller Zucker & Sharfstein, LLP, Uniondale
(Philip J. Campisi, Jr. of counsel), for appellants.

Schwartz Sladkus Reich Greenberg Atlas LLP, New York (Jared E.
Paioff and Steven D. Sladkus of counsel), for respondent.

Order, Supreme Court, New York County (Arthur F. Engoron,
J.), entered October 23, 2014, which, to the extent appealed
from, denied defendants WSA Equities, LLC, 80 John Condominium,
LLC, Fredric Oliver, Carol Achenbaum, William Achenbaum, and
Michael Achenbaum (the sponsor defendants) and WSA Management,
Ltd.'s motion to dismiss the first cause of action (breach of
contract) as against WSA Equities and 80 John, the second cause
of action (fraud) as against the sponsor defendants, and the
eighth cause of action (breach of contract) as against WSA
Management, unanimously modified, on the law, to grant the motion

as to so much of the second cause of action as is based on omissions (as opposed to affirmative misrepresentations), and otherwise affirmed, without costs.

The Martin Act (General Business Law § 352-c) does not bar a common-law breach of contract claim (*885 W.E. Residents Corp. v Coronet Props. Co.*, 220 AD2d 305 [1st Dept 1995]).

To the extent the fraud claim is based on omissions in the offering plan (e.g. paragraph 121 of the complaint), it is barred by the Martin Act (see e.g. *Kerusa Co. LLC v W10Z/515 Real Estate Ltd. Partnership*, 12 NY3d 236 [2009]). However, to the extent it is based on defendants' affirmative misrepresentations (e.g. paragraphs 122 and 125 of the complaint), it is not so barred (see e.g. *Assured Guar. [UK] Ltd. v J.P. Morgan Inv. Mgt. Inc.*, 18 NY3d 341, 353 [2011]).

The fraud claim is not duplicative of the first cause of action (see e.g. *Wyle Inc. v ITT Corp.*, 130 AD3d 438, 440 [1st Dept 2015]).

The motion court correctly sustained the fraud claim as against the individual defendants. “[A] corporate officer who participates in the commission of a tort may be held individually liable ... regardless of whether the corporate veil is pierced” (*Peguero v 601 Realty Corp.*, 58 AD3d 556, 558 [1st Dept 2009])

[internal quotation marks omitted]).

The eighth cause of action sufficiently pleads breach of contract (see *Mee Direct, LLC v Automatic Data Processing, Inc.*, 102 AD3d 569 [1st Dept 2013]).

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

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Plaintiffs' opening statement warranted dismissal of the negligence and negligent battery claims, because the claim that defendant Shepard used excessive force in handcuffing plaintiff Vaynschelbaum is fatally inconsistent with the negligence claims (see *Oteri v Village of Pelham*, 100 AD3d 725 [2d Dept 2012]; *Wertzberger v City of New York*, 254 AD2d 352, 352 [2d Dept 1998]).

However, plaintiffs' opening statement did not make any factual admissions that were fatal to their intentional battery claim based on Officer Shepard's alleged use of excessive force (see *Echavarria v Cromwell Assoc.*, 232 AD2d 347, 347 [1st Dept 1996]). To the extent defendants' eve-of-trial motion actually sought to dismiss the claims pursuant to CPLR 3211(a)(1) based on the inadequacy of plaintiffs' notice of claim, we note that defendants did not provide plaintiffs with notice and a fair opportunity to respond (CPLR 2214[b]).

In any event, the notice of claim provided sufficiently specific notice of the time, place and nature of the intentional battery claim to enable the City defendants to investigate (see *Brown v City of New York*, 95 NY2d 389, 393-394 [2000]; *Rivera v City of New York*, 169 AD2d 387 [1st Dept 1991]). Plaintiffs were not required to use the word "intentional" to give notice of

their legal theory of recovery, since the facts alleged provided notice of the excessive force theory (see *Miller v City of New York*, 89 AD3d 612 [1st Dept 2011]).

