SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 28, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

16077 Jorge DaSilva, Index 305435/10
Plaintiff-Appellant,

-against-

KS Realty, L.P., et al.,
Defendants-Respondents,

3223 Johnson Avenue Services, Inc.,
Defendant.

_____

Ogen & Sedaghati, P.C., New York (Eitan Alexander Ogen of counsel), for appellant.

Ryan & Conlon, LLP, New York (Christopher M. Carfora of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered May 20, 2014, which granted the motion of defendants KS Realty, L.P., and Steven Klein for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Plaintiff alleges that he fell in his apartment because of the sloping condition of the hallway floor, which caused his desk

chair to roll. Defendants made a prima facie showing that the slope of the apartment floor was a trivial defect, not a trap or dangerous condition (*see Leon v Alcor Assoc., L.P.*, 96 AD3d 635, 635 [1st Dept 2012]; *Marcus v Namdor, Inc.*, 46 AD3d 373, 374 [1st Dept 2007]). Defendants submitted photographs showing the floor to be in good condition, and also submitted evidence that plaintiff lived in his apartment for 16 years at the time of the accident, and thus was familiar with the condition of the hallway where the incident occurred. Moreover, the sloping condition of the floor in the hallway did not prevent plaintiff from using the space for his desk and chair without incident for approximately one year prior to the incident. Defendants also submitted an expert affidavit of an engineer who opined that the 4% slope in the area where plaintiff allegedly fell was not, in his opinion, a substantial factor or a proximate cause of the accident (*see Leon*, 96 AD3d at 635), and did not violate any code or standard. Defendants' failure to provide the certificate required by CPLR 2309(c) with the expert's report was a "mere irregularity," which the court properly excused, especially since defendants provided a corrected copy (*Matapos Tech. Ltd. v Compania Andina de Comercio Ltda*, 68 AD3d 672, 673 [1st Dept 2009]).

In opposition, plaintiff failed to raise an issue of fact.

While his expert engineer opined that the overall condition of the floor, which sloped as much as 5% in some areas, was dangerous, the engineer did not address how the slope was a proximate cause of plaintiff's fall from his chair (*see Stylianou v Ansonia Condominium*, 49 AD3d 399, 399 [1st Dept 2008]). Although plaintiff need not identify precisely what caused him to fall, "mere speculation about causation is inadequate to sustain [a] cause of action" (*Acunia v New York City Dept. of Educ.*, 68 AD3d 631, 631-632 [1st Dept 2009]).

The Decision and Order of this Court entered November 5, 2015 herein on is hereby recalled and vacated (*see* M-6305 decided simultaneously herewith).

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

ENTERED: APRIL 28, 2016

CLERK

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

40 The People of the State of New York, Ind. 4936/10
Respondent,

-against-

Ricardo Moya,
Defendant-Appellant.

_____

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

Ricardo Moya, appellant pro se.

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

_____

Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered March 19, 2013, convicting defendant, after a jury trial, of burglary in the second degree, and sentencing him, as a second violent felony offender, to a term of seven years, unanimously reversed, on the law, and the matter remanded for a new trial.

In conducting a colloquy on defense counsel's request to be relieved, the court erred in failing to permit defendant to provide any input, or to even be present. At least by the time that the substance of counsel's ex parte application became clear, defendant should have been included in the proceeding.

Defendant had criticized the performance of trial counsel

persistently and in many regards, in letters to the court and on the record in pretrial proceedings. He requested new counsel and also filed a disciplinary complaint against counsel while the case was pending. Nothing in the record suggests that counsel's performance was deficient on the grounds alleged or that defendant was entitled to new counsel on these grounds.

However, during the first afternoon of trial testimony, in an ex parte colloquy with the court that counsel requested, counsel, while recounting the efforts he had made to zealously represent defendant, stated, among other things, that he was concerned that defendant was attempting to "set [him] up to be the basis of his appeal for ineffective assistance of counsel or some other type of misconduct." Counsel also read to the court a letter he had received from defendant, in which defendant, among other things, stated, in a plainly accusatory manner, that "[t]here is no doubt where your interests lies," and that he "hope[d] you and [the judge] can continue a fine relationship." Counsel asked to be relieved and the court denied the request.

We agree with defendant that this proceeding was an "ancillary proceeding[] [at which] he . . . may have [had] something valuable to contribute" (*People v DePallo*, 96 NY2d 437, 443 [2001]), and thus that his exclusion from it was error.

While defendant may not have been able to justify counsel's removal, we cannot say that the "new matter" brought to light at the ex parte proceeding – where counsel revealed the content of a privileged communication with the court, and expressed the belief that defendant's criticisms of his performance were insincere attempts to sow error in the record – implicated "no potential for meaningful input from [] defendant" (*id.*) on the subject of whether continued representation by counsel was appropriate.

The proceeding also implicated the court's obligation to make a "minimal inquiry" regarding whether the new facts justified substitution of counsel (*see People v McCummings*, 124 AD3d 502 [1st Dept 2015]; *see also People v Brown*, 305 AD2d 422 [2d Dept 2003]). As in *McCummings*, "[w]e are mindful that had the court considered the application, only the most compelling circumstances would have justified granting it," but find that "a new trial is unavoidable under the circumstances presented" (124 AD3d at 504).

In light of the foregoing, we find it unnecessary to reach defendant's remaining contentions, including those contained in

his pro se supplemental brief, except that we find that the verdict was based on legally sufficient evidence.

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

ENTERED: APRIL 28, 2016

CLERK

Saxe, J.P., Moskowitz, Richter, Feinman, JJ.

109 Pinhas Zahavi, etc., Index 151635/13
Plaintiff-Respondent-Appellant,

-against-

JS Barkats PLLC, et al.,
Defendants-Appellants-Respondents.

_____

JSBarkats, PLLC, New York (Marc J. Block of counsel), for appellants-respondents.

D' Agostino, Levine, Landesman & Lederman, LLP, New York (Bruce H. Lederman of counsel), for respondent-appellant.

_____

Judgment, Supreme Court, New York County (Joan A. Madden, J.), entered April 9, 2015, awarding plaintiff interest at the statutory rate of 9% on a previously awarded principal sum, to the extent it brings up for review an order, same court and Justice, entered December 5, 2014, which, inter alia, granted plaintiff's motion to resettle a prior order, unanimously affirmed, and appeal from said judgment, to the extent it brings up for review an order, same court and Justice, entered April 16, 2014, which, inter alia, denied plaintiff's motion for partial summary judgment on his claim for an additional sum, unanimously dismissed, with costs to be paid by defendants.

Supreme Court acted within its authority in resettling an order to award interest owed to plaintiff (*see e.g. Williams v*

City of New York, 111 AD3d 420 [1st Dept 2013]; *Matter of New York State Urban Dev. Corp. [Alphonse Hotel Corp.]*, 293 AD2d 354 [1st Dept 2002]). The court properly determined that the period of interest should commence from the date on which plaintiff established that defendants lacked any good faith basis for retaining the principal sum in escrow and therefore were no longer entitled to the protection of Judiciary Law § 497(5), and could not be considered stakeholders within the meaning of CPLR 1006(f). It is of no consequence that defendants received no benefit from the money because it was held in their IOLA account (*see Toledo v Iglesia Ni Christo*, 18 NY3d 363, 369 [2012]).

Plaintiff's appeal from the judgment is dismissed since it concerns the claim he voluntarily discontinued pursuant to CPLR 3217(b).

We have considered all other claims and find them to be unavailing.

The Decision and Order of this Court entered herein on February 4, 2016 is hereby recalled and vacated (*see* M-764 & 898 decided simultaneously herewith).

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

ENTERED: APRIL 28, 2016

CLERK

Tom, J.P., Andrias, Manzanet-Daniels, Kapnick, Gesmer, JJ.

801-
802 Ind. 13761/91

The People of the State of New York,
Respondent,

-against-

Jose Rodriguez,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Beth Fisch Cohen of counsel), for respondent.

_____

Order, Supreme Court, New York County (James M. Burke, J.), entered on or about December 22, 2014, which denied defendant's Correction Law § 168-o(2) petition to modify his sex offender classification from level three to level two, unanimously affirmed, without costs.

The court providently exercised its discretion in denying a modification. The mitigating factors cited by defendant, including his age and his positive progress, are outweighed by the seriousness of the underlying crime and defendant's criminal

record, including his parole violations (*see e.g. People v McCormack*, 129 AD3d 644 [1st Dept 2015], *lv denied* 26 NY3d 908 [2015]).

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

ENTERED: APRIL 28, 2016

CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Kapnick, Gesmer, JJ.

944-
945 The People of the State of New York, Ind. 4777/10
Respondent, 1342/13

-against-

Adrian Khapesi also
known as Derrick Douglas,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Natalia Bedoya-McGinn of counsel), for respondent.

_____

Judgments, Supreme Court, New York County (Charles H. Solomon, J.), rendered November 26, 2013, as amended February 5, 2014, convicting defendant, upon pleas of guilty, of attempted assault in the first degree and violation of probation, and sentencing him, as a second violent felony offender, to a term of seven years on the attempted assault conviction, and to a concurrent term of one year for the probation violation, unanimously affirmed.

Defendant was not entitled to a youthful offender determination in connection with the violation of probation proceeding. At the time of his 2011 attempted robbery conviction, defendant was not considered for YO treatment, was

sentenced to probation without such treatment, and did not appeal. Since "to revoke a penalty of probation does not equate to annulling a sentence" (*People v Thompson*, __ NY3d __, 2016 NY Slip Op 00997, *4 [2016]), there is no reason to apply the principles of *People v Rudolph* (21 NY3d 497 [2013]) to defendant's situation. The 2011 judgment was final, and the violation of probation only resulted in a replacement of the original conditional penalty with a different punishment.

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

ENTERED: APRIL 28, 2016

CLERK

Acosta, J.P., Manzanet-Daniels, Kapnick, Gesmer, JJ.

946 In re Joseph Sanchez, Index 250137/13
Petitioner-Appellant,

-against-

Bronx County District Attorney's Office,
Respondent-Respondent.

_____

Joseph Sanchez, appellant pro se.

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

_____

Appeal from order, Supreme Court, Bronx County (Wilma Guzman, J.), entered March 20, 2014, which, to the extent appealed from as limited by the briefs, denied in part the petition seeking to compel respondent to disclose certain records pursuant to the Freedom of Information Law (FOIL), unanimously dismissed, without costs.

