SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 12, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Friedman, J.P., Saxe, Moskowitz, Gische, Kahn, JJ.

1818 Kumiva Group, LLC, formerly known as ATI Services, LLC, Plaintiff/Counterclaim-Defendant-Respondent, Index 650386/08

-against-

Garda USA Inc., Defendant/Counterclaim-Plaintiff-Appellant.

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Garda USA Inc., et al., Counterclaim-Plaintiffs-Appellants,

-against-

Richard Irvin, et al., Counterclaim-Defendants-Respondents.

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Goodwin Procter LLP, New York (Jeffrey Alan Simes of counsel), for appellants.

Dechert LLP, New York (Claude M. Tusk and Matthew L. Mazur of counsel), for respondents.

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Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered August 5, 2015, which, insofar as appealed from as limited by the briefs, granted plaintiff/counterclaim-defendant Kumiva Group, LLC (Kumiva) and counterclaim-defendants Richard Irvin and Robert Irvin's (Irvin defendants) motion for summary

judgment dismissing defendant/counterclaim-plaintiff Garda USA Inc. (Garda) and counterclaim-plaintiff ATI Systems International, Inc.'s (ATI) counterclaim for fraud, and awarded Kumiva prejudgment interest, at the statutory rate, upon $6,250,000 of Garda's liability, unanimously affirmed, with costs.

Garda is an American subsidiary of Garda World Security Corp., a Canadian corporation that is one of the largest security and cash handling businesses in the world. Garda sought to expand its operations into the United States, and in 2006 approached the Irvin defendants, who controlled ATI, a private security and armored car company with large operations in the United States, about a potential acquisition. Concurrent to ATI's negotiations with Garda, on November 30, 2006, ATI acquired CDC Systems Inc. (CDC), a smaller security and armored car company with a strong presence in the New York City market, for $25,000,000. ATI believed it could achieve significant synergies and cost savings by merging CDC's New Jersey operations with ATI's existing New Jersey operations.

On December 8, 2006, ATI counter-signed a nonbinding letter of intent from Garda, under which ATI agreed that Garda would conduct due diligence before purchasing ATI, and proposed that Garda would value ATI at 8.5 times ATI's 2006 pro forma Earnings

Before Interest, Taxes, Depreciation and Amortization (EBITDA). The letter of intent assumed a minimum 2006 pro forma EBITDA of $37,000,000, which would lead to a purchase price of $314,000,000, and established a maximum purchase price of $398,500,000 if ATI's 2006 pro-forma EBITDA exceeded $45,000,000. Subsequently, Garda retained PricewaterhouseCoopers (PWC) to conduct due diligence along with Garda's chief financial officer and investment bankers. Upon the conclusion of Garda's due diligence, on February 25, 2007, Garda and ATI entered into an Agreement and Plan of Merger (the merger agreement) under which Garda agreed to aquire ATI for a purchase price of $341,700,000.

From December 8, 2006, when ATI countersigned Garda's letter of intent, through February 25, 2007, when Garda and ATI entered into the merger agreement, the events forming the basis for the instant action occurred. During this period, Garda and ATI engaged in extensive negotiations, including numerous phone conferences, email exchanges, and meetings, to determine ATI's 2006 pro-forma EBITDA and the purchase price for ATI. A major point of contention was the effect that the anticipated positive synergies and savings from ATI's acquisition of CDC would have on ATI's 2007 pro forma EBITDA.

Garda avers that approximately one third of ATI's $341,700,000 purchase price was based on ATI's representation to

Garda of the value and positive synergies that ATI would realize through the integration of CDC into ATI's operations. Garda accuses ATI of fraudulently inducing Garda to raise its offer by misrepresenting to Garda that ATI was achieving significant savings by integrating CDC into its own operations, while minimizing the difficulties ATI was experiencing integrating CDC. Garda asserts that if it had known the extent of the difficulties ATI experienced integrating CDC, and the number of customers ATI lost due to these difficulties, Garda would have lowered its offer by an amount in the range from $36,000,000 to $81,000,000.

ATI acknowledges that it experienced significant issues integrating CDC, including a number of account cancellations due to unsatisfactory service. In fact, ATI insisted on including a disclosure in the merger agreement disclosing that ATI's integration of CDC involved "several start-up issues including deposits being misrouted, lost or delayed, which caused some financial losses and some potential lost business." Based on this disclosure and the due diligence Garda was allowed to conduct, Kumiva and the Irvin defendants assert that Garda had sufficient notice during the due diligence period of ATI's difficulties integrating CDC and, notwithstanding such notice, agreed to the $341,700,000 purchase price.

As relevant to this appeal, Kumiva and the Irvin defendants

moved for summary judgment dismissing Garda's counterclaim for fraudulent inducement on the grounds that Garda failed to show "out of pocket" damages and justifiable reliance on ATI's representations. Supreme Court granted Kumiva and the Irvin defendants summary judgment dismissing the fraudulent inducement counterclaims, holding that, as a matter of law, Garda failed to show nonspeculative damages and, further, that ATI's disclosures precluded Garda from showing justifiable reliance. Upon Garda's appeal, we affirm.

Initially, as to Garda's damages, New York courts for over one hundred years have differentiated between the damages recoverable for a breach of contract action and those recoverable for fraudulent inducement. While a plaintiff alleging breach of contract is entitled to damages restoring the full benefit of the bargain, a plaintiff alleging fraudulent inducement is limited to "out of pocket" damages, which consist solely of the actual pecuniary loss directly caused by the fraudulent inducement. "Out of pocket" damages are calculated in three steps. First, the plaintiff must show the actual value of the consideration it received. Second, the plaintiff must prove that the defendant's fraudulent inducement directly caused the plaintiff to agree to deliver consideration that was greater than the value of the received consideration. Finally, the difference between the

value of the received consideration and the delivered consideration constitutes "out of pocket" damages (see *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421-422 [1996]; *Sager v Friedman*, 270 NY 472, 481 [1936]; *Reno v Bull*, 226 NY 546, 552-553 [1919]; *Connaughton v Chipotle Mexican Grill, Inc.*, 135 AD3d 535, 538-539 [1st Dept 2016]).

Here, to show nonspeculative damages, Garda was required to submit evidence establishing ATI's actual value on February 25, 2007, the date of the execution of the merger agreement setting the purchase price for the company. Next, Garda had the burden to submit evidence that ATI's misrepresentations directly caused Garda to agree to pay consideration to ATI that was greater than ATI's actual value. The difference between these two sums would then constitute Garda's out-of-pocket damages. Garda failed to come forward with such evidence.

In opposition to Kumiva's and the Irvin defendants' motion for summary judgment, Garda submitted, inter alia, the expert affidavit of J.T. Atkins, the head of an advisory firm specializing in mergers and acquisitions. Atkins explained that the conventional manner to appraise a business requires conducting three studies: (1) a comparable company analysis; (2) a precedent transaction analysis; and (3) a discounted cash flow analysis. The results of these three studies are then

triangulated to determine the value of the business.

Garda concedes that it failed to conduct a formal valuation of ATI's value on February 25, 2007. Rather, Garda's experts attempted to calculate the first step of the "out of pocket" damages analysis by assuming that the $341,700,000 purchase price constituted ATI's actual value. Atkins acknowledged that using the $341,700,000 purchase price as a valuation of ATI was "not a formal valuation by any stretch of the imagination." Nevertheless, Garda posits that since ATI and Garda negotiated the $341,700,000 price through arms length negotiations, that price constitutes the "best measure" of ATI's value on February 25, 2007. Garda further contends that a formal appraisal method may have distorted Garda's damages by including damages "solely due to changes in methodology."

Contrary to Garda's arguments, the negotiated price cannot substitute for evidence of ATI's actual value on the relevant date for purposes of a damages calculation. As Garda itself concedes, a formal appraisal of ATI's value may have established that ATI was actually worth either more than or less than $341,700,000. If ATI's value were equal to or greater than $341,700,000 (which cannot be determined on this record), Garda would not be entitled to damages for fraudulent inducement *(see Lama Holdings*, 88 NY2d at 422 ["There were, however, no losses

here because plaintiffs . . . received more than twice the fair market value for their shares"]; *Reno*, 226 NY at 553 ["The plaintiff paid $5,000 for the stock purchased by him. If he were entitled to recover at all, it was the difference between that amount and the value of the stock which he received . . . He was not entitled to anything else").

Garda also failed to complete properly the second step of the "out of pocket" damages calculation. Instead of showing that Garda delivered consideration greater than ATI's actual value, Garda asked its experts to calculate the dollar amount by which ATI's misrepresentations "inflated" the purchase price. Atkins opined that the misrepresentations inflated ATI's price by $81,000,000. Garda also submitted the affidavit of another expert, Simon Platt, a forensic accountant, who opined that the misrepresentations inflated the price by $36,000,000. Based on these opinions, Garda concluded that it suffered out-of-pocket damages in an amount between $36,000,000 and $81,000,000. However, a showing that Garda would have made a lower offer if ATI had not made any misrepresentations does not suffice to demonstrate that Garda suffered any actual pecuniary loss. In fact, Garda essentially concedes that an actual formal valuation might well have shown that ATI was worth more than $341,700,000 on the valuation, in which case Garda would not have suffered any

pecuniary damages at all.

In sum, Garda failed to properly calculate "out of pocket" damages. First, apparently out of a misguided concern that a formal appraisal might show that it had paid a fair price for ATI, Garda conflated the first and second steps by concluding that the agreed-upon purchase constituted ATI's actual value, instead of conducting a formal appraisal to determine that actual value. Second, instead of comparing the delivered consideration to ATI's actual value, Garda attempted to work backwards from the agreed-upon price and to estimate how much lower Garda's offer would have been but for ATI's misrepresentations. These exercises cannot substitute for admissible evidence of ATI's actual value on the relevant date.

Turning next to the issue of justifiable reliance, while the merger agreement's disclaimers are not sufficiently specific to preclude justifiable reliance on the alleged misrepresentations, which concern facts peculiarly within the seller's knowledge (*see Basis Yield Alpha Fund [Master] v Goldman Sachs Group, Inc.*, 115 AD3d 128, 137 [1st Dept 2014]), such reliance was not reasonable where ATI informed Garda that "there were several start-up issues [with the integration of a recently acquired company] . . . which caused some financial losses and [] potential lost business" (as stated in schedule 3.7[13] to the merger agreement), Garda

received several indications that the integration was not going as smoothly as anticipated or reported, and its due diligence firm, PWC, warned that "it is too early to assess the effectiveness of the integration plan" (*see Centro Empresarial Cempresa S.A. v América Móvil, S.A.B. de C.V.*, 17 NY3d 269, 279 [2011]; *Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 100 [2006], *lv denied* 8 NY3d 804 [2007]).

Finally, Supreme Court properly awarded prejudgment interest, at the statutory rate, on the monies which had been held in escrow (CPLR 5001 and 5004). Neither the merger agreement nor the related escrow agreement specified an interest rate to be paid in the event of default (*see NML Capital v Republic of Argentina*, 17 NY3d 250, 258 [2011]; *Secular v Royal Athletic Surfacing Co.*, 66 AD2d 761 [1st Dept 1978], *appeal dismissed* 46 NY2d 1075 [1979]).

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

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

ENTERED: JANUARY 12, 2017

CLERK

Friedman, J.P., Andrias, Moskowitz, Gische, Gesmer, JJ.

2064 Jessica Torres, Index 24566/06
Plaintiff-Appellant,

-against-

Irene G. Cergnul, M.D., et al.,
Defendants-Respondents,

New York City Health and Hospitals Corporation, et al.,
Defendants.

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Sanocki Newman & Turret, LLP, New York (David B. Turret of counsel), for appellant.

Aaronson Rappaport Feinstein & Deutsch, LLP, New York (Steven C. Mandell of counsel), for respondents.

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Order, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered April 21, 2015, which, insofar as appealed from, granted defendants Irene G. Cergnul, M.D. and Bronx-Lebanon Hospital Center's motion for summary judgment dismissing the complaint as against them, reversed, on the law, without costs, and the motion denied.

