SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JULY 5, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Friedman, J.P., Andrias, Moskowitz, Kapnick, Webber, JJ.

861 Geraldine Myles, Index 156118/12
Plaintiff-Respondent,

-against-

Spring Valley Marketplace, LLC,
Defendants,

Christmas Tree Shops, Inc.,
Defendant-Respondent.

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Christmas Tree Shops, Inc.,
Third-Party Plaintiff-Respondent,

-against-

McCue Corporation,
Third-Party Defendant-Appellant.

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Goldman & Grossman, New York (Eleanor R. Goldman of counsel), for appellant.

Trolman, Glaser & Lichtman, P.C., New York (Tina M. Wells of counsel), for Geraldine Myles, respondent.

Litchfield Cavo, LLP, New York (Robert G. Macchia of counsel), for Christmas Tree Shops, Inc., respondent.

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Order, Supreme Court, New York County (Arthur F. Engoron, J.), entered on or about August 3, 2015, which denied third-party defendant McCue Corporation's motion to dismiss the third-party

complaint and the complaint as against defendant Christmas Tree Shops, Inc. (CTS), unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiff alleges that on June 7, 2011, around dusk, she tripped when the tip of her right foot hit a metal bar on the ground that formed part of a shopping cart corral in the parking lot of defendant CTS' store, located in a shopping center owned by defendant Spring Valley Marketplace (SVM). CTS brought a third-party action against McCue, which designed and sold it the corral, seeking contribution, common-law indemnification and contractual indemnification based on claims sounding in negligence, breach of warranty, strict liability, and breach of contract.

The submissions on the motion establish that "the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses" (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 79 [2015]; *see also Garcia v 549 Inwood Assoc., LLC*, 136 AD3d 555 [1st Dept 2016]; *Forrester v Riverbay Corp.*, 135 AD3d 448 [1st Dept 2016]). McCue presented photographs taken by plaintiff's photographer, which show that the metal bar was only three-eighths of an inch above the surface

of the parking lot. Those photographs, and others in the record that were shown to plaintiff at her deposition, establish that the bar was not hidden or covered in any way and did not constitute a trap.

McCue also presented the deposition transcripts of plaintiff, CTS' assistant manager, and McCue's comptroller. Plaintiff testified that the tip of her foot hit the bar, but could not identify any defects in the bar or the parking lot surface. While she testified at one point that there was "bad visibility" because the bar was under the canopy, when asked if she saw the bar the moment before she tripped, she replied as follows: "It is hard to say. I was looking straight ahead to get the cart." When asked again if she had looked at the ground, plaintiff repeated that she was "looking straight ahead" and did not remember seeing the bar.

CTS' assistant manager testified that although there was no lighting inside the corral, there were between five and ten lampposts in the parking lot and that the corral was well lit when he inspected it shortly after the accident. He also testified that there was no space between the surface of the parking lot and the bar, and that there had been no complaints about the bar prior to plaintiff's accident. McCue's comptroller testified that the cart corral had been sold for more than 10

years and that he was not aware of any claims or suits.

An expert affidavit submitted by CTS stated that the bar did not violate any safety codes, rules, or regulations, was not defectively designed, and did not present a tripping hazard. The expert stated that at the time of his August 9, 2013 visit, the bar was flush with the ground and its height was measured consistently at one-eighth of an inch above the pavement. He also stated that the bar was smooth, shiny and reflective, and its silver color contrasted sharply with the texture and color of the black, grainy surface of the parking lot, which made it conspicuous and easily observable, even at night; that the exterior weather enclosure covering the corral had clear plastic sides, which allowed the surface under the corral to be illuminated by natural light or the lampposts in the parking lot; and that the bar was located near the open entrance to the corral, which also permitted light to illuminate it. Furthermore, CTS presented the specifications for the cart corral which showed that the metal bar itself was only one-fourth of an inch in height, and that the sides of the corral were clear.

In opposition, plaintiff failed to raise a triable issue of fact as to the size of the defect itself, or whether "its intrinsic characteristics or the surrounding circumstances magnif[ied] the dangers it pose[d], so that it unreasonably

imperil[ed] the safety of [plaintiff]" (*Hutchinson*, 26 NY3d at 78 [internal quotation marks omitted]). Plaintiff's "guess" that the height of the bar was "maybe an inch or so" off the ground is not probative and is contradicted by the specifications and the photographs in the record. Her claim that she did not see the bar due to insufficient lighting, is belied by her deposition testimony that she did not see it because she was looking straight ahead at the carts in the corral.

Plaintiff's arguments that the motion court properly denied summary judgment dismissing the complaint as against CTS because McCue failed to argue in its moving papers below that the bar constituted a "trivial defect" and because the court had previously denied CTS' motion for summary judgment on that specific ground are unavailing. While McCue did not make an express trivial defect argument as a grounds for dismissing the complaint as against CTS, it did seek summary judgment on the basis that, as a contractor, it did not owe a duty to plaintiff, a noncontracting third party. In deciding that issue, the motion court reviewed all submissions and determined that the design of the bar, specifically, its height, formed the basis for potential liability under an *Espinal* (*Espinal v Melville Snow Contrs.*, 98 NY2d 136 [2002]) exception. Since the height of the bar was a basis for the motion court's decision, we may consider the issue

on appeal. While the motion court denied CTS' prior motion for summary judgment, the doctrine of law of the case only applies to courts of coordinate jurisdiction and is not binding on this Court (*see Martin v City of Cohoes*, 37 NY2d 162, 165 [1975]).

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

ENTERED: JULY 5, 2016

Margaret Saval

DEPUTY CLERK

Corrected Order - September 9, 2016

Sweeny, J.P., Acosta, Manzanet-Daniels, Gische, Gesmer, JJ.

1081N The People of the State of New York, Index 1431/14
Respondent,

-against-

Nasean Bonie,
Defendant.

- - - - -

Dina Sforza, a Representative of
News 12 the Bronx, L.L.C.,
Nonparty Appellant.

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Levine Sullivan Koch & Schulz, LLP, New York (Thomas B. Sullivan of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Jordan K. Hummel of counsel), for respondent.

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Order, Supreme Court, Bronx County (Ralph Fabrizio, J.), entered December 7, 2015, as corrected on or about December 23, 2015, which granted the People's motion to compel nonparty Dina Sforza, a representative of News 12 The Bronx, L.L.C. (News 12), to comply with a subpoena, to the extent of directing an in camera review of unpublished video footage of the News 12 reporter's interview of defendant, and denied News 12's cross motion to, inter alia, quash the subpoena, unanimously modified, on the law and the facts, to the extent of directing the trial judge to disclose to the People after in camera review only those portions of the video footage in which defendant makes any statement concerning killing the victim, or discusses their

relationship and his impressions and observations of her, including her conduct as a tenant, and otherwise affirmed, without costs.

Ramona Moore was last seen on July 31, 2012, when she vanished from her residence in the Bronx, which she rented from defendant. In June 2014, defendant was indicted for Ms. Moore's murder, although her body had not been discovered. The People's case consists almost entirely of circumstantial evidence, including witness testimony, allegations that defendant had asked Ms. Moore to submit false paperwork to apply for rent subsidies, and a statement made by defendant to the police, in or about August 2012, in which he said that he had argued with Ms. Moore about unpaid rent, and made derogatory comments about her lifestyle.

On December 15, 2014, News 12 reporter Ray Raimundi conducted and videotaped an interview of defendant at the Manhattan Detention Complex. On January 20, 2015, News 12 broadcast a five minute segment about defendant titled "Burden of Proof," including approximately one minute of Raimundi's 30 minute interview with him. In the broadcast portion of the interview, defendant denies killing Ms. Moore, and states that he "didn't have any personal issues with her" and "[n]ever had any kind of quarrel" with her. Raimundi states in the broadcast that

defendant described Ms. Moore as a "good tenant, and a good person who always paid her rent on time and was friendly with fellow neighbors."

In April 2015, utility workers discovered human remains in Orange County, New York. Medical tests confirmed that the remains were those of Ms. Moore.

On or about September 9, 2015, the People served a so-ordered subpoena on News 12 seeking production of the aired and unaired jailhouse interview footage. News 12 responded by providing a copy of the broadcast from January 20, 2015, but declined to produce the unaired footage, citing New York's Shield Law (Civil Rights Law § 79-h[c]). On or about October 22, 2015, the People filed an order to show cause seeking an order directing News 12 to comply with the subpoena. In a supporting affirmation, an Assistant District Attorney stated, "upon information and belief," that the material sought was an interview of defendant "regarding the . . . pending indictment" against him, and was therefore not governed by the Shield Law because it was "highly material and relevant, is critical or necessary to the maintenance of a party's claim, defense or proof of an issue material thereto; and is not obtainable from any alternative source." News 12 cross-moved for, inter alia, an order quashing the subpoena. In opposition to the cross motion,

the People argued, inter alia, that defendant's claim of innocence and his comments about his positive relationship with Ms. Moore and his lack of motive to kill her because she had paid her rent on time, made access to the tape critical and necessary to the prosecution. The People also advised the court that they had learned from the Department of Correction (DOC) that two DOC staff members were present during News 12's interview of defendant, but DOC was unable to determine the identity of the correction officers present, and DOC press liaison staff present that day no longer worked for DOC and had relocated without providing DOC with contact information. In reply, News 12 noted that they had located the LinkedIn account and employer's website of a person they believed to be the former DOC press liaison staff. Defendant took no position on the motion and cross motion, and has not taken a position on this appeal.