"No appeal lies as of right from an order in an article 78 proceeding remanding a matter to an agency for further nonministerial proceedings" (*Matter of Clermont Tenants Assn. v New York State Div. of Hous. & Community Renewal*, 73 AD3d 658, 658 [1st Dept 2010]; *see Matter of Crawford v New York City Dept.*

of Info. Tech. & Telecom., 136 AD3d 591 [1st Dept 2016]; *see also* CPLR 5701[b][1]), and we decline to grant leave sua sponte.

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

ENTERED: APRIL 28, 2016

CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Kapnick, Gesmer, JJ.

949 Freeway Company, LLC, Index 107203/11
Plaintiff-Appellant,

-against-

Technology Insurance Company, Inc.,
Defendant-Respondent,

Turan Umer,
Defendant.

_____

Goldberg & Carlton, PLLC, New York (Robert H. Goldberg of counsel), for appellant.

Farber, Brocks & Zane, LLP, Garden City (Sherri N. Pavloff of counsel), for respondent.

_____

Order, Supreme Court, New York County (Paul Wooten, J.), entered April 28, 2015, which denied plaintiff's motion for summary judgment declaring that defendant Technology Insurance Company, Inc. has a duty to defend and indemnify plaintiff in the underlying action, and granted Technology's motion for summary judgment declaring in its favor, and dismissed the complaint, unanimously modified, on the law, to declare that Technology has no duty to defend or indemnify plaintiff in the underlying action, and otherwise affirmed, without costs.

Plaintiff failed to establish prima facie that its failure to give timely notice of the occurrence to Technology should be

excused on the ground that it had a reasonable belief in non-liability (*see Security Mut. Ins. Co. of N.Y. v Acker-Fitzsimons Corp.*, 31 NY2d 436 [1972]; *SSBSS Realty Corp. v Public Serv. Mut. Ins. Co.*, 253 AD2d 583 [1st Dept 1998]). The record demonstrates that plaintiff unreasonably failed to keep itself informed of potential claims for damages arising from the incident (*see e.g. 310 E. 74 LLC v Fireman's Fund Ins. Co.*, 106 AD3d 469 [1st Dept 2013]; *Tower Ins. of N.Y. v Amsterdam Apts., LLC*, 82 AD3d 465 [1st Dept 2011].

Further, Technology was not required to show that it was prejudiced as a result of plaintiff's late notice, because the subject policy was issued before Insurance Law § 3420 was amended to provide that an insurer could disclaim coverage based on untimely notice only if it was prejudiced by the untimely notice (*see id.* § 3420[5]). The amendment expressly applies to policies issued on or after its effective date, January 17, 2009 (L 2008, ch 38, § 8).

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

While the motion court reached the correct result, we note that where, as here, a declaratory judgment action is resolved on the merits against the plaintiff, the proper course is to declare

in favor of the defendant, rather than dismiss the action (*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: APRIL 28, 2016

CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Kapnick, Gesmer, JJ.

950 William C. Osborn, et al., Index 152998/14
Plaintiffs-Appellants,

-against-

56 Leonard LLC, et al.,
Defendants-Respondents.
- - - - -
[And a Third-Party Action]

_____

Pollack, Pollack, Isaac & DeCicco, LLP, New York (Brian J. Isaac of counsel for appellants.

Ropers Majeski Kohn & Bentley, New York (Jason L. Beckerman of counsel), for respondents.

_____

Order, Supreme Court, New York County (Shlomo Hagler, J.), entered December 16, 2014, which granted defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

Plaintiff William C. Osborn, a New Jersey domiciliary, was injured by an unguarded saw blade while working at a site located in New Jersey. At the time, he was aware that the part he was fabricating was going to be installed at a construction site owned and operated by defendants, located in Manhattan. After being injured, Osborne and his wife asserted several claims grounded in the New York Labor Law (*see* Labor Law §§ 200, 241[6]). It is, however, well "settled that the protection afforded to New York employees by the Labor Law, including Labor

Law §§ 200, 240(1) and 241(6), has no application to an accident that occurs outside New York State, even where all parties are New York domiciliaries" (*Webber v Mutual Life Ins. Co. of N.Y.*, 287 AD2d 369, 370 [1st Dept 2001]; *see also Padula v Lilarn Props. Corp.*, 84 NY2d 519, 523 [1994 Titone, J., concurring]; *Florio v Fisher Dev.*, 309 AD2d 694, 696 [1st Dept 2003]; *cf. DaSilva v C & E Ventures, Inc.*, 83 AD3d 551 [1st Dept 2011]). Accordingly, because, inter alia, the accident undisputedly occurred in New Jersey at a site neither owned operated nor controlled by defendants and because plaintiffs were New Jersey domiciliaries, the court properly granted defendants' motion to dismiss the complaint.

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

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

ENTERED: APRIL 28, 2016

CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Kapnick, Gesmer, JJ.

951 The People of the State of New York, Ind. 4667/12
Respondent,

-against-

Lorde Young,
Defendant-Appellant.

_____

Scott A. Rosenberg, The Legal Aid Society, New York (Kristina Schwarz of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered December 6, 2012, convicting defendant, upon his plea of guilty, of grand larceny in the fourth degree, and sentencing him to a term of one year, unanimously affirmed.

The sentencing court properly found that it had no discretion to defer defendant's mandatory surcharge (*see People v Jones*, __ NY3d __, 2016 NY Slip Op 01208 [2016]).

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

ENTERED: APRIL 28, 2016

CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Kapnick, Gesmer, JJ.

952 Golden Technology Management, LLC, et al., Plaintiffs-Respondents, Index 653514/13

-against-

NextGen Acquisition, Inc., et al., Defendants-Appellants.

_____

Heller, Horowitz & Feit, P.C., New York (Stuart A. Blander of counsel), for appellants.

DeGraff, Foy, & Kunz, LLP, Albany (George J. Szary of counsel), for respondents.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered December 22, 2014, which, insofar as appealed from as limited by the briefs, denied defendants' motion for summary judgment dismissing the breach of contract cause of action, unanimously reversed, on the law, with costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint.

Plaintiffs allege that defendants breached the payment provisions of a stock purchase agreement (the contract), which required defendant NextGen Acquisition, Inc. to pay a purchase price consisting of a cash payment to be made at closing and a "holdback" amount, defined in the agreement, to be placed into an

account of the acquired company, nonparty NextGen Fuels, Inc., and held for a period of no more than one year. The contract created two separate obligations – an obligation to deposit funds into a separate account at closing and an obligation to pay those funds to plaintiffs one year later. Plaintiffs commenced this action against NextGen Acquisition and allegedly related entities almost seven years after the closing date but less than six years after the holdback amount was to be distributed from the company's account.

While plaintiffs argue that the contract did not expressly require deposit of the holdback amount "at closing," the relevant provisions of the contract clearly required the deposit to be made at or about the time of closing, so that the holdback would be available to either indemnify the buyers or make payment to the sellers, pursuant to the contract. A cause of action for breach of the deposit obligation would therefore be time-barred. However, plaintiffs do not seek to enforce the deposit obligation. They seek to enforce the payment obligation only, and the cause of action for breach of that obligation accrued one year after closing, i.e., when plaintiffs obtained "a legal right to demand payment" (*see Hahn Automotive Warehouse, Inc. v American Zurich Ins. Co.*, 18 NY3d 765, 770 [2012] [internal

quotation marks omitted]).

Nevertheless, although it is not time-barred (CPLR 213[2]), the cause of action for breach of the payment obligation must be dismissed because defendants are not responsible for that breach; the payment obligation belongs to nonparty NextGen Fuels, Inc.

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

ENTERED: APRIL 28, 2016

CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Kapnick, Gesmer, JJ.

953-
954 Index 653706/13

Spectris Inc.,
Plaintiff-Respondent,

-against-

The 1997 Milton B. Hollander Family Trust, et al.,
Defendants-Appellants.

_____

DLA Piper LLP (US), New York (Timothy E. Hoeffner of counsel), for appellants.

Sidley Austin LLP, New York (Eamon P. Joyce of counsel), for respondent.

_____

Orders, Supreme Court, New York County (Eileen Bransten, J.), entered July 28, 2014, which, to the extent appealed from as limited by the briefs, denied defendants' motion to dismiss the first amended complaint, unanimously affirmed, with costs.

The motion court correctly concluded that a judgment in a prior action in Delaware between privies of the parties here does not bar plaintiff's action under the doctrine of res judicata. The res judicata effect of a judgment is determined by the law of the rendering jurisdiction (*see Bruno v Bruno*, 83 AD3d 165, 169 [1st Dept 2011], *lv denied* 18 NY3d 805 [2012]). Under Delaware law, a subsequent action is barred if, among other things, "the original court had jurisdiction over the subject matter and the

parties[,]" and "the original cause of action or the issues decided was the same as the case at bar" (*LaPoint v AmerisourceBergen Corp.*, 970 A2d 185, 192 [Del 2009]).

Here, the motion court correctly found that plaintiff's cause of action is not the same as in the prior action. In the prior action, plaintiff's privies asserted an affirmative defense of fraud, based on the assertion that defendants had made misrepresentations as to undisclosed liabilities under a purchase agreement between plaintiff and defendants. Although the affirmative defense relied on the same provision of the purchase agreement that forms the basis for plaintiff's claim here, the court in Delaware expressly found that the purchase agreement was not relevant or controlling in the Delaware action, but that the action turned on the independent termination agreements among the parties in that action. Accordingly, the affirmative defense in the Delaware action and the issues decided in that action, although arising from the same operative facts, are not the same as plaintiff's claim and the issues raised in the action at bar (*see Villare v Beebe Med. Ctr., Inc.*, 2013 WL 2296312, *3-4, 2013 Del Super LEXIS 197, *11-15 [Del Super Ct, May 21, 2013, C.A. No. 08C-10-189 (JRJ)]; *Zutrau v Jansing*, 2013 WL 1092817, *3-4, 2013 Del Ch LEXIS 71, *9-10 [Del Ch, March 18, 2013, C.A. No. 7457-

VCP]).

Further, the Delaware court lacked jurisdiction to hear the instant claim, because the purchase agreement contains a mandatory choice of jurisdiction clause in favor of New York (*see Elf Atochem N. Am., Inc. v Jaffari*, 727 A2d 286, 288-289, 292 [Del 1999]).

