SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 29, 2015

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Andrias, Saxe, Richter, Clark, JJ.

11333 In re Dean T., Jr. and Another,

Dependent Children Under the
Age of Eighteen Years, etc.,

Dean T., Sr.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Carol K. Kahn, New York, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Karen M. Griffin of counsel), for respondent.

Karen P. Simmons, The Children's Law Center, Brooklyn (Barbara H. Dildine of counsel), attorney for the child Dean T., Jr.

Tamara A. Steckler, The Legal Aid Society, New York (Adira Hulkower of counsel), attorney for the child Devonte T.

_____

Order, Family Court, Bronx County (Monica Drinane, J.), entered on or about September 11, 2012, which, after a fact-finding hearing, determined that respondent father had abused his elder son and had derivatively neglected his younger son, unanimously affirmed, without costs.

On May 13, 2014, we held this appeal in abeyance and remanded the matter for an in camera review of the elder son's mental health treatment records, in accordance with Family Court Act § 1038(d), so that the Family Court could determine whether the records were relevant to the central issue of the child's credibility before making its disclosure ruling (117 AD3d 492).

The Family Court conducted the review and found no evidence in the subject records that the child had been fabricating the allegations of abuse, that he had been coached, or that he had mental health issues which would have affected his capacity to tell the truth. The court concluded that the interests of justice did not outweigh the child's need for confidentiality and denied the father's motion to subpoena and review the subject records (Mental Hygiene Law § 33.13[c][1]). Upon our independent review of the record, including review of the mental health records, we affirm this determination.

The record also supports a finding, by a preponderance of the evidence, of abuse and derivative neglect (*see* Family Court Act § 1046[b][i]). The testimony of the father's elder son as to the father's sexual abuse of him on multiple occasions was detailed and specific and, other than blanket denials, the father presented no evidence that refuted it.

We have considered and rejected the father's additional claims raised on the original appeal and in the supplemental briefing.

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

ENTERED: JANUARY 29, 2015

CLERK

Gonzalez, P.J., Saxe, Richter, Feinman, Kapnick, JJ.

13091 875 West 181 Owners Corp., Index 79223/10
Petitioner-Respondent, 570105/12

-against-

KB Gallery, LLC, et al.,
Respondents.

- - - - -

875 River View Realty, LLC,
Intervenor-Appellant.

_____

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

Ilene Guralnick, New York, for respondent.

_____

Order of the Appellate Term of the Supreme Court, First Department, entered February 22, 2013, which affirmed an order of the Civil Court, New York County (Andrea Masley, J.), entered on or about May 17, 2011, granting petitioner-co-op's motion to strike the intervenor's answer for lack of standing, unanimously reversed, on the law, without costs, the motion denied, the answer reinstated, and the matter remanded to Civil Court for further proceedings.

The co-op commenced the instant commercial holdover proceeding following judicial denial of the commercial tenant's (KB Gallery) petition for *Yellowstone* relief (*see KB Gallery, LLC v 875 W. 181 Owners Corp.*, 76 AD3d 909 [1st Dept 2010]). The

intervenor had assigned its interest in the commercial leasehold to KB Gallery's principal, individually, who, in turn, assigned the lease over to KB Gallery. In connection with the intervenor's assignment to the principal, the principal purchased the intervenor's leasehold interest, and in connection therewith, the principal purportedly executed a promissory note in the intervenor's favor in the amount of $550,000. The terms of the assignment provided, inter alia, that payment of the full amount of the purchase price, in specified installments, was contingent upon the principal and/or KB Gallery remaining in possession of the commercial leasehold, and that in the event of a default by the principal or KB gallery upon the payment obligations, the intervenor would have a reversionary interest in the leasehold.

KB Gallery contracted to sublease the premises to an entity that operated a commercial children's playhouse. The co-op served KB Gallery and the playhouse operator with a notice of termination of the lease and sublease, asserting that consent by the co-op was not obtained as required under, inter alia, the proprietary lease. KB Gallery's position was that its interest in the commercial leasehold involved "unsold shares," which excepted such lessee from the owner-consent requirements. KB Gallery's petition for *Yellowstone* relief was denied on the

procedural ground that it was untimely commenced after the time to cure had expired (*see KB Gallery*, 76 AD3d 909). Such denial of *Yellowstone* relief did not reach the merits of the validity of the co-op's notice to terminate (*see Village Ctr. for Care v Sligo Realty & Serv. Corp.*, 95 AD3d 219 [1st Dept 2012]), and the denial of preliminary injunctive relief "d[oes] not constitute [] law of the case or an adjudication on the merits" (*Town of Concord v Duwe*, 4 NY3d 870, 875 [2005]).

As such, the intervenor has demonstrated standing to serve an answer in the instant holdover proceeding, and the matter is remanded for further proceedings.

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

ENTERED: JANUARY 29, 2015

CLERK

Gonzalez, P.J., Friedman, Andrias, Gische, Kapnick, JJ.

14069- Ind. 3420/11
14070 The People of the State of New York, 2412/11
Respondent,

-against-

Jacqueline Leycock,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of The Appellate Defender, New York (Samantha L. Stern of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (William Terrell, III of counsel), for respondent.