In 1988, the Court of Appeals held that article I, section 8 of the New York State Constitution, which was adopted **prior to the Supreme Court's application of** the First Amendment **of** the US Constitution **to the states**, and is more expansive, provides a qualified privilege with regard to nonconfidential journalistic material[1] to prevent undue "diversion of journalistic effort and

[1] Then, as now, the Shield Law provided an absolute privilege with regard to confidential journalistic material

disruption of newsgathering activity" (*O'Neill v Oakgrove Constr.*, 71 NY2d 521, 527 [1988]).[2] In 1990, the New York State Legislature enacted subdivision (c) of the Shield Law, which codified the three-pronged test enunciated in *O'Neill*. Under that provision, a journalist's nonconfidential material is privileged unless the litigant seeking its disclosure makes a "clear and specific showing" that it "(i) is highly material and relevant; (ii) is critical or necessary to the maintenance of a party's claim, defense or proof of an issue material thereto; and (iii) is not obtainable from any alternative source" (Civil Rights Law § 79-h[c]). The statute further provides that "[a] court shall order disclosure only of such portion, or portions, of the news sought as to which the above-described showing has been made and shall support such order with clear and specific findings made after a hearing" (*id.*). The Court of Appeals has since noted in dicta that "there are uncertainties concerning the

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(Civil Rights Law § 79-h[b]).

[2] The majority in *O'Neill* also agreed with those federal jurisdictions that have held that the qualified privilege for nonconfidential journalistic material is required by the First Amendment to the US Constitution, while noting that the US Supreme Court had not yet recognized such a privilege (71 NY2d at 528). Justice Kaye dissented on this point, stating that the Court should base its decision only on the New York State Constitution to avoid the uncertainty in federal law on this issue (*id.* at 531).

application of the outer reaches of [New York's Shield Law], particularly the scope of the qualified privilege for nonconfidential news which must be determined on a case-by-case basis" (*Matter of Holmes v Winter*, 22 NY3d 300, 316 [2013], *cert denied* __ US __, 134 S Ct 2664 [2014], citing *People v Combest*, 4 NY3d 341 [2005]).

Here, the outtakes of an interview of defendant taken at a detention center in which he discusses, inter alia, the charges against him and his relationship with the victim, are on their face "highly material and relevant" (Civil Rights Law § 79-h[c]). In a circumstantial murder case, evidence which, standing alone, might appear innocuous can be deemed critical when viewed in combination with other circumstantial evidence (*see People v Mercereau*, 24 Misc 3d 366, 369 [Sup Ct, Richmond County 2009]). Here, the reporter described on air statements made by defendant in unaired portions of the interview to the effect that Ms. Moore was a good tenant and a good person who always paid her rent on time and was friendly with fellow neighbors. While these statements out of context might seem benign, the People argue persuasively that they are "critical or necessary" to the People's effort to prove motive, intent, and consciousness of guilt, since they contradict defendant's earlier statements to police (*see id.* at 368-369, citing Jerome Prince, Richardson on

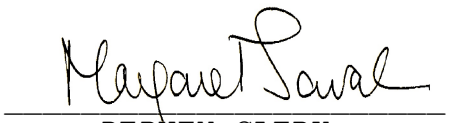
Evidence § 8-203 [Farrell 11th ed 1995]). Although the People have access to the substance of what defendant said from Raimundi's paraphrase on the News 12 broadcast, defendant's actual words and his demeanor as he said them are available only on the unpublished video of the interview in News 12's possession. Similarly, even if the People had located and contacted the DOC's employees who were present during the interview, their recollections, if any, of defendant's statements do not have the same evidentiary effect as would the video recording. Accordingly, defendant's unaired statements about Ms. Moore are not obtainable from an alternative source (*compare Matter of Gilson v Coburn*, 106 AD3d 424 [1st Dept 2013], *lv denied* 21 NY3d 863 [2013]). Therefore, we find that the People have made the "clear and specific showing" required to overcome News 12's qualified privilege as to nonconfidential journalistic material under article I, section 8 of New York's Constitution and the Shield Law only as to those portions of the unaired News 12 footage of its interview with defendant in which defendant makes any statement concerning killing Ms. Moore, and discusses their relationship and his impressions and observations of her, including her conduct as a tenant (Civil Rights Law § 79-h[c]; *see also People v Combest*, 4 NY3d 341, 345-346 [2005]). To the extent that the order appealed from holds that the People have

sustained their burden as to other portions of the unaired video, we disagree. The motion court's reliance on our decision in *Matter of Magrino* (226 AD2d 218 [1st Dept 1996]) was misplaced, since that case related to enforcement of a subpoena compelling production of unpublished video footage for use in a criminal proceeding in another state, pursuant to the interstate subpoena statute (CPL 640.10), and specifically held that the attempt to assert qualified privilege under the Shield Law lacked merit (Civil Rights Law § 79-h). We therefore do not credit the portion of *People v Mercereau* that incorrectly relies on *Magrino* (*see* 24 Misc 3d at 370).

In addition, we clarify that the trial judge need not issue further findings but need only disclose the portions of the footage delineated above.

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

ENTERED: JULY 5, 2016



DEPUTY CLERK

Acosta, J.P., Renwick, Saxe, Richter, Gische, JJ.

1486 Gallet, Dreyer & Berkey, LLP, Index 109687/11
Plaintiff-Respondent, 11590897/11

-against-

Frank Basile,
Defendant-Appellant.

- - - - -

Frank Basile,
Third-Party Plaintiff-Appellant,

The Estate of Celeste Holm, etc.,
Third-Party Plaintiff,

-against-

Gallet, Dreyer & Berkey, LLP,
Third-Party Defendant-Respondent,

Hoffman and Pollack, LLP,
Third-Party Defendant.

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The Law Offices of Neal Brickman, P.C., New York (Neal Brickman of counsel), for appellant.

Podvey, Meanor, Catenacci, Hildner, Cocoziello & Chattman, P.C., New York (Wendy B. Shepps of counsel), for respondent.

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Order, Supreme Court, New York County (Donna M. Mills, J.), entered April 14, 2015, which granted plaintiff's motion for summary judgment dismissing defendant Frank Basile's counterclaim and third-party complaint against it, unanimously affirmed, without costs.

Plaintiff law firm Gallet Dreyer & Berkey represented defendant Basile in connection with the December 21, 2009

settlement of a Surrogate's Court action brought in 2004 by his spouse, Celeste Holm, to revoke an irrevocable trust that she created in 2002. In this action brought by the law firm against Basile to recover outstanding legal fees, Basile has counterclaimed for attorney malpractice, taking the position that due to poor advice, factual omissions, and misinformation, he was persuaded to sign the stipulation in Holm's action to revoke her trust, which stipulation caused him (and Holm[1]) to forfeit valuable assets and the right to pursue valuable claims without their receiving any corresponding benefit.

To sustain a cause of action alleging legal malpractice, a plaintiff must establish not only that the defendant "failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession," but also that "the attorney's breach of this duty proximately caused plaintiff to sustain actual and ascertainable damages" (*Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP*, 26 NY3d 40, 49 [internal quotation marks omitted]). "An attorney's conduct or inaction is the proximate cause of a plaintiff's damages if but for the attorney's negligence the plaintiff would have succeeded on the merits of the underlying action, or would not have

[1] Basile has no authority to make a claim regarding injury to Holm; she had her own attorney advising her on the settlement.

sustained actual and ascertainable damages" (*id.* at 50 [internal quotation marks and citation omitted]). "[M]ere speculation of a loss resulting from an attorney's alleged omissions . . . is insufficient to sustain a claim for legal malpractice" (*Markard v Bloom*, 4 AD3d 128, 129 [1st Dept 2004], *lv denied* 2 NY3d 706 [2004]).

As a signatory to the settlement, Basile certainly had the right to be fully informed of the facts and provided with appropriate advice by his attorney before agreeing to its terms, and we cannot conclude as a matter of law on this record that the law firm's advice to Basile was complete and free of incorrect information. However, nothing in Basile's submissions shows that but for that claimed negligence, he "would not have sustained actual and ascertainable damages" (*Nomura*, 26 NY3d at 50 [internal quotation marks omitted]).

The irrevocable trust was created and funded with Holm's assets before Basile's marriage to Holm. Basile had no current interest in the trust's assets at the time of the settlement; he had, at best, a potential interest in those assets *if* the trust were to be set aside and the assets became part of Holm's estate, entitling Basile to an elective share. Similarly, the claims addressed in the stipulation regarding other, non-trust assets also concerned property that belonged to Holm alone, and Basile

had no present possessory right to them. Notwithstanding Basile's residuary interest in Holm's eventual estate, and the possibility that if Holm reacquired property that was previously transferred she would gift him a present interest, he had no established right to make any disposition of that property, or to claim ownership of any portion of that property, while she was alive. His lack of a present possessory interest in the property at issue severely restricts any rights to claim that the law firm's alleged failures proximately caused him to experience a financial loss in relation to those properties.

More importantly, Basile has not presented an evidentiary showing supporting a claim to "actual and ascertainable damages," as *Nomura* requires (26 NY3d at 50 [internal quotation marks omitted]). In cases presenting a valid claim of legal malpractice, the claimed "actual and ascertainable damages" have been clearly calculable (*see e.g. Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438 [2007]). In contrast, summary judgment dismissing the legal malpractice claim has been granted where the asserted damages are vague, unclear, or speculative (*see Bellinson Law, LLC v Iannucci*, 102 AD3d 563, 563 [1st Dept 2013]). Here, Basile essentially speculates that the information he lacked would have provided him with better leverage in negotiations, but he fails to show exactly how, if

counsel had properly informed and advised him, the outcome of the litigation would have been more favorable to him. This is particularly so since the settlement netted him a distribution in excess of $2,000,000, as compared to the $25,000 he would have received under the trust alone, in the absence of the stipulation. The submissions simply do not justify a conclusion that Basile would have achieved a more favorable result in the absence of counsel's claimed mistakes.

Plaintiff's motion for summary judgment dismissing the counterclaim and third-party complaint brought against it by defendant Frank Basile was therefore properly granted.

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

ENTERED: JULY 5, 2016

DEPUTY CLERK

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

1536 Bobby L. Moore, Index 651907/11
Plaintiff-Appellant,

-against-

IGPS Company LLC, et al.,
Defendants-Respondents.

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Goldberg & Rimberg PLLC, New York (Israel Goldberg of counsel), for appellant.