The motion court correctly determined that plaintiff stated a viable breach of contract claim. Defendants are correct that the dispute over how inventory was accounted for must focus on the specific clauses in the contract dealing with inventory, rather than general representations that the financial statements comply with Generally Accepted Accounting Principles (GAAP) (*see Waldman v New Phone Dimensions*, 109 AD2d 702, 704 [1st Dept 1985], *appeal dismissed* 65 NY2d 784 [1985]). However, textual ambiguities as to the applicability of certain carveouts from GAAP treatment, and as to whether there were multiple GAAP-compliant methods of accounting for the inventory, preclude dismissal at the pleading stage.

Plaintiff's alleged knowledge of the accounting practices at issue does not effect a waiver of its claims for breach of warranty (*see CBS Inc. v Ziff-Davis Publ. Co.*, 75 NY2d 496, 503-504 [1990]). At most, there is an issue of fact as to

whether plaintiff had agreed that the procedures in exhibit B of the purchase agreement limiting the applicability of GAAP were applicable to limit the general warranty of compliance with GAAP(*cf. Galli v Metz*, 973 F2d 145, 151 [2d Cir 1992] [matter remanded to determine whether breach of warranty claim was waived]).

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

ENTERED: APRIL 28, 2016

CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Kapnick, Gesmer, JJ.

955 In re E., etc.,

Nekadam Y.,
Petitioner-Appellant,

-against-

David B. and Jennifer B.,
Respondents-Respondents.

_____

Steven N. Feinman, White Plains, for appellant.

The Law Firm of Brett Kimmel, P.C., New York (Brett Kimmel of counsel), for respondents.

Anne Reiniger, New York, attorney for the child.

_____

Order, Surrogate's Court, New York County (Kristin Booth Glen, S.), entered December 31, 2012, which denied plaintiff's motion to set aside or revoke her extrajudicial consent and to dismiss the adoption proceeding of the infant by respondents, unanimously affirmed, without costs.

The court properly restricted the hearing to appellant's allegations that she was defrauded into signing the consent and the agreement concerning postadoption communication based on statements made to her by respondents. This court already determined that any technical deficiencies in the consent form did not invalidate it (*see Matter of Eliyahu [Nina Y.- Jennifer*

B.], 104 AD3d 488, 489 [1st Dept 2013]).

The court properly concluded that appellant failed to demonstrate by clear and convincing evidence that she was fraudulently induced to consent to the adoption of her son based on statements by respondent Jennifer B. that they would be "like sisters," the child would be enrolled in a yeshiva, would retain his Bukharian heritage and Russian language, and would always call plaintiff, "Mom." The court noted that no evidence was presented that even if these promises were made by respondents, they were false when made and respondents did not intend to act accordingly (*see Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]).

Moreover, deference should be accorded the court's credibility determination, which is supported by the record (*see Thoreson v Penthouse Intl.*, 80 NY2d 490, 495 [1992]).

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

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

ENTERED: APRIL 28, 2016

CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Kapnick, Gesmer, JJ.

956 The People of the State of New York, Ind. 2028/14
Respondent,

-against-

Jeffrey Smith,
Defendant-Appellant.

_____

Aidala Bertuna & Kamins, P.C., New York (Barry Kamins of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered March 9, 2015, convicting defendant, after a jury trial, of criminal sexual act in the first degree, 2 counts of sexual abuse in the first degree, and 41 counts of unlawful surveillance in the second degree, and sentencing him to an aggregate term of five years, unanimously affirmed. The matter is remitted to Supreme Court for further proceedings pursuant to CPL 460.50(5).

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence established all the required elements, including the victim's physical helplessness during the sex crimes. There is no basis for disturbing the jury's credibility determinations. The

victim's testimony was significantly corroborated by that of other witnesses, including the responding police officers, as well as by the photographs defendant took of the victim. On the other hand, defendant had falsely denied that his phone contained any photos of the victim, and defendant's trial testimony was generally inconsistent with his prior statements.

It was error for the court not to have precluded, on the ground of lack of CPL 710.30(1)(a) notice, defendant's statement that he "may have been a little inappropriate" with the victim, since the "sum and substance" (*People v Lopez*, 84 NY2d 425, 428 [1994]) of that statement was not provided by the noticed statements, which were considerably less inculpatory (*see People v Greer*, 42 NY2d 170, 179 [1977]). Nevertheless, the error in admitting the statement was harmless, and there was no significant probability that the jury would have acquitted defendant but for the error (*see People v Crimmins*, 36 NY2d 230 [1975]).

Defendant's challenges to certain testimony regarding the victim's prompt outcry and to portions of the prosecutor's summation are unpreserved, and we decline to review them in the

interest of justice. As an alternative holding, we find no basis for reversal.

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

ENTERED: APRIL 28, 2016

CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Kapnick, Gesmer, JJ.

957-
958-
959 Index 100341/12

In re Elaine Ward,
Petitioner-Appellant,

-against-

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

_____

Elaine D. Ward, appellant pro se.

Zachary W. Carter, Corporation Counsel, New York (Richard Dearing of counsel), for respondents.

_____

Order, Supreme Court, New York County (Donna M. Mills, J.), entered December 12, 2014, which denied petitioner's motion for leave to renew her motion to compel enforcement of an order of this Court, unanimously affirmed, without costs. Order, same court and Justice, entered April 20, 2015, which denied petitioner's motion f957-or a traverse hearing, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered October 24, 2014, which denied petitioner's motion to compel enforcement of an order of this Court, unanimously dismissed, without costs, as moot.

This proceeding, brought pursuant to CPLR article 78, has been finally determined by an order of the Court of Appeals

dismissing the petition (23 NY3d 1046 [2014], *rearg denied* 24 NY3d 1030 [2014]). Supreme Court correctly found that it lacked authority to overturn the order of the Court of Appeals (*see Matter of McKenna v County of Nassau, Off. of County Attorney*, 61 NY2d 739 [1984]; *Brown v Brown*, 169 AD2d 487 [1st Dept 1991]; *Maracina v Schirrmeister*, 152 AD2d 502 [1st Dept 1989]).

Petitioner's appeal from the order denying her attempt to enforce an order of this Court was rendered moot by the Court of Appeals' reversal of this Court's order (111 AD3d 498 [1st Dept 2013], *revd* 23 NY3d 1046 [2014]).

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

ENTERED: APRIL 28, 2016

CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Kapnick, Gesmer, JJ.

961 The People of the State of New York, Ind. 4350/12
Respondent,

-against-

Raymond Guillorly,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York C963ounty (Bruce Allen, J.), rendered May 22, 2013, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender previously convicted of a violent felony, to a term of six years, unanimously reversed, on the law, and the matter remanded for a new trial.

The court paraphrased two substantive jury notes rather than reading them into the record verbatim, and the record fails to demonstrate that defendant otherwise received "notice of the actual specific content of the jurors' request[s]" (*People v O'Rama*, 78 NY2d 270, 277 [1991]). Accordingly, a mode of proceedings error occurred, requiring reversal of defendant's

conviction even in the absence of objection (*see People v Walston*, 23 NY3d 986, 989 [2014]). "Where a trial transcript does not show compliance with *O'Rama*'s procedure as required by law, we cannot assume that the omission was remedied at an off-the-record conference that the transcript does not refer to" (*id.* at 990). The portions of the record cited by the People as evidence supporting an inference that these notes were revealed to counsel in their entirety are actually consistent with the notes having been described or paraphrased.

In light of this determination, we find it unnecessary to address any other issues.

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

ENTERED: APRIL 28, 2016

CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Kapnick, Gesmer, JJ.

962-
962A Index 301599/10

Jose Paulino, et al.,
Plaintiffs-Respondents,

-against-

580 8th Avenue Realty Co., LLC,
Defendant-Respondent,

Fadesa Construction Corp.,
Defendant,

Dry New York Inc.,
Defendant-Appellant.

_____

Goldberg Segalla LLP, Garden City (Brendan T. Fitzpatrick of counsel), for appellant.

Gorayeb & Associates, P.C., New York (John M. Shaw of counsel), for Jose Paulino and Maria Paulino, respondents.

Ahmuty, Demers & McManus, Albertson (Glenn A. Kaminska of counsel), for 580 8th Avenue Realty Co., LLC, respondent.

_____

Amended order, Supreme Court, Bronx County (Wilma Guzman, J.), entered April 6, 2015, which, to the extent appealed from, denied defendant Dry New York Inc.'s motion for summary judgment dismissing the Labor Law §§ 240(1) and 241(6) claims against it, and granted plaintiffs' motion for partial summary judgment on their Labor Law § 240(1) claim as against defendant Dry New York, unanimously reversed, on the law, without costs, Dry New York's motion granted, plaintiff's motion denied, and the complaint

dismissed against Dry New York. The Clerk is directed to enter judgment accordingly. Appeal from order, same court and Justice, entered February 11, 2015, unanimously dismissed, without costs, as superseded by the appeal from the amended order.

Plaintiff Jose Paulino was dismantling a scaffold outside a building when a plank on which he was standing broke, causing him to fall and sustain injuries. The accident occurred after completion of facade restoration work of a building owned by defendant 580 8th Avenue Realty Co., LLC (580). 580 retained defendant Dry New York to perform the facade work, and also retained plaintiff's employer, nonparty S&E Bridge Scaffold (S&E), to construct the subject scaffold for work on the front of the building.

Contrary to the motion court's conclusion, Dry New York was not a general contractor on the project, as it was not responsible for "the co-ordination and execution of all the work under all the contracts" on the project (*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 316 [1981]). Rather, the record demonstrates that 580 separately retained various prime contractors for the job, and coordinated the work among all those contractors itself.

Nor can Dry New York be held responsible as a statutory

"agent" under Labor Law §§ 240(1) or 241(6). Although the contract between 580 and Dry New York delegated Dry New York authority to supervise and control all work related to its facade restoration work, including the safety of the subject scaffold (*see Walls v Turner Constr. Co.*, 4 NY3d 861, 864 [2005]), such authority was limited only to the extent that Dry New York used the scaffold to perform its contracted for facade work (*see Russin*, 54 NY2d at 318). Here, it is undisputed that the facade work had been completed at the time of the dismantling of the scaffold. It is also undisputed that 580 retained S&E for construction of the scaffold, and directed S&E to dismantle the scaffold after Dry New York informed it that the scaffold was no longer needed.

