SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 19, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Friedman, Saxe, Richter, Abdus-Salaam, JJ.

8933 The People of the State of New York, Ind. 1054/09
Respondent,

-against-

Nathan Perry,
Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (David Crow of counsel), and Kirkland & Ellis LLP, New York (James H. McConnell of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Rafael Curbelo of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Colleen D. Duffy, J.), rendered August 20, 2010, as amended March 19, 2012, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to concurrent terms of four years, unanimously affirmed.

Upon review of the unredacted memo book entries of the testifying arresting officer for the day in question, we find no

reasonable possibility that the redaction of entries for earlier that day, even assuming that they were sufficiently related to the subject matter of the officer's direct testimony, materially contributed to the verdict or created the prejudice required to justify a reversal on *Rosario* grounds (*see* CPL 240.75; *People v Tucker*, 40 AD3d 1213, 1215 [3d Dept 2007], *lv denied* 9 NY3d 882 [2007]; *People v Wolf*, 284 AD2d 102 [1st Dept 2001], *mod on other grounds* 98 NY2d 105 [2002]).

The purported inconsistencies between the arresting officer's trial testimony and his statements in the complaint or the supporting deposition were so minor that the trial court's limitation of counsel's ability to cross-examine him in regard to them was harmless error. There is no reasonable likelihood that the jury would have discredited the officer's testimony upon learning of these discrepancies (*see People v Crimmins*, 36 NY2d 230, 237 [1975]).

Defendant failed to preserve his present argument that the glassines were improperly admitted into evidence based on the inaccuracy in the testimony of a chemist, who indicated that the substance she analyzed in People's Exhibit 3 was designated by the voucher number 363084, in contrast to the testimony of the arresting officer and the other chemist, indicating that voucher

number 363083 correlated with People's Exhibit 3 and voucher number 363084 correlated with People's Exhibit 4 (*see People v Gray*, 86 NY2d 10, 19-20 [1995]). Nor is there any reason to reach the issue in the interest of justice, since it is clear from the record that the prosecutor simply misspoke when she associated People's Exhibit 3 with voucher number P363084, which error the chemist simply failed to notice, and which would have been corrected had a specific objection or observation of the error been made.

Giving the necessary "great deference" to the trial court's *Batson* ruling as to whether the defense's proffered race-neutral reason was pretextual (*see People v Hecker*, 15 NY3d 625, 656 [2010], *cert denied* __ US __, 131 S Ct 2117 [2011]; *People v Perez*, 37 AD3d 152, 155 [1st Dept 2007]), we find that the ruling does not create grounds for reversal.

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

ENTERED: FEBRUARY 19, 2013

CLERK

Andrias, J.P., Friedman, Moskowitz, Freedman, Manzanet-Daniels, JJ.

7393 Jacinto C. Calcano, Index 303454/09
Plaintiff-Appellant,

-against-

Juan I. Rodriguez,
Defendant-Respondent.

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Ephrem J. Wertenteil, New York, for appellant.

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Stacy R. Seldin of counsel), for respondent.

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Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered on or about March 10, 2011, which, in an action for personal injuries sustained in a motor vehicle accident, granted defendant's motion for summary judgment dismissing the complaint, reversed, on the law, without costs, and the motion denied.

Defendant demonstrated that the injuries plaintiff sustained to his left shoulder and to his lumbar and cervical spines were not serious within the meaning of Insurance Law § 5102(d). Defendant submitted evidence, including the affirmed reports of a radiologist and an orthopedist, showing that the injuries were not caused by the accident, but were degenerative conditions that

preexisted the accident (*see Spencer v Golden Eagle, Inc.*, 82 AD3d 589, 590-591 [1st Dept 2011]).

On this record, triable issues of fact exist. A report of an MRI conducted of plaintiff's left shoulder on December 15, 2008, only five weeks after the accident, revealed a partial high-grade tear of the supraspinatus musculotendinous junction and a partial intrasubstance tear of the attachment of the infraspinatus tendon, which the radiologist opined were "post-traumatic with [a] high-degree [*sic*] of certainty." Plaintiff's orthopedic surgeon, who performed arthroscopic surgery on him on January 27, 2009, observed the relevant musculature with his own eyes, and opined that plaintiff suffered from a torn rotator cuff and impingement causally related to the accident. Although "[a] factfinder could of course reject this opinion" (*see Perl v Meher*, 18 NY3d 208, 219 [2011]), it cannot be said on this record, as a matter of law, that plaintiff's injuries had no causal connection to the accident.

Plaintiff's evidence showed that he tested positive for an impingement sign test, suffered persistent pain, and continued to exhibit range of motion deficits in his left shoulder even after undergoing arthroscopic surgery (*see Paulino v Rodriguez*, 91 AD3d 559 [1st Dept 2012]). The physicians also documented limitations

in the cervical and lumbar spines (*see Jang Hwan An v Parra*, 90 AD3d 574 [1st Dept 2011]).

Defendant did not meet his initial burden with respect to plaintiff's 90/180-day claim, since the argument was raised for the first time in his reply papers (*see Tadesse v Degnich*, 81 AD3d 570 [1st Dept 2011]; *McNair v Lee*, 24 AD3d 159 [1st Dept 2005]). Since the burden never shifted to plaintiff, it is unnecessary to consider the sufficiency of his evidence in opposition (*see Singer v Gae Limo Corp.*, 91 AD3d 526 [1st Dept 2012]).

All concur except Moskowitz and Manzanet-Daniels, JJ. who concur in a separate memorandum by Manzanet-Daniels, J. as follows:

MANZANET-DANIELS, J. (concurring)

Defendant demonstrated that the injuries plaintiff sustained to his left shoulder and to his lumbar and cervical spines were not serious within the meaning of Insurance Law § 5102(d). Defendant submitted evidence, including the affirmed reports of a radiologist and an orthopedist, showing that the injuries were not caused by the accident, but were degenerative conditions that preexisted the accident (*see Spencer v Golden Eagle, Inc.*, 82 AD3d 589, 590-591 [1st Dept 2011]).

Plaintiff, in turn, raised triable issues of fact. The record demonstrates that plaintiff was asymptomatic before the accident. Although plaintiff's physicians did not expressly address the conclusion that the injuries to the left shoulder and cervical spine were degenerative in origin, they attributed the injuries to a different, yet equally plausible cause, namely the accident (*see Perl v Meher*, 18 NY3d 208 [2011]; *Yuen v Arka Memory Cab Corp.*, 80 AD3d 481, 482 [2011]; *Biascochea v Boves*, 93 AD3d 548 [1st Dept 2012]; *Williams* v Perez, 92 AD3d 528 [2012]; *Grant v United Pavers Co., Inc.*, 91 AD3d 499 [1st Dept 2012]).

In my view, the majority fails to appreciate the breadth of the Court of Appeals' holding in *Perl*. In *Perl*, the defendant's expert opined that the etiology of certain injuries was

degenerative. The plaintiff's physician countered that since the plaintiff was asymptomatic before to the accident and had not suffered any prior injuries that would result in the positive radiological findings, the findings were causally related to the accident (18 NY3d at 219). Given the unequivocal holding of the Court of Appeals that proof such as this on a plaintiff's part suffices to raise a triable issue of fact as to causation, our holding in this case ought not be limited in the manner suggested by the majority (*see Perl*, 18 NY3d at 218-19; *Jeffers v Style Tr., Inc.*, 99 AD3d 576, 577 [1st Dept 2012]; *Pannell-Thomas v Bath*, 99 AD3d 485 [1st Dept 2012]; *Pakeman v Karekezia*, 98 AD3d 840, 841 [1st Dept 2012]; *Martin v Portexit Corp.*, 98 AD3d 63, 67-68 [1st Dept 2012]; *Davis v Alnhmi*, 96 AD3d 507, 508 [1st Dept 2012]; *Thompkins v Ortiz*, 95 AD3d 418 [1st Dept 2012]; *Vaughan v Leon*, 94 AD3d 646, 648 [1st Dept 2012] *Biasochea*, 93 AD3d at 549; *Grant*, 91 AD3d at 500).

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

ENTERED: FEBRUARY 19, 2013

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Richter, Román, JJ.

8402 The People of the State of New York, SCI 7027/03
Respondent,

-against-

Christopher Ford,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Steven Berko of counsel), for appellant.

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

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Order, Supreme Court, New York County (Laura A. Ward, J.), entered on or about January 6, 2010, which denied defendant's CPL 440.46 motion for resentencing, unanimously affirmed.

The court concluded that substantial justice dictated the denial of the motion (*see generally People v Gonzalez*, 29 AD3d 400 [1st Dept 2006], *lv denied* 7 NY3d 867 [2006]). We have consistently held that, in determining whether substantial justice dictates the denial of a resentencing application, it is proper to consider the totality of the circumstances, including the nature and seriousness of the offense for which the defendant was sentenced (*see e.g. People v Rodriguez* 54 AD3d 600 [1st Dept 2008]), the defendant's conduct post-sentence (*see People v*

Batista, 45 AD3d 396 [1st Dept 2007]), and his or her criminal and institutional record (*see People v Anonymous*, 98 AD3d 913 [1st Dept 2012], *lv denied* 20 NY3d 985 [2012]).