The notice of claim did not, however, provide adequate notice of the claims for false imprisonment, negligent hiring, retention and training, and intentional infliction of emotional distress (see *Scott v City of New York*, 40 AD3d 408, 409-410 [1st Dept 2007]). As plaintiffs do not address those claims in their appellate papers, and the claims would be subject to dismissal upon a proper motion to dismiss, we deem them abandoned.

Since the intentional battery claim is reinstated, the related vicarious liability and loss of services claims are also reinstated.

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 2, 2016

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Acosta, J.P., Saxe, Gische, Webber, Kahn, JJ.

1348 Roberto Rodriguez, Index 110422/10
Plaintiff-Appellant,

-against-

Jessica L. Baranek, et al.,
Defendants-Respondents.

- - - - -

[And Another Action]

Cannon & Acosta, LLP, Huntington Station (Gary R. Small of
counsel), for appellant.

Cheven, Keely & Hatzis, New York (William B. Stock of counsel),
for Jessica L. Baranek, respondent.

Russo, Apoznanski & Tambasco, Melville (Susan J. Mitola of
counsel), for Hawel Santana Montero, respondent.

Appeal from order, Supreme Court, New York County (Arlene P.
Bluth, J.), entered October 30, 2014, and from order, same court
and Justice, entered on or about January 15, 2015, which,
following a summary jury trial, denied plaintiff's motion for a
mistrial and dismissed the case, unanimously dismissed, without
costs.

Plaintiff's posttrial motion, although framed as a motion
for a mistrial based on an inconsistent verdict, in essence
sought to set aside the jury's verdict as against the weight of
the evidence, and is therefore prohibited by the summary jury

trial rules, which the parties agreed to follow. Moreover, those rules prohibit appeals, and therefore plaintiff's appeal should be dismissed (*Conrad v Alicea*, 117 AD3d 560 [1st Dept 2014], *lv dismissed* 24 NY3d 946 [2014]).

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Dept 2016])).

Defendant was ineligible to be considered for youthful offender treatment in connection with his burglary conviction because he was 19 years old when the offense was committed. However, although it is clear from the discussion of YO treatment during plea proceedings that the court was not inclined to grant such treatment on the larceny conviction, the court did not make the requisite explicit determination on the record at the sentencing proceeding, requiring that the matter be remanded for that purpose (see *People v Rudolph*, 21 NY3d 497 [2013]; *People v Basono*, 122 AD3d 553 [1st Dept 2014], *lv denied* 25 NY3d 1069 [2015]; *People v Smith*, 113 AD3d 453 [1st Dept 2014])).

We perceive no basis for reducing the sentences.

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Acosta, J.P., Saxe, Gische, Webber, Kahn, JJ.

1351 Carolina Del Carmen Diaz, as Index 302931/07
Administratrix of the Goods,
Chattels and Credits of
Angel Quito, Deceased,
Plaintiff-Respondent,

-against-

Elyvan Vasquez Boheciamp, et al.,
Defendants-Appellants,

Rana Waterproofing & Construction Co.,
et al.,
Defendants.

Mauro Lilling NaParty LLP, Woodbury (Seth M. Weinberg of
counsel), for appellants.

Marc A. Seedorf, Bronx, for respondent.

Order, Supreme Court, Bronx County (Kenneth L. Thompson,
Jr., J.), entered on or about November 6, 2015, which, among
other things, denied defendants Elyvan Vasquez Boheciamp and
Esther Vasquez's posttrial motion to set aside the verdict and
direct that judgment be entered in their favor or, alternatively,
that a new trial be ordered, unanimously reversed, on the law,
without costs, and the motion to set aside the verdict granted.
The Clerk is directed to enter judgment dismissing the complaint
against said defendants.