Defendants Dr. Cergnul and Bronx-Lebanon established prima facie that they did not depart from the accepted standard of medical care in diagnosing and treating plaintiff's 2006 ectopic pregnancy (*see Scalisi v Oberlander*, 96 AD3d 106, 120 [1st Dept 2012]). Their expert opined that Dr. Cergnul provided appropriate care when she saw plaintiff on June 6 and ordered a

repeat BhCG (a hormone produced during pregnancy) test, that no further tests were necessary that day because plaintiff was stable, and that it was appropriate and proper for the attending doctor at defendant Bronxcare MBD Family Practice Clinic (MBD) on June 7 to receive the laboratory reports, which indicated that the pregnancy was likely resolving by itself. With respect to plaintiff's June 22 visit to Bronx-Lebanon's emergency room, where the attending physician told plaintiff that he was too busy to perform diagnostic laparoscopy and would only perform a more invasive procedure, the expert opined that Bronx-Lebanon's staff fully explained to plaintiff the risks of her signing out against medical advice, and that there was in any event no immediate need for surgical intervention because plaintiff was stable. Defendants' expert further opined that neither Dr. Cergnul's treatment nor the performance of a salpingectomy at Bronx-Lebanon on June 23 caused plaintiff's fallopian tube to rupture.

In opposition, plaintiff raised issues of fact by submitting the report of an expert who opined that, in light of plaintiff's symptoms, which were indicative of an ectopic pregnancy, and medical history, which included a previous ectopic pregnancy, Dr. Cergnul should have followed up with plaintiff immediately after the results of the BhCG test she ordered on June 6 became available, and that as a result of her failure to do so,

plaintiff lost the opportunity to be timely treated with methotrexate and avoid a ruptured fallopian tube (*see Dallas-Stephenson v Waisman*, 39 AD3d 303, 307 [1st Dept 2007]). Defendants contend that the report should not have been considered, because the expert's name had been redacted from it. However, they did not object to the redaction (*see* CPLR 3101[d][1][i]); therefore, the report was properly considered (*see Vega v Mount Sinai-NYU Med. Ctr. & Health Sys.*, 13 AD3d 62 [1st Dept 2004]).

Defendants contend that plaintiff was solely at fault because, they allege, she was told to return to MBD two days later and failed to do so. However, there is no evidence in the record that an appointment was ever made for plaintiff for June 8.[1] Accordingly, the evidence presents issues of fact as to whether an appointment was scheduled and missed, whether Dr. Cergnul breached the standard of care by not following up with plaintiff after the June 7 BhCG test results became available (whether or not the alleged appointment was missed), and the apportionment of fault. Defendants' reliance on cases limiting

[1]The dissent appears to read Dr. Cergnul's note dated June 6, 2006, which orders the repeat BhCG test on June 7, and "F/U on Thursday" (June 8), to indicate that plaintiff was advised to return to MBD on June 8. We disagree that this is the only possible interpretation.

the duty of consulting physicians is misplaced (*see Sawh v Schoen*, 215 AD2d 291, 294 [1st Dept 1995]; *Lipton v Kaye*, 214 AD2d 319 [1st Dept 1995]). Dr. Cergnul was actively involved in plaintiff's treatment, even if she was not plaintiff's primary physician.

The dissent views plaintiff's expert's opinion regarding Dr. Cergnul's failure to follow up with plaintiff as soon as the June 7 BhCG test results were available as "speculative," citing *Rivers v Birnbaum*, 102 AD3d 26, 44 [2d Dept 2012]). In that case, more than a year passed between defendant's alleged misinterpretation of pathology slides and plaintiff's cancer diagnosis, and the Court found that plaintiff's expert's assertion that the correct diagnosis a year earlier would have led to appropriate treatment was speculative (*id.* at 32, 44). Here, plaintiff received what even Dr. Cergnul agrees was the appropriate treatment, methotrexate therapy. Plaintiff's expert asserts, however, that the treatment would have been more effective, preventing the loss of plaintiff's remaining fallopian tube, had it been administered as soon as Dr. Cergnul had the June 7 BhCG test results. Dr. Cergnul's colleague, Dr. Borne, did on June 16 exactly what plaintiff's expert said Dr. Cergnul should have done a week earlier: send plaintiff to the emergency room to rule out ectopic pregnancy and receive appropriate

treatment for her emergent condition. At the hospital, ectopic pregnancy could not be ruled out, and plaintiff was offered and accepted treatment with methotrexate. Dr. Cergnul testified that she was "relieved" when she later learned that plaintiff had received methotrexate, indicating her agreement that this was the appropriate treatment. Plaintiff's expert notes that "[i]t is widely recognized that the success of methotrexate therapy is significantly greater when introduced earlier in the pregnancy (when BhCG level is below 3,000) – and that the risk for failure, as was later experienced in this patient, is greater the longer the amount of time elapsing between conception and introduction of Methotrexate therapy." In the eight days between when the June 7 BhCG results were available to Dr. Cergnul (who testified that she could not recall if she ever saw them) and when plaintiff went to the hospital, plaintiff's BhCG levels had risen from 743.4 to 7,096.5. Accordingly, plaintiff's expert's opinion is based on facts in the record and is not speculative.

Plaintiff's expert's report also raised an issue of fact as to whether Bronx-Lebanon departed from medical standards by failing to provide plaintiff with the option of immediate surgical intervention, in particular, diagnostic laparoscopy, on June 22, when she presented with lower left quadrant and pelvic pain, cramping, and vaginal bleeding since the previous night.

Defendants contend that they cannot be held liable for plaintiff's refusal, against medical advice, to undergo immediate surgery (*see Ingutti v Rochester Gen. Hosp.*, 114 AD3d 1302 [4th Dept 2014], *appeal dismissed* 23 NY3d 929 [2014]). However, an issue of fact exists as to whether plaintiff was offered any meaningful option for surgical intervention, i.e., a procedure that would leave her remaining fallopian tube intact. Moreover, defendants' expert's opinion that there was no need for immediate surgical intervention because plaintiff was stable is undermined by the advice given by Bronx-Lebanon's own staff and in any event directly contradicted by plaintiff's expert (*see Frye v Montefiore Med. Ctr.*, 70 AD3d 15, 25 [1st Dept 2009]).

Our dissenting colleagues assert that plaintiff was offered an exploratory laparotomy. However, as the dissenting opinion acknowledges, this surgical procedure is far more invasive than the diagnostic laparoscopy that plaintiff had previously scheduled for the following day and would have preferred to have on June 22. Plaintiff's expert states that a laparotomy was also "far less appropriate" than a diagnostic laparascopy, and "unncecessary" under the circumstances. Furthermore, plaintiff testified that her understanding of what the Bronx-Lebanon physician told her was that he would "do a surgical procedure to remove my fallopian tube because he had a lot of surgeries and he

was in a rush," and that "[i]f I didn't want him to perform the surgery now, then I'd have to sign myself out of the hospital." Accordingly, plaintiff has clearly raised an issue of fact as to whether she was offered an appropriate option.

Contrary to defendants' contention, issues of fact also exist as to whether the delay in performing surgery was a proximate cause of plaintiff's ruptured fallopian tube (*see e.g. Lesniak v Stockholm Obstetrics & Gynecological Servs., P.C.*, 132 AD3d 959 [2d Dept 2015]). Defendants argue that their conduct could not have proximately caused the rupture of plaintiff's fallopian tube because intraoperative rupturing is a well known risk of even a non-negligently performed salpingostomy. However, this argument assumes that the rupture occurred during surgery, while the record is equally consistent with the fallopian tube having already ruptured before surgery. The dissent posits that plaintiff failed to present evidence supporting this. However, as plaintiff's expert noted, the operative report states that, after adhesions were removed from the fallopian tube, "it was

noted that there was a ruptured site." Furthermore, defendants' own expert opined that "the performance of the salpingectomy did not cause the plaintiff's fallopian tube to rupture."

All concur except Friedman, J.P. and Andrias, J. who dissent in a memorandum by Andrias, J. as follows:

ANDRIAS, J. (dissenting)

I disagree with the majority's conclusion that plaintiff's expert's affidavit raises a material issue of fact as to whether defendants Irene G. Cergnul, M.D. and Bronx-Lebanon Hospital Center departed from the accepted standard of medical care in diagnosing and treating plaintiff's 2006 ectopic pregnancy and proximately caused the rupture and removal of her left fallopian tube. The affidavit fails to address the prima facie showing in the detailed affidavit by defendants' expert, and proffers speculative opinions contrary to or otherwise unsupported by the evidence. Accordingly, I respectfully dissent.

After a positive home pregnancy test, on June 2, 2006, plaintiff went to see defendant Deborah E. Borne, M.D., her primary care doctor, at defendant Bronxcare MBD Family Practice Clinic (MBD). Plaintiff, then 30 years old, had previously given birth to three children, and had had an ectopic pregnancy that resulted in the removal of her right fallopian tube.

Plaintiff's beta human chorionic gonadotropin (BhCG) level, an indicator of pregnancy, was reported to be 1975 miU/mL, and the assessment was intrauterine pregnancy at approximately six weeks by the last menstrual period. Dr. Borne referred plaintiff to Third Avenue Radiology, where a June 5, 2006 ultrasound confirmed an intrauterine pregnancy of approximately 4.6 weeks'

gestational size. A repeat BhCG taken that day reflected a decrease in plaintiff's levels from 1975 to 1415 miU/mL.

On June 6, 2006, plaintiff returned to MBD as a "[w]alk-in" and saw Dr. Cergnul for the first time. Plaintiff complained of abdominal pain accompanied by vaginal spotting, and Dr. Cergnul's diagnosis was a "[l]ikely miscarriage." However, considering the possibility of an ectopic pregnancy, Dr. Cerngul ordered a third BhCG test for June 7 and noted in her records, "F/U [follow up] on Thursday" (June 8).

Plaintiff returned to MBD as directed on June 7 for the repeat BhCG, which was sent to a laboratory. While the test report indicated that plaintiff's BhCG levels had further decreased, Dr. Cergnul testified that she did not initially see the results, which would have been forwarded to MBD and reviewed by the attending physician on duty when they were received on June 8. However, Dr. Cergnul did testify that the test showed a BhCG level of 743 miU/mL, "which indicates loss of pregnancy." MBD's notes addressing the results of the test state that plaintiff was told she would "pass [the] pregnancy on [her] own."

On June 15, 2006, Dr. Cergnul contacted plaintiff to advise her of other test results, and asked that she return to MBD. On June 16, 2006, Dr. Borne examined plaintiff, who complained of severe left lower quadrant pain, and told her to go to an

emergency room to rule out a possible ectopic pregnancy. That evening, plaintiff went to Lincoln Hospital, where she was seen by several members of the gynecological staff.

Lincoln's records indicate that plaintiff's BhCG level was 7096.5 miU/mL "without a gestational sac in the uterus" and that an ectopic pregnancy could not be definitively ruled out. After consultation regarding the pros and cons of using medicine or surgical intervention, plaintiff opted for the former and was given a dose of methotrexate (MTX), a medication that inhibits rapid reproduction of cells, including fetal cells. Plaintiff was advised to return to Lincoln on June 21, 2006 for an initial follow-up to monitor the MTX's effectiveness.

On June 19, 2006, plaintiff, complaining of left lower abdominal pain, returned to MBD and informed Dr. Cergnul that she had been given an MTX shot at Lincoln. Concerned about plaintiff's lack of follow-up, Dr. Cergnul ordered another BhCG test, which revealed a level of 7,758 miU/mL.

On June 21, 2006, plaintiff presented to Dr. Borne with pain and mild vaginal spotting. After noting no change in plaintiff's elevated BhCG level, Dr. Borne prepared a consultation request for Dr. Coley at Bronx-Lebanon, where a transvaginal ultrasound revealed "No IUP [intrauterine pregnancy]" and "no distinct ectopic seen." However, Dr. Coley's assessment/plan stated:

> "Likely ectopic pregnancy [status post] Methotrexate administration on 6/17/06. [Patient] very stable. No free fluid in abdomen. No pain. No bleeding. [Patient] [status post] [right] salpingectomy in past for [right] ectopic, desires future fertility. ¶ In light of stable [patient] who desires future fertility and has only [left] tube remaining will have [patient] return 6/23 for repeat BhCG. Will put [patient] on schedule for laparoscopic salpingostomy if BhCG not significantly decreased on 6/23. Will proceed [with] surgery the same day. ¶ Patient given strict ectopic precautions to return [with] any pain to ER immediately."