_____

Appeals having been taken to this Court by the above-named appellant from judgments of the Supreme Court, Bronx County (Martin Marcus, J.), rendered on or about January 31, 2013,

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: JANUARY 29, 2015

CLERK

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

Gonzalez, P.J., Friedman, Andrias, Gishe, Kapnick, JJ.

14071 24 Fifth Owners, Inc., et al, Index 114280/10
Plaintiffs-Appellants,

-against-

Sirius America Insurance Company
now known as Delos Insurance Company,
Defendant-Respondent,

Illinois Union Insurance Company, et al.,
Defendants.

_____

Brill & Associates, P.C., New York (Corey M. Reichardt of counsel), for appellants.

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

_____

Order, Supreme Court, New York County (Carol Robinson Edmead, J.), entered June 14, 2013, which denied plaintiffs' motion for summary judgment, unanimously affirmed, with costs.

Plaintiffs' claim that Sirius's disclaimer letter did not specify that the late notice defense was based on the time that had elapsed between 24 Fifth Owners, Inc.'s receipt of the underlying complaint and the tender to Sirius, even considered for the first time on appeal as a purely legal argument (*cf. Titova v D'Nodal*, 117 AD3d 431, 431 [1st Dept 2014]), is unavailing, as the letter, which also referenced the policy condition relied upon, sufficiently apprised plaintiffs that

notice was considered untimely relative to either event - the date of occurrence or of receipt of the lawsuit (*see Massot v Utica First Ins. Co.*, 36 AD3d 499, 499 [1st Dept 2007], *lv denied* 8 NY3d 812 [2007]).

Where an insurance policy requires an insured to provide notice "as soon as practicable" after an occurrence, such notice must be provided within a reasonable time under all the facts and circumstances of each case (*Heydt Contr. Corp. v American Home Assur. Co.*, 146 AD2d 497, 498 [1st Dept 1989], *lv dismissed* 74 NY2d 651 [1989]), and the question of such reasonableness is generally a factual question for a jury (*see Jenkins v Burgos*, 99 AD2d 217, 219-220 [1st Dept 1984]).

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

ENTERED: JANUARY 29, 2015

CLERK

Gonzalez, P.J., Friedman, Andrias, Gische, Kapnick, JJ.

14072 George Newman, et al., Index 155632/12
Plaintiffs-Respondents,

-against-

RCPI Landmark Properties, LLC, et al.,
Defendants-Appellants.

_____

Ahmuty, Demers & McManus, Albertson (Glenn A. Kaminska of counsel), for appellants.

Napoli Bern Ripka Shkolnik LLP, New York (Annie E. Causey of counsel), for respondents.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered February 18, 2014, which denied defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

It is undisputed that plaintiff George Newman was injured when he followed a coworker in climbing down from a loading platform by stepping onto piled up milk crates, which were on the ground, although defendants provided a wall-mounted ladder for use in exiting the platform. Plaintiff's choice to use the crates rather than the ladder was the sole cause of his injuries

(see Torres v 1420 Realty, LLC, 111 AD3d 434 [1st Dept 2013]; *see also Montgomery v Federal Express Corp.*, 4 NY3d 805 [2005]). Whether the ladder was visible behind the trucks that were parked in the area is irrelevant, since plaintiff testified that he did not look for another means of accessing the parking level.

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

ENTERED: JANUARY 29, 2015

CLERK

Gonzalez, P.J., Friedman, Andrias, Gische, Kapnick, JJ.

14073 Matteo Nania, Index 402990/10
Plaintiff-Respondent,

-against-

Metropolitan Transit Authority, et al.,
Defendants-Appellants.

_____

Zaklukiewicz & Puzo, LLP, Islip Terrace (Daniel E. Furshpan of counsel), for appellants.

Matteo Nania, respondent pro se.

_____

Order, Supreme Court, New York County (George J. Silver, J.), entered August 20, 2013, which granted plaintiff's motion for reargument and, upon reargument, denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Under the circumstances presented, where the parties offered conflicting versions as to how the accident occurred, the court properly found that triable issues of fact and credibility precluded the dismissal of the action (*see Odikpo v American Tr., Inc.*, 72 AD3d 568 [1st Dept 2010]; *Elamin v Robert Express*, 290 AD2d 291 [1st Dept 2002]).

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

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

ENTERED: JANUARY 29, 2015

CLERK

Gonzalez, P.J., Friedman, Andrias, Gische, Kapnick, JJ.

14074 The People of the State of New York, SCI 1348/13
Respondent,

-against-

Gary Wade,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Margaret E. Knight of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Larry Stephen, J.), rendered on or about September 19, 2013, unanimously affirmed.

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

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

service of a copy of this order.

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

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

ENTERED: JANUARY 29, 2015

CLERK

Gonzalez, P.J., Friedman, Andrias, Gische, Kapnick, JJ.

14076 Edward Borner, Index 309359/08
Plaintiff-Respondent-Appellant,

-against-

Fordham University, et al.,
Defendants-Appellants-Respondents,

Sasaki Architects, et al.,
Defendants.