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

ENTERED: APRIL 28, 2016

CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Kapnick, Gesmer, JJ.

963 The People of the State of New York, Ind. 4638/13
Respondent,

-against-

Carlos Almonte,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Diane N. Princ of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Gregory Carro, J.), rendered September 24, 2014,

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: APRIL 28, 2016

CLERK

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

Acosta, J.P., Renwick, Manzanet-Daniels, Kapnick, Gesmer, JJ.

964 London Paint & Wallpaper Co., Inc. doing business as London True Value Hardware and doing business as London Paint, et al., Plaintiffs-Respondents, Index 152878/15

-against-

Sidney Kesselman as Co-Trustee of Kesselman Living Trust Dated October 6, 1997, et al., Defendants-Appellants,

Evelyn Kesselman as Co-Trustee of Kesselman Living Trust Dated October 6, 1997, et al., Defendants.

_____

Rosen Livingston & Cholst LLP, New York (Andrew J. Wagner of counsel), for appellants.

Wasser & Russ, LLP, New York (Adam H. Russ of counsel), for respondents.

_____

Order, Supreme Court, New York County (Arthur F. Engoron, J.), entered on or about July 28, 2015, which granted plaintiffs' motion for a preliminary injunction staying a summary holdover proceeding commenced by defendant Sidney Kesselman as Co-Trustee of Kesselman Living Trust Dated October 6, 1997, pending further order of the court and on condition that plaintiffs file an undertaking in the sum of $15,000, unanimously modified, on the facts and in the exercise of discretion, to vacate the amount of the undertaking, and the matter remanded for the setting of an

appropriate undertaking in accordance herewith, and otherwise affirmed, without costs.

Plaintiffs seek a judgment declaring that certain alleged oral agreements that they have relied on for decades are valid and enforceable. Their claim raises such issues as the capacity of defendants Sidney Kesselman and Evelyn Kesselman to enter into a restated trust agreement and their respective knowledge or understanding of the terms thereof, which allegedly allowed Sidney to act alone with respect to the building owned by the trust.

Plaintiffs demonstrated irreparable harm in the absence of a preliminary injunction staying the summary holdover proceeding, a likelihood of success on the merits of their claim, and a balance of the equities in their favor (*see Doe v Axelrod*, 73 NY2d 748 [1988]). The loss of plaintiff London Paint & Wallpaper Co., Inc.'s valuable commercial leasehold interest as a result of being evicted before the enforceability of those oral agreements was determined would render the ultimate relief inadequate (*see Jiggetts v Perales*, 202 AD2d 341 [1st Dept 1994]; *Calo v Chui*, 254 AD2d 191, 192 [1st Dept 1998]).

Plaintiffs submitted affidavits and documentary evidence supporting their claims that the parties had entered into oral

agreements that London Paint would pay below market rent, to be raised only upon the parties' agreement, so long as Sidney and Evelyn were alive, which agreements were reflected in writings and relied on by plaintiff Leonard Kesselman, who, inter alia, made improvements to the property (*see Calo v Chui*, 254 AD2d at 191-192). The issues raised in this intrafamily dispute are not susceptible to resolution in a summary proceeding. Moreover, while the Civil Court is the preferred forum for landlord-tenant disputes, it lacks the authority to grant the declaratory relief sought by plaintiffs (*see Lex 33 Assoc. v Grasso*, 283 AD2d 272, 272-273 [1st Dept 2001]). As for the balance of the equities, the only possible harm to defendants, if they prevail in the action, is a delay in receiving a market rate rent for the commercial space, which can be mitigated by an appropriate undertaking.

If it is determined that the preliminary injunction was not warranted, defendants will be entitled to recover fair market value for plaintiffs' use and occupancy of the subject commercial space between the purported expiration of the lease term on March 31, 2015 and the final determination (*see C & N Camera & Elecs. v Farmore Realty*, 178 AD2d 310 [1st Dept 1991]). Although the report submitted by defendants to establish the fair market rent

for the commercial space is unsworn and unsigned, it presents some evidence that the $15,000 undertaking ordered by Supreme Court is not rationally related to their potential damages. Accordingly, we remand the matter to Supreme Court to set the amount of plaintiffs' undertaking upon receipt of competent evidence of the fair market rent for the commercial space (*see e.g. 1414 Holdings, LLC v BMS-PSO, LLC*, 116 AD3d 641, 643-644 [1st Dept 2014]).

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

ENTERED: APRIL 28, 2016

CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Kapnick, Gesmer, JJ.

966 The People of the State of New York, Ind. 2995/10
Respondent,

-against-

Michael Idowu,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Analisa Torres, J.), rendered July 25, 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: APRIL 28, 2016

CLERK

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

Acosta, J.P., Renwick, Manzanet-Daniels, Kapnick, Gesmer, JJ.

967 The People of the State of New York, Ind. 5895/11
Respondent,

-against-

Shamel Wiggins,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County, (Edward J. McLaughlin, J. at plea; Richard D. Carruthers, J. at sentencing), rendered May 15, 2013, convicting defendant of burglary in the second degree, and sentencing him to a term of 3½ years, unanimously affirmed.

The sentencing court properly found that it had no

discretion to defer defendant's mandatory surcharge (*see People v Jones*, 26 NY3d 730 [2016]).

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

ENTERED: APRIL 28, 2016

CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Kapnick, Gesmer, JJ.

968 Cesar Cruz, Index 153005/12
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent.

_____

Hallock & Malerba, P.C., Deer Park (Larry Hallock of counsel), for appellant.

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

_____

Order, Supreme Court, Bronx County (Frank Nervo, J.), entered on or about January 9, 2015, which granted defendant's motion for summary judgment, and denied plaintiff's cross motion for leave to serve an amended notice of claim, unanimously affirmed, without costs.

The court properly granted the motion of defendant, the City of New York, for summary judgment pursuant to Administrative Code § 7-210, as a record search revealed that it did not own the multiple dwelling abutting the sidewalk where, according to the notice of claim and pleadings, plaintiff allegedly fell.

The court also properly denied plaintiff's cross motion to amend the notice of claim pursuant to General Municipal Law § 50-e(6) and to amend the complaint, because "plaintiff's

inconsistency as to the location of the accident and [his] failure to move timely to correct the notice of claim prejudiced defendant's ability to investigate the incident while the surrounding facts were still fresh" (*Matos v City of New York*, 126 AD3d 570, 571 [1st Dept 2015]; *Rodriguez v City of New York*, 38 AD3d 268 [1st Dept 2007]). Plaintiff's inconsistent and vague General Municipal Law § 50-h and deposition testimony failed to correct the defect.

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

ENTERED: APRIL 28, 2016

CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Kapnick, Gesmer, JJ.

969-
970-
971-
972-
973N

Index 652367/10

AQ Asset Management LLC, etc., et al.,
Plaintiffs-Respondents,

-against-

Michael Levine,
Defendant-Respondent,

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

- - - - -

Allen/Orchard, LLC,
Nonparty Respondent.

_____

Kerry Gotlib, New York, for appellants.

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

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

Rex Whitehorn & Associates, P.C., Great Neck (Rex Whitehorn of counsel), for Allen/Orchard, LLC, respondent.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered November 14, 2014, which granted plaintiffs' motion to quash notices of deposition served by defendants Habsburg Holdings Ltd. and Osvaldo Patrizzi (the sellers), unanimously affirmed, with costs. Orders, same court

and Justice, entered January 9, 2015, which, insofar as appealed from as limited by the briefs, denied the sellers' motion to hold nonparty Allen/Orchard LLC in civil contempt, granted Allen/Orchard's cross motion for sanctions, granted the motion of nonparty Kenrock Enterprises, LLC to quash the sellers' subpoena, and granted the motion of defendant Michael Levine to quash their notice of deposition, unanimously affirmed, with costs. Order, same court and Justice, entered April 20, 2015, which granted Allen/Orchard's motion to quash two subpoenas and, sua sponte, sanctioned the sellers, unanimously affirmed, with costs.

The court providently exercised its discretion (*see e.g. Kavanagh v Ogden Allied Maintenance Corp.*, 92 NY2d 952, 953-954 [1998]) by granting plaintiffs' motion to quash. Having reviewed the excerpts of plaintiff Evan Zimmermann's deposition that are in the record, we agree with the IAS court that he was not evasive, and that a further deposition is therefore unwarranted. Assuming, arguendo, that the sellers' argument about constructive trust is a pure issue of law that can be raised for the first time on appeal (*see generally Branham v Loews Orpheum Cinemas, Inc.*, 31 AD3d 319, 323 n 2 [1st Dept 2006], *affd* 8 NY3d 931 [2007]), we note that Zimmermann's deposition testimony already allowed the sellers to trace the $2 million at issue from Levine

to Zimmermann to plaintiff Antiquorum USA, Inc. We further note that, on the instant appeal, the sellers are seeking discovery beyond that required by the $2 million claim that we reinstated in 2014 (*AQ Asset Mgt., LLC v Levine*, 119 AD3d 457 [1st Dept 2014]).

The court properly denied the sellers' motion to hold Allen/Orchard in contempt. One of the requirements for contempt is disobedience of an order (*see e.g. Matter of McCormick v Axelrod*, 59 NY2d 574, 583 [1983]). Allen/Orchard obeyed the order entered September 5, 2014, which directed it to respond to the sellers' June 18, 2014 subpoena. The order noted that the subpoena sought information concerning a single, specified payment. As the court found in the January 2015 order appealed from, Allen/Orchard actually provided more documents than required.

"While discovery should be liberal, the information sought must be material and necessary, and meet a test of usefulness and reason" (*Manley v New York City Hous. Auth.*, 190 AD2d 600, 600 [1st Dept 1993] [internal quotation marks omitted]). The negotiations between nonparties Allen/Orchard and Kenrock for a lease are far afield from the issue of whether Levine misappropriated $300,000 from the sellers.

It was not an improvident exercise of discretion for the

court to find the sellers' conduct frivolous and to sanction them (*see e.g. Great Am. Ins. Cos. v Bearcat Fin. Servs., Inc.*, 90 AD3d 533 [1st Dept 2011], *lv dismissed* 18 NY3d 951 [2012]).