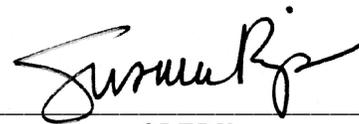
Plaintiff's decedent died after falling to the ground while working on the roof of a house owned by defendants. The sole issue at trial was whether defendants' house was a one- or two-family dwelling subject to the homeowner exemption from liability under Labor Law §§ 240(1) and 241(6). We find that the evidence established, as a matter of law, that the house was, at most, a two-family dwelling. Accordingly, defendants are entitled to judgment in their favor (see *Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]).

The applicability of the homeowner exemption is determined by a "site and purpose" test (*Bartoo v Buell*, 87 NY2d 362, 367-368 [1996]), which "hinges upon the site and the purpose of the work" and "must be employed on the basis of the homeowners' intentions at the time of the injury" (*Farias v Simon*, 122 AD3d 466, 467 [1st Dept 2014] [internal quotation marks omitted]). Here, the evidence established that, at the time of the accident, defendants' house was a two-family residential home with a basement apartment, where a family friend lived, and three upper floors, which defendants shared with an adult child and two grandchildren. Defendants did not receive any rental income. That three families, two of which are related, lived in the home is insufficient to raise an issue of fact as to whether the home

was a three-family dwelling (see *Patino v Drexler*, 116 AD3d 534, 535 [1st Dept 2014]). Nor do the notices of property value from the New York City Department of Finance raise an issue as to whether defendants intended to use the home as a three-family dwelling (see *Farias*, 122 AD3d at 467), particularly given defendant Elyvan Vasquez Boheciamp's uncontradicted testimony regarding the use and layout of the home. Although plaintiff refers to the top floor of the home as an "apartment," she points to no evidence that it contained anything other than two bedrooms, which were occupied by defendants' grandchildren. Accordingly, there was no basis for the jury to conclude that the home was a three-family dwelling (*Cohen*, 45 NY2d at 499).

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ENTERED: JUNE 2, 2016



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Acosta, J.P., Saxe, Gische, Webber, Kahn, JJ.

1354 In re Livan F.,

A Person Alleged to
be a Juvenile Delinquent,
Appellant.

- - - - -

Presentment Agency

Tamara A. Steckler, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.

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

Order of disposition, Family Court, Bronx County (Peter J. Passidomo, J.), entered on or about August 6, 2014, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed an act that, if committed by an adult, would constitute the crime of criminal possession of a controlled substance in the seventh degree, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court properly denied appellant's motion to suppress a bag containing drugs, which he discarded while fleeing from the police. The recovery of the drugs was not the product of any unlawful police conduct.

Once the police arrived at the location specified in a radio report of a fight among about 20 youths involving sticks and other weapons, a security guard informed the police that three male youths, who seemed to have initiated the fight, had fled east. The guard described one of them as having a "medium" complexion and wearing a white shirt. Contrary to appellant's contention, the face-to-face encounter with the security guard was significantly more reliable than an anonymous tip (see *People v Wallace*, 89 AD3d 559, 560 [1st Dept 2011], *lv denied* 18 NY3d 963 [2012]; *People v Herold*, 282 AD2d 1, 6 [2001], *lv denied* 97 NY2d 682 [2001]). Just a few minutes after the police had received the radio report, they found three youths about one and a half blocks east of where they had encountered the security guard, and the testifying officer noticed that appellant's shirt and skin tone matched the description provided by the guard.

Although that description was fairly generic, once appellant made eye contact with the two uniformed police officers and then immediately grabbed the right side of his waistband, turned around, and started running away from the police, the totality of the circumstances gave rise to reasonable suspicion justifying the police pursuit of appellant (see *People v Pitman*, 102 AD3d 595, 596 [1st Dept 2013], *lv denied* 21 NY3d 1018 [2013]). The

testifying officer convincingly explained that he recognized appellant's act of touching his waistband as a sign that he had a handgun, based on the officer's training and experience, confirming his suspicion that appellant might be armed based on his match with a description of a youth who had initiated a large, armed and possibly gang-related fight (see *People v White*, 117 AD3d 425 [1st Dept 2014], *lv denied* 23 NY3d 1044 [2014]).