Defendant had amassed an extensive criminal record in both New York and New Jersey dating back to 1987. While it is true that many of his convictions involved relatively minor misdemeanor property and drug possession crimes, a number of them were the result of pleas to misdemeanors in satisfaction of felony charges. Moreover, defendant's criminal history reveals his use of various aliases and dates of birth, as well as a number of convictions for the sale of drugs, and not mere possession. His history of recidivism, particularly his three parole violations for the commission of crimes while on parole, were all appropriate factors for the court to consider. Although defendant attempts to minimize the sale of cocaine to an undercover police officer in the instant case, the record reveals that he had on his person a greater amount of drugs than he sold to the officer. It is clear from these facts, as well as defendant's prior convictions for felony drug sales, that this sale was not an isolated incident.

The court also considered the evidence of defendant's rehabilitation while in prison (*see People v Davis*, 51 AD3d 573

[1st Dept 2008]). Defendant completed treatment programs for both his drug addition and his mental issues. His prison record was exemplary. Nevertheless, it was within the court's discretion to conclude that defendant's record while incarcerated did not outweigh the seriousness of his offense and his extensive history of recidivism and absconding (*see People v Spann*, 88 AD3d 597, 598 [1st Dept 2011], *lv denied* 18 NY3d 886 [2012]; *People v McRae*, 88 AD3d 552 [1st Dept 2011], *lv denied* 18 NY3d 884 [2012]). Nor do defendant's age and mental condition warrant a different result.

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

ENTERED: FEBRUARY 19, 2013

CLERK

Andrias, J.P., Friedman, DeGrasse, Manzanet-Daniels, Gische, JJ.

8774 Epic Security Corp., Index 601519/08
Plaintiff-Respondent,

-against-

AMCC Corp.,
Defendant-Appellant.

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Duane Morris, LLP, New York (John S. Wojak, Jr. of counsel), for appellant.

Condon & Associates, PLLC, Nanuet (Brian K. Condon of counsel), for respondent.

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Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered April 15, 2011, which, insofar as appealed from as limited by the briefs, denied defendant's motion for summary judgment dismissing the causes of action for breach of contract and fraudulent misrepresentation, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint.

No triable issues of fact exist as to plaintiff's fraudulent misrepresentation claim. The record establishes that any reliance by plaintiff on the alleged misrepresentations, concerning the taxable nature of the provision of plaintiff's services to defendant (a matter not peculiarly within defendant's knowledge), would have been unreasonable as a matter of law.

Plaintiff itself could readily have investigated the accuracy of the alleged representations, but failed to do so (*see Danann Realty Corp. v Harris*, 5 NY2d 317, 322 [1959]). Moreover, the certificate that defendant provided to plaintiff, on its face, concerned only the tax status of defendant's personal property, and did not state either that defendant was an agent of a tax-exempt public authority or that services provided to defendant would be nontaxable.

Defendant is also entitled to summary judgment dismissing the cause of action for breach of contract, which is based on the claim that defendant, as vendee of plaintiff's services, was contractually obligated to pay applicable sales tax in addition to the rate for those services set forth in the purchase orders. Contrary to plaintiff's contention, the purchase order agreements at issue unambiguously place the obligation to pay sales tax on plaintiff, as vendor. The purchase orders set the hourly rate for plaintiff's services at $17.00 per hour, "*including* all applicable tax" (emphasis added), plainly meaning that applicable

taxes were to be paid by the vendor (plaintiff) out of the amount due from the vendee (defendant) at the stated rate.

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

ENTERED: FEBRUARY 19, 2013

CLERK

Friedman, J.P., Acosta, Renwick, Richter, Román, JJ.

8900N William David, Index 308195/09
Plaintiff-Appellant,

-against-

Onilda Cruz,
Defendant-Respondent.

_____

Bernfeld, DeMatteo & Bernfeld, LLP, New York (Jeffrey L. Bernfeld of counsel), for appellant.

Daniel S. Perlman, New York, for respondent.

_____

Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered on or about August 10, 2011, which, insofar as appealed from, upon renewal of plaintiff's cross motion to enforce a settlement agreement, partially granted the cross motion, unanimously reversed, on the law, without costs, and the cross motion denied in its entirety.

An agreement purporting to opt out of the basic child support obligations set forth in the Child Support Standards Act (CSSA) must "include a provision stating that the parties have been advised of the provisions of [the CSSA]," must specify the amount that the basic child support obligation would have been, and the reason or reasons for the deviation (Family Court Act §

413[1][h]; Domestic Relations Law § 240[1-b][h]; *see Baranek v Baranek*, 54 AD3d 789 [2d Dept 2008], *lv dismissed* 14 NY3d 903 [2010]).

"Such provision may not be waived by either party or counsel" (Family Court Act § 413[1][h]; Domestic Relations Law § 240[1-b][h]; *see Blaikie v Mortner*, 274 AD2d 95, 99-101 [1st Dept 2000]; *Matter of Burnside v Somerville*, 202 AD2d 1064 [4th Dept 1994]).

Here, both the settlement agreement and the subject order effectuating it failed to recite that the parties were aware of the CSSA guidelines, failed to set forth the basic child support obligation, and failed to set forth the reasons for deviating from the guidelines (*see* Family Court Act § 413[1][h]; Domestic Relations Law § 240[1-b][h]; *Baranek*, 54 AD3d at 790-791; *Matter of Michelle W. v Forrest James P.*, 218 AD2d 175 [4th Dept 1996]).

Although the invalidity of a child support provision does not necessarily invalidate the agreement in its entirety (*see e.g. Cimons v Cimons*, 53 AD3d 125, 129 [2d Dept 2008]), the agreement at issue cannot be salvaged by deeming it divisible for partial illegality and severing and enforcing the provisions that do not pertain to child support. The provisions pertaining to

child support constituted the main objective of the agreement, or the bargained-for consideration inducing defendant to agree to the remainder of the agreement, including the injunctive provisions (*see e.g. Georgia Props., Inc. v Dalsimer*, 39 AD3d 332, 334 [1st Dept 2005]; *cf. Baranek*, 54 AD3d at 791).

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

ENTERED: FEBRUARY 19, 2013

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Richter, Clark, JJ.

9018 In re Michael P. Thomas, Index 113739/11
Petitioner-Appellant,

-against-

New York City Department of Education, et al.,
Respondents-Respondents.

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Hagan, Coury & Associates, Brooklyn (Paul Golden of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for respondents.

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Judgment, Supreme Court, New York County (Geoffrey D. Wright, J.), entered April 9, 2012, denying the petition seeking to compel respondents to disclose documents requested by petitioner pursuant to the Freedom of Information Law (FOIL), and dismissing the proceeding brought pursuant to CPLR article 78, unanimously reversed, on the law, without costs, the proceeding reinstated, and the matter remanded for an in camera inspection of the requested documents to determine if redaction could strike an appropriate balance between personal privacy and public policy interests, and whether respondents otherwise assert applicable FOIL exemptions.

Petitioner is a public school teacher employed by the Manhattan Center for Science and Mathematics (MCSM), which

allegedly receives funds under Title I, Part A of the Elementary and Secondary Education Act of 1965 (ESEA), reauthorized as the No Child Left Behind Act of 2001 (20 USC § 6301 *et seq*.). In August 2010, pursuant to the "No Child Left Behind Written Complaint and Appeal Procedures" adopted by the New York State Education Department, petitioner filed a complaint against the administrators of MCSM alleging that: "1. the [school's] 2009-2010 Comprehensive Educational Plan (CEP) was not developed with the involvement of parents and other members of the school community as required by Section 1114(b)(2)(B)(ii) of Title I, Part A of the ESEA; 2. required components of a schoolwide program that address the needs of at-risk students were not implemented as required by Section 1114(b)(2) and Section 1118 of Title I, Part A of the ESEA; 3. Title I funds were misappropriated and were not used to implement the components of a schoolwide program as required by Section 1114(b)(2)(A)(ii) of Title I, Part of the ESEA; and 4. the 2010-2011 CEP did not exist as required by Section 1114(b)(2)(B)(ii) of Title I, Part A of the ESEA."

Respondent New York City Department of Education (DOE) referred the complaint to its Office of Special Investigations (OSI). After OSI found the allegations to be unsubstantiated,

petitioner filed a FOIL request seeking the investigative report and related documents.

DOE's Central Record Access Officer (CRAO) denied the FOIL request pursuant to Public Officers Law § 87(2)(b) on the ground that all of the OSI records were exempt from disclosure because they related to unsubstantiated allegations of misconduct and their release would constitute an unwarranted invasion of the personal privacy of the employees in question. Respondent Michael Best, General Counsel of DOE, denied petitioner's administrative appeal, finding that the CRAO's determination fell "well within the bounds" of the Committee on Open Government's published advisory opinions denying FOIL requests in the context of unsubstantiated complaints, and that redaction of identifying details would not protect the personal privacy of the subject individuals because petitioner filed the underlying complaint and therefore knew the identity of the persons whose details he would have DOE delete.