_____

Donovan Hatem LLP, New York (Scott K. Winikow of counsel), for appellants-respondents.

O'Dwyer & Bernstien, LLP, New York (Beena Ahmad of counsel), for respondent-appellant.

_____

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered October 22, 2013, which to the extent appealed from as limited by the briefs, denied so much of defendants Fordham University (Fordham) and Mueser Rutledge Consulting Engineers' (MRCE) motion for summary judgment as sought dismissal of the common law negligence and Labor Law § 200 claims, and granted so much of defendants' motion as sought summary judgment dismissing the Labor Law § 241(6) claim insofar as it was based on a violation of Industrial Code § 23-1.7(d), unanimously affirmed, without costs.

The motion court properly denied that portion of defendants'

motion seeking dismissal of plaintiff's Labor Law § 200 and common law negligence claims. There are questions of fact concerning whether Fordham, the property owner, had actual or constructive notice of the icy condition that allegedly caused plaintiff, a core driller employed by nonparty Aquifier Drilling & Testing, to slip and fall (*see Urban v No. 5 Times Square Dev., LLC*, 62 AD3d 553, 556 [1st Dept 2009]). There are also questions of fact as to whether MRCE, a geotechnical engineering firm hired to assure compliance with construction plans and specifications, had control over plaintiff's work and the work site, precluding summary judgment (*see id.; Davis v Lenox School*, 151 AD2d 230, 231 [1st Dept 1989]).

The motion court properly dismissed plaintiff's Labor Law §241(6) claim insofar as it was predicated on a violation of Industrial Code 23-1.7(d). This regulation has no application to

the instant facts since plaintiff fell in a parking lot, not "'a floor, passageway, walkway, scaffold, platform or other elevated working surface,' within the purview of 12 NYCRR 23-1.7(d)" (*Raffa v City of New York*, 100 AD3d 558, 559 [1st Dept 2012]).

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

ENTERED: JANUARY 29, 2015

CLERK

Gonzalez, P.J., Friedman, Andrias, Gische, Kapnick, JJ.

14077 Leota Susan Branche, Index 304723/08
Plaintiff-Respondent,

-against-

Douglas Holloway,
Defendant-Appellant.

_____

Howard Benjamin, New York, for appellant.

Laurence P. Greenberg, New York, for respondent.

_____

Judgment of divorce, New York County (Ellen Gesmer, J.), entered August 29, 2013, inter alia, distributing the marital property, awarding spousal maintenance, child support, and counsel fees to plaintiff wife, and adjudging defendant husband in criminal contempt and sentencing him to 20 days' incarceration to be served on weekends, unanimously affirmed, without costs.

Supreme Court's unequal distribution of marital property in plaintiff's favor is amply supported by the record (*see* Domestic Relations Law § 236[5][d]; *Holterman v Holterman*, 3 NY3d 1 [2004]). The court carefully considered all relevant factors, including the parties' 18-year marriage, the parties' joint decision that plaintiff would take care of the children and home to the detriment of her career, the gross disparity in the parties' current and probable future incomes, the parties' age at

the time of trial – defendant was 59 and plaintiff was 55 – and their respective good health. The court also properly considered defendant's egregious economic fault in liquidating, dissipating, or failing to account for more than $2 million in assets, which represents approximately 25% of the marital estate, as well as his failure to disclose various accounts, and the fact that he increased the encumbrances on the marital home in violation of a court order (*see e.g. Maharam v Maharam*, 245 AD2d 94 [1st Dept 1997]).

The court properly imputed to defendant income of $1 million annually based on the fact that he earned in excess of $1 million annually from 2000 through 2009 (*Lennox v Weberman*, 109 AD3d 703 [1st Dept 2013]; *see also Hickland v Hickland*, 39 NY2d 1 [1976], *cert denied* 429 US 941 [1976]). The report and testimony of a vocational expert showed that defendant's present and future earning potential was $1 million annually and that defendant had failed to conduct a reasonable job search after his employment was terminated in 2009. Moreover, while defendant's base salary in the position for which he was hired in 2011 was $350,000, he was eligible for two bonuses that would bring his total salary to $1 million.

The maintenance award is supported by the record (*see*

Domestic Relations Law § 236[B][6][a]; *Naimollah v De Ugarte*, 18 AD3d 268, 271 [1st Dept 2005]). In determining its amount and duration, the court properly considered the marital standard of living, the length of the marriage and age of the parties, the parties' earning potential, the fact that, as of March 2011, plaintiff was raising the children without any assistance from defendant, and the amount of time that plaintiff would need to become self-supporting, given the limiting of her career throughout the marriage in favor of raising the children and taking care of the home.

The court properly calculated defendant's child support obligation by applying the statutory percentage to the parties' income in excess of the statutory cap, based on the income it had properly imputed to defendant (*see* Domestic Relations Law § 240[1-b][f]; *Matter of Cassano v Cassano*, 85 NY2d 649, 654-655 [1995]).