Plaintiff understood the procedure to be performed as follows: "[T]hey can look inside to see what is wrong . . . and if it was an ectopic pregnancy, they would try to remove the pregnancy and salvage my fallopian tube, but if it was too bad, they had to do what they had to do."

On June 22, 2006, at approximately 1:00 p.m., plaintiff presented to Bronx-Lebanon's emergency room, complaining of pelvic pain, left lower quadrant pain, and cramping. She was triaged by Edmund Yamoah, P.A., who noted "high suspicion for [left] ectopic pregnancy." At or around 3:50 p.m., plaintiff was seen by the attending OB/GYN, Dr. Phabillia Afflack, who admitted her to gynecology and placed her on call to the operating room. Plaintiff signed a consent form authorizing a "laparoscopy, possible laparotomy, possible oopherectomy [sic], [and] possible salpingostomy." A few hours later, she was seen by the then-attending OB/GYN Dr. Allen, whose contemporaneous notes

state,

> "[Patient] seen by Dr. Afflack today. [Patient] scheduled for diagnostic laparoscopy, possible salpingectomy. Discussed care [with patient]. [Patient] told strong likelihood of ectopic pregnancy [left] side. Advised laparotomy, possible salpingostomy, possible salpingectomy or Methotrexate therapy versus Admission[.] [P]roceed [with] diagnostic laparoscopy in daytime 6/23/06 [with] Dr. Coley. I [illegible] [patient] that [illegible] labor and delivery. Don't have time to do a diagnostic laparoscopy. [Patient] refuses to do an exploratory laparotomy. [Patient] states that she prefers a diagnostic laparoscopy [with] Dr. Coley in A.M. [Patient] advises admission to GYN service for a diagnostic laparoscopy in pm. [Patient] does not want to stay in hospital. [Patient] wants to sign out AMA [and] return in A.M. for a diagnostic laparoscopy [with] Dr. Coley. Risk of rupture, hemorrhage [and] death [discussed with] [Patient]. [Patient] still wants to sign out AMA return in A.M. [Patient] advised to return to hospital ASAP if [increased] abdominal pain, vaginal bleeding, . . . etc."

Plaintiff testified that Dr. Allen told her he was in a "rush" and would have to remove her fallopian tube. She decided to wait for her scheduled procedure with Dr. Coley the next morning, because she was "scared" and did not want to "remove [her] only chance of having another pregnancy" without having someone "go in and look first." The Departure Against Medical Advice form signed by plaintiff states:

> "[Patient] understands risks of death [secondary] to rupture of ectopic pregnancy & refuses to stay in hospital [patient] states she will return tomorrow for admission. She states there that she will return if she has any severe pain immediately."

On June 23, 2006, plaintiff presented to Dr. Coley at Bronx-Lebanon for surgery. Her BhCG level was retested, and remained at the relatively same elevated level, demonstrating the failure of the MTX to terminate her pregnancy. Accordingly, Dr. Coley undertook to perform the diagnostic laparoscopy. During the procedure, the ectopic pregnancy was confirmed. Plaintiff's left fallopian tube was also found to be "grossly distended" with "extensive adhesions." When the adhesions were removed, "it was noted that there was a ruptured site along the inferior aspect of the fallopian tube." Dr. Coley attempted to perform a salpingostomy, but ultimately performed a salpingectomy instead, because "the extreme dilation of the fallopian tube as well as the ruptured fimbriated end and a history of 2 ectopic pregnancies" made it "unlikely that the patient would have a successful pregnancy with the damaged fallopian tube."

Plaintiff alleges, inter alia, that Dr. Cergnul and Bronx-Lebanon were negligent in failing to diagnose that she was suffering from an ectopic pregnancy and/or that this condition was an emergent and/or emergency situation requiring immediate care and treatment, which caused her to suffer a ruptured left fallopian tube, subsequent removal of her left fallopian tube, and consequent infertility. The issue before us is whether the motion court erred in granting Dr. Cergnul and Bronx-Lebanon

summary judgment dismissing the complaint as against them.

In moving for summary judgment dismissing a complaint alleging medical malpractice, a defendant must establish, prima facie, either that there was no departure or that any departure was not a proximate cause of the plaintiff's injuries (*see Scalisi v Oberlander*, 96 AD3d 106, 120 [1st Dept 2012]). Once such a showing has been made, the plaintiff "must submit evidentiary facts or materials to rebut the prima facie showing by the defendant physician that he [or she] was not negligent in treating plaintiff so as to demonstrate the existence of a triable issue of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Dr. Cergnul and Bronx-Lebanon established, prima facie, their entitlement to summary judgment by submitting the expert opinion of Shonda Corbett, M.D., which addressed plaintiff's allegations and established that the treatment of plaintiff was within and in accordance with good and accepted practice and, in any event, was not the proximate cause of plaintiff's injury.

Dr. Corbett opined that Dr. Cergnul acted appropriately on June 6, 2006, by obtaining a medical history from plaintiff and reviewing her chart and the June 5, 2006 sonogram, which showed a single intrauterine gestational sac of approximately 4.6 weeks and did not identify a fetal pole or a yolk sac, which could

signify an ectopic pregnancy. Further, based on that sonogram, plaintiff's complaints of intermittent vaginal spotting, and the decrease in plaintiff's BhCG values from 1975 to 1415, Dr. Cergnul's working diagnosis of a possible miscarriage and her differential diagnosis of a possible ectopic pregnancy were correct and appropriate. Because plaintiff's vital signs were all within normal range and she was stable, a repeat sonogram or referral to an emergency room or specialist was not warranted, and ordering the repeat BhCG test was the appropriate course of action.

Dr. Corbett further opined that when Dr. Cergnul next saw plaintiff on June 19, 2006, she did not ignore plaintiff's signs and symptoms, but obtained a proper medical history, performed a proper, appropriate and thorough examination and workup, and acted appropriately in ordering a repeat BhCG test to determine if the MTX shot that plaintiff had received three days earlier had been effective. Plaintiff was stable, her vital signs were normal, and no further tests or treatment was warranted.

As to Bronx-Lebanon, Dr. Corbett opined that on June 21, 2006, Dr. Coley properly and thoroughly examined and treated plaintiff. The ultrasound taken that day showed no intrauterine pregnancy and no distinct ectopic pregnancy. Plaintiff was stable, with no complaints of pain or bleeding, and Dr. Coley

properly diagnosed a likely ectopic pregnancy status post MTX administration. Dr. Coley also acted appropriately in ordering a repeat BhCG test, scheduling plaintiff for a laparoscopic salpingostomy on June 23, 2006 in the event that the BhCG value did not significantly decrease, and in giving plaintiff strict ectopic precautions to return immediately to the emergency room with any complaints of pain.

With respect to plaintiff's June 22, 2006 visit to Bronx-Lebanon's emergency room, Dr. Corbett opined that the medical staff obtained a proper history and performed sufficient and timely tests, including a bedside sonogram and repeat BhCG. Plaintiff was admitted for monitoring, and there was no immediate need for surgical intervention, because her vital signs were all within normal limits and she did not complain of any increasing pain and revealed no weakness, shortness of breath, palpitations, paleness, dizziness, tachycardia or hypotensiveness – the signs or symptoms of a ruptured fallopian tube. In addition, since plaintiff was seen by two attending OB/GYN physicians, there was no need to order any additional consultations.

Dr. Corbett explained that based upon the BhCG values, the absence of a gestational sac on the sonogram performed at Lincoln Hospital, the diagnosis of an ectopic pregnancy at Lincoln Hospital, the administration of MTX, and plaintiff's complaints

of left lower quadrant abdominal pain, Dr. Afflack correctly diagnosed plaintiff with a left ectopic pregnancy. Plaintiff signed a consent form authorizing Dr. Afflack to perform a laparoscopy, possible laparotomy, possible oophorectomy, and possible salpingectomy, which informed her of the risks. Upon a further discussion with Dr. Allen, plaintiff elected to proceed with the diagnostic laparoscopy that was scheduled with Dr. Coley on June 23, 2006. Although admitted to the GYN service, plaintiff signed a Departure Against Medical Advice form, which noted that she refused to stay in the hospital and that she understood the risks of death secondary to rupture of ectopic pregnancy. Plaintiff was instructed to return to the hospital immediately if she had increased abdominal pain, vaginal bleeding, paleness and pain.

When plaintiff returned to Bronx-Lebanon on June 23, 2006, her reported pain was 0/10 on the pain scale, and her vital signs and white blood cell count were all within normal limits. Consequently, Dr. Corbett opined that plaintiff was stable and did not have the signs and symptoms of a ruptured fallopian tube. Once Dr. Coley confirmed that plaintiff's BhCG level remained above 7415 and that the MTX shot had failed to resolve the ectopic pregnancy, plaintiff executed a consent form authorizing Dr. Coley to perform a laparoscopy to evaluate her for an ectopic

pregnancy. Dr. Corbett opined that the medical staff at Bronx-Lebanon appropriately informed plaintiff of the risks of the procedure, that plaintiff consented to those risks by executing the consent form, and that a reasonable person in the same situation as plaintiff would have consented to the procedure after being informed of those risks. Dr. Corbett further opined that Dr. Coley then took all the necessary precautions to salvage plaintiff's fallopian tube by performing a diagnostic laparoscopy and attempting to perform a salpingostomy. Dr. Corbett also opined that Dr. Coley utilized her best medical judgment when "[d]ue to the extreme dilatation of the fallopian tube as well as the ruptured fimbriated end and a history of 2 ectopic pregnancies" she "decided to perform a salpingectomy as it was considered unlikely that the patient would have a successful pregnancy with the damaged fallopian tube."

In opposition, the affidavit by plaintiff's expert failed to demonstrate the existence of a material issue of fact whether defendants deviated from the applicable standard of care, and even if they did, whether the departure was a competent producing cause of the rupture of plaintiff's left fallopian tube (*see Bacani v Rosenberg*, 74 AD3d 500 [1st Dept 2010], *lv denied* 15 NY3d 708 [2010]).

Generally, "the opinion of a qualified expert that a

plaintiff's injuries were caused by a deviation from relevant industry standards would preclude a grant of summary judgment in favor of the defendants" (*Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002] [internal quotation marks omitted]). However, a plaintiff's expert's opinion "must demonstrate 'the requisite nexus between the malpractice allegedly committed' and the harm suffered" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 307 [1st Dept 2007]). If "the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation . . . the opinion should be given no probative force and is insufficient to withstand summary judgment" (*Diaz* at 544; *Giampa v Marvin L. Shelton, M.D., P.C.*, 67 AD3d 439 [1st Dept 2009]). Further, the plaintiff's expert must address the specific assertions of the defendant's expert with respect to negligence and causation (*see Foster-Sturrup* v Long, 95 AD3d 726, 728-729 [1st Dept 2012]).

The majority states that

> "plaintiff raised issues of fact by submitting the report of an expert who opined that, in light of plaintiff's symptoms, which were indicative of an ectopic pregnancy, and medical history, which included a previous ectopic pregnancy, Dr. Cergnul should have followed up with plaintiff immediately after the results of the BhCG test she ordered on June 6 became available, and that as a result of her failure to do so, plaintiff lost the opportunity to be timely treated with [MTX] and avoid a ruptured fallopian tube."

However, plaintiff's expert ignored Dr. Cergnul's testimony that on June 6 she "ordered beta HCG to be repeated [on June 7] and asked the patient to return the following day to follow-up [sic] results precisely because on the back of your mind you always keep ectopic pregnancy as a possibility." While plaintiff appeared on June 7 for the test, the record establishes that she did not come back the next day to follow up, as instructed by Dr. Cergnul, and did not return to MBD until June 16, when she saw Dr. Borne. Plaintiff did not deny that she was instructed to come back on June 8. Rather, plaintiff testified that she did not recall the name Dr. Cergnul or the appointment with her on June 6.

Dr. Cergnul also testified that the results of the June 7 BhCG test would have been seen by the "covering" physician on duty when it was received by MBD on June 8. Plaintiff's expert did not address Dr. Corbett's opinion that this was an appropriate procedure, and there is no evidence as to when Dr. Cergnul, who was not plaintiff's primary physician, saw those results.