The No Child Left Behind Written Complaint and Appeal Procedures expressly contemplate FOIL requests for Investigative Reports, stating as follows: "Does the State Education Department maintain a record of all complaints/appeals? Yes. Copies of correspondence, related documents, investigative reports, and

summary reports involved in the complaint/appeal resolution will be maintained by the State Education Department for five years. Records will be made available to interested parties in accordance with the provisions of the New York State Freedom of Information Law (Public Officers Law Sections 84-89)."

Pursuant to FOIL, government records are presumptively available to the public unless they are statutorily exempted by Public Officers Law § 87(2) (*see Matter of Fappiano v New York City Police Dept.*, 95 NY2d 738, 746 [2001]). "Those exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption" (*Matter of Hanig v State of N.Y. Dept. of Motor Vehs.*, 79 NY2d 106, 109 [1992]).

Public Officers Law § 87(2)(b) permits an agency to deny access to a document, or portion of a document, if disclosure "would constitute an unwarranted invasion of personal privacy." "What constitutes an unwarranted invasion of personal privacy is measured by what would be offensive and objectionable to a reasonable [person] of ordinary sensibilities" (*Matter of Beyah v Goord*, 309 AD2d 1049, 1050 [3d Dept 2003] [internal quotation marks omitted]).

"Public Officers Law § 89(2)(b) says that an unwarranted

invasion of personal privacy includes, but shall not be limited to seven specified kinds of disclosure. In a case, like this one, where none of the seven specifications is applicable, a court must decide whether any invasion of privacy . . . is unwarranted by balancing the privacy interests at stake against the public interest in [the] disclosure of the information" (*Matter of Harbatkin v New York City Dept. of Records & Info. Servs.*, 19 NY3d 373, 380 [2012] [internal quotation marks omitted]). However, the section does not create a blanket exemption. Public Officers Law § 89(2)(c)(i) provides that "[u]nless otherwise provided by this article, disclosure shall not be construed to constitute an unwarranted invasion of personal privacy pursuant to paragraphs (a) and (b) of this subdivision: . . . when identifying details are deleted."

The federal No Child Left Behind Act of 2001 (the NCLB) states as follows: "The purpose of this subchapter [20 USC § 6301 *et seq.*] is to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state [*sic*] academic assessments" (20 USC § 6301). Based on the theory that poverty

and low scholastic achievement are closely related, Subchapter I, Part A, of the NCLB, titled "Improving Basic Programs Operated by Local Educational Agencies," provides federal grants-in-aid to support compensatory education for disadvantaged children in low-income areas.

Petitioner's FOIL request sought the investigation report relating to his complaint against the administrators of MCSM, alleging that, in violation of the ESEA, the school's CEP was not developed with the involvement of parents and other members of the school community, that required components of the CEP were not implemented, and that Title I funds were misappropriated. Issues involving the expenditure of education funds and the quality of education, and why a government agency determined that a complaint concerning a violation of federal law relating thereto is allegedly unsubstantiated, are of significant public interest.

Despite this significant public interest, respondents denied the FOIL request in its entirety, with respondent Best citing a published advisory opinion of the Committee on Open Government, which states that "records related to unsubstantiated allegations of misconduct are not relevant to job performance and, therefore,

disclosure constitutes an unwarranted, not a permissible, invasion of personal privacy" (FOIL-AO-10399 [October 31, 1997]; *see also* FOIL-AO-12005 [March 21, 2000]). Acknowledging this policy, Supreme Court affirmed, stating in part that "[s]o long as the subject matter is quasi criminal in nature, as is the claim here, then the entire file of the investigation and the resulting findings, should be regarded as beyond the reach of [FOIL]."

However, advisory opinions issued by the Committee on Open Government "are not binding authority, but may be considered to be persuasive based on the strength of their reasoning and analysis" (*Matter of TJS of N.Y., Inc. v New York State Dept. of Taxation & Fin.*, 89 AD3d 239, 242 n [3d Dept 2011]; *see also Matter of Buffalo News v Buffalo Enter. Dev. Corp.*, 84 NY2d 488, 493 [1994]). There is no statutory blanket exemption for investigative records, even where the allegations of misconduct are "quasi criminal" in nature or not substantiated, and the ability to withhold records under FOIL can only be based on the effects of disclosure in conjunction with attendant facts (*see Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 275 [1996] ["[B]lanket exemptions for particular types of documents

are inimical to FOIL's policy of open government"]). Indeed, the Committee for Open Government has issued "advisory opinions regarding agencies' obligations under FOIL and has concluded, inter alia, that unless exempted under FOIL, the DOI [New York City Department of Investigation] must reveal the names of DOI employees who conducted an investigation once it has concluded (FOIL-AO-9399), communications between the DOI and the Department of State are subject to disclosure (FOIL-AO-4766), 'closing memoranda' prepared by the DOI as a result of an investigation are presumptively accessible to the public (FOIL-AO-9399), and the DOI must disclose all written documents, including reports and memoranda if sought pursuant to a FOIL request (FOIL-AO-3656)" (*Murphy v City of New York*, 2008 NY Slip Op 31926[U] [Sup Ct, NY County 2008] [DOI has no duty to ensure the confidentiality of its investigative reports, but, as a matter of law, is obligated to make available for public inspection all documents not specifically exempted under FOIL], *affd* 59 AD3d 301 [1st Dept 2009]).

For example, FOIL-A-9399, cited in *Murphy*, dealt with a request by the Daily News for closing memoranda prepared by the DO. The advisory opinion explained that "if a final

determination identifies a person who is the subject of a charge or allegation and the determination is that the charge or allegation has no merit, I believe that an applicant would have the right to obtain the substance of the determination, following the deletion of personally identifiable details. The Daily News may be interested not only in those cases in which charges have been substantiated, but also those in which the charges are found to have been without merit, perhaps as a means of attempting to ascertain more fully how DO operates and carries out its official duties."

This reasoning applies equally to petitioner's FOIL request for OSI's investigative report and related documents. As the Legislature declared in Public Officers Law § 84, "[t]he people's right to know the process of governmental decision-making and to review the documents and statistics leading to determinations is basic to our society. Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality."

FOIL-AO-10399, on which respondents rely, does not require otherwise. In that advisory opinion, which pertains to the disclosure of records related to an incident of alleged sexual

harassment, the Committee stated as follows: "It is clear that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. Further, the courts have found that, as a general rule, records that are relevant to the performance of a public employee's official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy" (internal citations omitted).

Here, the underlying complaint pertains to MCSM's administrators' performance of their official duties when using and applying federal funds, and in constructing and implementing the CEP. Accordingly, this matter should be remanded to the article 78 court for an in camera inspection of the documents to determine if redaction could strike an appropriate balance between personal privacy and public interests and which material could be properly disclosed (*see Matter of Molloy v New York City Police Dept.*, 50 AD3d 98, 100-101 [1st Dept 2008]; *Kwasnik v City*

of New York, 262 AD2d 171 [1st Dept 1999]). The court should also determine whether portions of the documents may be exempt from disclosure as intra- or inter-agency records that are not statistical or factual data (Public Officers Law § 87[2][g]; *see generally Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 275 [1996]).

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

ENTERED: FEBRUARY 19, 2013

CLERK

Andrias, J.P., Renwick, Freedman, Gische, JJ.

9259 The People of the State of New York, Ind. 524/93
Respondent,

-against-

Ivan Calaff,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (R. Vance, Jr., District Attorney, New York (David E.A. Crowley of counsel), for respondent.

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Appeal from judgment, Supreme Court, New York County (Harold Rothwax, J.), rendered March 24, 1993, convicting defendant, upon his plea of guilty, of attempted burglary in the second degree, and sentencing him, as a second violent felony offender, to a term of three to six years, unanimously dismissed.

We exercise our discretionary authority, after considering the relevant factors (*see People v Taveras*, 10 NY3d 227, 233 [2008]), to dismiss this 19-year-old appeal on the ground of "failure of timely prosecution or perfection" (CPL 470.60[1]). The right to appeal is a statutory right that must be affirmatively exercised and timely asserted" (*People v West*, 100 NY2d 23, 26 [2003], *cert denied* 540 US 1019 [2003]).

Defendant filed a timely notice of appeal in 1993. The sentencing minutes establish that defendant was advised of the simple procedural steps to be taken by defendant, personally, to obtain poor person relief and assigned appellate counsel (*see id.* at 26-29). However, defendant did not make the necessary request until 2012.

The People moved to dismiss this appeal for failure to prosecute, and this Court denied the motion with leave to the People to raise this issue in their respondent's brief (M-3028, 2012 NY Slip Op 80175[U]). In his submissions on the motion, and on this appeal, defendant has attempted to explain his failure to follow the instructions he received at sentencing. His explanation is refuted by the sentencing minutes and otherwise without merit.

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

ENTERED: FEBRUARY 19, 2013

CLERK

Andrias, J.P., Renwick, Freedman, Gische, JJ.

9260-
9261-
9262 In re Andre Asim M.,
Petitioner-Appellant,

-against-

Madeline N.,
Respondent-Respondent.

_____

Bonnie L. Mohr, New York, for appellant.

Dora M. Lassinger, East Rockaway, for respondent.

Tennille M. Tatum-Evans, New York, attorney for the child.