The finding of criminal contempt against defendant is overwhelmingly supported by the record, which includes evidence of his willful failure to pay the child and spousal support ordered in the pendente lite order and his failure to demonstrate any genuine attempt to obtain employment (*see* Judiciary Law § 750; *see Spector v Spector*, 18 AD3d 380 [1st Dept 2005]).

The award of counsel fees to plaintiff is supported by the respective financial positions of the parties and all the other circumstances of the case, which include the unnecessary litigation caused by defendant's failure to comply with discovery obligations, support obligations, and various orders of the court (*see* Domestic Relations Law § 237; *Johnson v Chapin*, 12 NY3d 461, 467 [2009]).

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

ENTERED: JANUARY 29, 2015

CLERK

Gonzalez, P.J., Friedman, Andrias, Gische, Kapnick, JJ.

14078 The People of the State of New York, Ind. 1017/09
Respondent,

-against-

Keith Mitchell,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

_____

Judgment, Supreme Court, Bronx County (Steven L. Barrett, J. at plea; John Moore, J. at sentencing), rendered on or about March 5, 2012, unanimously affirmed.

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

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

service of a copy of this order.

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

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

ENTERED: JANUARY 29, 2015

CLERK

Gonzalez, P.J., Friedman, Andrias, Gische, Kapnick, JJ.

14079 In re Elizabeth T.,
Petitioner-Respondent,

-against-

Andrew T.,
Respondent-Appellant.

_____

Leslie S. Lowenstein, Woodmere, for appellant.

White, Quinlan & Stanley, LLP, Garden City (Terence M. Quinlan of counsel), for respondent.

_____

Order, Family Court, New York County (Carol Goldstein, Referee), entered on or about December 10, 2013, which denied respondent's motion to vacate a two-year order of protection in petitioner's favor, unanimously reversed, on the law, without costs, and the order of protection vacated.

The order of protection is vacated because, even though it was properly entered upon respondent's failure to appear at the scheduled hearing, the Court of Appeals has since determined that the family offense of aggravated harassment in the second degree

(Penal Law § 240.30[1]), upon which this particular order of protection was based, "is unconstitutionally vague and overbroad" (*People v Golb*, 23 NY3d 455, 467 [2014]; *see Matter of Lystra Fatimah N. v Rafael M.*, 122 AD3d 499 [1st Dept 2014]; *Matter of Arnold v Arnold*, 119 AD3d 938, 939 [2d Dept 2014]).

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

ENTERED: JANUARY 29, 2015

CLERK

Gonzalez, P.J., Friedman, Andrias, Gische, Kapnick, JJ.

14080-
14081 Daniel Jollon,
Plaintiff-Appellant,

-against-

The City of New York City,
Defendant-Respondent.

Index 106692/09

Sullivan Papain Block McGrath & Cannavo P.C., New York (Stephen C. Glasser of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Susan P. Greenberg of counsel), for respondent.

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered July 19, 2013, which, to the extent appealed from as limited by the briefs, granted defendant's motion for summary judgment dismissing the cause of action under General Municipal Law § 205-a, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered April 16, 2014, which, upon reargument, adhered to the original determination, unanimously dismissed, without costs, as academic.

There is no evidence in the record that plaintiff's injury was directly or indirectly caused by a violation of either the statute or the regulation upon which his Municipal Law § 205-a claim is predicated (*see generally Williams v City of New York*, 2

NY3d 352, 363 [2004]). Pursuant to Labor Law § 27-a(3)(a)(1), defendant was required to furnish to plaintiff "employment and a place of employment ... free from recognized hazards ... and reasonable and adequate protection to [his] li[fe], safety or health." Plaintiff was injured not because of a defect in the facility or his equipment but because of a training instructor's failure to ensure that his personal protection system was properly attached to his bunker gear before he self-repelled from a training building (*see Williams*, 2 NY3d at 367-368; cf. *Gammons v City of New York*, ___ NY3d ___, 2014 NY Slip Op 08869 [2014]).

As the record shows that plaintiff's equipment was functional and in good order, there is no evidence that his injury was caused by any violation of 29 CFR 1910.156(d), which requires the employers of fire brigades to inspect firefighting equipment at least annually, "to assure the safe operational condition of the equipment."

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

ENTERED: JANUARY 29, 2015

CLERK

Gonzalez, P.J., Friedman, Andrias, Gische, Kapnick, JJ.

14082 The People of the State of New York, Ind. 687N/11
Respondent,

-against-

Larry Alexander,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of The Appellate Defender, New York (Sam Mendez of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Robert M. Stolz, J.), rendered December 19, 2012, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the third degree (two counts), criminally using drug paraphernalia in the second degree and unlawfully dealing with a child in the first degree, and sentencing him, as a second felony drug offender previously convicted of a violent felony, to an aggregate term of eight years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. In

addition to police testimony, there was evidence of recorded phone calls by defendant that can reasonably be interpreted as incriminating.

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 29, 2015

CLERK

Gonzalez, P.J., Friedman, Andrias, Gische, Kapnick, JJ.