Akin Gump Strauss Hauer & Feld LLP, New York (Mitchell P. Hurley of counsel), for respondents.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered February 23, 2015, which, insofar as appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing the breach of contract causes of action based on terminating plaintiff without following proper procedures and canceling plaintiff's vested shares upon termination, and the tortious interference with contract and fraudulent inducement causes of action, and denied plaintiff's cross motion for partial summary judgment, unanimously modified, on the law, to deny defendants' motion as to the breach of contract cause of action based on canceling plaintiff's vested shares upon his termination, and otherwise affirmed, without costs.

Under the operative agreements, plaintiff was entitled to

retain his vested equity even if fired for cause. While there were limitations on the marketability of plaintiff's vested shares as of the cancellation date, those limitations were not complete; plaintiff may have been able to sell the shares at that time had he retained possession of them. Thus, the vested shares, which otherwise had considerable value, were not rendered valueless by the limitations on marketability as of that date, and their improper cancellation in the amount of their ascertainable value caused injury to plaintiff (*see Cole v Macklowe*, 64 AD3d 480 [1st Dept 2009]; *PharmAthene, Inc. v Siga Tech., Inc.*, 2010 WL 4813553 [Del Ch 2010]). Accordingly, rather than dismissing the claim based on the fact that the value of the shares was later wiped out in IGPS's bankruptcy, the court should have considered plaintiff's evidence as to the shares' valuation as of the cancellation date, and, at most, applied a marketability discount to the valuation.

The court correctly dismissed the tortious interference claims, because there is no evidence that defendants realized any personal gain as a result of the cancellation of plaintiff's vested shares (*see Joan Hansen & Co. v Everlast World's Boxing Headquarters Corp.*, 296 AD2d 103, 109 [1st Dept 2002]).

The court correctly dismissed the claim for fraudulent inducement, because, even if there is evidence that defendants

induced plaintiff to execute a 2011 employment agreement for the purpose of binding him to the non-compete and non-solicitation provisions, plaintiff cannot show reasonable reliance under the circumstances (*see Frank Crystal & Co., Inc. v Dillmann*, 84 AD3d 704 [1st Dept 2011]). Further, the evidence that plaintiff relies on is inadequate to support the allegation that statements made by defendants in connection with hiring him as chairman were false or intentionally misleading.

Even if plaintiff can prove that his termination was in technical breach of procedural provisions in the operative agreements, he cannot show that he suffered any damages as a result of that breach.

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

ENTERED: JULY 5, 2016

DEPUTY CLERK

Sweeny, J.P., Acosta, Feinman, Kapnick, Kahn, JJ.

1648 The People of the State of New York, Respondent, Ind. 564/09

-against-

Robert Fleming, Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (Mark W. Zeno of counsel), and Kaye Scholer, LLP, New York (Thomas J. Szivos of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Eric C. Washer of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Margaret L. Clancy, J.), rendered September 4, 2013, convicting defendant, after a jury trial, of two counts of murder in the second degree, and sentencing him to consecutive terms of 25 years to life, unanimously affirmed.

After a thorough evidentiary hearing, the court properly denied defendant's motion to dismiss the indictment on the ground of preindictment delay (*see People v Singer*, 44 NY2d 241 [1978]; *People v Taranovich*, 37 NY2d 442, 445 [1975]; *see also United States v Lovasco*, 431 US 783, 790 [1977]). The People established good cause for the 5½-year delay between May 2003, when DNA evidence collected from the victims matched defendant's DNA profile, and January 2009, when he was indicted (*see People v*

Decker, 13 NY3d 12, 14 [2009]). In the intervening years, the prosecution had sought to obtain evidence to strengthen their case, which was based on circumstantial evidence, and the investigative delays were satisfactorily explained (*see id; People v Nazario*, 85 AD3d 577 [1st Dept 2011], *lv denied* 17 NY3d 904 [2011]). Furthermore, the resulting prejudice, if any, was minimal. While one potential witness, of questionable reliability, told police that two other men had committed the crimes, and that witness died during the period of delay at issue, the jury nevertheless heard testimony that one of those men had been arrested early in the case. Moreover, "a determination made in good faith to delay prosecution for sufficient reasons will not deprive defendant of due process even though there may be some prejudice to defendant" (*People v Vernace*, 96 NY2d 886, 888 [2001]).

The court properly exercised its discretion in denying, on the ground of lack of sufficient indicia of reliability, defendant's motion to admit hearsay evidence of third-party culpability (*see Chambers v Mississippi*, 410 US 284 [1973]; *People v Robinson*, 89 NY2d 648, 654 [1997]; *see also People v Burns*, 6 NY3d 793 [2006]). The declarant, the above-discussed man who died during the pendency of the investigation, contradicted himself in numerous statements, including regarding

whether he was present at the time of the crime, how he came to be present, whether one the purported real perpetrators had threatened him, and even whether the victims were dead or alive when he left the apartment. Moreover, other evidence in the case directly undermined the reliability of his statements. In particular, blood samples taken from the declarant and the two men the declarant said had committed the crimes excluded the two men as well as the declarant himself as contributors to forensic evidence at the crime scene, suggesting that none of the three were present (*see People v Coleman*, 69 AD3d 430, 431 [1st Dept 2010], *lv denied* 15 NY3d 748 [2010]).

The verdict was supported by legally sufficient evidence, and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The record establishes the reliability of the DNA evidence, and there is no reasonable explanation, under all the circumstances of the case, for the presence of defendant's DNA in the victims' bodies other than defendant's guilt of both sexually assaulting and strangling the victims.

The record fails to support defendant's claim that the court coerced him to withdraw his application to proceed pro se. First, there was nothing improper about the court's decision to order a second competency examination. Defendant agreed to the

reexamination, and in any event, given defendant's history of mental health issues, the court providently exercised its discretion in ordering new CPL article 730 proceedings to ensure that any waiver of the right to counsel would be knowing, voluntary, and intelligent (*see People v Stone*, 22 NY3d 520, 526–27 [2014]). Second, by fulfilling its obligation to undertake a searching inquiry regarding defendant's waiver of his right to counsel, which included warning defendant of the dangers and disadvantages of proceeding pro se (*see People v Crampe*, 17 NY3d 469, 484 [2011]), the court did not coerce defendant into withdrawing the application (*see People v Agard*, 107 AD3d 613 [1st Dept 2013], *lv denied* 21 NY3d 1039 [2013]). As for defendant's subsequent, midtrial request to represent himself, the court properly denied it as untimely, and defendant failed to cite any compelling circumstances for the request (*see People v McIntyre*, 36 NY2d 10, 17 [1974]).

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

ENTERED: JULY 5, 2016

Margaret Soval
DEPUTY CLERK

Sweeny, J.P., Acosta, Kapnick, Kahn, JJ.

1649 Keri Horowitz, Index 152242/14
Plaintiff-Respondent,

-against-

Ethan Chen,
Defendant-Appellant.

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Law Offices of Michael E. Pressman, New York (Stuart B. Cholewa of counsel), for appellant.

Gersowitz Libo & Korek, P.C., New York (Michael Chessa of counsel), for respondent.

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Order, Supreme Court, New York County (Robert D. Kalish, J.), entered November 24, 2015, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff snowboarder was injured when, while standing at the base of a beginner ski slope and speaking with a friend, defendant struck her while skiing at approximately 20 to 30 kilometers per hour. Although there are inherent risks in the sports of skiing and snowboarding, "participants do not consent to conduct that is reckless, intentional or so negligent as to create an unreasonably increased risk" (*Pantalone v Talcott*, 52 AD3d 1148, 1149 [3d Dept 2008]).

Here, the record presents triable issues as to whether defendant had engaged in reckless conduct as he skied into a

crowded area at the base of a beginner's slope, which was at or near a marked safety zone, and that he did so despite his awareness of his limited abilities to safely handle such speed under the snow surface conditions presented. Furthermore, in view of the significant injuries sustained by plaintiff, reasonable inferences may be drawn that she endured a violent collision, which raises an issue as to whether the speed at which defendant was skiing was reckless under the circumstances (*see Moore v Hoffman*, 114 AD3d 1265 [4th Dept 2014]).

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

ENTERED: JULY 5, 2016

DEPUTY CLERK

Sweeny, J.P., Acosta, Feinman, Kapnick, Kahn, JJ.

1650 In re Daniela H., and Others,

Children Under the Age of Eighteen Years, etc.,

Marilyn A.,
Respondent-Appellant,

Administration for Children's Services,
Petitoner-Respondent.

_____

Simpson & Thacher & Bartlett LLP, New York (Randy Moonan of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Diana Lawless of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Riti P. Singh of counsel), attorney for the children.

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Order of disposition, Family Court, Bronx County (Ruben A. Martino, J.), entered on or about April 22, 2015, to the extent it brings up for review, as limited by the briefs, a fact-finding order, same court and Judge, entered on or about March 28, 2015, which found that respondent-mother derivatively neglected her three younger children, unanimously affirmed, without costs.

A preponderance of the evidence supports the court's finding that the excessive amount of school missed by the two older children, as well as their additional tardiness, without adequate excuse, significantly compromised their educational performance and compliance with related services, and thus, that respondent

neglected these children and derivatively neglected the three younger children (*see Matter of Danny R.*, 60 AD3d 450 [1st Dept 2009]).

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

ENTERED: JULY 5, 2016

DEPUTY CLERK

Sweeny, J.P., Acosta, Feinman, Kapnick, Kahn, JJ.

1651 In re Lillian Cheung, Index 100417/15
Petitioner-Appellant,

-against-

Commissioner, Department of Housing Preservation and Development, et al.,
Respondents-Respondents.

_____

Brooklyn Legal Services Corporation A, Brooklyn (Sara Wolkensdorfer of counsel), for petitioner.

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

Gallet, Dreyer & Berkey, LLP, New York (Michelle P. Quinn of counsel), for Lindsay Park Housing Corp., respondent.

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Determination of respondent Department of Housing Preservation and Development (HPD), dated January 20, 2015, which, after a hearing, found that petitioner illegally sublet her Mitchell-Lama subsidized apartment, and issued a certificate of eviction in favor of respondent Lindsay Park Housing Corporation, unanimously confirmed, the petition denied and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Joan B. Lobis, J.], entered May 4, 2015), dismissed, without costs.