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Order, Family Court, Bronx County (Jody Adams, J.), entered on or about March 17, 2011, which, after a hearing, denied the petition to vacate the acknowledgment of paternity of the child, unanimously affirmed, without costs. Appeals from order, same court and Judge, entered on or about July 21, 2010, unanimously dismissed, without costs, as abandoned.

The acknowledgment of paternity was not void because the mother was legally married at the time she and petitioner executed it, as nothing in Public Health Law § 4135-b(2)(b) requires the mother to have been unmarried at the time the child was born. Assuming that petitioner demonstrated that he signed the acknowledgment of paternity under a mistake of fact, the

Family Court was required to conduct a hearing on the best interests of the child before ordering a genetic marker test (*see Matter of Westchester County Dept. of Social Servs. v Robert W.R.*, 25 AD3d 62, 69-71 [2d Dept 2005]), and properly determined that it was not in the child's best interests on the basis of equitable estoppel to order genetic marker tests (Family Ct Act § 516-[a][b][ii]). A man who mistakenly represents himself as a child's father may be equitably stopped from denying paternity, and made to pay child support, when the child justifiably relied on the man's representation of paternity, to the child's detriment because it is shown that a parent-child relationship has developed between the two (*see Matter of Shondel J. v Mark D.*, 7 NY3d 320, 324, 327 [2006]).

The record demonstrates that, after the child was born in 2005, appellant held himself out to be the father of the child to his family and coworkers, permitted the child to call him "daddy," provided the mother with support for the child, and placed the child on his medical insurance until January 2009, when he ceased interacting with the child based on his belief he was not the biological father (*see Matter of Merritt v Allen*, 99 AD3d 1006, 1007 [2d Dept 2012]; *Matter of Griffin v Marshall*, 294 AD2d 438, 439 [2d Dept 2002]). The record also demonstrates that

at the time appellant sought to vacate the acknowledgment of paternity, the child recognized him as his father and continued to have a relationship with appellant's family even after appellant stopped seeing him (*see Matter of Savel v Shields*, 58 AD3d 1083 [3rd Dept 2009]).

The court properly excluded the emails appellant sought to introduce into evidence, because the mother's belief as to whether maintaining the legal relationship between appellant and the child was in her son's best interest was irrelevant to the court's determination of whether equitably estoppel applied.

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

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

ENTERED: FEBRUARY 19, 2013

CLERK

Andrias, J.P., Renwick, Freedman, Gische, JJ.

9263-
9264-
9265 J. Remora Maintenance LLC, et al., Index 650943/11
Plaintiffs-Respondents,

-against-

German Efromovich,
Defendant-Appellant.

_____

Leslie Trager, New York (Samuel Feldman of counsel), for appellant.

Bracewell & Giuliani, New York (Michael C. Hefter of counsel), for respondents.

_____

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered January 5, 2012, which, inter alia, granted plaintiffs' motion for summary judgment on the complaint and dismissal of the counterclaim, and order, same court and Justice, entered June 11, 2012, which, inter alia, confirmed the report of the Special Referee awarding plaintiffs $165,825 in attorneys' fees plus expenses, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered June 19, 2012, unanimously dismissed, without costs, as abandoned.

We affirm for reasons other than those stated by the motion court (*see Matter of American Dental Coop. v Attorney-General of State of N.Y.*, 127 AD2d 274, 279 fn 3 [1st Dept 1987]). Defendant's defenses to the Guaranty were not barred by the waiver provision of its Section 8(k), which was unambiguously a waiver of jurisdictional and venue defenses only; the "any" defense language relied upon by defendant and the motion court was, as to every clause in that provision, modified by the word "that," which restricted the defenses waived to those relating to the adjudicative power of the courts and did not include any substantive defenses.

However, we agree with plaintiffs' argument that the Guaranty incorporated the waiver provisions of the Purchase Agreement by reference (*see generally Rudman v Cowles Communications*, 30 NY2d 1, 13 [1972]; *Movado Group, Inc. v Mozaffarian*, 92 AD3d 431 [1st Dept 2012]). The Guaranty and Purchase Agreement were executed simultaneously as part of a single transaction, the Purchase Agreement requires execution of the Guaranty, attaches it as an exhibit, defines "Agreement" and "Ancillary Agreements" as including the Guaranty, provides that

its merger clause applies to Ancillary Agreements, and further provides that the guarantor's obligation to pay the purchase price is "to the extent due and payable within the terms of the Purchase Agreement." The Purchase Agreement's "as is" provision and waiver of any defense as to the "condition" of the asset that was the subject of that agreement barred the failure of consideration and fraud in the inducement defenses to the Guaranty and the counterclaim for rescission based upon the same alleged fraud (*see Princes Point, LLC v AKRF Eng'g, P.C.*, 94 AD3d 588 [1st Dept 2012]). Even if the provisions of the Purchase Agreement were not incorporated into the Guaranty, these defenses would nonetheless be barred because they are unavailable to the primary obligor.

The report of the special referee on attorneys' fees was supported by the record (*see Matter of Ideal Mut. Ins. Co.*, 82 AD3d 518, 519 [1st Dept 2011]). Upon our own review (*see Katz Park Ave. Corp. v Jagger*, 98 AD3d 921, 922 [1st Dept 2012]), we find the fees awarded not excessive. Block billing did not render the invoiced amounts per se unreasonable (*see 546-552 W. 146th St. LLC v Arfa*, 99 AD3d 117, 123 [1st Dept 2012]), and the

evidence before the special referee adequately presented him with the opportunity to assess the reasonableness of the fees.

In view of the foregoing it is unnecessary to address the remaining contentions of the parties.

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

ENTERED: FEBRUARY 19, 2013

CLERK

Andrias, J.P., Renwick, Freedman, Gische, JJ.

9266 Patrolmen's Benevolent Association of the City of New York, et al., Plaintiffs-Appellants, Index 100561/11

-against-

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

_____

Gleason, Dunn, Walsh & O'Shea, Albany (Ronald G. Dunn of counsel), for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Paul T. Rephen of counsel), for respondents.

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Order, Supreme Court, New York County (Barbara Jaffe, J.), entered November 16, 2011, which granted defendants' motion to dismiss plaintiffs' complaint seeking declaratory relief, unanimously modified, on the law, to deny defendants' motion to dismiss and to declare in defendants' favor, and otherwise affirmed, without costs.

Supreme Court properly determined that, under the clear and unambiguous language of section 12-127 of the Administrative Code of the City of New York (*see Matter of Polan v State of N.Y. Ins. Dept.*, 3 NY3d 54, 58 [2004]; *Doctors Council v New York City Employees' Retirement Sys.*, 71 NY2d 669, 674-675 [1988]), defendants are not required to pay for the medical expenses

incurred by retirees of defendant New York City Police Department (NYPD) for injuries and/or illnesses sustained in the line of duty. Indeed, the court properly determined that section 12-127 applies to only current or active employees and members of the NYPD, not retirees. Retirees are entitled to reimbursement for medical expenses in accordance with the provisions of Administrative Code § 12-126.

We modify solely to declare in defendants' favor, rather than dismiss the complaint (*see Maurizzio v Lumbermens Mut. Cas. Co.*, 73 NY2d 951, 954 [1989]).

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

ENTERED: FEBRUARY 19, 2013

CLERK

Andrias, J.P., Renwick, Freedman, Richter, JJ.

9267-
9268

In re East 91st Street Crane Collapse Litigation

Index 117294/08
117469/08
590314/10
590739/10
591073/10

- - - - -

Donald Raymond Leo, etc.,
Plaintiff,

-against-

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

Michael Carbone, et al.,
Defendants,

1765 First Associates, LLC, et al.,
Defendants-Appellants.

- - - - -

Leon D. DeMatteis Construction Corporation,
Third-Party Plaintiff,

-against-

Sorbara Construction Corp.,
Third-Party Defendant-Appellant.

- - - - -

Leon D. DeMatteis Construction Corporation,
Second Third-Party Plaintiff-Appellant,

-against-

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

- - - - -

Sorbara Construction Corp.,
Third Third-Party Plaintiff-Appellant,

-against-

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

[And Other Third-Party Actions]

- - - - -

In re East 91st Street Crane Collapse Litigation

- - - - -

Xhevahire Sinanaj, et al.,
Plaintiffs,

-against-

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

Michael Carbone, et al.,
Defendants,

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

- - - - -

Leon D. DeMatteis Construction Corporation,
Third-Party Plaintiff-Appellant,

-against-

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

- - - - -

Sorbara Construction Corp.,
Second Third-Party Plaintiff-Appellant,

-against-

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

[And Another Third-Party Action]

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Nicoletti Hornig & Sweeney, New York (Scott D. Clausen of counsel), for 1765 First Associates, LLC, appellant.

Cartafalsa, Slattery, Turpin & Lenoff, New York (B. Jennifer Jaffee of counsel), for Sorbara Construction Corp., appellant.

Smith, Mazure, Director, Wilkins, Young & Yagerman, P.C., New York (Marcia K. Raicus of counsel), for Leon D. DeMatteis Construction Corporation, appellant.

Michael A. Cardozo, Corporation Counsel, New York (Kenneth Sasmor of counsel), for respondents.