14083- SCI 1876/11
14084 The People of the State of New York, Ind. 1640/12
Respondent,

-against-

Shanika Damm,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Eve Kessler of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Rebecca L. Johannesen of counsel), for respondent.

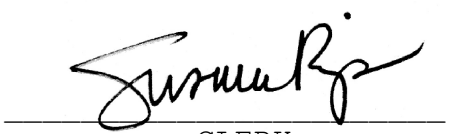
_____

Appeals having been taken to this Court by the above-named appellant from judgments of the Supreme Court, Bronx County (Ethan Greenberg, J. at plea; Eugene Oliver, J. at sentencing [SCI 1876/11], and Eugene Oliver, J. [Ind. 1640/12), rendered on or about July 19, 2012,

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: JANUARY 29, 2015



CLERK

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

Gonzalez, P.J., Friedman, Andrias, Gische, Kapnick, JJ.

14086- Index 652367/10
14087-
14088-
14089 AQ Asset Management, LLC, as
Successor to Artist House
Holding Inc., et al.,
Plaintiffs-Respondents,

-against-

Michael Levine,
Defendant-Respondent,

Habsburg Holdings Ltd., et al.,
Defendants-Appellants.

_____

Law Offices of Michael A. Haskel, Mineola (Michael A. Haskel of counsel), for appellants.

Reitler Kailas & Rosenblatt LLC, New York (Edward P. Grosz of counsel), for AQ Asset Management, Antiquorum, S.A., Antiquorum USA, Inc. and Evan Zimmermann, respondents.

Levine & Associates, P.C., Scarsdale (Michael Levine of counsel), for Michael Levine, respondent.

_____

Orders, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered March 3, 2014, which, insofar as appealed from as limited by the briefs, denied the motion of defendants Habsburg Holdings Ltd. and Osvaldo Patrizzi for a default judgment on their cross claims against defendant Michael Levine, denied their motions to obtain full accountings from Levine and plaintiff Evan Zimmermann and for leave to issue certain

subpoenas to financial institutions, and granted the cross motion of Levine to the extent of dismissing, in part, Habsburg and Patrizzi's fourth cross claim against him, and the seventh cross claim in its entirety, unanimously affirmed, with costs. Order, same court and Justice, entered August 16, 2014, which directed the sealing of certain documents in this action, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered January 17, 2014, which dismissed appellants' fifth counterclaim against plaintiffs in its entirety and the sixth counterclaim against plaintiffs in part, unanimously dismissed, without costs, as moot.

The court properly dismissed the breach of fiduciary duty cross claim against Levine as escrow attorney to the extent it related to the authorized disbursement of $625,000 to Karastir, LLC. It also properly dismissed, in its entirety, the cross claim against Levine for breach of fiduciary duty in his individual capacity as appellants' attorney.

The court properly exercised its discretion in denying appellants' request for the entry of a default judgment on their cross claims against Levine, and in directing the sealing of certain documents in this litigation.

Nor did the court abuse its discretion in denying appellants' motions to obtain full accountings from Levine and plaintiff Evan Zimmermann and for leave to issue certain subpoenas to financial institutions.

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

ENTERED: JANUARY 29, 2015

CLERK

Gonzalez, P.J., Friedman, Andrias, Gische, Kapnick, JJ.

14093 The People of the State of New York, Ind. 2902/10
Respondent,

-against-

Dolores Abreu,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Jeffrey Dellheim of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Kelly Anne Holohan of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Judith Leib, J.), rendered on or about December 7, 2012,

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: JANUARY 29, 2015

CLERK

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

Gonzalez, P.J., Friedman, Andrias, Gische, Kapnick JJ.

14094N Julius Goodwin, Index 152769/13
Plaintiff-Respondent,

-against-

Empire City Subway Company, Ltd., et al.,
Defendants,

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

_____

Morris Duffy Alonso & Faley, New York (Kerry E. Sullivan and Andrea M. Alonso of counsel), for appellants.

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Order, Supreme Court, New York County (Louis B. York, J.), entered on or about January 29, 2014, which denied the unopposed motion by the City of New York and the New York City Department of Transportation (collectively the City) to amend the answer to assert certain affirmative defenses and counterclaims, unanimously modified, on the law, to grant so much of the City's motion as sought to assert affirmative defenses and cross claims other than affirmative defenses based on Workers' Compensation, accord and satisfaction and the emergency doctrine, and otherwise affirmed, without costs.

The affirmative defenses based on Workers' Compensation Law, accord and satisfaction and the emergency doctrine are waived by

the City. In the absence of any opposition, either to the motion below or to this appeal, it cannot be said that the proposed amended affirmative defenses or cross-claims are "palpably insufficient" or "patently devoid of merit" (*see Kocourek v Booz Allen Hamilton Inc.*, 85 AD3d 502, 504-505 [1st Dept 2011]; *Perrotti v Becker, Glynn, Melamed & Muffly LLP*, 82 AD3d 495, 498 [1st Dept 2011]), especially at this early stage of discovery. Nor can it be said that plaintiff or co-defendants were surprised or prejudiced by proposed amendments, as no party felt it necessary to oppose the motion. There is certainly no "indication that the [opposing party] has been hindered in the preparation of [its] case or has been prevented from taking some measure in support of [its] position" (*Kocourek v Booz Allen Hamilton Inc.*, 85 AD3d at 504). The City was not required to establish the merits of each of the affirmative defenses or cross

claims (see *Perrotti v Becker, Glynn, Melamed & Muffly LLP*, 82 AD3d at 498), so long as they were not palpably insufficient or patently devoid of merit, and did not surprise or prejudice any opposing party.