Petitioner's claim that the hearing officer erred in failing to dismiss the grounds for termination of her tenancy based on Lindsay Park's inability to prove Cheung's failure to cure, is

unpersuasive, as HPD regards illegal subletting to be incurable (*see* 28 RCNY § 3-18(b); *Matter of O'Quinn v New York City Dept. of Hous. Preserv. & Dev.*, 284 AD2d 211, 212 [1st Dept 2001] [citation omitted]; *Matter of Studley v New York City Dept. of Hous. Preserv. & Dev.*, 277 AD2d 101 [1st Dept 2000]).

Petitioner's due process rights were also adequately protected, as the hearing officer did not improvidently exercise her discretion in allowing the testimony of the rebuttal witnesses whose testimony did not amount to mere bolstering of respondent's case (*see Herrera v V.B. Haulage Corp.*, 205 AD2d 409, 410 [1st Dept 1994]). Moreover, she had the opportunity to cross-examine both rebuttal witnesses and an opportunity to call her own rebuttal witnesses, which she declined to do.

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

ENTERED: JULY 5, 2016

Margaret Saval

DEPUTY CLERK

Sweeny, J.P., Acosta, Feinman, Kapnick, Kahn, JJ.

1652 Susan Budney, Index 350091/12
Plaintiff-Respondent,

-against-

Michael Santomauro,
Defendant-Appellant.

_____

Victor Levin, Garden City, for appellant.

The Mandel Law Firm, New York (Madelyn Jaye of counsel), for respondent.

_____

Order, Supreme Court, New York County (Matthew F. Cooper, J.), entered August 22, 2014, which, insofar as appealed from as limited by the briefs, directed that defendant pay attorney's fees in the amount of $28,000 directly to plaintiff's attorneys, and granted plaintiff's request for an award of child support add-on expenses in the amount of $2,615.87, unanimously affirmed, without costs.

Defendant's argument that plaintiff's application for counsel fees was deficient because no billing statement accompanied her motion, is unpreserved, as it is raised for the first time on appeal (*see Matter of Torres*, 124 AD3d 525, 527 [1st Dept 2015], *lv dismissed* 26 NY3d 954 [2015]). Defendant never mentioned in his opposing papers that there was an absence

of documentation to support the claim for legal fees; nor did he appear at oral argument to assert same. Were we to review the argument, we would find that the award of counsel fees was supported by the affirmation of plaintiff's counsel, the retainer agreement, and the billing statement, all of which were submitted on the motion, and warranted in light of defendant's obstructionist tactics (*see De Bernardo v De Bernardo*, 180 AD2d 500, 502 [1st Dept 1992]).

Although defendant challenges the court's award of child support add-ons in the amount of $2,615.87 because plaintiff refused to inform him of the exact amount of the healthcare bills, he failed to specifically challenge any item of expense for which plaintiff sought reimbursement. Thus, his argument that the add-on expenses, including those for the child's camp, did not reflect proper child support add-on expenses, is

unpreserved, and in any event, is unpersuasive (*see* Domestic Relations Law § 240 [1-b][c][4]; *Micciche v Micciche*, 62 AD3d 673 [2d Dept 2009]).

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: JULY 5, 2016

DEPUTY CLERK

Sweeny, J.P., Acosta, Feinman, Kahn, JJ.

1654- Commerce Bank, et al., Index 651967/14
1655- Plaintiffs-Respondents-Appellants, 651442/11
1656

-against-

The Bank of New York Mellon,
Defendant-Appellant-Respondent.

- - - - -

Knights of Columbus,
Plaintiff-Respondent-Appellant,

-against-

The Bank of New York Mellon,
Defendant-Appellant-Respondent.

_____

Mayer Brown LLP, New York (Matthew D. Ingber of counsel), for appellant-respondent.

Talcott Franklin P.C., Arlington, TX (Talcott Franklin of the bars of the State of Texas, the State of North Carolina, and the State of Michigan, admitted pro hac vice, of counsel), for respondents-appellants.

_____

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered June 18, 2013, which, insofar as appealed from as limited by the briefs, granted defendant's motion to dismiss the breach of fiduciary duty claim and denied the motion as to the negligence claim, unanimously modified, on the law, to grant the motion as to so much of the negligence claim as is based on subparagraphs 139(b) and (f) of the amended complaint, and otherwise affirmed, without costs. Order, same court (Saliann Scarpulla, J.), entered on or about July 24, 2015, which, insofar

as appealed from as limited by the briefs, denied defendant's motion to dismiss the breach of contract claim, except for the fifth "breaching act," unanimously modified, on the law, to grant the motion as to so much of the contract claim as is based on section 2.03(c) of the Pooling and Servicing Agreements (PSAs) and so much of the negligence claim as is based on subparagraphs 169(b) and (f) of the second amended complaint, and otherwise affirmed, without costs. Order, same court and Justice, entered October 6, 2015, which, insofar appealed as appealed from as limited by the briefs, granted defendant's motion to dismiss the breach of fiduciary duty claim, and denied the motion as to the negligence claim and as to the contract claim, except for the fourth breaching act, unanimously modified, on the law, to grant the motion as to so much of the contract claim as is based on section 2.03(c) of the PSAs and so much of the negligence claim as is based on subparagraphs 188(b) and (f)-(i) of the complaint, and otherwise affirmed, without costs.

Defendant acknowledges that it had contractual obligations to review or inventory mortgage files and make certifications. It contends that plaintiffs' allegations are insufficient, because they are not tied to the particular trusts in which plaintiffs invested. Defendant relies on *Retirement Bd. of Policemen's Annuity & Benefit Fund of City of Chicago v Bank of*

N.Y. Mellon (775 F3d 154 [2d Cir 2014], *cert denied* ___ US ___, 136 S Ct 796 [2016]), which found that a named plaintiff in a putative class action lacked class standing because defendant's "alleged misconduct must be *proved* loan-by-loan and trust-by-trust" (*id.* at 162 [emphasis added]). However, there is persuasive authority that *Retirement Bd.* does not apply to the sufficiency of allegations on a motion to dismiss for failure to state a claim (*see e.g. Phoenix Light SF Ltd. v Deutsche Bank Natl. Trust Co.*, ___ F Supp 3d __, 2016 WL 1212573, *8-9, 2016 US Dist LEXIS 41119, *28-29 [SD NY, March 28, 2016, No. 14-cv-10103 (JGK)]; *Royal Park Invs. SA/NV v Bank of N.Y. Mellon*, 2016 WL 899320, *4, 2016 US Dist LEXIS 26793, *12-13 [SD NY, March 2, 2016, No. 1:14-cv-6502-GHW] [collecting cases]).

The court correctly denied defendant's motions to dismiss so much of the contract claims as is based on section 2.01(c) of the PSAs, because that section is ambiguous as to whether the opinions of counsel excused defendant from the obligation to affix certain language on assignments of mortgage or the obligations to cause such assignments to be in proper form for recording and to cause them to be delivered to the appropriate public office for recording (*see Telerep, LLC v U.S. Intl. Media, LLC*, 74 AD3d 401 [1st Dept 2010]).

To the extent the contract claims are based on section

2.03(c) of the PSAs, they should be dismissed. That section states, "Upon discovery by any of the parties hereto of a breach of a representation or warranty with respect to a Mortgage Loan *made pursuant to Section 2.03(a)* . . . that materially and adversely affects the interests of the Certificateholders in the Mortgage Loan, the party discovering such breach shall give prompt notice thereof to the other parties" (emphasis added). The representations and warranties made pursuant to section 2.03(a) address loan-to-value ratio, whether there are other liens on a property, whether a loan was underwritten pursuant to nonparty Countrywide Home Loans's underwriting guidelines, and the like. Plaintiffs do not allege that defendant discovered breaches of such representations and warranties.

The court correctly dismissed so much of the contract claims as was based on defendant's failure to give notice of an Event of Default pursuant to section 7.03(b) of the PSAs. That section says, "Within 60 days after the occurrence of any Event of Default, the Trustee shall transmit by mail to all Certificateholders notice of each such Event of Default . . . *known to the Trustee"* (emphasis added). Section 8.02(viii) specifies that "the Trustee shall not be deemed to have knowledge of an Event of Default until a Responsible Officer of the Trustee shall have received written notice thereof." The October 2010

letter sent by nonparty Gibbs & Bruns was not a notice of an Event of Default; rather, it was a notice of events that, with time, might ripen into Events of Default. Furthermore, the settlement among defendant, Countrywide, and nonparty Bank of America (BofA), which we approved in its entirety (*see Matter of Bank of N.Y. Mellon*, 127 AD3d 120, 128 [1st Dept 2015]), rendered the letter inoperative, i.e., as if never sent. Plaintiffs allege no written notice other than the letter.

In light of *AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.* (11 NY3d 146, 158 [2008]), defendant's argument that the negligence claims should be dismissed in their entirety as duplicative of the contract claims is unavailing. However, parts of the negligence claims should be dismissed.

In *AG Capital*, the Court of Appeals agreed with other courts that had "held that prior to default, indenture trustees[1] owe note holders an extracontractual duty to perform basic, nondiscretionary, ministerial functions" (11 NY3d at 157). Plaintiffs allege that defendant had the duty to notify them that other parties to the PSA had failed to perform their obligations (paragraph 139[b] of the amended complaint in *Knights of*

[1] "PSAs . . . are trust agreements similar to bond indentures in many respects" (*Ellington Credit Fund v Select Portfolio Servicing, Inc.*, 837 F Supp 2d 162, 192 [SD NY 2011] [internal quotation marks omitted]).

Columbus, paragraph 169[b] of the second amended complaint in *Knights*, and paragraph 188[b] of the *Commerce Bank* complaint) and that the Master Servicer was covering up defendant's failures (paragraph 139[f] of the amended complaint in *Knights*, paragraph 169[f] of the second amended complaint in *Knights*, and paragraph 188[f] of the *Commerce Bank* complaint). However, in order to give plaintiffs such notice, defendant would have had to monitor other parties. A failure to monitor other parties "plainly do[es] not involve the performance of basic non-discretionary ministerial tasks" (*Ellington*, 837 F Supp 2d at 193 [internal quotation marks omitted]).