Appellant's argument that the testifying officer failed to identify him in court, and that the presentment agency failed to present any witness who could testify that appellant was the person who was chased and arrested by the police, is unavailing. The testifying officer described the relevant facts leading up to and including his own recovery of the bag, based on his firsthand observations. Accordingly, his testimony established all the facts necessary to establish the legality of the police conduct, which was the only issue to be decided at the suppression hearing.

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ENTERED: JUNE 2, 2016



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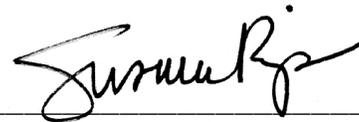
Petitioner, a tenured teacher with a 15 year career, does not challenge the findings that over a two-year time period at numerous different schools she committed forty acts of misconduct, including insubordination, dereliction of duty, and incompetence. She also does not deny that she ignored the efforts of numerous supervisors and administrators to remedy her pedagogical deficiencies, contending that she became demoralized when she was assigned to the absent teacher reserve pool and did not have permanent assignment at one school.

The penalty of termination of employment was not unduly harsh or excessive given petitioner's failure to conform her behavior to the requirements of the job and her unwillingness to accept assistance or improve her performance. Respondents were not required to assign petitioner to the position she desired, and the record reflects that she was warned many times that her

conduct would result in disciplinary action. Despite these warnings, petitioner failed to take steps to correct the deficiencies noted by numerous supervisors and administrators.

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

ENTERED: JUNE 2, 2016

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The Static-99R does not take into account the nature of the sexual contact with the victim or the degree of harm that would potentially be caused in the event of reoffense. In any event, the low-moderate score appears to be consistent with the risk assessment instrument, which scored defendant at the low end of level two.

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

ENTERED: JUNE 2, 2016



CLERK

Acosta, J.P., Saxe, Gische, Webber, Kahn, JJ.

1357 CB Richard Ellis, Inc., Index 101259/12
Plaintiff-Respondent,

-against-

Harleysville Insurance Company
of New Jersey,
Defendant-Appellant,

Wade Ray & Associates Construction,
Inc., etc.,
Defendant.

O'Connor Redd LLP, Port Chester (Amy L. Fenno of counsel), for
appellant.

Fixler & LaGattuta, LLP, New York (Jason Fixler of counsel), for
respondent.

Order, Supreme Court, New York County (Kathryn E. Freed,
J.), entered February 3, 2015, which, insofar as appealed from,
denied the cross motion of defendant Harleysville Insurance
Company of New Jersey (Harleysville) for summary judgment and
granted the motion of plaintiff, CB Richard Ellis, Inc. (CBRE),
for summary judgment declaring that Harleysville must defend it
in the underlying personal injury action, unanimously affirmed,
with costs.

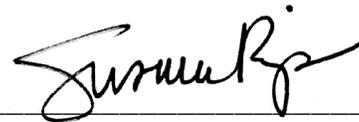
Under New Jersey law, "[a]n insurer's duty to defend an
action brought against its insured depends upon a comparison

between the allegations set forth in the complainant's pleading and the language of the insurance policy" (*Flomerfelt v Cardiello*, 202 NJ 432, 444, 997 A2d 991, 998 [2010]). Although the basis of the complaint in the underlying personal injury action alleged a sidewalk fall due to ice and snow, the removal of which is excluded from coverage under the Harleysville policy issued to defendant Wade Ray & Associates Construction, Inc. (Wade Ray), the underlying complaint further alleged the underlying defendants' general negligence in the ownership, operation, management, maintenance and control of the premises and/or sidewalk where the accident occurred. As amplified by the bill of particulars (see *Tierney v Tierney*, 13 NJ Misc 654, 656, 179 A 314, 315 [NJ Ch 1935]), the underlying defendants were also allegedly negligent in failing to safeguard, cordon off or provide warning signs in the unsafe, slippery area. Since the allegations in the underlying complaint, as amplified by the bill of particulars, do not all arise out of ice and snow removal,

Harleyville's duty to defend CBRE as an additional insured under the policy issued to Wade Ray was properly triggered (see *Flomerfelt v Cardiello*, 202 NJ at 444, 997 A2d at 998).