In any event, the expert's opinion that had Dr. Cergnul followed up with plaintiff immediately "the subsequent chain of events resulting in the rupture of [plaintiff's] fallopian tube would have been avoided," is speculative and thus fails to raise

a triable issue of fact as to causation (*see Rivers v Birnbaum*, 102 AD3d 26, 44 [2d Dept 2012]). Plaintiff's BhCG values had decreased from 1975 MiU/mL on June 2 to 1415 MiU/mL on June 5 to 753.4 MiU/mL on June 7. Dr. Takeshige, an attending physician in the Department of Obstetrics and Gynecology at Lincoln stated in his affidavit that plaintiff was medically and hemodynamically stable when she presented at Lincoln on June 16, meaning she was not actively bleeding, her blood test showed normal liver and kidney functions, her ultrasound showed no free fluid in the cul-de-sac and no gestational sac in the uterus (therefore no fetal cardiac activity), and her BhCG levels were below 1500 MiU/mL. The Lincoln physicians reached no definitive diagnosis, at various times writing "consider ectopic pregnancy," "suspicious for ectopic,", "question of ectopic vs. missed abortion," and "rule out left ectopic pregnancy." Plaintiff's expert never identified which of the tests performed at Lincoln, had they been performed after June 7 and prior to June 16, would have resulted in the "definitive diagnosis" of an ectopic pregnancy. Nor did plaintiff's expert address Dr. Corbett's opinion that by June 7, 2006, the pregnancy was likely a miscarriage or an ectopic pregnancy that was spontaneously resolving by itself due to the decreasing BhCG levels between June 2 and June 7.

Nor does plaintiff's expert raise an issue of fact as to Dr. Cergnul's alleged malpractice with respect to plaintiff's June 19 visit. Dr. Takeshige stated that on June 16 he discussed both laparoscopic surgery and MTX with plaintiff, including that MTX required at least two additional follow-up visits, on day four and seven, and that there was still the risk of a rupture of the fallopian tube. Plaintiff's expert did not opine that the MTX treatment was untimely or inappropriate. Nor did plaintiff's expert dispute that the effectiveness of MTX therapy required re-evaluation. Plaintiff's expert did not refute Dr. Corbett's assessment that when plaintiff was seen by Dr. Cergnul on June 19, Dr. Cergnul acted appropriately in ordering a repeat BhCG test to determine if the MTX had been effective.

The majority finds that "[p]laintiff's expert's report also raised an issue of fact as to whether Bronx-Lebanon departed from medical standards by failing to provide plaintiff with the option of immediate surgical intervention, in particular, diagnostic laparoscopy, on June 22." The majority rejects defendants' contention that they cannot be held liable for plaintiff's refusal, against medical advice, to undergo immediate surgery, finding that "an issue of fact exists as to whether plaintiff was offered any meaningful option for surgical intervention, i.e., a procedure that would leave her remaining fallopian tube intact."

The majority's view coincides with the defense expert's interpretation of the entry in Dr. Allen's notes stating, "Don't have time to do a diagnostic laparoscopy. [Patient] refuses to do an exploratory laparotomy." Based on this note, plaintiff's expert opined that there "was a departure from good and accepted medical practice in failing to provide [plaintiff] with the option of immediate (within a reasonable timeframe) surgical intervention - - particularly, diagnostic laparoscopy." The expert asserted that if Bronx-Lebanon Hospital was unable to do the diagnostic laparoscopy that day, plaintiff "should have been referred to another facility where an immediate laparoscopy could have been performed."

However, plaintiff's expert failed to refute Dr. Corbett's opinion that plaintiff was stable and did not exhibit any signs or symptoms of a ruptured fallopian tube requiring immediate surgery. Furthermore, plaintiff's expert failed to address the fact that plaintiff signed a consent form authorizing Dr. Afflack to perform a laparoscopy, possible laparotomy, possible oophorectomy and possible salpingectomy. While a laparotomy is an open surgery and more invasive than a laparoscopy, its purpose is still exploratory, and it would not have led to the removal of plaintiff's left fallopian tube unless the exploratory surgery showed that that was medically warranted.

Plaintiff's expert also ignored that part of Dr. Allen's note stating, "Patient advised admission to GYN service for a diagnostic laparoscopy in p.m." Instead of availing herself of this and the other procedures offered, plaintiff signed out against medical advice, choosing to proceed with surgery to be performed by Dr. Coley the following morning (*see Ingutti v Rochester Gen. Hosp.*, 114 AD3d 1302 [4th Dept 2014], *appeal dismissed*, 23 NY3d 929 [2014]; *Ford v Southside Hosp.*, 12 AD3d 561 [2d Dept 2004]).

The majority also finds that issues of fact exist as to whether the delay in performing surgery was a proximate cause of plaintiff's ruptured fallopian tube. The majority rejects defendants' argument that their conduct could not have proximately caused the rupture because intraoperative rupturing is a well known risk of even a non-negligently performed salpingostomy on the ground that it "assumes that the rupture occurred during surgery, while the record is equally consistent with the fallopian tube having already ruptured before surgery."

However, plaintiff's expert never offered a departure opinion with respect to Dr. Coley's working diagnosis, the timing of the proposed treatment, or her decision to convert the procedure from a diagnostic laparoscopy to salpingostomy to salpingectomy. Nor did the expert offer any evidence to support

the conclusion that the rupture occurred before Dr. Coley's surgery or offer any medical evidence demonstrating that had the diagnostic laparoscopy been attempted on June 22 the result would have been different.

Accordingly, I would affirm the order awarding Dr. Cergnul and Bronx-Lebanon summary judgment dismissing the complaint as against them.

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

ENTERED: JANUARY 12, 2017

CLERK

Richter, J.P., Manzanet-Daniels, Feinman, Kapnick, Gesmer, JJ.

2400 Salvatore Oliveri, et al., Index 109331/09
Plaintiffs-Respondents, 590039/11

-against-

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

WDF Inc., et al.,
Defendants-Respondents,

Environmental Laboratories Inc.,
Defendant-Appellant.

- - - - -

[And A Third-Party Action]

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Downing & Peck, P.C., New York (Matthew G. Merson of counsel), for appellant.

The Feld Law Firm P.C., New York (Michael J. Lynch of counsel), for Salvatore Oliveri and Josephine Oliveri, respondents.

DOPF, P.C., New York (Martin B. Adams of counsel), for WDF, Inc. and PRO Safety Services, LLC, respondents.

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Order, Supreme Court, New York County (Paul Wooten, J.), entered March 25, 2015, which, to the extent appealed from as limited by the briefs, denied defendant Environmental Laboratories Inc.'s (ELI) motion for summary judgment dismissing the Labor Law § 200 and common-law negligence claims and the Labor Law § 241(6) claim predicated on Industrial Code (12 NYCRR) § 23-1.7(d) as against it, unanimously affirmed, without costs.

The motion court properly found a material question of fact

as to whether ELI, the site safety consultant employed by plaintiff Salvatore Oliveri's employer, had supervisory control and authority over the work being done when plaintiff was injured, and can be held liable for plaintiff's injuries under the Labor Law as an agent of the owner or general contractor. ELI argues that at best it had only a general supervisory role that was not enough to establish agency (*see Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]; *Smith v McClier Corp.*, 22 AD3d 369, 371 [1st Dept 2005]; *Dalanna v City of New York*, 308 AD2d 400 [1st Dept 2003]). ELI's principal testified that the responsibility of a site safety consultant was to consult with and make recommendations to the foreman, project manager or superintendent should he or she observe a potentially unsafe condition. However, the agreement under which ELI performed its services for plaintiff's employer, defendant Schlesinger-Siemens Electrical LLC, provided that the site safety consultant, in addition to making inspections of the work place to ascertain a safe operating environment, was to "[t]ake necessary and timely corrective actions to eliminate all unsafe acts and/or conditions," and "[p]erform all related tasks necessary to achieve the highest degree of safety." Elsewhere, the agreement states that Schlesinger-Siemens "shall be solely responsible for the adequacy and safety of all construction

methods, materials, equipment and the safe prosecution of the work." During his deposition, Schlesigner-Siemens's general foreman did not address his understanding of ELI's responsibility concerning safety hazards. Consequently, summary dismissal was properly denied as its responsibilities may have included authority over plaintiff's work.

The motion court correctly denied dismissal of the Labor Law § 241(6) claim, alleging a violation of Industrial Code (12 NYCRR) § 23-1.7(d), pertaining to slipping hazards.

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

ENTERED: JANUARY 12, 2017

CLERK

Tom, J.P., Friedman, Saxe, Feinman, Kahn, JJ.

2459 The People of the State of New York, Respondent, Ind. 353/13

-against-

Sherif Rizk, Defendant-Appellant.

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Amed Marzano & Sediva PLLC, New York (Naved Amed of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Joshua L. Haber of counsel), for respondent.

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Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered January 8, 2014, convicting defendant, after a jury trial, of assault in the second degree, and sentencing him to a term of 3 years, unanimously modified, as a matter of discretion in the interest of justice, to reduce the sentence to a term of 2 years, with 1 ½ years' postrelease supervision, and otherwise affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). To the extent that questions may be raised concerning the reliability of the trial witnesses and the credibility of their testimony, great deference must be accorded to the jury's findings because the jury had an "opportunity to view the witnesses, hear the testimony and observe demeanor" (*People v Bleakley*, 69 NY2d 490,

495 [1987]). The surveillance video corroborates the complaining witness's testimony, and thus there is no need to disturb the jury's determination regarding the identification of defendant (*see People v Alvarez*, 117 AD3d 411, 412 [1st Dept 2014], *lv denied* 23 NY3d 1059 [2014]).

Late disclosure of 21 seconds of the outdoor surveillance videotape was not prejudicial to defendant, as that portion of the videotape "is simply not exculpatory or helpful to the defense in any way" (*see People v Mingo*, 141 AD3d 423 [1st Dept 2016]). Defendant's claim that the prosecution failed to disclose a second outdoor surveillance videotape is unpreserved, as defendant failed to request any remedy as to such failure (*People v Graves*, 85 NY2d 1024, 1027 [1995]; *People v Rogelio*, 79 NY2d 843, 844 [1992]).

Defendant's claim that he was denied a fair trial by the prosecution's improper cross-examination of a character witness is without merit. The prosecutor inquired of the character witness whether he had heard that defendant had taken cell phone videos of himself and his friends pouring hot sauce into the ears of sleeping homeless people. The witness responded that he had "never heard anything like that." Outside the presence of the jury, the defense counsel moved for a mistrial, and the prosecutor represented to the trial court that the videos to

which her line of inquiry referred had been recovered both from defendant's cell phone and from another cell phone belonging to a codefendant.

The following day, the prosecutor reported to the trial court that she had been mistaken, and that the videos in question had been recovered only from the cell phone belonging to the codefendant. Defense counsel again moved for a mistrial, which motion the trial court denied. The trial court then gave extensive curative instructions to the jury to the effect that there was no such video contained on defendant's cell phone and that the jury should disregard the entire exchange concerning the nonexistent video. The curative instructions were sufficient to alleviate any prejudice to defendant, and his defense counsel did not make an immediate application seeking further or more complete instructions (*People v Santiago*, 52 NY2d 865, 866 [1981]). The fact that the character witness answered the prosecutor's question was not prejudicial to defendant, since the witness denied hearing any such report and "there is no significant probability that the jury would have acquitted [defendant] had it not heard the challenged answer" (*People v Simmons*, 208 AD2d 214, 215 [1st Dept 1994], *lv denied* 84 NY2d 872 [1994]). Moreover, this is not a case in which reversal and a new trial is warranted in light of multiple trial errors that,

taken cumulatively, deprived the defendant of the right to a fair trial (*cf. People v Calabria*, 94 NY2d 519, 522-523 [2000]; *People v Cavallerio*, 71 AD2d 338 [1st Dept 1979]).

We find the sentence excessive to the extent indicated.

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

ENTERED: JANUARY 12, 2017

CLERK

Acosta, J.P., Andrias, Moskowitz, Gische, Webber, JJ.

2484 Dave Garcia, et al., Index 155556/12
Plaintiffs-Appellants,

-against-

The Church of St. Joseph of the Holy Family of the City of New York,
Defendant-Respondent.