The *Commerce Bank* plaintiffs further allege that defendant had the duty to "'[n]ose to the source' of the systematic improper servicing and administration conduct . . . described in multiple governmental actions . . . to discover if Events of Default or Master Servicer Event of Defaults [sic] or other PSA breaches had occurred" (paragraph 188[h]). However, the trustee of an RMBS (residential mortgage-backed securities) trust does not have a duty to "nose to the source" (*VNB Realty, Inc. v U.S. Bank, N.A.*, 2014 WL 1628441, *6 n 3, 2014 US Dist LEXIS 57189, *18 n 3 [D NJ, Apr. 23, 2014, Civ. No. 2:13-04743 (WJM)]).

Paragraph 188(i) of the *Commerce Bank* complaint is unintelligible; to the extent it can be understood, it does not

allege a "basic, nondiscretionary, ministerial function[]" (*AG Capital*, 11 NY3d at 157).

Paragraph 188(g) of the *Commerce Bank* complaint is barred by our approval of the settlement in *Bank of N.Y. Mellon* "in all respects, including the aspect releasing the loan modification claims" (127 AD3d at 128).

The court correctly dismissed the breach of fiduciary duty claims. While the pre-default duty to avoid conflicts of interest (*AG Capital*, 11 NY3d at 156-157) is a fiduciary duty (*see Beck v Manufacturers Hanover Trust Co.*, 218 AD2d 1, 11-13 [1st Dept 1995]), the *Knights'* amended complaint merely contains conclusory allegations as to such conflict (*see Heritage Partners, LLC v Stroock & Stroock & Lavan LLP*, 133 AD3d 428 [1st Dept 2015], *lv denied* __ NY3d __, 2016 NY Slip Op 71804 [Apr. 28, 2016]; *see also Elliott Assoc. v J. Henry Schroder Bank & Trust Co.*, 838 F2d 66, 70 [2d Cir 1988]).

The *Commerce Bank* complaint contains factual allegations about defendant's conflict of interest, but they are not sufficient. "[T]he existence of a conflict of interest can not be inferred solely from a relationship between an issuer and an indenture trustee that is mutually beneficial and increasingly

lucrative" (*Royal Park Invs. SA/NV v HSBC Bank USA, N.A.*, 109 F Supp 2d 587, 598 [SD NY 2015] [internal quotation marks omitted]). Unlike the plaintiff in *Royal Park Invs. SA/NV v Deutsche Bank Natl. Trust Co.* (2016 WL 439020, *9, 2016 US Dist LEXIS 12982, *28-29 [SD NY, Feb. 3, 2016, No. 14-CV-4394 [AJN]), the *Commerce Bank* plaintiffs do not allege a quid pro quo situation.

To the extent the *Commerce Bank* complaint alleges that defendant breached its fiduciary duty with respect to loan modification claims, that claim is precluded by our approval of the settlement in *Bank of N.Y. Mellon* (127 AD3d at 128) and our declaration that "there is no indication that [defendant] was acting in self-interest or in the interests of BofA rather than those of the certificateholders" when it entered into the settlement (*id.* at 126).

Since no Event of Default occurred, the court correctly dismissed plaintiffs' post-default fiduciary duty claims (*see Putman High Yield Trust v Bank of N.Y.*, 7 AD3d 439 [1st Dept 2004]).

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

ENTERED: JULY 5, 2016

DEPUTY CLERK

Sweeny, J.P., Acosta, Feinman, Kapnick, Kahn, JJ.

1657 In re OTR Media Group, et al., Petitioners-Appellants, Index 260130/14

-against-

Board of Standards and Appeals of the City of New York, et al, Respondents-Respondents.

_____

Smith, Buss & Jacobs, LLP, Yonkers (Jeffrey D. Buss of counsel), for appellants.

Zachary W. Carter, Corporation Counsel, New York (Brian T. Horan of counsel), for respondents.

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Judgment (denominated a decision and order), Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered November 23, 2015, denying the petition seeking to annul a resolution of respondent Board of Standards and Appeals of the City of New York (BSA), dated January 28, 2014, which affirmed respondent the New York City Department of Buildings' (DOB) determination denying petitioners' application to register a sign as a nonconforming advertising sign, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Substantial evidence supports BSA's determination that the continuation of the nonconforming use of the sign as an advertising sign is prohibited because such nonconforming use was discontinued for more than two years, when it was replaced by an

accessory sign beginning in 1981 (*see* NY City Zoning Resolution § 52-61; *Matter of Toys "R" Us v Silva*, 89 NY2d 411 [1996]). Petitioners' contention that Supreme Court erred in applying the substantial evidence standard is unavailing (*see Matter of SoHo Alliance v New York City Bd. of Stds. & Appeals*, 95 NY2d 437, 440 [2000]; *Matter of Sasso v Osgood*, 85 NY2d 374, 384 n 2 [1995]). Nor is there any basis for disturbing BSA's determination to discredit affidavits submitted by petitioners, sworn in 2011 and 2013, which contradicted documents submitted in support of the accessory sign application that was granted by DOB in 1981.

Since the record shows that BSA's determination was supported by substantial evidence and had a rational basis, petitioners were not entitled to a hearing pursuant to CPLR 7804(h) (*see Matter of St. Onge v Donovan*, 71 NY2d 507, 519 [1988]; *cf. Matter of Church of Scientology of N.Y. v Tax Commn. of City of N.Y.*, 120 AD2d 376 [1st Dept 1986] [matter remanded for a full evidentiary hearing because the record was not sufficient to determine whether the respondent had acted arbitrarily and capriciously], *appeal dismissed* 68 NY2d 807 [1986], *lv dismissed* 69 NY2d 659 [1986]).

Petitioners' due process claim is unpreserved, and this Court has "no discretionary authority" to reach it in the

interest of justice (*Matter of Khan v New York State Dept. of Health*, 96 NY2d 879, 880 [2001]; *see Green v New York City Police Dept.*, 34 AD3d 262, 263 [1st Dept 2006]).

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

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

ENTERED: JULY 5, 2016

DEPUTY CLERK

Sweeny, J.P., Acosta, Feinman, Kapnick, Kahn, JJ.

1660-
1660A The People of the State of New York, Respondent,

Ind. 3150/12
1257/14

-against-

Angelo Rios,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Joseph M. Nursey of counsel), for appellant.

_____

Judgment, Supreme Court, Bronx County (Ethan Greenberg, J. at plea; Nicholas Iacovetta, J. at sentencing), rendered October 23, 2014, as modified December 3, 2014, and judgment, Supreme Court, Bronx County (Nicholas Iacovetta, J.), rendered October 23, 2014, unanimously affirmed.

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

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on

reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

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

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

ENTERED: JULY 5, 2016

Margaret Sowal
DEPUTY CLERK

Sweeny, J.P., Acosta, Feinman, Kapnick, Kahn, JJ.

1662 Daniel Ankers, Index 155221/12
Plaintiff-Respondent,

-against-

Horizon Group, LLC, et al.,
Defendants,

Horizon At Ridge Hill, LLC,
et al.,
Defendants-Appellants.
- - - - -
[And a Third-Party Action]

_____

Cozen O'Connor, New York (Vincent P. Pozzuto of counsel), for appellants.

Sacks & Sacks, LLP, New York (Scott N. Singer of counsel), for respondent.

_____

Order, Supreme Court, New York County (Paul Wooten, J.), entered October 13, 2015 which granted plaintiff's motion for partial summary judgment on the question of defendants' Labor Law § 240(1) liability, and denied defendants Horizon at Ridge Hill LLC, and Azorim at Ridge Hill, Inc.'s cross motion for summary judgment dismissing the complaint as against them, unanimously modified, on the law, to deny plaintiff's motion for partial summary judgment, to grant defendants' motion for summary judgment dismissing plaintiff's Labor Law § 241(6) claim insofar

as predicated on violations of Industrial Code (12 NYCRR) §§ 23-1.5, 23-1.7(a) and 1.7(c) through (h), 23-1.8, 23-1.23, 23-2.2, 23-4.1, 23-4.3, 23-4.4, 23-4.5, 23-9.2, 23-9.4, 23-9.5, and 23-9.7, and otherwise affirmed, without costs.

Plaintiff was the foreman for third-party Hank Shaw Golf Construction, LLC (Shaw). Shaw was engaged to perform certain plumbing work on the "Horizon at Ridge Hill" project to build condominiums on top of a hill. At the end of the work day, plaintiff went to talk to a co-worker who was operating a Benford motorized wheelbarrow (Benford), which was stopped near the top of the hill. Plaintiff stood on the Benford to talk to his co-worker. The Benford then began to slide down the hill. The operator could neither control nor stop it. In the process, plaintiff either jumped or was thrown from the Benford. He tumbled down the side of the hill, approximately fifteen feet, before coming to rest at the bottom of a concrete sand filtration system that had been cut into a level spot on the hillside.

Issues of fact exist here as to whether plaintiff's accident was the result of a gravity-related risk or part of the usual and ordinary dangers of the work site (*see e.g. Settimo v City of New York*, 61 AD3d 840 [2d Dept 2009]). Hence partial summary

judgment on plaintiff's Labor Law § 240(1) claim should have been denied, and summary dismissal of plaintiff's Labor Law § 200 and common law negligence claims was properly denied.

In support of his Labor Law § 241(6) claims, plaintiff has pleaded violations of numerous sections of the Industrial Code that are either insufficiently specific or are inapplicable to the facts here. Accordingly, insofar as plaintiff's § 241(6) claims are predicated on violations of sections 23-1.5, 23-1.7(a) and 1.7(c) through (h), 23-1.8, 23-1.23, 23-2.2, 23-4.1, 23-4.3, 23-4.4, 23-4.5, 23-9.2, 23-9.4, 23-9.5, and 23-9.7, those claims are dismissed (*see e.g. Mouta v Essex Mkt. Dev. LLC*, 106 AD3d 549, 550 [1st Dept 2013]).