With respect to the April 2015 order appealed from, the sellers contend that they needed certain documents from Allen/ Orchard and its counsel, nonparty Rex Whitehorn & Associates, P.C., to prepare for the fee hearing before the special referee that the court ordered in January 2015. This issue is moot, as the hearing has already taken place. If the sellers can make a non-frivolous argument that they were ambushed at the hearing because they did not have the subpoenaed documents in advance thereof, they can raise that issue in their future appeal from the sanctions judgment. We note that the sellers did receive Whitehorn's detailed affidavit and the relevant bill that his firm sent its client before the hearing. They did not need all records relating to Allen/Orchard's legal fees for the entire proceeding, as opposed to just the motion for which the court awarded fees. Furthermore, the sellers' claim that cross-examination of Allen/Orchard might reveal inconsistencies between the amounts claimed by Whitehorn and the amounts actually paid by Allen/Orchard is a "'hypothetical speculation[] calculated to justify a fishing expedition'" (*Manley*, 190 AD2d at 601).

We have considered the sellers' remaining arguments and find them unavailing.

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

ENTERED: APRIL 28, 2016

CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Kapnick, Gesmer, JJ.

974 In re John Reyes, Ind. 3935/14
[M-1260] Petitioner,

-against-

Hon. James Burke, etc., et al.,
Respondents.

_____

John Reyes, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Alissa S. Wright of counsel), for Hon. James Burke, respondent.

Cyrus R. Vance, Jr., District Attorney, New York (Andrew Mercer of counsel), for New York County, District Attorney, 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.

ENTERED: APRIL 28, 2016

CLERK

Tom, J.P., Mazzarelli, Friedman, Richter, Kahn, JJ.

975 The People of the State of New York, Ind. 2615/08
Respondent,

-against-

Jeffrey Wilson,
Defendant-Appellant.

_____

Jeffrey Wilson appellant pro se.

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

Darcel D. Clark, District Attorney, Bronx (Clara H. Salzberg of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Martin Marcus, J. at jury trial, Barbara F. Newman, J. at sentencing), rendered July 23, 2013, convicting defendant of robbery in the first degree and attempted assault in the first degree, and sentencing him, as a second violent felony offender, to an aggregate term of 17 years, unanimously affirmed.

The court properly exercised its discretion in replacing absent jurors in two instances. A court has broad discretion to replace a juror whose absence would cause a delay of two hours (*People v Jeanty*, 94 NY2d 507, 515-517 [2000]; CPL 270.35[2][a]). Here, each juror's absence would have far exceeded two hours, and would have unduly disrupted a trial already plagued by delays.

The court also properly exercised its discretion in charging the jury, over defense counsel's objection, that no adverse inference should be drawn from defendant's exercise of his right not to be present. Defendant chose to absent himself late in the trial, and the court properly determined that the circumstances of the case called for such an instruction in order to explain why the trial was continuing notwithstanding defendant's absence, after he had been absent on the prior day due to illness (*see People v Brisbane*, 205 AD2d 358 [1st Dept 1994], *lv denied* 84 NY2d 933 [1994]). Defendant's claim of potential prejudice is speculative.

We have considered and rejected defendant's pro se claims.

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

ENTERED: APRIL 28, 2016

CLERK

Tom, J.P., Mazzarelli, Friedman, Richter, Kahn, JJ.

976 Carol Hollman, Index 160861/13
Plaintiff-Appellant,

-against-

480 Associates Inc.,
Defendant,

The City of New York,
Defendant-Respondent.

_____

Gruenberg Kelly Della, Ronkonkoma (Zachary M. Beriloff of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Jason Anton of counsel), for respondent.

_____

Order, Supreme Court, New York County (Frank P. Nervo, J.), entered February 25, 2015, which granted defendant City's motion to dismiss the complaint and cross claims against it, unanimously reversed, on the law, without costs, and the City's motion denied.

Plaintiff's amended notice of claim satisfied the statutory notice of claim requirement by providing the City "information sufficient to enable [it] to investigate" her claim, within 90 days after the claim arose (*Brown v City of New York*, 95 NY2d 389, 393 [2000] [internal quotation marks omitted]; General Municipal Law § 50-e[1][a]; [2]). Although plaintiff initially

identified the wrong cross street, within 90 days of the accident she served an amended notice of claim, with photographs of the correct location, and the City was not prejudiced by the initial mistake since it never investigated the wrong location (*Torres v City of New York*, 125 AD3d 573, 574 [1st Dept 2015]; *see Goodwin v New York City Hous. Auth.*, 42 AD3d 63, 66 [1st Dept 2007]). Further, at her General Municipal Law § 50-h hearing, plaintiff circled on a photograph the specific area of her fall, and testified that she fell in the roadway, before she reached the sidewalk or curb, because she tripped on metal sticking out of the street. Taken together, the amended notice of claim, photographs, and 50-h testimony provided the City with sufficient information to investigate plaintiff's claim (*see Brown v City*, 95 NY2d at 393; *Torres*, 125 AD3d at 574). That the claimed defect may have been repaired in the one-month period after the

accident and before plaintiff returned to photograph the site does not render her amended notice of claim ineffective.

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

ENTERED: APRIL 28, 2016

CLERK

Tom, J.P., Mazzarelli, Friedman, Richter, Kahn, JJ.

980 The People of the State of New York, Ind. 415/13
Respondent,

-against-

Mark Travis,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Harold V. Ferguson, Jr. of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (John T. Hughes 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 (Patricia Nunez, J.), rendered January 30, 2014,

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: APRIL 28, 2016

CLERK

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

Tom, J.P., Mazzarelli, Friedman, Richter, Kahn, JJ.

981 United Services Automobile Association,
Plaintiff-Appellant-Respondent,

-against-

Robert N. Iannuzzi,
Defendant-Respondent-Appellant.

Index 150319/14

_____

Marshall Dennehey Warner Coleman & Goggin, New York (Jeffrey J. Imeri of counsel), for appellant-respondent.

Law Offices of Eric Dinnocenzo, New York (Eric Dinnocenzo of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Joan A. Madden, J.), entered January 30, 2015, which denied plaintiff's motion for summary judgment declaring that it has no obligation to defend or indemnify defendant in the underlying personal injury action, and granted defendant's motion for summary judgment to the extent of declaring that plaintiff is obligated to defend defendant in the underlying action, unanimously reversed, on the law, without costs, plaintiff's motion granted, and defendant's motion denied. The Clerk is directed to enter judgment declaring that plaintiff has no obligation to defend or indemnify defendant in the underlying action.

Defendant pleaded guilty to third-degree assault (Penal Code

§ 120.00[1] ["With intent to cause physical injury to another person, he causes such injury]"). Thus, he is collaterally estopped to litigate in this declaratory judgment action the issue of his intent to inflict bodily injury on the person he injured (the claimant) (*see Hughes v Farrey*, 30 AD3d 244, 247 [1st Dept 2006], *lv dismissed* 8 NY3d 841 [2007]).

Although, as defendant argues, "accidental results may flow from intentional causes" (*Slayko v Security Mut. Ins. Co.*, 98 NY2d 289, 293 [2002] [internal quotation marks omitted]), defendant knew that when he hit the claimant, after flipping him over his shoulder onto the pavement, injuries could result (*see State Farm Fire & Cas. Co. v Whiting*, 53 AD3d 1033, 1034 [4th Dept 2008], *appeal withdrawn* 12 NY3d 780 [2009]). The harm to the claimant was inherent in the nature of the act, although the injuries may have been more extensive than defendant intended (*see Empire Ins. Co. v Miguel*, 114 AD3d 539 [1st Dept 2014], *lv denied* 23 NY3d 908 [2014]; *cf. Automobile Ins. Co. of Hartford v Cook*, 7 NY3d 131 [2006].

Since the acts at issue were outside the scope of coverage, timely disclaimer pursuant to Insurance Law § 3420(d) was unnecessary (*see Hough v USAA Cas. Ins. Co.*, 93 AD3d 405 [1st Dept 2012]).

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

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

ENTERED: APRIL 28, 2016

CLERK

Tom, J.P., Mazzarelli, Friedman, Richter, Kahn, JJ.

982 The People of the State of New York, Ind. 3389/12
Respondent,

-against-

Bakary Camara,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Harold V. Ferguson, Jr. of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Ross D. Mazer of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Juan M. Merchan, J.), rendered November 14, 2012, as amended December 18, 2012, convicting defendant, upon his plea of guilty, of murder in the first degree, murder in the second degree (two counts), burglary in the first degree (two counts), rape in the first degree and predatory sexual assault (two counts), and sentencing him to an aggregate term of 25 years to life, unanimously affirmed.

The record does not cast doubt on defendant's mental competency, and the sentencing court was not obligated, sua sponte, to order a CPL article 730 examination based on information in defendant's presentence report (*see Pate v Robinson*, 383 US 375 [1966]; *People v Tortorici*, 92 NY2d 757 [1999], *cert denied* 528 US 834 [1999]). When defendant was

arrested, he was taken to Bellevue Hospital for psychiatric evaluation. After extensive observation and testing, the Bellevue staff concluded that defendant was a malingerer who feigned delusions and auditory hallucinations. There is nothing in the record to suggest otherwise. Although the probation officer who prepared the presentence report recommended that defendant undergo a psychiatric assessment, the report contained no basis on which to doubt defendant's competency. In particular, the report cited defendant's self-reporting of auditory command hallucinations, but the Bellevue evaluation had already found that defendant tended to fabricate such symptoms.

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

was objectively unreasonable for counsel to refrain from requesting a CPL article 730 examination at sentencing, or from advocating for a lesser sentence than the court had promised, or that defendant was prejudiced by any of counsel's conduct.

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

ENTERED: APRIL 28, 2016

CLERK

Tom, J.P., Mazzarelli, Friedman, Richter, Kahn, JJ.

983 The People of the State of New York, Case No. 25728C/10
Respondent,

-against-

Alexis Mora,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Arthur H. Hopkirk of counsel), for appellant.

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

_____

Judgment, Supreme Court, Bronx County (Joseph J. Dawson, J.), rendered January 9, 2012, convicting defendant, after a nonjury trial, of attempted forcible touching, attempted endangering the welfare of a child, and sexual abuse in the third degree, and sentencing him to an aggregate term of 15 days and a conditional discharge, 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 court's credibility determinations.