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

ENTERED: JUNE 2, 2016

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CLERK

child abuse by exaggerating the children's symptoms and repeatedly subjecting them to unnecessary and at times invasive medical treatment (see *Matter of Andrew B.*, 49 AD3d 638 [2d Dept 2008], *lv denied* 10 NY3d 714 [2008]; *Matter of Patrick GG.*, 286 AD2d 540, 544 [3d Dept 2001]). The court-appointed psychiatrist, specialists in medical child abuse, and the children's pediatrician testified that defendant relentlessly pursued diagnostic medical treatments, took the children to unnecessary specialists, and took them for appointments against the advice of and without telling the pediatrician. The court's determination is further supported by reports from Comprehensive Family Services of his supervised visits with the children, which describe his fixation with their health, his desire to photograph their numerous purported injuries during his visits, and his desire to seek medical treatment during the visits.

As the court noted, even if defendant's conduct fell short of medical child abuse, other factors warranted awarding custody to plaintiff, including defendant's impaired mental health, his false accusations of abuse, neglect and alienation against plaintiff, and his inferior parenting capabilities. There is support in the record for the court-appointed expert's findings regarding the father's mental health, including the opinions of

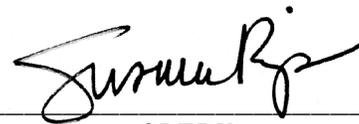
several other experts, and the court's observations of the father's demeanor during the trial (*Rentschler v Rentschler*, 204 AD2d 60 [1st Dept 1994], *lv dismissed* 84 NY2d 1027 [1995]).

For the same reasons, and due to defendant's conduct during visits, the court properly concluded that supervised visitation is in the children's best interests (see *Ronald S. v Lucille Diamond S.*, 45 AD3d 295 [1st Dept 2007]; *Matter of Gabriel J. [Dainee A.]*, 100 AD3d 572, 573 [1st Dept 2012]; see also *Arelis Carmen S. v Daniel H.*, 78 AD3d 504 [1st Dept 2010], *lv denied* 16 NY3d 707 [2011]).

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

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

ENTERED: JUNE 2, 2016

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CLERK

Acosta, J.P., Saxe, Gische, Webber, Kahn, JJ.

1359 Colleen Holahan, Index 650875/14
Plaintiff-Appellant,

-against-

488 Performance Group, Inc.,
doing business as Madison
Performance Group, et al.,
Defendants-Respondents.

Moritt Hock & Hamroff LLP, New York (Bruce Schoenberg of
counsel), for appellant.

Farrell Fritz, P.C., Uniondale (Franklin C. McRoberts of
counsel), for respondents.

Order, Supreme Court, New York County (Shirley Werner
Kornreich, J.), entered April 22, 2015, which granted defendants'
motion to dismiss the complaint, unanimously affirmed, without
costs.

Plaintiff's breach of contract claim, which alleged that the
corporate defendant breached the parties' employment agreement by
failing to pay her certain compensation and benefits upon the
termination of her employment in 2013, was correctly dismissed.
The employment agreement expired in December 2007, and it
unambiguously provided that any extension of the agreement needed
to be in writing. Because there was no writing extending the
agreement, her breach of contract claim fails as a matter of law

(*Goldman v White Plains Ctr. for Nursing Care, LLC*, 11 NY3d 173, 178 [2008]).