There exist, however, as noted above, issues of fact concerning the exact nature of the hazard facing plaintiff, including whether it was a hazardous opening within the meaning of § 23-1.7(b), whether safety devices such as those contemplated in §§ 23-1.15, 23-1.16, and 23-1.17 could have protected

plaintiff and whether the excavation for the sand filtration system conformed with the requirements of § 23-4.2.

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

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

ENTERED: JULY 5, 2016

Margaret Sowal
DEPUTY CLERK

Sweeny, J.P., Acosta, Feinman, Kapnick, Kahn, JJ.

1663 Case 39/15

[M-4745] In re Tocqueville Asset Management L.P.,
Petitioner,

-against-

New York City Tax Appeal Tribunal, et al.,
Respondents.

_____

Seward & Kissel, LLP, New York (Mark J. Hyland of counsel), for petitoner.

Zachary W. Carter, Corporation Counsel, New York (Amy H. Bassett of counsel), for respondents.

_____

Determination of respondent Tax Appeals Tribunal of the City of New York, dated May 29, 2015, affirming an administrative deficiency notice disallowing an unincorporated business deduction claimed by petitioner for calendar year 2005, unanimously confirmed, without costs, the petition denied, and the proceeding commenced in this Court pursuant to CPLR 506(b)(4) and article 78 dismissed.

Petitioner failed to establish its entitlement to the specific deduction it claims (Administrative Code of City of NY § 11-529[e]). The Tax Appeals Tribunal's determination that the claimed deduction is nondeductible under Administrative Code §

11-507(3) and 19 RCNY 28-06(d)(1)(i)(A) is supported by substantial evidence and has a rational basis in the law. No exception applies to make the claimed deduction properly deductible.

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

ENTERED: JULY 5, 2016

Margaret Sowal
DEPUTY CLERK

Sweeny, J.P., Acosta, Feinman, Kapnick, Kahn, JJ.

1664 Bakari Kinsey, Index 306534/09
Plaintiff-Appellant,

-against-

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

_____

Harmon Linder & Rogowsky, New York (Mitchell Dranow of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Devin Slack of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered May 21, 2015, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

New York City police officers and emergency medical technicians [EMTs] responded to a 911 call regarding plaintiff, who suffered from bipolar disorder. When they arrived, plaintiff appeared calm, and wanted help. The police convinced plaintiff to enter an ambulance, but after he was seated and his vital signs were taken, he opened the ambulance door, ran up five flights of stairs of a nearby building and, while attempting to climb down the fire escape, fell to the ground.

Defendants made a prima facie showing of entitlement to judgment as a matter of law by demonstrating that they owed no

special duty to plaintiff (*see McLean v City of New York*, 12 NY3d 194, 199 [2009]), other than "that owed the public generally" (*Lauer v City of New York*, 95 NY2d 95, 100 [2000]). In opposition, plaintiff failed to raise an issue of fact (*see Torres v City of New York*, 116 AD3d 947 [2d Dept 2014]; *compare Applewhite v Accuhealth, Inc.*, 21 NY3d 420 [2013]).

Moreover, since the decisions of the City's police officers and EMTs were discretionary ones, the City is protected by governmental immunity (*see Valdez v City of New York*, 18 NY3d 69, 79 [2011]) and, even if such decisions prove to be erroneous, they do not cast the City in damages (*see DiMeo v Rotterdam Emergency Med. Servs., Inc.*, 110 AD3d 1423, 1424 [3d Dept 2013], *lv denied* 22 NY3d 864 [2014]).

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: JULY 5, 2016

Margaret Sowal
DEPUTY CLERK

Sweeny, J.P., Acosta, Feinman, Kapnick, Kahn, JJ.

1665 The People of the State of New York, Respondent, Ind. 1113/12 17153C/12

-against-

Derrick Monroe, Defendant-Appellant.

_____

Cardozo Appeals Clinic, New York (Stanley Neustadter of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (William Terrell, III of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Seth L. Marvin, J.), rendered August 20, 2013, as amended September 26, 2013, convicting defendant, after a jury trial, of rape in the first degree and criminal sexual act in the first degree, and sentencing him, as a persistent felony offender, to concurrent terms of 22 years to life, unanimously affirmed.

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

in testimony. The element of forcible compulsion was established by, among other things, the victim's testimony that defendant held her down during the attack (*see e.g. People v Simmons*, 278 AD2d 29 [1st Dept 2000] *lv denied* 96 NY2d 787 [2001]).

We perceive no basis for reducing the sentence.

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

ENTERED: JULY 5, 2016

DEPUTY CLERK

Sweeny, J.P., Acosta, Feinman, Kapnick, Kahn, JJ.

1666 Tyrone Shields, et al., Index 22414/13
Plaintiffs-Appellants,

-against-

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

_____

Neil Wollerstein, Bronx (Mitchell Dranow of counsel), for appellants.

Zachary W. Carter, Corporation Counsel, New York (Michael Pastor of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Ruben Franco, J.), entered on or about August 20, 2015, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing plaintiffs' claims for false arrest, false imprisonment, malicious prosecution, abuse of process, and assault and battery at their apartment and while entering the police van, unanimously affirmed, without costs.

Defendants made a prima facie showing of probable cause supporting the issuance of the search warrant for plaintiffs' apartment, and plaintiffs failed to raise a triable issue of fact (*see Delgado v City of New York*, 86 AD3d 502, 507 [1st Dept 2011]). The search warrant was issued as the result of an investigation during which a registered confidential informant made three confirmatory purchases of marijuana in plaintiffs'

apartment during the week before the issuance of the warrant. A detective and an assistant district attorney submitted affidavits explaining why a search warrant was needed, and the confidential informant gave sworn testimony before the Magistrate that issued the warrant. Under these circumstances, there was no need to satisfy the *Aguilar-Spinelli* test (*see id.*).

Defendants also made a prima facie showing of probable cause for plaintiffs' arrest, by submitting evidence, including documentary evidence, showing that a total of 37 bags of marijuana were recovered from plaintiffs' bedrooms during the search (*see People v Baker*, 20 NY3d 354, 359 [2013]). Plaintiffs' conclusory denials do not suffice to raise triable issues of fact (*see Silver v Silver*, 17 AD3d 281, 281 [1st Dept 2005]). The existence of probable cause constitutes a complete defense to plaintiffs' causes of action for false arrest, false imprisonment, and malicious prosecution (*see Lawson v City of New York*, 83 AD3d 609, 609 [1st Dept 2011], *lv dismissed* 19 NY3d 952 [2012]). Since plaintiffs point to no evidence that defendants were motivated by some collateral objective, the existence of probable cause likewise constitutes a defense to plaintiffs' cause of action for abuse of process (*see Rosen v Hanrahan*, 2 AD3d 352, 353 [1st Dept 2003], *lv denied* 3 NY3d 605 [2004]).

Plaintiffs have shown that there are triable issues of fact as to whether assault and battery was committed by the defendants when they conducted strip searches of the plaintiffs. The mere fact that someone has been arrested and taken into custody "does not justify police intrusion into a person's body" (*People v Hall*, 10 NY3d 303, 307 [2008], citing *Schmerber v California*, 384 US 757, 769-770 [1966]). A strip search of an arrestee charged with a misdemeanor or other minor offense violates the Fourth Amendment to the United States Constitution unless there is a reasonable suspicion that the arrestee is concealing weapons or contraband (*Huck v City of Newburgh*, 275 AD2d 343, 344 [2d Dept 2000], *lv dismissed*, 95 NY2d 929 [2000]). As there is no showing of concealment of weapons or contraband by the plaintiffs in this case, the court below correctly denied the defendants' motion as to the third and tenth causes of action alleging assault and battery.

As the plaintiffs have failed to show the existence of questions of fact as to their claims under 42 USC § 1983, the

sixth and thirteenth causes of action were properly dismissed by the court below.

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: JULY 5, 2016

DEPUTY CLERK

Sweeny, J.P., Acosta, Feinman, Kapnick, Kahn, JJ.

1667 The People of the State of New York, Respondent, Ind. 3129/03

-against-

John Mingo, Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Alexandra Keeling of counsel), and Lankler Siffert & Wohl LLP, New York (Jonathan D. Lamberti of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (David M. Cohn of counsel), for respondent.

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Order, Supreme Court, New York County (Bonnie G. Wittner, J.), entered on or about August 4, 2008, which summarily denied defendant's CPL 440.10 motion to vacate a judgment rendered February 14, 2005, unanimously affirmed.

The court correctly denied defendant's CPL 440.10 motion alleging ineffective assistance of counsel. 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]). Regardless of whether trial counsel actually viewed the entirety of a surveillance videotape from which several still photographs were received at trial, and regardless of whether counsel reasonably should have done so, defendant cannot satisfy the state or

federal prejudice requirements, because the videotape is simply not exculpatory or helpful to the defense in any way. We have examined the tape, and we find that the only relevant portions are the photographs that were introduced at trial. Accordingly, a remand for an evidentiary hearing would serve no useful purpose.

Although "the court's statement that it denied defendant's motion 'for the reasons set forth in the People's response' was insufficient to satisfy the requirements of CPL 440.30(7)[,] . . . the record is sufficient to enable us to intelligently review the order denying defendant's motion" (*People v Jones*, 109 AD3d 1108, 1109 [4th Dept 2013], *affd* 25 NY3d 57 [2015]). Therefore, a remand for more specific findings of fact and conclusions of law is likewise unwarranted.

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

ENTERED: JULY 5, 2016

Margaret Sarah
DEPUTY CLERK

Sweeny, J.P., Acosta, Feinman, Kapnick, Kahn, JJ.

1669N In re Yahaira Rivera, Index 402582/12
Petitioner-Appellant,

-against-

Elizabeth R. Berlin, etc.,
Respondent-Respondent,

Robert Doar, etc., et al.,
Respondents.

_____

HIV Law Project, Inc., Brooklyn (Armen H. Merjian of counsel), for appellant.

Eric T. Schneiderman, Attorney General, New York (Philip V. Tisne of counsel), for respondent.

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Order, Supreme Court, New York County (Donna M. Mills, J.), entered April 8, 2015, which, upon renewal, denied petitioner's motion for an award of attorney's fees pursuant to CPLR article 86, unanimously affirmed, without costs.