We reject defendant's claim that the superseding information was jurisdictionally defective with regard to the crime of forcible touching. The factual allegations describe conduct that would reasonably satisfy the "low threshold for the forcible

component of this crime's actus reus" (*People v Guaman*, 22 NY3d 678, 684 [2014]).

The crime of attempted endangering the welfare of a child is not a legal impossibility, because the underlying crime is not result-based, but instead involves acts that can be attempted (*see People v Vargas*, 8 Misc 3d 113 [App Term, 2d & 11th Jud Dists 2005], *lv denied* 5 NY3d 795 [2005]; *People v Vega*, 185 Misc 2d 73 [Crim Ct Bronx County 2000]; *see also People v Aponte*, 16 NY3d 106, 109 [2011]). *People v Prescott* (95 NY2d 655 [2001]) is distinguishable because the definition of the crimes at issue in that case did not contemplate an attempted offense.

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

ENTERED: APRIL 28, 2016

CLERK

Tom, J.P., Mazzarelli, Friedman, Richter, Kahn, JJ.

984-
985-
986-
987 Index 304673/11

Katarzyna Joanna Krause-Edelman,
Plaintiff-Respondent,

-against-

Lee Moss Edelman,
Defendant-Appellant.

_____

Jerome A. Scharoff, P.C., Garden City (Jerome A. Scharoff of counsel), for appellant.

Joseph & Smargiassi, LLC, New York (John Smargiassi of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Deborah A. Kaplan, J.), entered July 21, 2015, in favor of plaintiff wife, and bringing up for review an order, same court and Justice, entered November 3, 2014, which, inter alia, granted the wife's motion to enforce the terms of the parties' transcribed settlement stipulation and to estop defendant husband from altering the terms of the settlement agreement, unanimously affirmed, without costs. Appeal from aforesaid order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment. Appeals from orders, same court and Justice, entered June 9, 2015 and June 10, 2015, unanimously dismissed, without costs.

Under the circumstances presented, the court properly enforced the agreement. There was significant partial performance by the husband, and the wife took no further steps to enforce her rights following the settlement (*see World Color v Collectors' Guild,* 181 AD2d 430 [1st Dept 1992], *lv dismissed* 80 NY2d 924 [1992]; *Conlon v Concord Pools*, 170 AD2d 754 [3d Dept 1991]).

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

ENTERED: APRIL 28, 2016

CLERK

Tom, J.P., Mazzarelli, Friedman, Richter, Kahn, JJ.

988 The People of the State of New York, Ind. 1875/13
Respondent,

-against-

Shigetaka Ogihara,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered October 28, 2014, convicting defendant, upon his plea of guilty, of grand larceny in the first degree, and sentencing him to a term of three to nine years, unanimously affirmed.

Defendant's challenge to his plea does not come within the narrow exception to the preservation requirement (*see People v Conceicao*, 26 NY3d 375 [2015]; *People v Peque*, 22 NY3d 168, 183 [2013], *cert denied sub nom. Thomas v New York*, 574 US —, 135 S Ct 90 [2014]), and we decline to review this unpreserved claim in the interest of justice. As an alternate holding, we find no basis for reversal.

Defendant's factual allocution established all of the

elements of first-degree grand larceny, and during the allocution itself defendant said nothing that negated any element, raised any defense, or cast any doubt on his guilt (*see People v Toxey*, 86 NY2d 725 [1995]). In the allocution, defendant, who was then an attorney (*see Matter of Ogihara*, 121 AD3d 47 [1st Dept 2014]), expressly admitted he stole $1.8 million from a client by wrongfully transferring the money "with the intent to appropriate those funds to a third person." Defendant's assertion that he did not intend to permanently misappropriate the money is based entirely on matters that were alluded to outside the allocution, and thus did not require a sua sponte inquiry by the court (*see e.g. People v Praileau*, 110 AD3d 415 [1st Dept 2013], *lv denied* 22 NY3d 1202 [2014]). In any event, defendant's claimed defense is unavailing (*see People v Argentieri*, 66 AD3d 558, 559 [1st

Dept 2009], *lv denied* 14 NY3d 769 [2010]; *People v Mishkin*, 134 AD2d 529 [2d Dept 1987], *lv denied* 71 NY2d 900 [1988]).

We perceive no basis for reducing the sentence.

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

ENTERED: APRIL 28, 2016

CLERK

Tom, J.P., Mazzarelli, Friedman, Richter, Kahn, JJ.

993 The People of the State of New York, Ind. 262/11
Respondent,

-against-

Eddie T. Vastion,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Ross D. Mazer of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Bonnie Wittner, J.), rendered April 10, 2014,

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: APRIL 28, 2016

CLERK

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

Tom, J.P., Mazzarelli, Friedman, Richter, JJ.

994 Teresa Williams, Index 113568/10
Plaintiff-Appellant,

-against-

Prudential Financial, Inc., et al.,
Defendants-Respondents.

_____

Norman A. Olch, New York, for appellant.

d'Arcambal Ousley & Cuyler Burke LLP, New York (Jaclyn D. Malyk of counsel), for Prudential Financial, Inc. and Pruco Life Insurance Company of New Jersey, respondent.

White Fleischner & Fino, LLP, New York (William M. Billings of counsel), for Albert B. Brodbeck, respondent.

_____

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered June 1, 2015, which granted defendants' motions for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff seeks to recover from defendant insurance companies and insurance agent proceeds of two life insurance policies that lapsed shortly before the death of the insured, her late husband.

The two policies had already lapsed due to nonpayment of premiums at the time of her husband's death, and by their terms, they could not be reinstated after death (*see Brecher v Mutual*

Life Ins. Co. of N.Y., 120 AD2d 423, 426 [1st Dept 1986]). Contrary to plaintiff's assertion, there is no issue of fact with respect to whether defendants extended the grace period for payment of premiums on those two policies. Plaintiff's claim is based solely on certain communications with defendant insurance agent, who did not, as a contractual matter, have the authority to extend the grace period. "Where an agent's authority is specifically limited by the terms of the policy, he has no right or power to waive the conditions and provisions of the policy relating to forfeiture and continuance of the insurance" (*Drennan v Sun Indem. Co. of N.Y.*, 244 App Div 571, 579 [1st Dept 1935], *affd* 271 NY 182 [1936]; *see also Spiegel v Metropolitan Life Ins. Co.*, 6 NY2d 91, 95 [1959]).

Plaintiff also failed to establish the existence of an issue of fact with respect to the insurance agent's personal liability for misleading plaintiff regarding the due dates for premium payments on those policies. "[I]nsurance agents have a common-law duty to obtain requested coverage for their clients within a reasonable time or inform the client of the inability to do so" (*Murphy v Kuhn*, 90 NY2d 266, 270 [1997]; *accord Chase Scientific Research v NIA Grp.*, 96 NY2d 20, 30 [2001]). "An agent who fails to keep a policy in force after promising to do so is in no

better position than one who neglects to procure a policy after agreeing to do so" (*Spiegel*, 6 NY2d at 96). However, unlike in *Spiegel*, here, defendant insurance agent did not promise to keep the policies in force. There is thus no basis for holding him liable for their lapse. We have considered plaintiff's remaining arguments and find them unavailing.

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

ENTERED: APRIL 28, 2016

CLERK

Tom, J.P., Mazzarelli, Friedman, Richter, Kahn, JJ.

995 The People of the State of New York, Ind. 1404/13
Respondent,

-against-

Sidney Curry,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Anita Aboagye-Agyeman of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered October 22, 2013, convicting defendant of conspiracy in the second degree and criminal possession of a weapon in the second degree, and sentencing him to concurrent terms of 4 to 12 years and 6 years, respectively, unanimously affirmed.

The record does not support defendant's contention that the court failed to consider youthful offender treatment. On the contrary, "the sentencing court did, indeed, consider defendant's youthful offender status upon his request" (*People v Pacherille*, 25 NY3d 1021, 1023 [2015]). The court expressly stated that it had discretion to grant YO treatment but was denying it based on its individualized evaluation of the seriousness of defendant's

criminal conduct. Accordingly, the court properly conducted the determination required by *People v Rudolph* (21 NY3d 497 [2013]).

Defendant made a valid waiver of his right to appeal (*see People v Sanders*, 25 NY3d 337, 341 [2015]; *People v Lopez*, 6 NY3d 248, 256-257 [2006]), which forecloses his remaining claims. Regardless of whether defendant validly waived his right to appeal, we perceive no basis for reducing the sentence or granting youthful offender treatment as a matter of discretion.

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

ENTERED: APRIL 28, 2016

CLERK

Tom, J.P., Mazzarelli, Friedman, Richter, Kahn, JJ.

996-
997 Index 652763/13

In re Grace Financial Group, LLC,
Petitioner-Appellant,

-against-

Richard Dino, et al.,
Respondents-Respondents.

_____

Law Offices of Timothy P. Kebbe, White Plains (Timothy P. Kebbe of counsel), for appellant.

Sichenzia Ross Friedman Ference LLP, New York (Daniel S. Furst of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Jeffrey K. Oing, J.), entered October 14, 2014, against petitioner and in favor of respondents in the total amount of $57,441.69, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered June 26, 2014, which denied petitioner's petition to vacate an arbitration award in a Financial Industry Regulatory Authority (FINRA) arbitration proceeding, and granted respondents' cross petition to confirm the award, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The motion court properly upheld the award, since the award does not exhibit a manifest disregard of the law (*Wien & Malkin*

LLP v Helmsley-Spear, Inc., 6 NY3d 471, 480-481 [2006], *cert dismissed* 548 US 940 [2006]; *McLaughlin, Piven, Vogel Sec., Inc. v Ferrucci*, 67 AD3d 405, 406 [1st Dept 2009]; *see also Wallace v Buttar*, 378 F3d 182, 189 [2d Cir 2004]). To the extent that respondents' statements of claim plead a violation of a FINRA Notice to Members (NTM) and the rules of FINRA (or its predecessor, the National Association of Securities Dealers [NASD]), the law is clear that there is no private cause of action for such claims (*see e.g. Fox v Lifemark Sec. Corp.*, 84 F Supp 3d 239, 245 [WD NY 2015]; *see also Gurfein v Ameritrade, Inc.*, 312 Fed Appx 410, 412-413 [2d Cir 2009]; *Brady v Calyon Sec. [USA]*, 406 F Supp 2d 307, 312 [SD NY 2005]). The award, however, does not exhibit a manifest disregard of this law, since it characterizes respondents' claim as asserting only "excessive fees and mark-ups" arising from trading fees that petitioner, a brokerage firm, charged respondents, its customers, and it does not refer to the NTM or FINRA rules.