Plaintiff's unjust enrichment claim, which seeks posttermination commissions, also fails as a matter of law. Upon the expiration of her employment agreement, plaintiff became an "at-will" employee (*id.*), and such employees are not entitled to posttermination commissions (*Mackie v La Salle Indus.*, 92 AD2d 821, 822 [1st Dept 1983]).

The motion court correctly dismissed plaintiff's claims for promissory estoppel, fraud, and negligent misrepresentation, since, in the absence of a signed employment agreement, she could not have reasonably relied upon defendants' alleged oral representations regarding the terms of her employment (*Meyercord v Curry*, 38 AD3d 315, 316 [1st Dept 2007]; *Arias v Women in Need*, 274 AD2d 353, 354 [1st Dept 2000]).

Plaintiff's Labor Law claim was correctly dismissed, because it is undisputed that her earnings were in excess of \$900 a week (see Labor Law § 198-c[3]; *Eden v St. Luke's-Roosevelt Hosp. Ctr.*, 96 AD3d 614, 615 [1st Dept 2012]).

We reject plaintiff's assertion that the motion court should have allowed her to conduct further discovery under CPLR 3211(d) so that she could obtain documents confirming that her

employment was renewed after the expiration of her employment agreement in December 2007. As noted, any renewal was required to be in writing, and plaintiff alleged in her complaint that the parties did not execute any further written amendments to the employment terms after the expiration of the December 2007 agreement. Accordingly, there was no basis for further discovery.

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: JUNE 2, 2016

A handwritten signature in black ink, appearing to read "Susan R. [unclear]", written over a horizontal line.

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Acosta, J.P., Saxe, Gische, Webber, Kahn, JJ.

1360 In re Cheryl McBride,
Petitioner,

Index 101033/14

-against-

New York City Housing Authority,
Respondent.

Cravath, Swaine & Moore LLP, New York (Christopher J. Gessner of
counsel), for petitioner.

David I. Farber, New York (Seth E. Kramer of counsel), for
respondent.

Determination of respondent New York City Housing Authority
(NYCHA), dated July 14, 2014, which, after a hearing, denied
petitioner's grievance seeking succession rights, as a remaining
family member, to the tenancy of her late uncle, unanimously
confirmed, the petition denied, and the proceeding brought
pursuant to CPLR article 78 (transferred to this Court by order
of Supreme Court, New York County [Andrea Masley, J.], entered
April 1, 2015), dismissed, without costs.

Substantial evidence supports respondent's determination
that petitioner is not entitled to succession rights as a
remaining family member (*see generally 300 Gramatan Ave. Assoc. v*
State Div. of Human Rights, 45 NY2d 176, 179-182 [1978]). The
hearing officer's failure to credit petitioner's family's

testimony as to the submission of written requests that she be allowed to join the household is entitled to great weight (see *Matter of Berenhaus v Ward*, 70 NY2d 436, 443 [1987]). Even if we were to credit this testimony, it would not establish entitlement to succession rights. Petitioner acknowledges that these requests were never granted and her residency and income were not reflected on the affidavits of income for the apartment (see *Matter of Ponton v Rhea*, 104 AD3d 476 [1st Dept 2013]; *Matter of Adler v New York City Hous. Auth.*, 95 AD3d 694, 695 [1st Dept 2012], *lv dismissed* 20 NY3d 1053 [2013]).

Petitioner may not invoke estoppel against a governmental agency, such as respondent (see *Matter of Schorr v New York City Dept. of Hous. Preserv. & Dev.*, 10 NY3d 776, 779 [2008]; *Matter of Parkview Assoc. v City of New York*, 71 NY2d 274, 282 [1988], *cert denied, appeal dismissed*, 488 US 801 [1988]; *Adler* at 695) and the record affords no basis upon which to relieve petitioner of the written consent requirement (see *Matter of McFarlane v New York City Hous. Auth.*, 9 AD3d 289 [1st Dept 2004]; *cf. Matter of Gutierrez v Rhea*, 105 AD3d 481 [1st Dept 2013], *lv denied* 21 NY3d 861 [2013]).