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

Leahey & Johnson, P.C., New York (Joanne Filiberti of counsel), for respondent.

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Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered June 12, 2015, which denied the motion of plaintiff Dave Garcia for partial summary judgment on the issue of liability on his Labor Law § 240(1) cause of action, unanimously reversed, on the law, without costs, and the motion granted.

Plaintiff commenced this action to recover for personal injuries allegedly sustained when he fell from a ladder at defendant church in connection with electrical work he was performing.[1] The complaint asserted causes of action for common-law negligence and violations of Labor Law §§ 200, 240(1), and 241(6).

Plaintiff was employed as an electrician by nonparty Megan

[1] His wife is suing derivatively, for loss of services.

Electrical Enterprises, which the church hired to perform certain electrical work. Plaintiff had been working at the church for about 10 days before the day of his accident. On the day of the accident, he was working in the attic of the church.

Plaintiff testified that as he descended from the attic on a wooden ladder, which was permanently affixed to the wall, the ladder shifted. Specifically, plaintiff testified that as he attempted to descend the ladder, he reached for it and placed his right hand and foot on it, but it moved away from him, causing him to fall headfirst to the choir loft, some 12 to 17 feet below. He further testified that he did not have anything in his hands as he was coming down the ladder. According to plaintiff, the ladder was attached to the wall in a jerry-rigged fashion, connected at the top to a joist beam with grey metal wires. The ladder went up the wall of the choir loft/mezzanine to an access point for the attic of the church. The church's pastor testified that he guessed the ladder had been there since the church had been built 150 years ago.

We find that Supreme Court improperly denied plaintiff's motion for partial summary judgment on his Labor Law § 240(1) claim. Plaintiff's testimony that the ladder shifted as he descended, thus causing his fall, established a prima facie violation of Labor Law § 240(1) (*Hart v Turner Constr. Co.*, 30

AD3d 213, 214 [1st Dept 2006]; *see also Picano v Rockefeller Ctr. N., Inc.*, 68 AD3d 425 [1st Dept 2009]; *Montalvo v J. Petrocelli Constr., Inc.*, 8 AD3d 173, 174 [1st Dept 2004]). The affidavit submitted by defendant averring that plaintiff had told his employer that he fell when attempting to descend the ladder using one hand as he carried tools or equipment in the other and missed a rung with his free hand, failed to refute plaintiff's testimony that the ladder shifted and failed to create triable issues of fact that plaintiff's actions were the sole proximate cause of the accident. Plaintiff also denies making the statement.

Further, we reject defendant's contention that issues of fact exist as to whether plaintiff may be the sole proximate cause of the accident for failing to use the ladder, safety harness and rope provided by his employer. While the vice-president of plaintiff's employer stated in an affidavit that safety harnesses and other safety devices were available to plaintiff, the affidavit was vague as to what other unspecified safety devices were available, to what plaintiff should have attached the harness, or whether there were any available anchorage points (*see Miglionico v Bovis Lend Lease, Inc.*, 47 AD3d 561, 564-565 [1st Dept 2008]). Defendant further fails to explain how a rope that was used to hoist materials to the attic

area where plaintiff was working could be used as a safety device, and plaintiff's decision to use the ladder already in place cannot be the sole proximate cause of his accident where he was never instructed not to use it (*see Dwyer v Central Park Studios, Inc.*, 98 AD3d 882, 884 [1st Dept 2012]).

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

ENTERED: JANUARY 12, 2017

CLERK

Sweeny, J.P., Renwick, Mazzarelli, Manzanet-Daniels, Feinman, JJ.

2724 The People of the State of New York, Ind. 4528/11
Respondent,

-against-

Milton Alequin,
Defendant-Appellant.

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Richard D. Carruthers, J.), rendered January 15, 2014,

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

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

ENTERED: JANUARY 12, 2017

CLERK

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

Sweeny, J.P., Renwick, Mazzarelli, Manzanet-Daniels, Feinman, JJ.

2726-
2727 In re Karin R.,
Petitioner-Appellant,

Delinda R.,
Respondent-Respondent.

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In Hunter R.,

A Child Under Eighteen Years of Age,
etc.,

Delinda R.,
Respondent-Appellant,

The Children's Village,
Petitioner-Respondent.

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Geoffrey P. Berman, Larchmont, for Karin R., appellant.

Dora M. Lassinger, East Rockaway, for Delina R., appellant.

Rosin Steinhagen Mendel, New York (Douglas H. Reiniger of counsel), for respondent.

Karen Freedman, Lawyers for Children, New York (Shirim Nothenberg of counsel), attorney for the child.

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Order of disposition, Family Court, New York County (Clark V. Richardson, J.), entered on or about July 13, 2015, which, upon a fact-finding determination of abandonment and permanent neglect, terminated respondent mother's parental rights and transferred custody and guardianship of the subject child to petitioner agency and the Commissioner of Social Services for the

purpose of adoption, and denied and dismissed petitioner maternal grandmother's petition for custody, unanimously affirmed, without costs.

The finding of abandonment is supported by clear and convincing evidence that respondent failed to have any contact with the child during the six months preceding the filing of the petition to terminate her parental rights, and had only one contact with the agency during that time, which did not rise beyond the level of minimal, sporadic and insubstantial contact (*see* Social Services Law [SSL] § 384-b[5][a]; *Matter of Jaylen Derrick Jermaine A. [Samuel K.]*, 125 AD3d 535 [1st Dept 2015]). Respondent's vicarious communication with petitioner maternal grandmother, who had visitation with the child, did not evince her intention to maintain a parental role (*see Matter of Mathew Niko M. [Niko M.]*, 71 AD3d 440 [1st Dept 2010]).

The finding of permanent neglect is supported by clear and convincing evidence that the agency made diligent efforts to encourage and strengthen the parental relationship by, among other things, developing a service plan, which included drug testing, rehabilitation and visitation with the child (*see* SSL § 384-b[7][a]; *see e.g. Matter of Josephine O.*, 245 AD2d 900 [3d Dept 1997], *lv denied* 91 NY2d 814 [1998]). Despite these efforts, however, respondent was expelled from her inpatient drug

rehabilitation program for noncompliance, and failed to maintain contact with the agency or keep it apprised of her whereabouts and contact information so that additional referrals could be provided or visitation established (*see* SSL § 384-b[7][e][i]). Respondent failed to address the issues underlying the child's placement into foster care in the first instance (*see Matter of Nathaniel T.*, 67 NY2d 838 [1986]), and failed to demonstrate a viable and realistic plan for the child's future (*see* SSL § 384-b[7][c]; *Matter of Miguel S.*, 140 AD2d 202, 205 [1st Dept 1988]).

To the extent respondent contends that, rather than terminating her parental rights, the court should have awarded custody of the child to petitioner grandmother, and contrary to petitioner grandmother's argument that, in light of her connection to the child and his bond with her, denying her custody was contrary to the child's best interests, we agree with the court that it would not be in the child's best interests to

uproot him from his pre-adoptive foster home, the only stable home he has ever known (*see Matter of Luz Maria V.*, 23 AD3d 192 [1st Dept 2005], *lv denied* 6 NY3d 710 [2006]; *Matter of Karon J.*, 293 AD2d 404 [1st Dept 2002]).

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

ENTERED: JANUARY 12, 2017

CLERK

Sweeny, J.P., Renwick, Mazzarelli, Manzanet-Daniels, Feinman, JJ.

2728 Stanley Pina, an Infant by his Mother and Natural Guardian Erica Abreu, et al., Plaintiffs-Respondents, Index 350430/11

-against-

Meleen Chuang, M.D., et al., Defendants-Appellants.

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Shaub, Ahmuty, Citrin & Spratt LLP, Lake Success (Christopher C. Simone of counsel), for appellants.

Krentsel & Guzman, LLP, New York (Anthony T. Hirschberger of counsel), for respondents.

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Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered January 11, 2016, which, after a jury trial, denied defendants' motion to set aside the verdict on the issue of liability or, alternatively, to set aside the verdict awarding infant plaintiff $150,000 for past pain and suffering and $250,000 for future pain and suffering for 21 years, unanimously affirmed, without costs.

The record shows that while performing a caesarean section delivery, defendant physicians lacerated the baby's face during the incision of the uterus, resulting in an approximately three centimeter scar on infant plaintiff's face. Although the happening of the injury itself does not mean that there was a departure from the standard of care (*see Johnson v St. Barnabas*

Hosp., 52 AD3d 286, 288 [1st Dept 2008], *lv denied* 11 NY3d 705 [2008]), the verdict was supported by legally sufficient evidence that the standard of care required defendants to have discovered the location of the infant plaintiff's cheek during this non-emergent, elective, procedure (*see Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]; *Ross v Mandeville*, 45 AD3d 755 [2d Dept 2007]).

The aggregate award of $400,000 for past and future pain and suffering does not deviate materially from what is reasonable compensation under the circumstances (CPLR 5501[c]).

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

ENTERED: JANUARY 12, 2017

CLERK

Sweeny, J.P., Renwick, Mazzarelli, Manzanet-Daniels, Feinman, JJ.

2729 In re Tory Burch LLC, Index 154246/16
Petitioner-Respondent,

-against-

Herbert Moskowitz doing business as
Manhattan Realty Company,
Respondent-Appellant.

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Peluso & Touger, LLP, New York (Robert Reed Moore, Jr. of counsel), for appellant.

Wasserman Grubin & Rogers, L.L.P., New York (Richard Wasserman of counsel), for respondent.

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Order, Supreme Court, New York County (Robert R. Reed, J.), entered July 11, 2016, which granted petitioner a license to enter respondent's adjoining property in order to take steps to protect respondent's property during renovations to the facade and roof of petitioner's building, unanimously reversed, on the law, without costs, the petition denied, and the proceeding pursuant to RPAPL 881, dismissed.

The petitioner failed to make a showing as to the reasonableness and necessity of the trespass referenced in the order where, at the time of its petition, none of the items sought had been memorialized in specific plans filed and approved by the Department of Buildings, and the project was under a stop work order (*see Mindel v Phoenix Owners Corp.*, 210 AD2d 167 [1st

Dept 1994], *lv denied* 85 NY2d 811 [1995]; *see also Matter of Board of Mgrs. of Artisan Lofts Condominium v Moskowitz*, 114 AD3d 491 [1st Dept 2014]). Further, the court erred in including those items in the license that would be permanent encroachments on respondent's buildings (*see Broadway Enters., Inc. v Lum*, 16 AD3d 413 [2d Dept 2005]). The parties' disagreement over their respective rights, if any, arising from a party wall in use prior to petitioner's demolition of the building formerly at 151 Mercer, is not relevant upon this limited petition.

We have considered the parties' remaining contentions and find them unavailing.

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

ENTERED: JANUARY 12, 2017

CLERK

Sweeny, J.P., Renwick, Mazzarelli, Manzanet-Daniels, Feinman, JJ.

2731 David Eshaghian, Index 654481/15
Plaintiff-Appellant,

-against-

Mahrokh Eshaghian, et al.,
Defendants-Respondents,

First American Title Insurance Company,
Nominal Defendant.

_____

Kaye Scholer LLP, New York (James M. Catterson of counsel), for appellant.

Vishnick McGovern Milizio LLP, Lake Success (Jordan Freundlich of counsel), for respondents.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered on or about June 13, 2016, which, among other things, denied plaintiff's motion for summary judgment, and granted defendants-respondents' cross motion for summary judgment on their counterclaims and for sanctions against plaintiff, unanimously affirmed, without costs.

Supreme Court correctly determined that plaintiff's action is barred by the doctrine of res judicata (*see Landau, P.C. v LaRossa, Mitchell & Ross*, 11 NY3d 8, 12 [2008]), because he is essentially seeking to relitigate the validity of a side agreement that was at issue and decided in a Surrogate's Court proceeding. The side agreement and the parties' letter agreement

are intertwined and part of the same real estate transaction (*see Wietschner v Dimon*, 139 AD3d 461, 461 [1st Dept 2016], *lv denied* 28 NY3d 901 [2016]). By the terms of the letter agreement, defendants, as the prevailing parties in the Surrogate's Court proceeding, are entitled to their reasonable attorneys' fees and costs incurred in that proceeding. The sanctions imposed by the motion court were appropriate (22 NYCRR 130-1.1[a]).