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Orders, Supreme Court, New York County (Paul G. Feinman, J.), entered October 5, 2011, which, upon reargument, granted so much of defendants-respondents' (the City) motion to dismiss as sought dismissal of defendants-appellants' (the Construction Defendants) cross claims seeking indemnification and contribution, unanimously affirmed, without costs.

In this wrongful death action arising from a crane collapse during construction of a building, the court correctly dismissed the cross claims, as the construction defendants have not shown a special relationship between themselves and the City that gave rise to a special duty (*see Garrett v Holiday Inns*, 58 NY2d 253, 261-262 [1983]). A municipality is not liable for negligent performance of a governmental function unless there exists a

special duty to the injured party, as opposed to a general duty owed to the public (*McLean v City of New York*, 12 NY3d 194, 199 [2009]). Here, nothing in the record indicates that the City assumed an affirmative duty, either through promises or acts, to ensure the safety of the crane on the construction defendants' behalf (*see id.* at 201-202). Rather, the City took steps to ensure the safety of the crane as an exercise of its duty to the general public (*id.*). There is also no evidence that the City directed and controlled the subject crane in the face of known, blatant, and dangerous safety violations (*cf. Garrett*, 58 NY2d at 262; *Smullen v City of New York*, 28 NY2d 66, 70-71 [1971]). Rather, the record shows that at the time the City authorized the crane's operation on the site, it was not aware of the faulty weld condition that caused the accident.

Given the absence of a showing of a special duty, we need not determine whether the City's authorization of the use of the crane was discretionary or ministerial (*see Valdez v City of New York*, 18 NY3d 69, 80 [2011]). In any event, given the record, we would find that the City's authorization was discretionary, as it

was based on the exercise of reasoned judgment (*see Tango v Tulevech*, 61 NY2d 34, 41 [1983]).

We have reviewed the construction defendants' remaining contentions and find them unavailing.

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

ENTERED: FEBRUARY 19, 2013

CLERK

Andrias, J.P., Renwick, Freedman, Gische, JJ.

9269 Domingos Mouta, et al., Index 307749/08
Plaintiffs-Respondents, 83768/09
83824/09

-against-

Essex Market Development LLC,
Defendant-Appellant-Respondent,

JF Contracting Corp.,
Defendant-Respondent-Appellant,

MSS Construction Corp.,
Defendant.

- - - - -

Essex Market Development LLC,
Third-Party Plaintiff-
Appellant-Respondent,

-against-

Marangos Construction Corp.,
Third-Party Defendant-
Respondent-Appellant.

- - - - -

JF Contracting Corp.,
Third-Party Plaintiff-
Respondent-Appellant,

-against-

Marangos Construction Corp.,
Third-Party Defendant-
Respondent-Appellant.

_____

Kral, Clerkin, Redmond, Ryan, Perry & Van Etten, LLP, Melville (James V. Derenze of counsel), for appellant-respondent.

Armienti, DeBellis, Guglielmo & Rhoden, LLP, New York (Karen S. Drotzer of counsel), for JF Contracting Corp., respondent-appellant.

Ahmuty, Demers & McManus, Albertson (Glenn A. Kaminska of counsel), for Marangos Construction Corp., respondent-appellant.

Siegel & Coonerty, LLP, New York (Steven Aripotch of counsel), for respondents.

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Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered January 31, 2012, which granted plaintiffs' motion for summary judgment as to liability under Labor Law § 240(1), denied defendant/third-party plaintiff JF Contracting Corp.'s motion for summary judgment dismissing the complaint as against it, for summary judgment on its claims for common-law and contractual indemnification and breach of contract against third-party defendant Marangos Construction Corp., to strike Marangos's answer for failure to provide insurance information, and to compel defendant/third-party plaintiff Essex Market Development LLC to produce copies of its relevant insurance policies, and denied Essex's motion for summary judgment on its common-law and contractual indemnification claims against JF and Marangos, unanimously modified, on the law, to grant JF's motion for summary judgment dismissing as against it the Labor Law § 200 and common-law negligence claims and the Labor Law § 241(6) claims insofar as they are predicated on violations of Industrial Code (12 NYCRR) §§ 23-1.5, 23-1.8, 23-1.11, 23-1.15, 23-1.16, 23-1.17,

23-1.24, 23-5.3, 23-5.4, 23-5.5, 23-5.6, and 23-5.7, and for summary judgment on its indemnification claims against Marangos, and to deny Essex's motion for summary judgment on its indemnification claims against Marangos, with leave to renew, and, upon a search of the record, summary judgment is awarded to Essex and defendant MSS Construction Corp. dismissing as against them the Labor Law § 241(6) claims insofar as they are predicated on the above-cited violations of the Industrial Code, and otherwise affirmed, without costs.

Plaintiff Domingos Mouta was injured when he stepped on a section of plywood platform that, unbeknownst to him, was being dismantled, and he fell from the fourth floor to the second. There is no question that plaintiff's was a "gravity-related . . . fall[] from a height," and that plaintiff was provided with no safety devices, such as a harness, to prevent the fall. Marangos's conclusory claims that safety devices were available are not sufficient to raise an issue of fact. Thus, defendants are liable for his injuries pursuant to Labor Law § 240(1) (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]).

To the extent the Labor Law § 241(6) claim is predicated on Industrial Code (12 NYCRR) § 23-1.5 (general responsibilities of employees), § 23-1.8 (personal protective equipment), § 23-1.11

(lumber and nail fastenings), § 23-1.15 (construction of safety railings), § 23-1.16 (safety belts, harnesses, tail lines and lifelines), § 23-1.17 (life nets), § 23-1.24 (work on roofs), and §§ 23-5.3, 5.4, 5.5, 5.6, and 5.7 (various types of scaffolds), it must be dismissed as against all defendants because these provisions either are too generic to support a § 241(6) claim or are simply inapplicable to the facts of this case.

JF demonstrated that it did not supervise and control plaintiff's work or the area of the work site in which plaintiff's accident occurred, and therefore cannot be held liable for plaintiff's injures under Labor Law § 200 or common-law negligence principles (*Torkel v NYU Hosps. Ctr.*, 63 AD3d 587 [1st Dept 2009]). The record demonstrates that Marangos, plaintiff's employer, which pursuant to its contract with JF was responsible for site safety, was in charge of all aspects of the work at issue, including safety.

The contract between JF and Marangos obligated Marangos to indemnify JF against losses arising out of Marangos's negligent performance of its work. Since the record establishes that plaintiff's accident was not caused by any negligence on JF's part, that JF's liability is purely vicarious under Labor Law § 240(1), and potentially under § 241(6), and that Marangos was

responsible for the accident, JF is entitled to summary judgment on its contractual and common-law indemnification claims against Marangos (*see Correia v Professional Data Mgt.*, 259 AD2d 60, 64-65 [1st Dept 1999]).

Essex failed to include a copy of the third-party complaint in its motion for summary judgment on its indemnification claims against Marangos (*see* CPLR 3212[b]). We therefore affirm the denial of Essex's motion, without prejudice to renewal upon proper papers (*see Krasner v Transcontinental Equities*, 64 AD2d 551 [1st Dept 1978]). The court correctly denied JF's motion as to the insurance policies procured by Marangos and Essex.

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

ENTERED: FEBRUARY 19, 2013

CLERK

Andrias, J.P., Renwick, Freedman, Gische, JJ.

9275- Ind. 2322N/05
9276 The People of the State of New York, 48/09
Respondent,

-against-

Tommy Nettles,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

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

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Appeals having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Laura A. Ward, J.), rendered on or about March 3, 2009, and a judgment, same court (Michael Obus, J.), rendered on or about April 29, 2009,

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

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

ENTERED: FEBRUARY 19, 2013

CLERK

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

Andrias, J.P., Renwick, Freedman, Feinman, JJ.

9280 Peter Molinari, Index 100658/07
Plaintiff-Respondent,

-against-

167 Housing Corp., et al.,
Defendants-Appellants.

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Fixler & LaGattuta, LLP, New York (Paul F. LaGattuta III of counsel), for appellants.

Avanzino & Moreno, P.C., Brooklyn (Samantha Canterino of counsel), for respondent.

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Order, Supreme Court, New York County (Judith J. Gische, J.), entered June 21, 2012, which denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Summary judgment was properly denied in this action where plaintiff was allegedly caused to fall by a raised sidewalk flag outside defendants' building, since triable issues exist as to whether defendants had constructive notice of the raised flag (*see George v New York City Tr. Auth.*, 41 AD3d 143 [1st Dept 2007]; *Obie v Catsimatidis*, 10 AD3d 569 [1st Dept 2004]). Plaintiff testified as to the cause and location of his fall and

such testimony was consistent with the photographs showing an uneven sidewalk at the location of the accident. Moreover, plaintiff stated that the condition of the defect at the time of the accident was substantially as shown in the photographs (*see Taylor v New York City Tr. Auth.*, 48 NY2d 903 [1979]). Although there is no indication as to who took the subject photographs, or exactly when they were taken, where a defect in a concrete surface has indicia of coming into existence over a period of time, a jury could find that, "whenever taken," certain photographs are "a fair and accurate representation" of the condition at the time of an accident (*Taylor* at 905).