In this article 78 proceeding, petitioner, inter alia, sought to compel respondent New York City Human Resources Administration (HRA) to comply with respondent New York State Office of Temporary and Disability Assistance's (OTDA) direction that it redetermine petitioner's eligibility for public assistance benefits and food stamps and/or restore any lost benefits retroactively. Petitioner had successfully challenged HRA's determinations at four fair hearings before OTDA, but was

unable to secure HRA's compliance with OTDA's decisions after fair hearing until this lawsuit. While this lawsuit prompted HRA to change its position, it had no such effect on OTDA, which had consistently sided with petitioner. Therefore, she is not entitled to an award of attorney's fees under New York's Equal Access to Justice Act (CPLR art 86) (*see Matter of Solla v Berlin*, 24 NY3d 1192, 1195 [2015]; *see also Hernandez v Thomas* 98 NY2d 735 [2002]).

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

ENTERED: JULY 5, 2016

DEPUTY CLERK

Sweeny, J.P., Acosta, Feinman, Kapnick, Kahn, JJ.

1670N Yellowbook, Inc., formerly known as Yellow Book Sales & Distribution Company, Inc.,
Plaintiff-Respondent,

-against-

Heller & Heller, et al.,
Defendants-Appellants.

Index 653498/11

Peter Toumbekis, Brooklyn, for appellants.

Concetta G. Spirio, Sayville, for respondent.

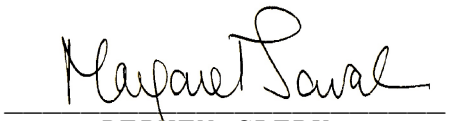
Order, Supreme Court, New York County (Ellen M. Coin, J.), entered November 5, 2014, which, upon reargument, adhered to a prior determination granting plaintiff's motion to strike defendants' answer and enter judgment in plaintiff's favor, unanimously affirmed, with costs.

The motion court providently exercised its discretion in striking defendants' answer, including their remaining counterclaim, given their "willful and repeated failure to comply with court-ordered discovery" (*Soto-Law v Law*, 264 AD2d 695, 696 [1st Dept 1999]). After repeated discovery violations for which defendants were sanctioned, the individual defendant failed to appear for his deposition, which had already been rescheduled. Defendants' behavior, and their failure to offer a reasonable excuse for it, supported the motion court's finding of

willfulness (*see Fish & Richardson, P.C. v Schindler*, 75 AD3d 219, 221-222 [1st Dept 2010]; *Kutner v Feiden, Dweck & Sladkus*, 223 AD2d 488, 489 [1st Dept 1996], *lv denied* 88 NY2d 802 [1996]).

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

ENTERED: JULY 5, 2016



DEPUTY CLERK

Sweeny, J.P., Acosta, Feinman, Kahn, JJ.

1671N BEW Parking Corp., et al., Index 601155/09
Plaintiffs-Appellants,

-against-

Apthorp Associates LLC,
Defendant-Respondent.

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The Baez Law Firm, PLLC, New York (José Anibal Báez of counsel), for appellants.

Marc E. Elliott, P.C., New York (Marc E. Elliott of counsel), for respondent.

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Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered on or about March 25, 2015, which, to the extent appealed from as limited by the briefs, denied plaintiffs' motion to compel the production of certain documents withheld as protected by the attorney-client privilege, unanimously affirmed, without costs.

Defendant, which has no employees, established, through specific affidavits of persons with knowledge, that its counsel had to communicate with defendant's agents in order to provide legal advice regarding, among other things, the repairs to the garage it owned and the vacate order regarding the garage. Further, the averments of counsel and the context of the communications demonstrate that there was an expectation by defendant that the communications would be held in confidence.

As such, defendant established that the communications at issue were privileged (*see Gama Aviation Inc. v Sandton Capital Partners, L.P.*, 99 AD3d 423, 424 [1st Dept 2012]). Defendant did not waive the privilege by producing nonprivileged documents related to the same issues (*see Deutsche Bank Trust Co. of Ams. v Tri-Links Inv. Trust*, 43 AD3d 56, 64 [1st Dept 2007]). A waiver occurs when the privileged information itself is placed at issue (*id.*; *see also Orco Bank v Proteinas Del Pacifico*, 179 AD2d 390 [1st Dept 1992]); such a waiver did not occur here.

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

ENTERED: JULY 5, 2016

DEPUTY CLERK

Mazzarelli, J.P., Andrias, Richter, Manzanet-Daniels, Kahn, JJ.

1260- Index 450370/14
1261-
1262 In re The City of New York,
Petitioner-Respondent,

-against-

2305-07 Third Avenue, LLC, et al.,
Respondents-Appellants,

Heron Real Estate Corp.,
Intervenor-Appellant.

_____

Feerick, Lynch, MacCartney PLLC, South Nyack (J. David MacCartney, Jr., of counsel), for 2305-07 Third Avenue LLC, 207 East 125th Street, LLC, 205 East 125th Street, LLC, and City Lights Properties Three LLC., appellants.

Meister Seelig & Fein LLP, New York (Stephen B. Meister of counsel), for Heron Real Estate Corp, appellant.

Zachary W. Carter, Corporation Counsel, New York (Michael Chestnov of counsel), for respondent.

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Order, Supreme Court, New York County (Shlomo Hagler, J.), entered on or about August 14, 2015, affirmed, without costs. Appeal from purported order, same court and Justice, entered on or about September 17, 2015, dismissed, without costs, as taken from a nonappealable paper. Order, same court and Justice, entered on or about February 17, 2016, affirmed, without costs.

Opinion by Manzanet-Daniels, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
Richard T. Andrias
Rosalyn H. Richter
Sallie Manzanet-Daniels
Marcy L. Kahn, JJ.

1260-1261-1262
Index 450370/14

_____x

In re The City of New York,
Petitioner-Respondent,

-against-

2305-07 Third Avenue, LLC, et al.,
Respondents-Appellants,

Heron Real Estate Corp.,
Intervenor-Appellant.

_____x

Respondents and intervenor appeal from the order of the Supreme Court, New York County (Shlomo Hagler, J.), entered on or about August 14, 2015, which, insofar as appealed from as limited by the briefs, denied their motions to dismiss the petition on the ground that it is untimely, and respondents appeal from the purported order of the same court and Justice, entered on or about September 17, 2015 and the order of the same court and Justice, entered on or about February 17, 2016, which granted the petition to acquire properties by eminent domain.

Feerick, Lynch, MacCartney PLLC, South Nyack (J. David MacCartney, Jr., of counsel), for 2305-07 Third Avenue LLC, 207 East 125th

Street, LLC, 205 East 125th Street, LLC, and City Lights Properties Three LLC., appellants.

Meister Seelig & Fein LLP, New York (Stephen B. Meister, Alexander D. Pencu and Michael B. Sloan of counsel), for Heron Real Estate Corp, appellant.

Zachary W. Carter, Corporation Counsel, New York (Michael Chestnov of counsel), for respondent.

MANZANET-DANIELS, J.

On this appeal we consider whether the City timely commenced this proceeding pursuant to article 4 of the Eminent Domain Procedure Law (EDPL). We are in accord with Supreme Court that the proceeding was commenced within the applicable time limitation set forth in section 401(A)(3), which provides that the condemnor must commence such proceedings within three years after the latest of, inter alia, "entry of the final order or judgment on judicial review," and we now affirm.

In June 2009, the City published a determination and findings authorizing the takings of 10 parcels (including four parcels held by the respondents) in connection with the East 125th Street Development Project and the Fifteenth Amended Harlem-East Harlem Urban Renewal Plan. The public use, benefit and purpose of the project is to eliminate blight and to redevelop the East 125th Street area.

In July 2009, parties led by Uptown Holdings, LLC, and including Heron Real Estate Corp., the intervenor in the instant proceeding (together the Uptown Petitioners), commenced an original proceeding in this Court, pursuant to section 207(A) of the EDPL, to annul the determination. By order entered October 12, 2010, this Court denied the petition, confirmed the determination, and dismissed the EDPL § 207 proceeding (*see*

Matter of Uptown Holdings, LLC v City of New York, 77 AD3d 434 [1st Dept 2010], *appeal dismissed* 16 NY3d 764 [2011]).

On November 12, 2010, the Uptown Petitioners filed a notice of appeal to the Court of Appeals as of right pursuant to CPLR 5601(b), on the ground that a substantial constitutional question had been raised. By letter dated November 30, 2010, the Court of Appeals advised the parties that it would examine "its subject matter jurisdiction with respect to whether a substantial constitutional question is directly involved to support an appeal as of right." The Court invited the parties to submit letter briefs on the issue. The Court stated that pending its inquiry, the time in which to file "briefs on the merits" would be held in abeyance.

The Uptown Petitioners submitted a letter asserting that their appeal presented substantial constitutional questions as to whether the takings were "in conformity with the federal and state constitutions and whether a public use, benefit or purpose will be served by the acquisition." The Uptown Petitioners contended that the taking could be constitutional only if "made pursuant to a carefully formulated and integrated comprehensive development plan to which a developer is contractually bound." Petitioners maintained that the Court of Appeals had never squarely addressed the issue. The Uptown Petitioners further

asserted that this Court failed to address whether the record contained a rational basis for the determination of blight, the alleged basis for the takings.

The City maintained that the appeal did not involve a substantial constitutional question. The City asserted that the Uptown Petitioners could not show that the proposed takings were "not rationally related to a conceivable public purpose" or that the determination was "baseless, corrupt or palpably without reasonable foundation." The City maintained that the finding of blight was "both rational and amply supported by the evidence," and therefore "indisputably a basis for the exercise of eminent domain."

In a single-sentence memorandum dated February 17, 2011, the Court of Appeals dismissed the appeal, "sua sponte, upon the ground that no substantial constitutional question is directly involved" (*Matter of Uptown Holdings, LLC v City of New York*, 16 NY3d 764, 764 [2011]).