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

ENTERED: JANUARY 29, 2015

CLERK

Gonzalez, P.J., Friedman, Andrias, Gische, Kapnick, JJ.

14095 In re Sean Doughty, Ind. 3757/13
[M-5430] Petitioner,

-against-

Bronx County Criminal Supreme Court, et al.,
Respondents.

Sean Doughty, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Anthony J. Tomari of counsel), for Bronx County Criminal Supreme Court, respondent.

Robert T. Johnson, District Attorney, Bronx (Melanie A. Sarver of counsel), for Robert T. Johnson, respondent.

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

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

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

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

ENTERED: JANUARY 29, 2015

CLERK

Friedman, J.P., Acosta, Saxe, Manzanet-Daniels, Gische, JJ.

13515 CRP/Extell Parcel I, L.P., Index 113914/10
Petitioner-Appellant,

-against-

Andrew M. Cuomo, etc., et al.,
Respondents,

3to4, LLC, et al.,
Respondents-Respondents.

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Boies, Schiller & Flexner LLP, Armonk (Jason C. Cyrulnik of counsel), for appellant.

Cohen & Coleman, LLP, New York (John A. Coleman, Jr. of counsel), for respondents.

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Judgment, Supreme Court, New York County (Anil C. Singh, J.), entered August 12, 2013, to the extent appealed from as limited by the briefs, awarding respondents purchasers 9% interest, with amounts specified for each purchaser, unanimously reversed, on the law, without costs, the judgment vacated, and the motion denied.

Following the dismissal of an underlying Article 78 proceeding and this court's affirmance of the dismissal (101 AD3d 473 [1st Dept 2012]), the motion court entered money judgments in favor of respondents, representing statutory interest on the monies that the New York State Attorney General directed be

returned to them (*see* CPLR 5001). Petitioner challenges both the jurisdictional and the substantive basis for the monetary award. Because we find that the motion court did not have jurisdiction to issue the money judgments after the underlying proceeding had been dismissed, we reverse without reaching the substantive issues regarding whether prejudgment interest calculated at the statutory rate was proper.

Petitioner CRP/Extell Parcel is the sponsor of newly constructed condominium units in the Rushmore Condominium. After petitioner failed to honor respondents' rights as purchasers to rescind the purchase agreements if the first closing under the plan did not occur by a date certain, respondents filed complaints with the New York State Attorney General. The Attorney General issued an administrative determination directing petitioner and its escrow agent to release to respondents approximately $16 million in down payments, because the first unit sale failed to close by "September 1, 2008," the date set forth in the condominium's offering plan. The first closing did not occur until February 12, 2009. Although petitioner sought reformation of the offering plan and purchase agreements on the basis that the "2008" date was an unintended scrivener's error, and the intended deadline

was actually "September 1, 2009," the Attorney General rejected that argument, finding no evidence that the earlier date (September 1, 2008) was contrary to the parties' intention.

Petitioner then filed this hybrid action challenging the Attorney General's determination pursuant to Article 78 of the CPLR. It also sought reformation of the purchase agreements based on the claimed scrivener's error. In their answer to the petition, respondents demanded that petitioner and its escrow agent release the down payments to them "together with prejudgment interest." Respondents did not, however, assert any counterclaims seeking a money judgment for the unpaid down payments, or file a cross petition challenging the Attorney General's award in any manner.

The motion court dismissed the petition, directing that petitioner and its escrow agent return the down payments "together with any accumulated interest." We affirmed that order, and petitioner returned the down payments with the interest that accrued while the funds were in escrow. Notwithstanding the dismissal of this proceeding, the motion court entertained a postjudgment motion by respondents for "statutory interest" under CPLR 5001 and entered judgment for statutory, prejudgment interest as compensation for having been

deprived of their monies.

CPLR 5001(a) "mandates the award of interest to verdict in breach of contract actions" (*see J. D'Addario & Co. v Embassy Indus., Inc.*, 20 NY3d 113, 117 [2012] [internal citations omitted]) or where an act or omission deprives or interferes with title to, or possession or enjoyment of property (CPLR 5001[a]). The interest award is to "compensate the wronged party for the loss of use of the money" (*id.*). Respondents, however, never asserted a breach of contract claim, or a claim for interference with property. Indeed, they made no affirmative claim for relief at all, but solely opposed the petition for reversal of the Attorney General's determination that it was not entitled to reformation of the operative documents. To the extent they sought a release of the down payments in escrow with prejudgment interest, that request simply tracked the direction of the Attorney General and did not, from any pleading point of view, seek resolution of any dispute regarding the applicable interest rate or amount of interest owed. The request for statutory interest was, therefore, not fairly raised in the underlying pleadings which did not contain a counterclaim for make a specific reference to, interest under CPLR 5001. There was no basis for the motion court to award interest after we affirmed

dismissal of the action.