Moreover, since the photographs may be relied upon, the conclusion of plaintiff's expert that the sidewalk flag was a raised condition was "reasonably inferable from the photographs," and no inspection was required by the expert, particularly where, as here, such an inspection would have been impossible under the

circumstances (*Fazio v Costco Wholesale Corp.*, 85 AD3d 443, 443 [1st Dept 2011]). We have considered defendants' remaining contentions and find them unavailing.

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

ENTERED: FEBRUARY 19, 2013

CLERK

Andrias, J.P., Renwick, Freedman, Gische, JJ.

9281 The People of the State of New York, Ind. 4028/10
Respondent,

-against-

Andy Rafael Garcia,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (R. Vance, Jr., District Attorney, New York (Joshua L. Haber 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 (Lewis B. Stone, J.), rendered on or about November 17, 2011,

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.

ENTERED: FEBRUARY 19, 2013

CLERK

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

Andrias J.P., Renwick, Freedman, Gische, JJ.

9283 Travelers Property Casualty Company of America as subrogee of Sherle Wagner International,
Plaintiff,

-against-

Consolidated Edison Company of New York, Inc.,
Defendant.
- - - - -
Consolidated Edison Company of New York, Inc.,
Third-Party Plaintiff-Respondent,

-against-

450 Park LLC, et al.,
Third-Party Defendants-Appellants,

Taconic Investment Partners, LLC, et al.,
Third-Party Defendants.

[And Another Third Party Action]

Index 110462/07
591089/07
590340/09

_____

Carol R. Finocchio, New York, for appellants.

Richard W. Babinecz, New York (Stephen T. Brewi of counsel), for respondent.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered June 22, 2012, which, insofar as appealed from as limited by the briefs, denied third-party defendants-appellants' motion for summary judgment dismissing the third-party complaint and all cross claims as against them, unanimously reversed, on

the law, with costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

In this case Travelers Property Casualty Company of America, as subrogee of Sherle Wagner international, LLC (SWI), seeks recovery for losses sustained when SWI's Manhattan showroom, located in the sub-basement of 60 E. 57th Street, became flooded after the sump pump in an adjacent Con Edison vault failed to work. The vault, which was located outside of the premises, housed an electrical transformer and supplied power to the premises through electrical wires. The wires were run through conduits, between the vault and a "network compartment" room, which shared a wall with the vault, but was located within 450 Park LLC's premises.

450 Park LLC and Taconic Management Company, LLC, the owner and property manager of the premises, respectively, made a prima facie showing of entitlement to dismissal of the claims asserted against them. The motion papers established that 450 Park LLC and Taconic Management Company, LLC lacked control or responsibility for the space within the conduits, through which, according to their two experts, the water entered the premises, and established lack of prior notice of an insufficient waterproofing condition. Although the network compartment was

located on the premises, it housed Con Edison's equipment and Con Edison had exclusive access to the locked room, via use of a standardized key used for other network compartments throughout Manhattan. Further, a long-time Con Edison employee testified that, in order to prevent water from traveling through the conduits between the vault and the network compartment, the ducts were packed with a fibrous substance and then sealed with a sealant, which materials he carried on his truck and applied when necessary.

In opposition, Con Edison failed to raise a triable issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Con Edison did not dispute that the water entered the premises through the conduits, which carried its wires from the vault to Con Edison's equipment in the network compartment. As such, responsibility for sealing the space between the conduits and the exterior wall of the premises, on which point the opposition papers were focused, is not at issue. Given Con Edison's

admitted responsibility for the "electrified components" in the network compartment {*see* 16 NYCRR 98.4), there is no logical basis upon which to exclude its responsibility for the sealing of the subject conduits.

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

ENTERED: FEBRUARY 19, 2013

CLERK

Tom, J.P., Moskowitz, Richter, Manzanet-Daniels, Clark, JJ.

9287 The People of the State of New York, Ind. 4169/10
Respondent,

-against-

Jerredy Baez,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Susan Epstein of counsel), for appellant.

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

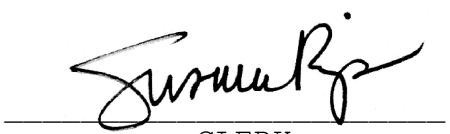
_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Lewis Bart Stone, J.), rendered on or about December 2, 2010,

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.

ENTERED: FEBRUARY 19, 2013



CLERK

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

Tom, J.P., Moskowitz, Richter, Manzanet-Daniels, Clark, JJ.

9288 Janice Weiters, Index 20918/10
Plaintiff-Respondent,

-against-

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

MTA Bus Company,
Defendant-Appellant.

_____

Barry, McTiernan & Moore, New York (David H. Schultz of counsel), for appellant.

Scott Baron & Associates, P.C., Howard Beach (John Burnett of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered October 19, 2011, which denied defendant MTA Bus Company's (MTA) motion for summary judgment dismissing the complaint and all cross claims as against it, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiff was injured when she tripped and fell on an allegedly defective roadway condition in the vicinity of a bus stop. Plaintiff asserts that MTA created the condition by its operation of buses on the subject roadway. MTA established its entitlement to judgment as a matter of law by showing that it was not responsible for maintenance of the public roadways and that

its use of the roadways does not constitute a 'special use' (*see Cabrera v City of New York*, 45 AD3d 455, 456 [1st Dept 2007]; *Towbin v City of New York*, 309 AD2d 505 [1st Dept 2003]).

No triable issue of fact was raised in opposition as to whether MTA owed plaintiff any duty with regard to the roadway. Nor was the motion premature as plaintiff and defendant Riverbay Corporation failed to identify any outstanding discovery that was needed to oppose the motion (*see e.g. Billy v Consolidated Mach. Tool Corp.*, 51 NY2d 152, 163-164 [1980]).

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

ENTERED: FEBRUARY 19, 2013

CLERK

Tom, J.P., Moskowitz, Richter, Manzanet-Daniels, Clark, JJ.

9289 Yvette Fonda, etc., Index 109244/09
Plaintiff-Respondent,

-against-

Ronald J. Wapner, M.D., et al.,
Defendants-Appellants.

_____

Aaronson Rappaport Feinstein & Deutsch, LLP, New York (Robert S. Deutsch of counsel), for appellants.

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

_____

Order, Supreme Court, New York County (Alice Schlesinger, J.), entered February 15, 2012, which, in this medical malpractice action seeking damages for wrongful birth, denied defendants' motion to dismiss the complaint on forum non conveniens grounds and declared that Colorado law should be applied at trial, unanimously affirmed, without costs.

Defendants failed to meet their burden of establishing that New York is an inconvenient forum for this action (*see Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 478-479 [1984], *cert denied* 469 US 1108 [1985]). The court indicated that it had considered the relevant factors (*id.* at 479), and there is no basis for disturbing its determination (*id.*).

The court correctly applied an interest analysis to the

choice-of-law issue, correctly determined that the conflicting wrongful birth laws at issue are loss-allocating rules, and correctly concluded that Colorado law applies (*see Cooney v Osgood Mach.*, 81 NY2d 66, 72 [1993]). Indeed, under the second rule set forth in *Neumeier v Kuehner* (31 NY2d 121, 128 [1972]), which applies in this case, the "place of injury" governs and is understood to be where the injury, or the last event necessary to make the defendant liable, occurred, even if the defendant did not actually engage in any actual tortious conduct in that location (*see Glunt v ABC Paving Co.*, 247 AD2d 871, 871 [4th Dept 1998]; *see also Schultz v Boy Scouts of Am.*, 65 NY2d 189, 195 [1985]). Here, the last events necessary to make defendants liable, namely the birth and treatment of the subject child, occurred in Colorado.

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

ENTERED: FEBRUARY 19, 2013

CLERK

Tom, J.P., Moskowitz, Richter, Manzanet-Daniels, Clark, JJ.

9290 Board of Managers of the 129 Lafayette Street Condominium, Plaintiff-Appellant, -against- 129 Lafayette Street, LLC, Defendant-Respondent, William Fegan, et al., Defendants. Index 103032/08

Rosabianca & Associates, P.L.L.C., New York (Jeremy Panzella of counsel), for appellant.

Wrobel & Schatz, LLP, New York (M. Katherine Sherman of counsel), for respondent.

Order, Supreme Court, New York County (Louis B. York, J.), entered August 16, 2011, which dismissed the action pursuant to CPLR 3126, unanimously affirmed, without costs.

It is quite clear that the court dismissed this action due to plaintiff's repeated failures to adhere to the court's discovery orders. Thus, we reject plaintiff's argument that the court meant to dismiss this action pursuant to CPLR 3216 instead of 3126. It is also clear that the order was not entered until August 16, 2011. Therefore, we reject plaintiff's argument that

the court dismissed the action before the August 5, 2011 deadline to file the note of issue.

Plaintiff contends that the action should not have been dismissed because its behavior was neither willful nor contumacious. However, plaintiff engaged in a "long continued pattern of noncompliance with court orders and discovery demands" (*Jones v Green*, 34 AD3d 260, 261 [1st Dept 2006]). Moreover, the July 2011 status conference order was a *conditional* dismissal order, which "relieve[d] [the court] of the unrewarding inquiry into whether [plaintiff's] resistance was wilful" (*Gibbs v St. Barnabas Hosp.*, 16 NY3d 74, 82 [2010] [internal quotation marks omitted]).