We have considered the parties' remaining arguments, including defendants' request for sanctions for this appeal, and find them unavailing.

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

ENTERED: JANUARY 12, 2017

CLERK

Sweeny, J.P., Renwick, Mazzarelli, Manzanet-Daniels, Feinman, JJ.

2732 The People of the State of New York, SCI 3634/13
Respondent,

-against-

Roger Rabsatt,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Michael J. Yetter of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Laura Ward, J. at plea; Larry Stephen, J. at sentencing), rendered October 23, 2013,

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

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

ENTERED: JANUARY 12, 2017

CLERK

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

Sweeny, J.P., Renwick, Mazzarelli, Manzanet-Daniels, Feinman, JJ.

2733 In re Gustavo D.,
Petitioner-Appellant,

-against-

Michael D.,
Respondent-Respondent.

Beth E. Goldman, New York Legal Assistance Group, New York (Alexandra Lewis-Reisen of counsel), for appellant.

Order, Family Court, New York County (Adetokunbo O. Fasanya, J.), entered on or about January 9, 2015, which dismissed, without prejudice, the petition for an order of protection against respondent for lack of jurisdiction, unanimously reversed, on the law, without costs, the petition reinstated, and the matter remanded for the court to advise petitioner of his right to counsel, and for a new hearing consistent with this decision.

Family Court committed reversible error when, during a brief hearing in this article 8 proceeding, it failed to advise the pro se petitioner that he had a right to the assistance of counsel of his own choosing, a right to an adjournment to confer with counsel, and a right to have counsel assigned if he was financially unable to obtain representation (Family Ct Act § 262[a][ii]; *see Matter of Ford v Tindal*, 24 AD3d 664, 665 [2d

Dept 2005]; *see also Matter of Mora v Alatriste*, 99 AD3d 540, 541 [1st Dept 2012]). Moreover, Family Court did not possess sufficient relevant information to allow it to make an informed determination as to whether the parties are or have been in an "intimate relationship" within the meaning of Family Court Act § 812(1)(e) (*see Matter of Seye v Lamar*, 72 AD3d 975, 977 [2d Dept 2010]). Further evidence is needed regarding the frequency of petitioner and respondent's interactions (*Matter of Winston v Edwards-Clarke*, 127 AD3d 771, 773 [2d Dept 2015]).

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

ENTERED: JANUARY 12, 2017

CLERK

Sweeny, J.P., Renwick, Mazzarelli, Manzanet-Daniels, Feinman, JJ.

2734 Alison Stolzman, as Administratrix of the Estate of Henry Stolzman, deceased, etc., Plaintiff-Appellant, Index 112913/09

-against-

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

Manhattan Community Board 7, et al., Defendants.

_____

Napoli Bern Ripka Shkolnik, LLP, New York (Joseph Napoli of counsel), for appellant.

Mischel & Horn, P.C., New York (Scott T. Horn of counsel), for respondents.

_____

Order, Supreme Court, New York County (Margaret A. Chan, J.), entered January 16, 2015, which, to the extent appealed from as limited by the briefs, granted the motion of defendants Boulevard Housing Corp. (BHC) and Akam Associates, Inc. (Akam) for summary judgment dismissing the complaint as against them, and sua sponte dismissed the complaint as against the defaulting defendants Manhattan Community Board 7 and Cooper Square Realty Inc., unanimously reversed, on the law, without costs, the motion denied, and the complaint reinstated as against BHC, Akam, and the defaulting defendants.

BHC and Akam, the owner and property manager of the premises

that abutted a sidewalk where plaintiff Alison Stolzman tripped, established prima facie entitlement to summary judgement based on the testimony and photographic evidence indicating the alleged hazard was open and obvious and not inherently dangerous (*see generally Boyd v New York City Hous. Auth.*, 105 AD3d 542 [1st Dept 2013]).

However, there remain triable issues as to whether the alleged low-lying tripping condition dangerously narrowed the passable area of the sidewalk and was adequately visible at night (*see Nunez v Wah Kok Realty Corp.*, 110 AD3d 560 [1st Dept 2013]; *Centeno v Regine's Originals*, 5 AD3d 210 [1st Dept 2004]; *compare Barchi v Rudin E. 55th St. LLC*, __ AD3d __, 2016 NY Slip Op 07266 [1st Dept 2016]).

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

ENTERED: JANUARY 12, 2017

CLERK

Sweeny, J.P., Renwick, Mazzarelli, Manzanet-Daniels, Feinman, JJ.

2735 The People of the State of New York, Respondent, Ind. 5573/13

-against-

Donald Phinazee, Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Katheryne M. Martone of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Michael J. Yetter of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Michael J. Obus, J.), rendered December 11, 2014, convicting defendant, upon his plea of guilty, of robbery in the first degree, and sentencing him, as a second violent felony offender, to a term of 10 years, unanimously affirmed.

Defendant's challenges to his plea do not come within the narrow exception to the preservation requirement *(see People v Conceicao*, 26 NY3d 375, 382 [2015]). Even if defendant may be deemed to have moved to withdraw his plea, he did not make any of the claims he makes on appeal, despite his opportunity to do so. We decline to review defendant's unpreserved claims in the interest of justice. As an alternative holding, we find that the record as a whole establishes that the plea was knowingly, intelligently and voluntarily made. The circumstances of the

plea were not coercive (*see People v Fiumefreddo*, 82 NY2d 536, 544 [1993], defendant's factual allocution did not cast doubt on his guilt, and the court's omission of one of defendant's rights under *Boykin v Alabama* (395 US 238 [1969]) did not invalidate the plea (*see People v Sougou*, 26 NY3d 1052 [2015]).

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

ENTERED: JANUARY 12, 2017

CLERK

Sweeny, J.P., Renwick, Mazzarelli, Manzanet-Daniels, Feinman, JJ.

2736 In re Xavier P.,

A Person Alleged to be a
Juvenile Delinquent,
Appellant.
- - - - -
Presentment Agency

_____

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

Zachary W. Carter, Corporation Counsel, New York (Jeremy Shweder of counsel), for presentment agency.

_____

Order, Family Court, Bronx County (Gayle P. Roberts, J.), entered on or about November 17, 2015, which adjudicated appellant a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would constitute the crime of sexual abuse in the second degree, and placed him on probation for a period of 18 months, unanimously affirmed, without costs.

The court providently exercised its discretion in adjudicating appellant a juvenile delinquent and placing him on probation since this was the least restrictive dispositional alternative consistent with appellant's needs and the community's need for protection (*see Matter of Katherine W.*, 62 NY2d 947 [1984]), in light of the serious sex offense committed against a much younger child. An adjournment in contemplation of dismissal

would not have ensured that, after its term expired, appellant remained in and satisfactorily completed an appropriate sex offender treatment program.

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

ENTERED: JANUARY 12, 2017

CLERK

Sweeny, J.P., Renwick, Mazzarelli, Manzanet-Daniels, Feinman, JJ.

2737 Dean Orofino, Index 102109/11
Plaintiff,

-against-

388 Realty Owners, LLC, et al.,
Defendants-Appellants,

Adelhardt Construction Corporation,
Defendant-Respondent.

- - - - -

388 Realty Owners, LLC, et al.,
Third-Party Plaintiffs,

-against-

ADCO Electrical Corporation,
Third-Party Defendant.

- - - - -

Adelhardt Construction Corporation,
Second Third-Party Plaintiff-Respondent,

-against-

Biordi, Inc., et al.,
Second Third-Party Defendants-Respondents,

- - - - -

Biordi, Inc.,
Third Third-Party Plaintiff-Respondent,

-against-

Mourne Management Corp.,
Third Third-Party Defendant-Respondent.

_____

Perry, Van Etten, Rozanski & Priavera LLP, Melville (Elizabeth Gelfand Kastner of counsel), for appellants.

Barry, McTiernan & Moore LLC, New York (Laurel A. Wedinger of counsel), for Biordi Inc., respondent.

Law Office of James J. Toomey, New York (Eric P. Tosca of

counsel), for Adelhardt Construction Corporation, respondent.

Nicoletti Gonson Spinner LLP, New York (Laura M. Mattera of counsel), for Interstate Mechanical Services, Inc., respondent.

Cascone & Kluepfel, LLP, Garden City (James K. O'Sullivan of counsel), for Mourne Management Corp., respondent.

Order, Supreme Court, New York County (Paul Wooten, J.), entered January 6, 2016, which granted the motions by Adelhardt Construction Corporation, Biordi, Inc., Mourne Management Corp., and Interstate Mechanical Services, Inc. for summary judgment dismissing all claims and cross claims against them, unanimously modified, on the law, to deny Interstate's motion as to defendants 388 Realty Owners LLC, CityGroup Global Markets, Inc., and SL Green Realty Corp.'s (collectively, 388 Realty) claims for common-law indemnification and contribution as against it, and otherwise affirmed, without costs.

Mourne established prima facie that it did not create the condition that caused plaintiff's fall on December 18, 2009, by submitting the deposition testimony of its principal, who testified that Mourne finished building the wall around December 8, left the work area spotless and free of debris before leaving that day, and did not return to the job site to perform caulking work until January 2010 (*see* CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). This proof that Mourne was not on

site on the day of the accident is supported by other record evidence, including the testimony of Biordi's principal. 388 Realty failed to raise a triable issue of fact (*see id.*). In light of Mourne's unrebutted proof warranting dismissal of the claims asserted against it, the claims against Biordi, which had subcontracted all its work to Mourne and was never on site, were also correctly dismissed.

Even if 388 Realty could assert Labor Law claims against Adelhardt, Adelhardt cannot be held liable as a statutory agent under the Labor Law, because ADCO Electrical Corporation, which subcontracted with it, did not delegate it authority to supervise and control the injury-producing work, and Adelhardt did not exercise any control over that work (*see Rizzo v Hellman Elec. Corp.*, 281 AD2d 258, 259 [1st Dept 2001]). The record shows that Adelhardt completed all its work and turned over the work site to ADCO by December 15, 2009. Thus, any work that caused plaintiff's fall was not within Adelhardt's control. 388 Realty failed to raise a triable issue of fact. To the extent it contends that Adelhardt's time cards show its presence on the day of the accident, there is no evidence that those time cards relate to work performed on the subject project. Given the unrebutted proof that Adelhardt and its subcontractors were no longer on site at the time of the accident, Adelhardt cannot be

held liable for common-law negligence.

The record presents a triable issue of fact as to Interstate's negligence. Although the deposition transcript of Interstate's principal, initially submitted unsigned, was properly considered, the principal's testimony that Interstate did not perform work on the ninth floor on the day of the accident was equivocal. In addition, the testimony of the various deponents showing that openings were made in the wall for HVAC installation and that the wall had been "chopped out" to enlarge the holes to accommodate bigger sheet metal sleeves raises an issue of fact whether Interstate created the condition that caused plaintiff's fall.

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

ENTERED: JANUARY 12, 2017

CLERK

Sweeny, J.P., Renwick, Mazzarelli, Manzanet-Daniels, Feinman, JJ.

2745 The People of the State of New York, Respondent, Ind. 1339N/13

-against-

Jonathan Gonzalez, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Michael Sonberg, J.), rendered April 15, 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: JANUARY 12, 2017

CLERK

Sweeny, J.P., Renwick, Mazzarelli, Manzanet-Daniels, Feinman, JJ.

2746 The People of the State of New York, Ind. 1683/14
Respondent,

-against-

Christopher Cruz,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Daniel Fitzgerald, J. at plea; Richard D. Carruthers, J. at sentencing), rendered September 24, 2014,

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

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

ENTERED: JANUARY 12, 2017

CLERK

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

Sweeny, J.P., Renwick, Mazzarelli, Manzanet-Daniels, Feinman, JJ.

2747-
2748-
2748A-
2748B

Index 157029/15

Prospect Funding Holdings L.L.C,
Plaintiff-Respondent,

-against-

Pamela Maslowski,
Defendant-Appellant,

James Schwebel, Esq., et al.,
Defendants.

_____

Ferro Labella & Zucker L.L.C., White Plains (Michael A. McDonough of counsel), for appellant.

Callagy Law P.C., New York (Michael J. Smikun of counsel), for respondent.