In an Article 78 proceeding the court's review is limited to whether the action taken was in violation of lawful procedure, was affected by error of law, was arbitrary or capricious, or was on abuse of discretion. Although petitioner asserted plenary claims in this hybrid action, the relief was for a stay of the Attorney General's determination and reformation of the contract, both of which are contradictory to purchasers' goals of enforcing the agreement, as written, allowing them to recover their down payments. Consequently, the motion court exceeded its jurisdiction by deciding the parties' dispute regarding a proper rate of interest after the action had been fully resolved.

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

ENTERED: JANUARY 29, 2015

CLERK

Mazzarelli, J.P., DeGrasse, Manzanet-Daniels, Feinman, Gische, JJ.

13895-
13895A Index 305112/08

Amilda Agosto, as Administratrix
of the Estate of Cecilia Rosado
Rodriguez, Deceased,
Plaintiff-Respondent,

-against-

Ohannes A. Nercessian,
Defendant-Appellant,

Douglas D. Nowak, et al.,
Defendants.

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Morris Duffy Alonso & Faley, New York (Arjay G. Yao, Kevin G. Faley and James E. Pannone of counsel), for appellant.

Meagher & Meagher, P.C., White Plains (Merryl F. Weiner of counsel), for respondent.

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Order, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered July 11, 2013, which, to the extent appealed from, upon renewal, denied defendant Ohannes Nercessian's motion for summary judgment dismissing the complaint and cross claims as against him, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered November 26, 2012, unanimously dismissed, without costs, as superseded by the appeal from the July 11, 2013 order.

On February 9, 2007, decedent underwent a total knee replacement performed by defendant Dr. Nercessian, an orthopedic

surgeon. Post-operatively, defendant issued orders including, inter alia, the administration of 10 mg of Lisinopril daily by mouth and 25 mg of Hydrocholorthiasize by mouth, as well as oxycodone for pain.

On February 10, 2007, the day following surgery, decedent complained of stomach pain and constipation to the hospital staff. During his morning visit, Dr. Nercessian advised decedent that he was leaving for an orthopedic conference in San Diego, and purported to have left her in the care of Dr. Howard A. Kiernan, another attending orthopedist at the hospital. It is undisputed that neither Dr. Kiernan, nor any other attending physician, saw decedent prior to discharge.

On February 10, 2007, decedent was given oxycodone pursuant to the standing orders issued by Dr. Nercessian. At 2:00 a.m. the next morning, decedent was given Zofran for her complaints of nausea. Later that morning, she was administered an enema in response to gastrointestinal complaints. Throughout, decedent continued to complain to hospital personnel that her "stomach hurt[]."

During the afternoon of February 11, 2007, decedent continued to complain of stomach pain, bloating and constipation and was given milk of magnesia and numerous suppositories. A

distended abdomen was twice noted.

On February 12, 2007, decedent complained of stomach pain, abdominal bloating, constipation, nausea and vomiting. She ran a fever of 102.8, and became tachycardic.

On February 13, 2007, decedent was still running a fever and complaining of stomach pain, abdominal bloating, constipation, nausea and vomiting. Nonetheless, she was discharged from the hospital at approximately 3:45, without being first examined by an attending physician. Dr. Nercessian electronically signed the discharge papers, which list him as "attending physician."

On February 14, 2007, at 6:30 a.m., 15 hours post-discharge, decedent was found face down, dead, on her bedroom floor.

The motion court, upon renewal, denied Dr. Nercessian's motion for summary judgment, finding triable issues of fact as to whether decedent was properly transferred to the care of another physician on February 10, 2007, and whether Dr. Nercessian's postoperative care of decedent until the time he left for the conference was in conformity with good and accepted medical practice. We agree, and now affirm.

A defendant in a medical malpractice action establishes prima facie entitlement to summary judgment when he or she establishes that in treating the plaintiff he or she did not

depart from good and accepted medical practice or that any such departure was not the proximate cause of the plaintiff's alleged injuries (*see Thurston v Interfaith Med. Ctr.*, 66 AD3d 999 [2d Dept 2009]). Once a defendant doctor meets his or her burden, the plaintiff must rebut defendant's prima facie showing via medical evidence attesting that the defendant departed from accepted medical practice and that such departure was a proximate cause of the injuries alleged (*see id.*).