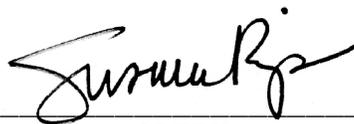
Petitioner's mitigating circumstances do not provide a basis for annulling NYCHA's determination (see *Matter of Firpi v New*

York City Hous. Auth., 107 AD3d 523, 524 [1st Dept 2013]; *Matter of Guzman v New York City Hous. Auth.*, 85 AD3d 514 [1st Dept 2011]).

Finally, we find NYCHA's submission of correspondence, not before the hearing officer, to be improper, and have not considered it in reaching our decision (see *Matter of Featherstone v Franco*, 95 NY2d 550, 554 [2000]).

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

ENTERED: JUNE 2, 2016

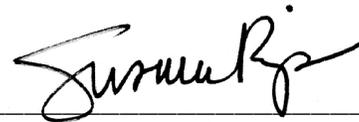
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Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: JUNE 2, 2016

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CLERK

Acosta, J.P., Saxe, Gische, Webber, Kahn, JJ.

1362N Suarna Mehulic,
Plaintiff-Appellant,

Index 103297/08

-against-

New York Downtown Hospital,
Defendant-Respondent.

Suarna Mehulic, appellant pro se.

Epstein Becker & Green, P.C., New York (Victoria Sloan Lin of
counsel), for respondent.

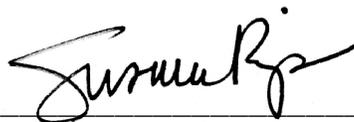
Order, Supreme Court, New York County (Shlomo Hagler, J.),
entered June 9, 2015, which, insofar as appealed from, denied
plaintiff's motion for recusal, unanimously affirmed, without
costs.

The court's denial of recusal was an appropriate exercise of
discretion (*see generally People v Grasso*, 49 AD3d 303, 306-307
[1st Dept 2008]). Pro se plaintiff has not shown that the
Justice is "interested" in the action (Judiciary Law § 14), or
that the Justice's "impartiality might reasonably be questioned"

(Rules of Chief Admin of Cts [22 NYCRR] § 100.3[E][1]). Nor has she shown that the trial court, as sole arbiter of the issue, abused its discretion.

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

ENTERED: JUNE 2, 2016

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CLERK

Acosta, J.P., Saxe, Gische, Webber, Kahn, JJ.

1363N Artcorp Inc.,
 Plaintiff-Appellant,

Index 653878/13

-against-

 Citirich Realty Corp.,
 Defendant-Respondent.

Moulinos & Associates LLC, New York (Peter Moulinos of counsel),
for appellant.

Todd Rothenberg, New Rochelle, for respondent.

Order, Supreme Court, New York County (Nancy M. Bannon, J.),
entered October 7, 2015, which denied plaintiff's motion for a
default judgment and granted defendant's cross motion to, among
other things, compel plaintiff to accept its late answer,
unanimously affirmed, with costs.

In this action seeking to prevent the termination of a
commercial lease, the motion court providently exercised its
discretion in denying plaintiff's motion, made more than a year
after defendant's purported default, and in granting defendant's
cross motion (see *Guzetti v City of New York*, 32 AD3d 234, 238
[1st Dept 2006]). Defendant provided a reasonable excuse for the
delay in answering the complaint (see CPLR 2005, 3012[d]; *Marine
v Montefiore Health Sys., Inc.*, 129 AD3d 428, 429 [1st Dept

2015]), and the record clearly demonstrates that defendant did not intend to abandon the case, since it appeared in opposition to plaintiff's motion for a *Yellowstone* injunction and in opposition to plaintiff's appeal from the order denying that motion (124 AD3d 545 [1st Dept 2015]). Plaintiff failed to show that it suffered any prejudice as a result of defendant's delay, and the strong public policy in favor of resolving cases on the merits warranted denial of plaintiff's motion (see *Marine*, 129 AD3d at 429). Although it was not "essential[,]" defendant also showed a meritorious defense (*Jones v 414 Equities LLC*, 57 AD3d 65, 81 [1st Dept 2008]; *Guzetti*, 32 AD3d at 238).