Although the motion court erred to the extent it concluded that the underlying account agreements between petitioner and each respondent incorporate FINRA rules by reference and therefore form a basis for a viable breach of contract claim (*see Gurfein*, 312 Fed Appx at 413), the motion court correctly noted

that petitioner's claim is essentially an "overcharge claim." The statements of claim and other submissions expressly considered by the arbitrator, state that petitioner had charged respondents excessive fees, without notice and contrary to a previously negotiated fee schedule. This claim sufficed as a "barely colorable basis" for the award (*Matter of Roffler v Spear, Leeds & Kellogg*, 13 AD3d 308, 310 [1st Dept 2004]; *see Wallace*, 378 F3d at 190).

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

ENTERED: APRIL 28, 2016

CLERK

Tom, J.P., Mazzarelli, Friedman, Richter, Kahn, JJ.

998 Joseph Maddox, Index: 107776/11
Plaintiff-Appellant,

-against-

Tishman Construction
Corporation, et al.,
Defendants-Respondents.

_____

Hach & Rose, LLP, New York (Robert F. Garnsey of counsel), for appellant.

London Fischer LLP, New York (Michael J. Carro of counsel), for respondents.

_____

Order, Supreme Court, New York County (Shlomo S. Hagler, J.), entered March 25, 2015, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing the common-law negligence and Labor Law § 200 claims, unanimously affirmed, without costs.

Contrary to plaintiff's contention, the double-stacking of the sand and cement bags at the work site was not an inherently dangerous condition of the work site but a result of the means and methods of the injury-producing work (*see Dalanna v City of New York*, 308 AD2d 400, 401 [1st Dept 2003]). Defendants established prima facie that they exercised no supervision or control over plaintiff's work and therefore cannot be held liable

for plaintiff's injuries under common-law negligence principles or Labor Law § 200 (*see Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 AD3d 446, 449 [1st Dept 2013]). In opposition, plaintiff failed to raise an issue of fact. He argues that defendants had the authority to stop the work and that they regularly inspected the job site. However, regular general inspection of a site to ensure that work is progressing according to schedule and the authority to stop any work perceived to be unsafe are not enough to warrant imposing liability (*id.* at 449; *Singh v Black Diamonds LLC*, 24 AD3d 138, 140 [1st Dept 2005]). In view of the foregoing, we need not reach the issue whether defendants had actual or constructive notice of the stacked bags (*see Alonzo*, 104 AD3d at 449).

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: APRIL 28, 2016

CLERK

Tom, J.P., Mazzarelli, Friedman, Richter, Kahn, JJ.

999N Annabel Vered, etc., et al., Index 158844/14
Plaintiffs-Respondents,

-against-

Maurice J. Wittenberg,
Defendant-Appellant.

_____

Montfort, Healy, McGuire & Salley, Garden City (Donald S. Neumann, Jr. of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered May 5, 2015, which, in an action arising out of a motor vehicle accident in Suffolk County, denied defendant's motion to change venue from New York County to Suffolk County, unanimously reversed, on the law and the facts, without costs, and the motion granted.

Supreme Court improvidently exercised its discretion in denying defendant's motion to change venue pursuant to CPLR 510(3). Defendant showed that nonparty material witnesses — including the police officer, detective, and paramedics who responded to the scene of the accident in Suffolk County — were willing to testify, but would be inconvenienced by having to travel to New York County (*see Henry v Central Hudson Gas & Elec.*

Corp., 57 AD3d 452 [1st Dept 2008]; *Hoogland v Transport Expressway, Inc.*, 24 AD3d 191 [1st Dept 2005]; *Kennedy v C.F. Galleria at White Plains*, 2 AD3d 222, 223 [1st Dept 2003]). Moreover, most of the medical records and witnesses are located in Suffolk County (*see Gentry v Finnigan*, 110 AD3d 568, 569 [1st Dept 2013]). In response to defendant's showing, plaintiffs have not shown that New York County, where they reside, is preferable to Suffolk County, where they own a home (*see Cardona v Aggressive Heating*, 180 AD2d 572, 573 [1st Dept 1992]).

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

ENTERED: APRIL 28, 2016

CLERK

Tom, J.P., Acosta, Moskowitz, Gische, JJ.

216-
217 Anastasia Klupchak,
Plaintiff-Respondent,

-against-

First East Village Associates, et al.,
Defendants-Appellants.

Index 110617/09

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Louise M. Cherkis of counsel), for appellants.

Kramer, Dillof, Livingston & Moore, New York (Matthew Gaier of counsel), for respondent.

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered January 13, 2015, insofar as it granted plaintiff's motion for partial summary judgment upon reargument, affirmed, without costs, and the appeal from said order, insofar as the order denied defendants' motion for reargument, dismissed, without costs, as taken from a nonappealable order. Order, same court and Justice, entered June 18, 2014, to the extent appealed from as limited by the briefs, affirmed, without costs.

Opinion by Tom, J.P. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Rolando T. Acosta
Karla Moskowitz
Judith J. Gische, JJ.

216-
217
Index 110617/09

_____x

Anastasia Klupchak,
Plaintiff-Respondent,

-against-

First East Village Associates, et al.,
Defendants-Appellants.

_____x

Defendants appeal from the order of the Supreme Court, New York County (Geoffrey D. Wright, J.), entered January 13, 2015, which granted plaintiff's motion for reargument, and, upon reargument, granted plaintiff's motion for partial summary judgment deeming Multiple Dwelling Law § 53, New York City Building Code (Administrative Code of City of NY §§ 27-354, 27-380) and Rules of the NY City Dept. of Buildings (1 RCNY 15-10) (former New York City Housing Maintenance Code § 15-10) applicable to this action, and denied defendants' motion for, inter alia, reargument of their motion for summary judgment dismissing causes of action for statutory violations, and, to the extent appealed from as limited by the briefs, from the order of the same court and Justice,

entered June 18, 2014, which denied defendant's prior motion for summary judgment dismissing causes of action for statutory violations.

Smith Mazure, New York (Louise M. Cherkis of counsel) for, appellants.

Kramer, Dillof, Livingston & Moore, New York (Matthew Gaier and Pani Vo of counsel) for, respondents.

TOM, J.

This appeal raises the issue of whether Multiple Dwelling Law section 53 and related New York City building code provisions and regulations which mandate the removal and replacement of vertical ladder fire escapes are applicable to the pre-1929 vertical fire escape from which plaintiff fell and sustained serious injuries. We find that they are.

On the evening of November 15, 2008, plaintiff, Anastasia Klupchak, then 22 years old and a student at New York University, went to the building at 82 Second Avenue in Manhattan to visit her friend, who lived in apartment 3. The four-story brick building with an attic was constructed in 1841. In 1918, the building was altered from a four-story lodging house and club room to a five-story building with a store, an office, and dwellings for two families. It is unknown precisely when the wrought iron vertical ladder fire escape attached to the building was constructed, but it is undisputed that it was constructed prior to 1929. The two required means of egress (*see* Multiple Dwelling Law § 187[1][b]) were an interior stairway and the fire escape.

At about 11:30 p.m., plaintiff climbed through the kitchen window onto the fire escape with two friends, because one of the friends was smoking and they wanted to see the view of the City.

Plaintiff was aware that it was dark and that the fire escape had an opening or gap at the edge of the platform leading to the level below. She stood on the platform of the fire escape close to the opening.

At some point, one of her friends inside the apartment stated that it was time to leave. Plaintiff turned toward the apartment to climb through the kitchen window, when the heel of her boot got caught between the slats of the platform. She fell through the opening, landing on her back, approximately 12 feet below the platform, and was rendered paraplegic.

Plaintiff commenced this action against defendant First East Village Associates (First East), a partnership that purchased the building in 1981, whose partners included defendants Bernard McElhone and Susan Schenk. Defendant Tri-Star Equities, Inc. (Tri-Star), whose president and sole owner was defendant Rod Feldman, has managed the property since 2006.

In her complaint, plaintiff alleged that the building, which housed four separate residential apartments, was a multiple dwelling as defined in Multiple Dwelling Law § 4, which defendants do not dispute, and that the accident was caused by the improper operation and maintenance of the fire escape in violation of Multiple Dwelling Law § 53, Rules of the NY City Dept. of Buildings (1 RCNY 15-10) (former New York City Housing

Maintenance Code [HMC] § 15-10), and New York City Building Code (Administrative Code of City of NY) § 27-380. The parties agree that Multiple Dwelling Law § 53 and HMC § 15 prohibit the type of fire escape from which plaintiff fell but disagree as to whether the statutes apply to pre-1929 erected fire escapes.

Defendants moved to dismiss plaintiff's claims alleging violations of Multiple Dwelling Law § 53, HMC § 15-10, and New York City Building Code § 27-380. Among other contentions, defendants argued that the opening sentence of Multiple Dwelling Law § 53 expressly directed the provisions only to fire escapes erected after 1929.[1] Plaintiff cross-moved for partial summary judgment on the issue of whether Multiple Dwelling Law § 53 and HMC § 15-10 were applicable as a matter of law. In support of the motions, the parties provided evidence of changes in the building's occupancy over the years as well as alterations to the building. They also provided affidavits from their experts establishing that the fire escape was a vertical ladder fire escape system.

Supreme Court denied both motions. The court, relying on

[1] The first sentence of Multiple Dwelling Law § 53 provides that "[e]very fire-escape erected after April eighteenth, nineteen hundred twenty-nine, shall be located, arranged, constructed and maintained in accordance" with provisions set forth in the statute.

People v Little (53 Misc 2d 645 [App Term, 1st Dept 1967]), concluded that the essential element in a fire escape liability claim under Multiple Dwelling Law § 53 was the date of the erection of the fire escape - specifically, whether it was erected after 1929 - and found that whether the building was designated as a tenement, a multi-family dwelling or otherwise, the statute clearly stated that the date of the erection of the fire escape was dispositive. The court further found that the original nature and use of the building was "murky," but that it was undisputed that it was built sometime before 1918 and before the Multiple Dwelling Law was enacted in 1929.