_____

Order, Supreme Court, New York County (Barry R. Ostrager, J.), entered November 13, 2015, which, to the extent appealed from as limited by the briefs, denied defendants' motion insofar as they sought to dismiss the complaint pursuant to CPLR 327(a) and 3211(a)(4) as against defendant Pamela Maslowski, unanimously reversed, on the law, on the facts, and in the exercise of discretion, with costs, and the motion granted. Order, same court and Justice, entered January 27, 2016, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for a preliminary injunction enjoining Ms. Maslowski from any further attempt to litigate in Minnesota the matter at issue

in this action, unanimously reversed, on the law, with costs, and the motion denied. Appeals from order, same court and Justice, entered January 20, 2016, and from order, same court and Justice, entered on or about January 22, 2016, unanimously dismissed, without costs. The Clerk is directed to enter judgment accordingly.

Ms. Maslowski, a resident of Minnesota, sustained injuries in a car accident in Minnesota. Plaintiff, a limited liability company (LLC) set up under the laws of New York but with its principal place of business in Minnesota, entered into a litigation financing agreement with Ms. Maslowski, which included a clause designating New York as the forum for disputes arising out of the agreement. Ms. Maslowski eventually filed an action in Minnesota challenging the validity of the agreement. Shortly thereafter, plaintiff filed this New York action alleging, among other things, Ms. Maslowski's breach of the agreement.

The New York action should have been dismissed pursuant to CPLR 327(a). "[I]n the interest of substantial justice," the parties' dispute should be heard in Minnesota (CPLR 327[a]; *Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 478-479 [1984], *cert denied* 469 US 1108 [1985]). Ms. Maslowski demonstrated that the choice of forum provision in the parties' agreement is unreasonable and should not be enforced (*see Brooke Group v JCH*

Syndicate 488, 87 NY2d 530, 534 [1996]). Every aspect of the transaction at issue occurred in Minnesota, the parties, documents, and witnesses are located in Minnesota, and defending this action in New York would be a substantial hardship to Ms. Maslowski.

Dismissal of the New York action is also warranted pursuant to CPLR 3211(a)(4) in favor of the action pending in Minnesota (*National Union Fire Ins. Co. of Pittsburgh, Pa. v Jordache Enters.*, 205 AD2d 341, 343 [1st Dept 1994]).

Given the foregoing determination, there is no basis for an anti-suit injunction.

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

ENTERED: JANUARY 12, 2017

CLERK

Sweeny, J.P., Renwick, Mazzarelli, Manzanet-Daniels, Feinman, JJ.

2749 Ivana Polini, Index 107572/11
Plaintiff-Respondent,

-against-

Schindler Elevator Corporation,
Defendant-Appellant,

Palace 43 LLC, et al.,
Defendants.

_____

Kirkland & Ellis LLP, Washington, DC (H. Christopher Bartolomucci of the bar of the District of Columbia, admitted pro hac vice, of counsel), for appellant.

Bisogno & Meyerson, LLP, Brooklyn (Theresa A. Ficchi of counsel), for respondent.

_____

Order, Supreme Court, New York County (Donna M. Mills, J.), entered July 29, 2014, which granted plaintiff's motion for partial summary judgment on the issue of liability as against defendant Schindler Elevator Corporation (Schindler), and denied Schindler's cross motion for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Schindler's arguments that the wooden panel that its workers leaned against the wall was open and obvious, that plaintiff failed to use her senses to observe it, and that any barricades or warnings would not have prevented the accident, are unpreserved as they were not presented to the motion court

(*see e.g. Gyabaah v Rivlab Transp. Corp.*, 129 AD3d 447 [1st Dept 2015]). In any event, we would find such arguments unavailing because even if a hazard is open and obvious, that merely eliminates the duty to warn, but not the duty to maintain the premises in a reasonably safe condition (*see generally Westbrook v WR Activites-Cabrera Mkts.*, 5 AD3d 69, 70 [1st Dept 2004]). Here, it is undisputed that Schindler's employees failed to secure the seven-foot tall wooden panel that they leaned against the wall or create a perimeter around it to prevent others from entering the area.

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

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

ENTERED: JANUARY 12, 2017

CLERK

Sweeny, J.P., Renwick, Mazzarelli, Manzanet-Daniels, Feinman, JJ.

2750 The People of the State of New York, Ind. 3654/13
Respondent,

-against-

Christopher Knight,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Marcy L. Kahn, J.), rendered June 26, 2014,

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

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

ENTERED: JANUARY 12, 2017

CLERK

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

Sweeny, J.P., Renwick, Mazzarelli, Manzanet-Daniels, Feinman, JJ.

2752- Index 155605/12
2753 Moon 170 Mercer, Inc.,
Plaintiff-Respondent,

-against-

Zachary Vella,
Defendant-Appellant.

- - - - -

Moon 170 Mercer,
Plaintiff-Respondent-Appellant,

-against-

Zachary Vella,
Defendant-Appellant-Respondent.

_____

Steven Landy & Associates, PLLC, New York (David A. Wolf of counsel), for appellant/appellant-respondent.

Cordova & Schwartzman, LLP, Garden City (Jonathan B. Schwartzman of counsel), for respondent/respondent-appellant.

_____

Orders, Supreme Court, New York County (Barry R. Ostrager, J.), entered May 19, 2016, which denied defendant's motions for summary judgment and for sanctions, and denied plaintiff's motions for summary judgment and for an order of preclusion, unanimously modified, on the law, to grant plaintiff's motion for summary judgment, and otherwise affirmed, without costs. The Clerk is directed to enter judgment in favor of plaintiff and against defendant in the amount of $1,070,682.08, together with interest.

In this action to enforce a guaranty of rent payments pursuant to a commercial lease, plaintiff was previously granted summary judgment on the issue of defendant's liability, and the matter was remanded for discovery and a trial on damages (*Moon 170 Mercer, Inc. v Vella*, 122 AD3d 544 [1st Dept 2014]). Upon remand, the motion court correctly denied defendant's motion for summary judgment limiting his damages to unpaid rent that accrued when the tenant occupied the premises. Defendant argues that the lease never went into effect because its commencement was conditioned on delivery of the board's recognition and attornment agreement and a written copy of the board's waiver of first refusal, which never occurred. Nevertheless, the tenant signed the lease, occupied the premises for years, and made rent payments during that time, thus ratifying the lease terms (*see U.O.T.S. Inc. v DeBaron Assoc. LLC*, 89 AD3d 538 [1st Dept 2011]; *see also Townhouse Co. v Williams*, 307 AD2d 223 [1st Dept 2003]; *Anyang-Kusi v Solomon*, 24 Misc 3d 140[A], 2009 NY Slip Op 51695[U] [App Term, 1st Dept 2009]).

Defendant's argument that the tenant was unlawfully evicted, and that therefore he is liable only for rent accrued until the tenant's eviction, is barred by the doctrine of collateral estoppel. The claim of unlawful eviction was dismissed on the merits in a separate action between the tenant and plaintiff, and

a motion to renew and reargue was denied based on the same purportedly new evidence defendant cites here. Since the unlawful eviction issue was raised in the prior action and decided against the tenant, with whom defendant, as guarantor of the lease, stands in privity, defendant is precluded from relitigating it in this action (*see Buechel v Bain*, 97 NY2d 295, 303 [2001], *cert denied* 535 US 1096 [2002]; *APF 286 Mad LLC v Chittur & Assoc. P.C.*, 132 AD3d 610, 610 [1st Dept 2015], *lv dismissed* 27 NY3d 952 [2016]).

Moreover, defendant's argument is barred by the doctrine of law of the case, since this Court rejected it in the prior appeal, based on the dismissal of the unlawful eviction claim (*see Carmona v Mathisson*, 92 AD3d 492 [1st Dept 2012]).

Defendant also argues that the guaranty is not enforceable because the tenant incorporated itself only after the lease and the guaranty were signed. This Court has already held that the guaranty is enforceable (*Moon 170 Mercer*, 122 AD3d at 544). In any event, the tenant's incorporation did not change the debts and responsibilities that defendant undertook in the guaranty, and therefore did not affect the validity of the guaranty (*see Fehr Bros. v Scheinman*, 121 AD2d 13, 18 [1st Dept 1986]).

The damages calculation spreadsheet on which plaintiff relies in its motion for summary judgment is a ledger maintained

in the ordinary course of business (CPLR 4518[a]), and plaintiff's vice president's affidavit explaining the calculations and the spreadsheet suffices to authenticate the document (*see General Bank v Mark II Imports*, 290 AD2d 240 [1st Dept 2002]).

Plaintiff has corrected the errors we identified in its damages calculations in its prior motion for summary judgment (*Moon 170 Mercer*, 122 AD3d at 545), and defendant does not dispute those calculations or any specific line item. Therefore, plaintiff is entitled to summary judgment on damages (*Matter of Moskowitz v Jorden*, 27 AD3d 305 [1st Dept 2006], *lv dismissed* 7 NY3d 783 [2006]). In light of the foregoing, plaintiff's motion for an order of preclusion is moot.

Defendant's motion for sanctions striking the complaint is based on evidence that plaintiff purportedly withheld, namely, that plaintiff had leased the premises to two companies. However, plaintiff's principal explained that plaintiff's efforts to lease the premises to those companies had failed. There is no evidence that plaintiff hid any profits from those leases or otherwise failed to credit any amounts due towards the damages it seeks from defendant. Nor is there evidence that any noncompliance in failing to timely disclose additional information relating to those two tenants during discovery was

willful, contumacious or in bad faith, warranting the drastic remedy of striking the complaint, and any mere lack of diligence in furnishing certain requested materials is not a ground for dismissal (*see Postel v New York Univ. Hosp.*, 262 AD2d 40, 42 [1st Dept 1999]).

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

ENTERED: JANUARY 12, 2017

CLERK

Tom, J.P., Sweeny, Richter, Manzanet-Daniels, Webber, JJ.

2166-
2167N-
2168N &
M-5240

Index 152411/13

The Heywood Condominium, etc.,
Plaintiff-Respondent,

-against-

Steven Wozencraft,
Defendant-Appellant,

Wells Fargo Bank, N.A., et al.,
Defendants.

_____

Jonathan M. Landsman, New York, for appellant.

Schwartz Sladkus Reich Greenberg Atlas LLP, New York (Mitchell Flachner of counsel), for respondent.

_____

Order Supreme Court, New York County (Donna M. Mills, J.), entered on or about November 17, 2014, affirmed, without costs. Order, same court and Justice, entered on or about January 28, 2015, modified, on the law, to dismiss the second cause of action, for money damages, and otherwise affirmed, without costs. Order, same court and Justice, entered September 9, 2015, affirmed, without costs.

Motion to take judicial notice denied.

Opinion by Tom, J.P. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
John W. Sweeny, Jr.
Rosalyn H. Richter
Sallie Manzanet-Daniels
Troy K. Webber, JJ.

2166-
2167N-
2168N &
M-5240
Index 152411/13

_____x

The Heywood Condominium, etc.,
Plaintiff-Respondent,

-against-

Steven Wozencraft,
Defendant-Appellant,

Wells Fargo Bank, N.A., et al.,
Defendants.

_____x

Defendant Steven Wozencraft appeals from the order of the Supreme Court, New York County (Donna M. Mills, J.), entered on or about November 17, 2014, which granted plaintiff's motion to confirm the January 14, 2014 report of the Judicial Hearing Officer, determining, after a traverse hearing, that process had been properly served, and recommending the appointment of a temporary receiver, and denied defendant's cross motion to reject the report; the order of the same court and Justice, entered on or about January 28, 2015, which, inter alia, granted plaintiff's prior motion for the appointment of a receiver and directed defendant to pay

monthly rent of $6,500 to the receiver for his use and occupancy of the condominium unit, and denied defendant's cross motion to dismiss the complaint and to dismiss the second cause of action, for money damages; and the order of the same court and Justice, entered September 9, 2015, which granted the court-appointed receiver's motion for a writ of assistance ejecting defendant from his condominium unit.

Jonathan M. Landsman, New York, for appellant.

Schwartz Sladkus Reich Greenberg Atlas LLP, New York (Mitchell Flachner and Steven D. Sladkus of counsel), for respondent.

TOM, J.P.