By notice and petition filed on February 12, 2014, the City commenced this proceeding pursuant to EDPL article 4 in Supreme Court, New York County, seeking to acquire the subject properties via eminent domain. Respondents served a verified answer on or about May 5, 2014, asserting various objections, affirmative defenses, and counterclaims. Among these, the first affirmative

defense and first counterclaim contended that the City's right to proceed under EDPL article 4 accrued on October 12, 2010, the date of our denial of the EDPL 207 petition. Respondents thus argued that the petition, filed in February 2014, was untimely under the applicable three-year statute of limitations, with the underlying determination being deemed abandoned.

The City served a verified reply on June 18, 2014, contending, among other things, that the instant petition was timely because it was brought within three years of the date of the Court of Appeals' decision dismissing the appeal as of right in *Uptown Holdings*. By notice dated June 19, 2014, the City moved to dismiss respondents' affirmative defenses and counterclaims. The City reiterated that its right to file the instant petition accrued when the Court of Appeals dismissed the *Uptown Holdings* petition, and that the instant petition was brought within the requisite three years from that date.

Supreme Court granted the City's motion to the extent of striking most of respondents' affirmative defenses and counterclaims, and denied appellants' motions for dismissal of the petition. On the key issue of "whether the accrual date of EDPL 401(A)(3) runs from the Appellate Division order on October 12, 2010," or was "extended by the Court of Appeals' dismissal of the appeal on February 17, 2011," the motion court held that it

was bound by the Fourth Department's decision in *Matter of City of Syracuse Indus. Dev. Agency (J.C. Penney Corp. - Carousel Ctr. Co., L.P.*) (32 AD3d 1332 [4th Dept 2006], *lv denied* 7 NY3d 714 [2006], *cert denied* 550 US 918 [2007]), which was squarely on point. In *J.C. Penney*, the Fourth Department held that the three-year time period set forth in EDPL 401(A)(3) did *not* run from the date of the Appellate Division order confirming the EDPL article 2 condemnation determination, but from the date of the Court of Appeals' decisions denying and dismissing the property owners' motions for leave to appeal and purported appeal as of right (*see J.C. Penney*, 32 AD3d at 1333). The motion court accordingly held that the instant petition was timely filed on February 12, 2014, "within the three year statute of limitations set forth in EDPL [] 401(A)(3)."

We agree and now affirm. As the lower court recognized, the petition is timely since it was filed within the requisite three years of the final order of the Court of Appeals dismissing the appeal of the section 207 challenge. This view is consistent with the plain meaning of and the purpose underlying the relevant statute.

EDPL 207, entitled "Judicial Review," provides that any persons "aggrieved by the condemnor's determination and findings made pursuant to [EDPL 204] may seek judicial review thereof by

the appellate division . . . by the filing of a petition in such court within thirty days after the condemnor's completion of its publication of its determination and findings." The court in an EDPL 207 proceeding "shall either confirm or reject the condemnor's determination and findings" (EDPL 207[C]).

EDPL 401, entitled "Time for acquisition," prescribes the time during which a condemnor may commence proceedings "to acquire the property necessary for the proposed public project" (EDPL 401[A]). Specifically, section 401(A) provides that the condemnor may commence such proceedings "up to three years" after the latest of "(1) publication of its determination and findings pursuant to [EDPL 204], or (2) the date of the order or completion of [an exemption procedure under EDPL 206], or (3) entry of the final order or judgment on judicial review pursuant to [EDPL 207]" (EDPL 401[A][1]-[3]). Section 401(B) provides that if the condemnor does not commence EDPL article 4 proceedings within the specified time, "the project shall be deemed abandoned, and thereafter, before commencing [EDPL article 4 proceedings,] the condemnor must again comply with the provisions of article two" (EDPL 401[B]).

The plain and common-sense interpretation of the statute is that "the final order or judgment on judicial review" is the final order or judgment disposing of any EDPL 207 challenge and

terminating judicial review. Our October 12, 2010 decision did *not* finally terminate judicial review, as the challengers filed a notice of appeal which entailed further review by the Court of Appeals. The decision of the Court of Appeals could not be known until such time as it issued its order dismissing the appeal.

Nothing in the statute supports an interpretation that "the final order or judgment on judicial review" entails a determination on the merits. If the legislature so intended, it could have appended the language "on the merits." Section 207(B)'s provision that the order of the Appellate Division "shall be final *subject to review by the court of appeals*" would otherwise be superfluous, contrary to familiar precepts of statutory construction.

It is evident that while an appellate division order denying a section 207 challenge is *a* final order under section 207(B) and CPLR 5611, subject to review by the Court of Appeals, it is not "*the* final order or judgment on judicial review" unless it in fact is the final order that disposes of the section 207 challenge.

Interpreting "the final order or judgment on judicial review" to mean the final order or judgment disposing of a section 207 challenge is also the only practical and common-sense means of applying the statute, allowing for a consistent point

from which to determine the running of the statute of limitations. Under appellants' interpretation, the parties would not know whether the three-year statute had begun running until after the Court of Appeals acted on a motion for leave. Indeed, Heron expressly admits that the pendency of an appeal or leave application to the Court of Appeals will cast "an inchoate shadow" over the proceedings, until the Court "dissipate[s]" the shadow by deciding whether to take the appeal.

The Fourth Department, in the sole appellate case directly on point, held:

> "[T]he court properly determined that the three-year time period set forth in EDPL 401(A)(3) commenced on February 25, 2003, the date on which the Court of Appeals denied the motion for leave to appeal from our orders of November 15, 2002 confirming the 2002 determination and findings of [the condemnor] to acquire certain property interests and dismissed the appeal of respondent J.C. Penney Corporation, Inc."

(*J.C. Penney*, 32 AD3d at 1333). While the *J.C. Penney* majority did not explain its reasons for so construing the statute, it plainly rejected the reasoning of the dissenting Justice, who, like appellants here, maintained that a Court of Appeals dismissal of an appeal or denial of leave does not constitute "judicial review" for purposes of Section 401(A), because in refusing the appeal, the Court "refused to review the orders of this Court and thus did not adjudicate the merits of the

attempted appeals" (*J.C. Penney*, 32 AD3d at 1335 [Hurlbutt, J., dissenting]).

Appellants' reliance on *Matter of New York State Urban Dev. Corp. (TOH Realty Corp.)* (165 AD2d 733 [1st Dept 1991], *appeal dismissed* 76 NY2d 982 [1990], *lv denied* 77 NY2d 810 [1991]) is misplaced. In *TOH Realty*, we simply noted that the appeal had been timely commenced within three years of "surviv[ing] final judicial scrutiny on May 8, 1986 [i.e., the date on which the Court of Appeals issued a determination on the merits]" (*TOH Realty*, 165 AD2d at 735). We had no occasion to rule on whether a Court of Appeals decision declining to take an appeal would constitute the requisite "judicial review," as the issue was not presented, and this Court accordingly offered no commentary on the point.

Appellants' contention that the Court of Appeals does not engage in "judicial review" when it determines that it will not hear an appeal ignores the extensive review which such determinations in fact entail. Far from having no power over the case, the Court of Appeals retains extensive control over the case, including the power to issue stays as appropriate (*see* CPLR 5519[c]), up until the moment it issues its decision.

The determination to deny leave entails a thorough review of the issues presented in the case. The Court of Appeals' "major

functions . . . include the duty uniformly to settle the law for the entire State and finally to determine its principles" (*Matter of Miller*, 257 NY 349, 357-358 [1931]). As the Court of Appeals makes clear in its Rules of Practice, leaveworthy cases are ones in which "the issues are novel or of public importance, present a conflict with prior decisions of this Court, or involve a conflict among the departments of the Appellate Division" (22 NYCRR § 500.22[b][4]).

Hence, far from being pro forma, the Court of Appeals' determination of whether a case merits granting leave — i.e., is "leaveworthy" — entails a careful analysis of the issues presented by the case.

This careful, threshold consideration of the issues presented is also performed in cases in which a party purports to appeal as of right on constitutional grounds, or, as pertinent here, "from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States" (CPLR 5601[b]). Although it is not explicitly stated in the statute, in order to "safeguard against abuse of the right to appeal on constitutional questions" (lest creative attorneys manufacture constitutional issues in every case in which they lose in the Appellate Division) (Arthur Karger, Powers of the New

York Court of Appeals § 7.5 at 226 [3d ed rev 2005]), the predicate constitutional issue must be "substantial" (*People ex rel. Uviller v Luger*, 38 NY2d 854 [1976]). Determining whether a constitutional issue is "substantial," in turn, entails an analysis very similar to the leaveworthiness analysis performed on motions for leave to appeal. As the leading commentator on Court of Appeals procedure summarized:

> The Court has . . . generally not hesitated to dismiss appeals for want of substantiality where the settled law is to the contrary of the position urged by the appellant — as, for example, where a statute under attack has been previously sustained as against the same or equivalent constitutional objections; or where the purported constitutional question is predicated on a general claim that an allegedly erroneous decision by the courts below constituted a denial of due process; or where there is no basis for any constitutional, as distinct from some other legal, objection.

(Karger, *op cit*, § 7.5, at 227-228 [footnotes omitted].)

The Court of Appeals undertook precisely this sort of "substantiality" analysis in dismissing the appeal as of right in *Uptown Holdings*, with one Judge taking the uncommon step of writing a concurrence explaining that the constitutional issues raised by the Uptown Petitioners (relating to the validity of the procedures employed by the City) were insubstantial because they were governed by well-settled precedent (*see Uptown Holdings*, 16 NY3d at 764-765 [R.S. Smith, J., concurring]).

We have considered appellants' remaining contentions and find

them unavailing.

Accordingly, the order of the Supreme Court, New York County (Shlomo Hagler, J.), entered on or about August 14, 2015, which, insofar as appealed from as limited by the briefs, denied appellants' motions to dismiss the petition on the ground that it is untimely, should be affirmed, without costs. The appeal from the purported order of the same court and Justice, entered on or about September 17, 2015 should be dismissed, without costs, as taken from a nonappealable paper. The order of the same court and Justice, entered on or about February 17, 2016, should be affirmed, without costs.

All concur.

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

ENTERED: JULY 5, 2016

DEPUTY CLERK