The court reasoned that the qualifying statement of the first sentence of Multiple Dwelling Law § 53, concerning its applicability only to fire escapes erected after 1929, could not be ignored. Further, the court found that the undisputed changes in the building's occupancy were not relevant because in order to bring a grandfathered fire escape into the reach of section 53, the fire escape must have been specifically modified, and none of the work on the building involved the fire escape. The court also determined that HMC § 15-10 was inapplicable because it applied only when Multiple Dwelling Law § 53 applied.

The court, however, denied defendants' motion for dismissal, finding there was a genuine issue of fact as to whether Building

Code § 27-380 applied, in light of several violations of the Building Code between 1984 and 2009 that were noted by the City, and under a theory of common law negligence.

Thereafter, plaintiff and defendants moved for, among other things, reargument of the order denying their motions. The court granted plaintiff leave to reargue, and, upon reargument, granted plaintiff's cross motion for partial summary judgment on the issue of whether Multiple Dwelling Law § 53 and HMC § 15-10 were applicable as a matter of law. The court found that since 1948 fire escapes such as the one from which plaintiff fell were unlawful on any multiple dwelling, regardless of when the fire escape was built. We agree with that conclusion and now affirm that order.[2]

The New York State Legislature enacted the Multiple Dwelling Law in 1929 after finding that

> "intensive occupation of multiple dwelling sites, overcrowding of multiple dwelling rooms, inadequate provision for light and air, and insufficient protection against the defective provision for escape from fire, and improper sanitation of multiple dwellings in certain areas of the state are a menace to the health, safety, morals, welfare, and reasonable comfort of the citizens of the state." It therefore determined "that the establishment and maintenance of proper housing standards requiring sufficient light, air, sanitation and protection from fire hazards are

[2] The court denied defendants' motion.

essential to the public welfare"

(*see* Multiple Dwelling Law § 2; Laws of New York, 1929, ch 713).

When it was first enacted, Multiple Dwelling Law § 53 (formerly Multiple Dwelling Law § 145) set forth various provisions for fire escapes erected after April 18, 1929. Among other things, these provisions covered access to the fire escape from inside each apartment, proper locations for the erection of fire escapes, and load requirements for fire escapes, and required that every fire escape be made up of balconies and stairways (*see* Multiple Dwelling Law § 53[1] - [8]). A separate section - Multiple Dwelling Law § 231 - prohibited vertical ladder fire escapes in tenement buildings. It would thus appear that at the time the Multiple Dwelling Law was enacted, vertical ladder fire escapes erected prior to 1929 on non-tenement buildings, such as the one at issue, were permissible.

However, in 1948, the Legislature amended the section to add language to subsection nine of Multiple Dwelling Law § 53 (*see* Laws of New York, 1948, ch 850). The law was entitled "An Act to amend the multiple dwelling law, in relation to existing fire escapes," and subsection nine, as amended, expressly states that "[a] wire, chain cable, vertical ladder or rope fire-escape is an unlawful means of egress. Every such fire-escape, if required as a means of egress, shall be removed and replaced by a system of

fire-escapes constructed and arranged as provided in this section" (Multiple Dwelling Law § 53[9]).

A plain reading of the clear and unambiguous language of subsection nine leads to the conclusion that all vertical ladders on multiple dwellings, regardless of when the fire escape was constructed, are unlawful and must be removed and replaced by a fire escape that complies with the provisions of Multiple Dwelling Law § 53. Notably, the section includes no exceptions of any kind, and does not limit the requirement to fire escapes built after 1929. Also significant is that Multiple Dwelling Law § 53(9) is written in the future tense, suggesting that the action to remove and replace should apply in the future, which would include pre-1929 fire escapes. Moreover, § 53(9) would be superfluous if it only applied to fire escapes postdating 1929 because those fire escapes were already governed by § 53. Construing the section in this manner effectuates the intent of the Legislature, as evinced from the plain meaning of the words used in the amendment (*see Patrolmen's Benevolent Assn. of City of N.Y. v City of New York*, 41 NY2d 205, 208 [1976]). Thus, we categorically reject defendants' position that the fire escape was somehow "grandfathered" in as permissible because it was erected prior to 1929. Nor are we bound to follow the holding in *People v Little* (53 Misc 2d 645 [App Term, 1st Dept 1967]) that

section 53(9) applies only to fire escapes erected after 1929, which holding we reject.

A review of other sections of the Multiple Dwelling Law, as well as the section's legislative history, further bolsters our plain-text interpretation of section 53(9). The March 19, 1948 memorandum in support of the bill by the Joint Legislative Committee on Housing and Multiple Dwellings stated that the proposed amendment sought to make "the same provisions" (regarding the types of fire escapes that were unlawful) applicable to all types of multiple dwellings erected before 1929, "particularly since many hotels and similar type transiently occupied multiple dwellings were presently so equipped" (*see* 1948 NY Legis Ann at 237; Mem of Joint Legis Comm on Housing and Multiple Dwellings, Bill Jacket, L 1948, ch 850).

Defendants contend that removal of the fire escape was not required by § 53(9) because agency permission was a prerequisite to removal. However, the requirement to obtain permission prior to removal of a vertical ladder fire escape does not mean that the removal requirement was nullified, only that the Department of Buildings should be made aware of the renovation in order to monitor the construction and replacement of the fire escape system.

A separate memorandum from the Commissioner of Housing

further explained that sections 231 and 232 of the Multiple Dwelling Law provided that a wire, chain cable, or vertical ladder fire-escape was an unlawful means of egress for tenements, and that this bill would include the same prohibitions for "multiple dwellings generally" and would "add rope fire-escapes to those presently prohibited by Section 232" (Mem of Commissioner of Housing, Bill Jacket, L 1948, ch 850). Similarly, a memorandum from the New York City Mayor's Office noted that the fire escapes prohibited by the bill were "outmoded," and, although the memorandum opined that such fire escapes were found only in "old law tenements," it stated that "should they be found in any other type of multiple dwelling, the bill would prohibit their use and direct their removal and replacement" (Mem of Office of the Mayor, City of NY Bill Jacket, L 1948, ch 850).

This legislative history indicates that the intention of the Legislature in enacting the bill was to have the prohibitions on wire, chain cable, vertical ladder and rope fire escapes apply to all multiple dwellings, without exception. Accordingly, we find that as a matter of law Multiple Dwelling Law § 53(9) is applicable to the vertical fire escape constructed prior to 1929 where plaintiff fell.

We separately find that removal of the fire escape here was required without regard to § 53(9) because the building's

occupancy classification changed over time. Defendants concede that the building was a "converted dwelling" because it was a dwelling erected before April 18, 1929, to be occupied by one or two families living independently of each other, and subsequently occupied as a multiple dwelling (with two or more families living independently) (*see* Multiple Dwelling Law § 4[10]). Pursuant to Multiple Dwelling Law § 9(3), a dwelling of one class or kind, altered or converted after April 18, 1929, to another class or kind, "shall thereupon become subject to all the provisions of this chapter applicable to a building of that class or kind, erected after such date, to which it is altered or converted."

Multiple Dwelling Law § 187(1)(b), which is applicable to converted dwellings, provides that dwellings with more than two stories shall have two independent means of egress or one means of egress and a sprinkler system, and that the required second means of egress shall be a system of outside fire escapes, constructed and arranged as provided in section 53 for fire escapes erected after April 18, 1929 (*see* Multiple Dwelling Law § 187[1][e]). Therefore, compliance with Multiple Dwelling Law § 53 was required for converted dwellings such as the subject building regardless of when the fire escape system was constructed.

Alternatively, were the building considered to be a tenement

- i.e. a building erected before April 18, 1929, which is occupied in whole or part as a residence of three families or more living independently, that is not a converted dwelling (*see* Multiple Dwelling Law § 4[11]) - then the vertical ladder fire escape was prohibited by Multiple Dwelling Law §§ 231(3)(d) and 232(2), which were applicable to tenements.

Further, having found that Multiple Dwelling Law § 53(9) is applicable as a matter of law, we also find that HMC § 15-10(c) (1 RCNY § 15-10), which supplements the provisions of Multiple Dwelling Law § 53 in relation to fire escapes, and similarly mandates that vertical ladder fire escape systems be removed and replaced, is applicable to this action.

Supreme Court also correctly found that there was a genuine issue of fact as to whether New York City Building Code tit 27, subch 6 applied. Building Code § 27-354 provides that Building Code tit 27, subch 6 is applicable where there was an alteration or change in occupancy of a building. Building Code § 27-380 required that the means of egress comply with the provisions governing fire escapes. Section C26-298.0 of the 1938 Code and section 27-380 of the 1968 Code required that a fire escape have stairs, and the subject fire escape did not have stairs. The citations issued for violation of other sections of these Building Codes, defendants' concession that the occupancy

classification of the building changed over time, and the affidavit from plaintiff's expert relating to the changes in occupancy were sufficient to raise an issue of fact about the applicability of the 1938 and 1968 Building Codes. In particular, plaintiff's expert opined that the building's conversion of the second floor from commercial space to residential occupancy sometime after 1940 made the 1938 Building Code and its requirement of a fire escape with stairs applicable, and that, in the alternative, the subsequent conversion to a multiple dwelling of three or more families from a two family dwelling in 1959 may have made either the 1938 or 1968 Code applicable.

We have considered defendants' remaining arguments, including those regarding due process and proximate cause, and find them unavailing.

Accordingly, the order of the Supreme Court, New York County (Geoffrey D. Wright, J.), entered January 13, 2015, which, to the extent appealable, upon granting plaintiff reargument, granted her cross motion for partial summary judgment deeming Multiple Dwelling Law § 53, New York City Building Code (Administrative Code of City of NY §§ 27-354, 27-380) and Rules of the NY City Dept. of Buildings (1 RCNY 15-10) (former New York City Housing Maintenance Code § 15-10) applicable to this action, should be

affirmed, without costs, and the appeal from said order, to the extent the order denied defendants' motion for reargument, should be dismissed, without costs, as taken from a nonappealable order. The order of the same court and Justice, entered June 18, 2014, which, insofar as appealed from as limited by the briefs, denied defendants' prior motion for summary judgment dismissing claims based on statutory violations, should be affirmed, without costs.

All concur.

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

ENTERED: April 28, 2016

CLERK