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

ENTERED: JUNE 2, 2016

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CLERK

Acosta, J.P., Saxe, Gische, Webber, Kahn, JJ.

1364-

Index 159079/14

1365N Gail Gantt,
Plaintiff-Appellant,

-against-

North Shore-LIJ Health System,
et al.,
Defendants-Respondents.

Brisette Lucas, New York, for appellant.

Venable LLP, New York (Benjamin E. Stockman of counsel), for
respondents.

Order, Supreme Court, New York County (Manuel J. Mendez,
J.), entered on or about January 23, 2015, which, to the extent
appealed from, denied plaintiff's motion for a default judgment
against defendants, and order, same court and Justice, entered
April 21, 2015, which, to the extent appealed from, denied
plaintiff's motion to renew, and deemed defendants' answer
served, unanimously affirmed, with costs.

Plaintiff satisfied the requirements of CPLR 3215(f) for a
default judgment by providing proof of service of the summons and
complaint and proof of the facts constituting the claim, the
default and the amount due. However, we decline to disturb the
motion court's exercise of its broad discretion in finding

sufficient defendants' excuse for their delay in answering the complaint (*Cirillo v Macy's, Inc.*, 61 AD3d 538, 450 [1st Dept 2009]), i.e., the parties' settlement discussions (see *Polanco v Scott*, 41 AD3d 182 [1st Dept 2007]; *Finkelstein v East 65th St. Laundromat*, 215 AD2d 178 [1st Dept 1995]).

We note, contrary to the motion court, that any irregularity in the affidavit of nonmilitary service submitted on plaintiff's motion for a default judgment did not rise to the level of a jurisdictional defect, since defendant Hilerio never made any pretense of either being on active military duty or being a military dependent at the time of her default (see *Department of Hous. Preserv. & Dev. of City of N.Y. v West 129th St. Realty Corp.*, 9 Misc 3d 61 [App Term, 1st Dept 2005]).

The motion court properly deemed defendants' answer served, in light of defendants' reasonable excuse for the delay, the relatively short delay, plaintiff's failure to demonstrate

prejudice, and the strong preference in this State for deciding matters on the merits.

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: JUNE 2, 2016



CLERK

Acosta, J.P., Saxe, Gische, Webber, Kahn, JJ.

1366N Dalia J. Siderias,
Plaintiff-Respondent,

Index 310314/13

-against-

Nicholas K. Siderias,
Defendant-Appellant.

Paul P. De Fiore, Long Island City, for appellant.

Robert W. Hiatt, Staten Island, for respondent.

Order, Supreme Court, New York County (Lori S. Sattler, J.), entered on or about April 6, 2015, which denied defendant's motion to vacate the default judgment entered against him, unanimously affirmed, without costs.

Defendant, who did not appear in this action to annul the parties' marriage, concedes that he was served with the summons and notice, and did not object to the annulment. He contends, however, that a statement in the summons that "[t]he parties have divided up the marital property, and no claim will be made by either party under equitable distribution," is false. He also argued to the motion court that he did not understand the consequences of the statement, and did not realize that he should have retained an attorney. Under the circumstances presented, defendant has failed to establish a reasonable excuse to justify

vacatur of the judgment of annulment pursuant to CPLR 5015(a)
(see *Washington v Janati*, 118 AD3d 603 [1st Dept 2014]).

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

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

ENTERED: JUNE 2, 2016

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Opinion by Andrias, J. All concur except Saxe, J. who
dissents in an Opinion.

Order filed.