Plaintiff failed to offer any excuse for ignoring the court's disclosure orders (*see Milton v 305/72 Owners Corp.*, 19 AD3d 133 [1st Dept 2005], *lv denied* 7 NY3d 778 [2006]; *see also Jones*, 34 AD3d at 261).

In view of the foregoing, it does not avail plaintiff that, one day before the deadline to file the note of issue, it moved to extend that deadline (*see Abouzeid v Cadogan*, 291 AD2d 423 [2d Dept 2002]).

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

ENTERED: FEBRUARY 19, 2013

CLERK

Tom, J.P., Moskowitz, Richter, Manzanet-Daniels, Clark, JJ.

9292 Mark Orenstein, Index 650757/09
Petitioner-Appellant,

-against-

Snow Becker Krauss P.C.,
Respondent-Respondent.

_____

A.M. Richardson, P.C., New York (Ambrose M. Richardson, III of counsel), for appellant.

Gallet Dreyer & Berkey, LLP, New York (Edward M. Cuddy, III of counsel), for respondent.

_____

Order, Supreme Court, New York County (Paul G. Feinman, J.), entered on or about October 13, 2011, which denied the petition and dismissed the proceeding brought pursuant to Business Corporation Law § 624, unanimously affirmed, with costs.

The court properly denied the petition, finding that petitioner was not entitled to inspect respondent's corporate documents since he was no longer a shareholder (*see Matter of Rosenberg v Steinberg-Kass*, 6 AD2d 685 [1st Dept 1958]). Petitioner waived his right to challenge the propriety of the termination of his shareholder interest in respondent by signing an agreement to that effect, and by failing to assert a right to inspect documents until more than six years after the termination (*see Hadden v Consolidated Edison Co. of N.Y.*, 45 NY2d 466, 469

[1978]). Petitioner's argument that he has a right to inspect the records even though he ceased to be a shareholder in 2002 is improperly raised for the first time in his reply brief. In any event, Business Corporation Law § 624 provides this right only to current shareholders (*see Matter of Benishai v Ilan Props.*, 303 AD2d 226 [1st Dept 2003]).

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

ENTERED: FEBRUARY 19, 2013

CLERK

Tom, J.P., Moskowitz, Richter, Manzanet-Daniels, Clark, JJ.

9293 Damon G. Barber, Index 100653/11
Plaintiff-Appellant,

-against-

Deutsche Bank Securities, Inc., et al.,
Defendants-Respondents.

_____

Michael G. Berger, New York, for appellant.

Seyfarth Shaw, LLP, New York (Cameron Smith of counsel), for respondents.

_____

Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered July 14, 2011, which granted defendants' motion to dismiss the complaint for failure to state a cause of action, unanimously affirmed, without cost.

Contrary to plaintiff's contention, the November 19, 2008 letter agreement setting forth the terms of his assignment in Hong Kong (the HK contract) did not expressly modify the at-will provision of the August 6, 2007 letter offering him employment (the offer letter), which explicitly provided that all terms and conditions of his employment were set forth in the offer letter and could only be modified by a written agreement or by a change in defendants' personnel policies. The HK contract contained no provision that expressly promised plaintiff a fixed two-year position in Hong Kong or elsewhere. Indeed, paragraph 7 of the

HK contract provided that defendants could terminate plaintiff's Hong Kong assignment at any time and reassign him. Plaintiff has not identified, in either the offer letter or the HK contract, an express limitation on defendants' right to discharge him (*see Novinger v Eden Park Health Servs.*, 167 AD2d 590, 591 [3d Dept 1990], *lv denied* 77 NY2d 810 [1991]). Accordingly, the fourth cause of action, which alleges that plaintiff was terminated at the end of the first year of the HK contract without cause and is entitled to his unpaid base salary for the second year, fails to state a cause of action (*see Cron v Hargo Fabrics*, 91 NY2d 362, 367 [1998]). Plaintiff's at-will employment also renders unviable his fifth cause of action, which alleges breach of the implied covenant of good faith and fair dealing. The terms of the HK contract were plain and clear, leaving plaintiff no room to argue mistaken intent or bad faith (*compare Richbell Info. Servs. v Jupiter Partners*, 309 AD2d 288, 302 [1st Dept 2003]; *see also Nikitovich v O'Neal*, 40 AD3d 300 [1st Dept 2007]).

The first three causes of action are based on an alleged oral promise that plaintiff would be paid a non-discretionary bonus in 2009 if he took the assignment in Hong Kong. It is clear that plaintiff's alleged conduct – uprooting his financial business and disrupting his fiancee's successful career in New

York to go to Hong Kong, where plaintiff had no business contacts or acquaintances – if proved, would constitute partial performance of this oral promise and obviate the no-oral-modification clause in the offer letter (*see* General Obligations Law § 15-301; *Rose v Spa Realty Assoc.*, 42 NY2d 338, 343-344 [1977]). Moreover, defendants could be equitably stopped to rely upon that clause by their alleged inducement of plaintiff's "significant and substantial reliance" on the alleged oral promise (*see* id. at 344). And, in view of plaintiff's at-will employment, the alleged oral promise would not be barred by the Statute of Frauds (*see Caron*, 91 NY2d at 367).

Nonetheless, the first cause of action, alleging breach of the alleged oral promise, fails to state a cause of action, because the alleged promise was superseded by the HK contract, which provided that any incentive compensation would be awarded at defendants' sole discretion (*see Case v Phoenix Bridge Co.*, 134 NY 78, 81 [1892]; *College Auxiliary Serve. of State Univ. Coll. at Plattsburgh v Slater Corp.*, 90 AD2d 893 [3d Dept 1982]). The HK contract also renders unviable the second cause of action, which alleges breach of the implied covenant of good faith and fair dealing.

The third cause of action alleges that defendants' failure

to pay the orally promised bonus violated Labor Law § 193, which prohibits employers from making deductions from the wages of employees (with certain exceptions). Plaintiff contends that the promised bonus, which was withheld by defendants, fits within the definition of "wages" in Labor Law § 190(a). Even assuming an enforceable oral promise of a bonus, this cause of action would fail. We do not find that the bonus would constitute wages, since it was discretionary (pursuant to the offer letter) and based at least in part on factors other than plaintiff's own performance, including, according to the complaint, "what would be commensurate with the average of what other Managing Directors of the Natural Resources Group in New York received for 2009" (*see Truelove v Northeast Capital & Advisory*, 95 NY2d 220, 223-224 [2000]).

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: FEBRUARY 19, 2013

CLERK

Tom, J.P., Moskowitz, Richter, Manzanet-Daniels, Clark, JJ.

9294 In re John D., Jr. and Another,

Children Under Eighteen
Years of Age, etc.,

John D.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Dora M. Lassinger, East Rockaway, for appellant.

Michael A. Cardozo, Corporation counsel, New York (Kathy H. Chang of counsel), for respondent.

Tamara A. Steckler, Legal Aid Society, New York (Patricia S. Colella of counsel), attorney for the children.

_____

Order, Family Court, New York County (Clark V. Richardson, J.), entered on or about June 7, 2011, which, to the extent appealed from, after a hearing, found that respondent father neglected his children by committing acts of domestic violence in their presence, unanimously reversed, on the law and the facts, without costs, the finding of neglect vacated, and the petition dismissed as against respondent.

Petitioner failed to demonstrate by a preponderance of the evidence that respondent neglected his children by committing an

act of domestic violence in their presence (*see* Family Ct Act § 1046[b][I]). The record is not clear that the children were in the room when the alleged domestic violence occurred.

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

ENTERED: FEBRUARY 19, 2013

CLERK

Tom, J.P., Moskowitz, Richter, Manzanet-Daniels, Clark, JJ.

9297 Celia Farber, Index 106399/09
Plaintiff-Appellant,

-against-

Richard Jefferys,
Defendant-Respondent,

Kevin Kuritsky, et al.,
Defendants.

_____

Nesenoff & Miltenberg, LLP, New York (Philip A. Byler of counsel), for appellant.

Gibson, Dunn & Crutcher, LLP, New York (Joseph Evall of counsel), for respondent.

_____

Order, Supreme Court, New York County (Louis B. York, J.), entered November 9, 2011, which granted defendant Richard Jefferys' motion for summary judgment dismissing the complaint as against him, unanimously affirmed, with costs.

Supreme Court properly determined that plaintiff was a limited public figure because, through her publication of countless articles, she voluntarily injected herself into the controversial debate on whether HIV causes AIDS with a view toward influencing the debate (*see Krauss v Globe Intl.*, 251 AD2d 191, 192 [1st Dept 1998]), and "project[ed] [her] name and personality before . . . readers of nationally distributed magazines . . . to establish [her] reputation as a leading

authority" in this area (*Maule v NYM Corp.*, 54 NY2d 880, 882-883 [1981]). The court also properly concluded that the subjects of HIV/AIDS, plaintiff's journalism, and her receipt of an award for her journalism fell "within the sphere of legitimate public concern" (*Chapadeau v Utica Observer-Dispatch*, 38 NY2d 196, 199 [1975]). Indeed, the record established that plaintiff was a contentious figure within the traditional HIV/AIDS community.