Plaintiff raises triable issues of fact as to whether Dr. Nercessian departed from accepted medical practice in abandoning the decedent and failing to ensure adequate coverage during his absence. Dr. Kiernan, to whom care was purportedly transferred, acknowledged that he made no notes in the chart, and did not personally treat decedent during her hospital stay. Although he maintained that he was responsible for supervising the residents, he answered no queries concerning the decedent, nor did he modify or change any of the orders that had been issued by Dr. Nercessian. Dr. Nercessian, not Dr. Kiernan, is listed as the attending physician for decedent for the entirety of her admission. Dr. Nercessian, not Dr. Kiernan, is listed on the discharge papers as the attending physician and electronically signed the discharge order. The record contains no affirmation

from the hospital or an expert concerning the propriety of the alleged oral transfer of care from Dr. Nercessian to Dr. Kiernan. Indeed, Dr. Nercessian's statement that "decedent's care was entrusted to [the] New York Presbyterian staff," contradicts his argument that care was entrusted to Dr. Kiernan, as the record contains an affidavit from a hospital administrator stating, inter alia, that Dr. Kiernan was not employed by the hospital. The fact that Dr. Kiernan surfaced after expiration of the statute of limitations further undermines the assertion that he assumed decedent's care. Dr. Nercessian asserts that plaintiff became aware of the identity of Dr. Kiernan during defendant's EBT; however, Dr. Nercessian's EBT took place after the statute of limitations had already expired. This case is distinguishable from *Brown v Bauman* (42 AD3d 390 [1st Dept 2007]), in which the defendant doctor confirmed, via telephone, than an attending physician was providing care to his patient pending his arrival.

Plaintiff also raises triable issues of fact as to whether Dr. Nercessian's postoperative treatment of decedent deviated from good and accepted medical practice. Plaintiff's expert opined, to a reasonable degree of medical certainty, that the failure to order either a gastroenterology or cardiology consultation constituted a departure from the standard of care.

The expert opined that it was departure to fail to order radiological studies and/or endoscopies of decedent's bowel, and a departure to fail to develop a differential diagnosis for decedent's symptoms which included colonic ileus, blockage and/or bowel ischemia. Plaintiff's expert also opined that it was a departure to continue decedent's medications without any further parameters, and to order a daily intake diet of 1,800 calories in the presence of abdominal pain and distension. He opined that decedent's blood pressure medications were a substantial factor in reducing the blood flow to her cecum and terminal ileum leading to bowel ischemia. Plaintiff's expert further opined that it was departure to discharge decedent without an attending physician first conducting a predischarge examination. The expert opined that in light of decedent's symptoms at the time, i.e., fever, abdominal pain, and bloating, she ought not to have been discharged.

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

ENTERED: JANUARY 29, 2015

CLERK

Tom, J.P., Saxe, Feinman, Clark, Kapnick, JJ.

13976 Migdalia Negroni, Index 302136/09
Plaintiff-Respondent, 84257/09

-against-

Langsam Property Services Corp.,
et al.,
Defendants-Respondents-Appellants.

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Langsam Property Services Corp.,
et al.,
Third-Party Plaintiffs-
Respondents-Appellants,

-against-

A&G Plastering and Tile Corp.,
Third-Party Defendant-
Appellant-Respondent.

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Law Office of Judah Z. Cohen, PLLC, Woodmere (Judah Z. Cohen of counsel), for appellant-respondent.

Rosenbaum & Taylor, P.C., White Plains (Scott P. Taylor of counsel), for respondents-appellants.

Pollack, Pollack, Isaac & DeCicco, LLP, New York (Jillian Rosen of counsel), for respondent.

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Order, Supreme Court, Bronx County (Edgar G. Walker, J.), entered February 14, 2013, which, inter alia, denied the motion of defendants/third-party plaintiffs for summary judgment dismissing the complaint, and denied the motion of third-party defendant A&G Plastering and Tile Corp. (A&G) for summary

judgment dismissing the complaint and the third-party complaint, unanimously modified, on the law, to grant A&G's motion to the extent it seeks dismissal of the contractual indemnification cause of action in the third-party complaint, and otherwise affirmed, without costs.

Defendants did not establish entitlement to judgment as a matter of law in this action where plaintiff was injured when the kitchen ceiling in her apartment collapsed. Defendants failed to submit sufficient evidence showing that they neither created nor had actual or constructive notice of the dangerous condition (*see e.g. Best v 1482 Montgomery Estates, LLC*, 114 AD3d 555 [1st Dept 2014]; *Lisbey v Pel Park Realty*, 99 AD3d 637 [1st Dept 2012]; *Perez v 2305 Univ. Ave., LLC*, 78 AD3d 462 [1st Dept 2010]).

The record shows that the same portion of the ceiling had collapsed the previous year and defendants failed to address the allegations that the ceiling had been negligently repaired and that defendants failed to properly inspect the site to ensure its structural integrity, thus causing or contributing to the second collapse, which injured plaintiff. Indeed, defendants' evidence concerning the work performed consisted merely of invoices for plastering and sheetrock repair. The record further demonstrates that there were leaks in two of the apartments directly above

plaintiff's apartment less than two months before the subject accident, that the superintendent's inspection several weeks earlier revealed bubbling paint on the wall abutting plaintiff's kitchen, and that he noted a concealed leak.

As no opposition has been submitted to A&G's challenge on appeal to the denial of that part of its motion seeking dismissal of the contractual indemnification cause of action in the third-party complaint, the order is modified to the extent indicated.

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

ENTERED: JANUARY 29, 2015

CLERK