Jefferys met his burden of demonstrating that plaintiff could not show by clear and convincing evidence that he made the challenged statements with actual malice or with gross irresponsibility (*see Huggins v Moore*, 94 NY2d 296 [1999]; *Chapadeau v Utica Observer-Dispatch*, 38 NY2d 196 [1975], *supra*). The record was devoid of evidence that Jefferys acted with knowledge that his statements were false or with reckless disregard for the truth, or that he did not follow the standards of information gathering employed by reasonable persons. Jefferys sufficiently explained that his statement about plaintiff's journalism was based on his expertise and research on HIV/AIDS for many years, on an article signed by prominent experts in the field, as well as on the many articles in the record which critiqued plaintiff's 2006 article as being filled with misquotes or misrepresentations. Jefferys also provided

documentation to support why he believed what he wrote about the plaintiff was true and compared in detail plaintiff's journalism to the articles and studies she cited and explained why he believed her work to contain misrepresentations.

In opposition, plaintiff failed to raise a triable issue of fact. Her effort to establish that her work does not contain misquotes or misrepresentations is immaterial because even if plaintiff were correct about her work, she can point to no evidence that would establish actual malice or gross irresponsibility (*Mahoney v Adirondack Publ. Co.*, 71 NY2d 31, 39 [1987] ["(f)alsity and actual malice are distinct concepts"]). Similarly, plaintiff's assertion that Jefferys was biased against her or bore her ill will does not aid her cause (*see Harte-Hanks Communications, Inc. v Connaughton*, 491 US 657, 666 [1989]). Moreover, there is no reason to offer less protection to the contested statement because it was made via an Internet communication (*see Sandals Resorts Intl. Ltd. v Google, Inc.*, 86 AD3d 32, 43-44 [1st Dept 2011]).

Supreme Court was also correct in finding that the use of the word "liar" in the contested statement was not actionable (*see Ram v Moritt*, 205 AD2d 516 [2d Dept 1994]; *see also Steinhilber v Alphonse*, 68 NY2d 283, 294 [1986]). The full

content of the statement, including its tone and apparent purpose, and the broader context of the statement and surrounding circumstances leads to the conclusion that what was being read was "likely to be opinion, not fact" (*see Thomas H. v Paul B.*, 18 NY3d 580, 584 [2012] [internal quotation marks omitted]; *see Immuno AG. v Moor-Jankowski*, 77 NY2d 235, 254 [1991], *cert denied* 500 US 954 [1991]).

Supreme Court appropriately resolved the case through summary judgment because the issues can be determined by the objective proof in the record (*see Kipper v NYP Holdings Co., Inc.*, 12 NY3d 348, 354 [2009]; *Karaduman v Newsday, Inc.*, 51 NY2d 531, 545 [1980]), and no additional discovery was necessary or warranted to resolve the motion.

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: FEBRUARY 19, 2013

CLERK

Tom, J.P., Moskowitz, Richter, Manzanet-Daniels, Clark, JJ.

9298 Tribeca Lending Corporation, Index 105275/07
Plaintiff-Respondent,

-against-

Gregory M. Bartlett, etc.,
Defendant-Appellant.

_____

Gregory M. Bartlett, appellant pro se.

Jill C. Lesser, New York, for respondent.

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered April 13, 2011, which, to the extent appealed from as limited by the briefs, upon renewal, denied defendant's motion to vacate a default judgment of foreclosure, unanimously affirmed, without costs.

Even if the appraisal report were newly discovered and therefore a proper basis for renewal after our affirmance of the prior order (84 AD3d 496 [1st Dept 2011]) (*see Tishman Constr. Corp. of N.Y. v City of New York*, 280 AD2d 374, 377 [1st Dept 2001]), the motion would be denied because the appraisal report would not change the prior determination (*see* CPLR 2221[e][2]; *New Haven Props. v Grinberg*, 302 AD2d 331 [1st Dept 2003]).

There is no evidence to support attributing to plaintiff lender any possible fraud by the appraiser of defendant's property in connection with his mortgage loan.

We perceive no basis for granting plaintiff's request for sanctions on appeal.

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

ENTERED: FEBRUARY 19, 2013

CLERK

Tom, J.P., Moskowitz, Richter, Manzanet-Daniels, Clark, JJ.

9300 B&H Associates of New York LLC, doing business as Prudential Douglas Elliman Real Estate, Plaintiff-Appellant, Index 603234/09

-against-

Andrea Ackerman, Defendant-Respondent.

_____

Cole Hansen Chester, LLP, New York (Michael S. Cole of counsel), for appellant.

Margolin & Pierce, LLP, New York (Errol F. Margolin of counsel), for respondent.

_____

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered July 18, 2012, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for summary judgment, unanimously affirmed, without costs.

The provision of the parties' April 25, 2007 letter agreement requiring plaintiff brokerage firm to pay defendant broker draws based on commissions (plural), which is not limited to any stated period of time, is ambiguous since it is subject to different interpretations (*see Feldman v National Westminster Bank*, 303 AD2d 271 [1st Dept 2003], *lv denied* 100 NY2d 505 [2003]). Defendant also established the existence of triable

issues of fact, including whether plaintiff was the first to repudiate this provision of the parties' agreement.

We have reviewed plaintiff's remaining claims and find them unavailing.

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

ENTERED: FEBRUARY 19, 2013

CLERK

Tom, J.P., Moskowitz, Richter, Manzanet-Daniels, Clark, JJ.

9302 Martin Weinstein, Index 104823/11
Plaintiff-Appellant,

-against-

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

_____

Fred Lichtmacher, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Fay Ng of counsel), for respondents.

_____

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered November 7, 2011, which granted defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

A claim for prima facie tort cannot be asserted by an at-will employee to avoid this State's rule that a wrongful termination claim is not available to him (*Russek v Dag Media Inc.*, 47 AD3d 457 [1st Dept 2008]). Nor may plaintiff avoid the defects in his defamation claim by recasting the claim as one for prima facie tort (*see Freihofer v Hearst Corp.*, 65 NY2d 135, 142-143 [1985]). As plaintiff withdrew his defamation claim during oral argument of the motion, his request for discovery to enable him to replead it is not properly before us. Were we to consider the request, we would deny it, because plaintiff failed to show that he has a valid claim for defamation; he may not use

discovery – either pre-action or pretrial – to remedy the defects in his pleading (*see Liberty Imports v Bourguet*, 146 AD2d 535, 536 [1st Dept 1989]; *Chappo & Co., Inc. v Ion Geophysical Corp.*, 83 AD3d 499, 500-501 [1st Dept 2011]). The fraudulent inducement claim is pleaded without the requisite specificity (*see* CPLR 3016[b]), since it alleges only that plaintiff was "led to believe" that defendants would not interfere with his subsequent job search, and fails to identify any statement by defendants or any speaker (*see MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 87 AD3d 287, 295 [1st Dept 2011]).

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

ENTERED: FEBRUARY 19, 2013

CLERK

Tom, J.P., Moskowitz, Richter, Manzanet-Daniels, Clark, JJ.

9303 Stamell & Schager LLP, Index 118155/09
Plaintiff-Respondent,

-against-

Vladimir Dubinin,
Defendant-Appellant.

_____

Vladimir Dubinin, appellant pro se.

Stamell & Schager, LLP, New York (Richard J. Schager, Jr. of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Ira Gammerman, JHO), entered December 23, 2011, which, after a nonjury trial, awarded plaintiff law firm fees with interest, costs and disbursements in the total amount of $32,523.02, unanimously affirmed, without cost.

Defendant does not challenge the terms of the retainer agreement, that the work was performed, or the reasonableness of the time expended by plaintiff in representing defendant in the

underlying action. His arguments on appeal are unavailing as well as unpreserved and/or unsupported by the record.

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

ENTERED: FEBRUARY 19, 2013

CLERK

Tom, J.P., Moskowitz, Richter, Manzanet-Daniels, Clark, JJ.

9304N 338 W. 46th Street Realty, LLC, Index 570421/10
Petitioner-Respondent,

-against-

George Morton, et al.,
Respondents-Appellants.

_____

Bierman & Palitz, LLP, New York (Mark H. Bierman of counsel), for appellants.

Daniel R. Miller, Brooklyn, for respondent.

_____

Order of the Appellate Term of the Supreme Court, First Department, entered on or about July 15, 2011, which, to the extent appealed from, modified an amended order of Civil Court, New York County (Gary F. Marton, J.), entered on or about October 7, 2009, to reduce the amount of attorneys' fees awarded to respondents, unanimously affirmed, without costs.

Notwithstanding that the proceeding before the Division of Housing & Community Renewal (DHCR) was related to the summary possession proceeding, Real Property § 234 is not applicable to

the DHCR proceeding, and respondents are not entitled to attorneys' fees incurred therein (*see Matter of Blair v New York State Div. of Hous. & Community Renewal*, 96 AD3d 687 [1st Dept 2012]).

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

ENTERED: FEBRUARY 19, 2013

CLERK