In these appeals we must consider a rare occurrence - the eviction of a condominium unit owner from his apartment for failure to pay condominium common charges and rent. Indeed, unlike co-op boards, which are "well equipped with legal remedies to address the issue of chronic misconduct by tenant-shareholders" (Bruce A. Choist and Mary Kosmark, Outside Counsel, *Overcoming Limitations of Condo Boards in Dealing with Unruly Residents*, NYLJ, March. 13, 2012, at 4, Col 1), condo boards are far less empowered to deal with difficult condominium owners (*see generally* Michael R. Fierro, *Condominium Association Remedies Against A Recalcitrant Unit Owner*, 73 St John's L Rev 247 [1999]). However, the Condominium Act and the applicable bylaws for the subject condominium authorize a lien for unpaid common charges and permit a lien foreclosure action and an action for the appointment of a receiver where appropriate (*see Real Property Law* §§ 339-z, 339-aa). Further, the order appointing the receiver in this matter authorized the receiver to take certain actions, including ejectment of defendant from the property

(*see Fourth Fed. Sav. Bank v 32-22 Owners Corp.*, 236 AD2d 300, 301 [1st Dept 1997]). Accordingly, we hold that pursuant to the Condominium Act and relevant condominium bylaws, and under the

circumstances presented here, eviction was proper and not unconstitutional.

In May 2006, defendant Steven Wozencraft purchased an apartment in the Heywood, a condominium located at 263 Ninth Avenue in Manhattan. According to Article 5 of the condo's bylaws, each unit owner is responsible for the payment of monthly common charges and assessments. Notably, under the bylaws, dissatisfaction with the quantity or quality of maintenance or services is not a ground for withholding or failing to pay common charges.

The bylaws provide that failure to timely pay common charges and assessments places the unit owner in default of the bylaws and triggers the imposition of late charges. Further, if the common charge or assessment is not paid within 30 days after the due date, such common charge or assessment will bear interest and the Board of Managers may bring legal action against the unit owner.

In addition, section 5.5(c) of the bylaws states, in pertinent part:

> "The expenses, including without limitation, attorneys' fees and disbursements, incurred by the Board in any proceeding brought to collect such unpaid Common Charges or assessments, shall be added to the amount of such delinquent Common Charge, assessment or installment thereof, together with late charges and interest."

Section 5.7 of the bylaws also states, in pertinent part:

> "All sums assessed as Common Charges by the Board of Managers, as well as any other assessments made by the Board of Managers, but unpaid, together with late charges as may be established by the Board of Managers, interest thereon . . . and reasonable attorneys' fees and other costs and expenses incurred in efforts to collect such past due Common Charges and/or other assessments, shall be the personal obligation of the Unit Owner. Such sums shall constitute a lien upon the Unit. . ."

Section 5.8 of the bylaws permits the Board of Managers to foreclose on any lien for past due common charges and assessments, and section 5.9(a) provides:

> "In any action brought by the Board of Managers to foreclose a lien on a Unit because of unpaid Common Charges or other assessments, the Unit Owner shall be required to pay a reasonable rental for the use of said Unit Owner's Unit and the plaintiff in such foreclosure action shall be entitled to the appointment of a receiver to collect the same."

In April 2007, less than one year after defendant purchased his unit, he ceased paying his common charges and assessments. Defendant claimed he was denied various nonessential services such as doorman services, service calls to his unit, and receipt of packages and deliveries. Defendant asserts that efforts to resolve the dispute were persistently rebuffed by plaintiff. In any event, as a result of defendant's failure to pay common charges, plaintiff exercised its right to curtail certain

nonessential services to defendant pursuant to Rule 32 of the condo's House Rules, which permits the cessation of such services to unit owners who are more than 60 days in arrears in the payment of common charges. Additionally, pursuant to section 5.5(c) of the bylaws, plaintiff began assessing late charges, interest and attorneys' fees incurred in its efforts to collect the unpaid charges from defendant.

Thereafter, in 2011, plaintiff commenced a plenary action for unpaid common charges seeking only a money judgment in the amount of $96,021.30, and the appointment of a receiver to collect "reasonable rent" from defendant. Defendant answered, asserting numerous affirmative defenses and counterclaims, alleging that plaintiff breached its obligations to him in failing to provide proper services to him. In October 2011, plaintiff entered into a "so ordered" stipulation in which it withdrew, with prejudice, as to that 2011 action only, its causes of action for rent allegedly due and its request for the appointment of a receiver.

In March 2012, plaintiff moved for summary judgment in its favor for unpaid common charges, an order dismissing defendant's affirmative defenses and counterclaims, an order appointing a receiver, and an award of attorneys' fees. Then, in July 2012, prior to a ruling on its summary judgment motion, plaintiff again

moved for an order appointing a receiver for the unit.

In September 2012, the court denied plaintiff's motions for summary judgment on its claims for common charges, appointment of a receiver, and for attorneys' fees, and denied defendant's cross motion for partial summary judgment.

Then, on February 21, 2013, plaintiff recorded a lien in the Office of the City Register against the unit for unpaid common charges in the amount of $211,178.40, of which $69,470.51 constituted late fees and $63,408.59 legal fees. In March 2013, while the 2011 action was still pending, plaintiff filed a notice of pendency and commenced this foreclosure action, asserting three causes of action: (1) judgment of foreclosure; (2) money damages in the amount of $215,318.13; and (3) attorneys' fees. Simultaneously, plaintiff moved for the appointment of a temporary receiver, pursuant to Real Property Law § 339-aa.

Defendant cross-moved to dismiss the action on the grounds that: (a) service of process was defective; (b) a prior action was pending between the parties; (c) plaintiff waived the right to foreclose its lien by failing to assert the claim in the prior foreclosure action and/or res judicata; (d) documentary evidence bars this action, as the action seeks to foreclose on a fraudulently inflated lien; and (e) the complaint fails to state a legally cognizable cause of action.

As to the first ground, defendant argued that service of process was defective, because the affidavit of service was never filed in the County Clerk's office within 20 days of mailing; the process server failed to use the required due diligence, pursuant to CPLR 308(4), since he only made three attempts to serve him, all of which occurred during business hours on weekdays at his residence; and the summons and complaint were not affixed to his apartment door, but had been slipped under the door and discovered there by his personal assistant.

By order entered September 20, 2013, the court referred the matter to a special referee to conduct a traverse hearing to determine whether defendant had been properly served with process and whether the appointment of a receiver should be ordered. Plaintiff's motion and defendant's cross motion were held in abeyance pending receipt of the referee's report.

On December 17, 2013, a traverse hearing was held before JHO Ira Gammerman. At the conclusion of the hearing, the JHO determined that defendant had been properly served with the summons and complaint, and recommended the appointment of a temporary receiver to collect rent, unless defendant paid all common charges and assessments going forward, and placed in escrow all past common charges and assessments.

Plaintiff moved to confirm the JHO's report, arguing that

the report's findings are supported by the record. Defendant cross-moved to reject the report, reiterating arguments he had raised on his cross motion to dismiss, and arguing that certain comments by the JHO constituted "procedural irregularities" warranting rejection of the report.

By order entered November 17, 2014, Supreme Court granted plaintiff's motion to confirm the JHO's report, and denied defendant's cross motion to reject it. The court found that the JHO "repeatedly defined the issues," and made pronouncements as to which evidence he found credible and persuasive. The court also found that while, "in an effort to reach substantive issues, the JHO may have been flippant with some of his remarks, including his comment about the process server having an 'honest face,'" such comments did not mandate rejection of the report, especially since defense counsel offered no objection to the evidence itself.

As to the appointment of a receiver for the unit, the court found that defendant offered no evidence to refute plaintiff's assertion that he had made no payments towards the unit's common charges from April 2007 to the present. Thus, the court found that the record, taken as a whole, supported the JHO's findings of fact.

By order entered January 28, 2015, the court granted

plaintiff's motion for the appointment of a temporary receiver, denied defendant's cross motion to dismiss, and deemed defendant properly served with the summons and complaint. The court appointed Allison M. Furman as temporary receiver for the unit, with the authority and directive to rent the unit, and, inter alia, directed defendant, who still occupied the unit, to pay to the receiver "the reasonable fair market rent of $6,500" per month for his use and occupancy. The order explicitly granted the receiver authorization to institute any necessary legal proceedings for the protection of the unit, including instituting proceedings to remove any tenant, including defendant.

Approximately six months later, the receiver moved, pursuant to RPAPL 221, for a writ of assistance ejecting defendant from the unit as a result of his failure to comply with the prior order directing him to pay $6,500 per month for his use and occupancy of the unit. By order entered September 9, 2015, the court granted the receiver's motion for an order ejecting defendant from the unit, with a 20-day stay of execution. On December 22, 2015, this Court granted a stay of the September 9, 2015 order pending determination of the appeal.

Initially, we find there are no grounds to overturn the JHO's conclusion that defendant was properly served with the summons and complaint in this action. The JHO's finding, after a

traverse hearing, that defendant had been properly served with process is supported by the record and was properly confirmed by the court (*see Bubul v Port Parties, Ltd.*, 83 AD3d 517 [1st Dept 2011]).

In particular, the process server testified that he had made three attempts at serving defendant at his home with the summons, complaint, and notice of pendency before resorting to "nail and mail" service. After the last attempt, he affixed the summons and complaint to the door and was escorted out of the building by the building's superintendent. He then completed service by mailing the papers on April 4, 2013 by first class mail. This testimony was corroborated by the server's logbook and the testimony of the superintendent, who stated that on April 1, 2013 he escorted Banks, witnessed him knock on the door, wait for a response, and then affix the summons, complaint, and notice of pendency to the door, at about eye level with what looked like tape. We reject defendant's challenges to the process server's credibility, since the JHO was "in the best position to weigh the evidence and make credibility determinations" and such determinations are accorded deference by the motion court (*Winopa Intl., Ltd. v Woori Am. Bank*, 59 AD3d 203, 204 [1st Dept 2009][internal quotation marks omitted]).

The JHO was free to discredit the testimony of defendant's

assistant, who claimed there were no papers taped to the door and that the papers were shoved under the apartment door when he returned to the apartment between 3:00 and 4:00 p.m. on April 1, 2013. Notably, the assistant also testified that he arrived at the apartment on the same day as the Jeffrey Cares Fashion event, and the record establishes that that particular event was held the following day, April 2, 2013, the day after the process server had affixed the papers to defendant's door.

We find no merit to defendant's remaining contentions regarding the JHO's ruling, including his complaints about certain comments made by the JHO.

Turning to defendant's arguments in favor of dismissing the causes of action in the complaint, we find no basis to dismiss the first cause of action for lien foreclosure. In particular, we reject defendant's contentions that plaintiff's lien on the unit is fraudulent to the extent it includes attorneys' fees, late fees, and interest. Real Property Law § 339-z provides, "The board of managers, on behalf of the unit owners, shall have a lien on each unit for the unpaid common charges thereof, together with interest thereon." Moreover, section 5.5(c) of the condominium bylaws authorizes plaintiff to add attorneys' fees, late fees, and interest to the amount of the delinquent common charges, and section 5.7 of the bylaws states that all such fees

will constitute a lien on the unit (*see Frisch v Bellmarc Mgt., Inc.*, 190 AD2d 383, 386 [1st Dept 1993]; *see also In re Forde*, 507 BR 509 [SD NY 2014]).

Defendant's challenges to the amounts due should be addressed by a referee, pursuant to RPAPL 1321 (*see Board of Mgrs. of Cent. Park Place Condominium v Potoschnig*, 111 AD3d 586 [1st Dept 2013]; *1855 E. Tremont Corp. v Collado Holdings LLC*, 102 AD3d 567, 568 [1st Dept 2013]). We relatedly find that Supreme Court properly denied defendant's motion to dismiss plaintiff's third cause of action, for attorneys' fees, because sections 5.5(c)(iii) and 5.7 of the bylaws allow plaintiff to recover from defendant "reasonable attorneys' fees" incurred in efforts to collect past due common charges and assessments. The referee should also determine the amount of plaintiff's reasonable attorneys' fees (*see* CPLR 4311; *Potoschnig*, 111 AD3d at 586).

However, we dismiss the second cause of action for money damages. While section 5.9(c) of the bylaws and Real Property Law § 339-aa permit plaintiff to proceed with both the 2011 action to recover a money judgment and the instant foreclosure action, plaintiff may not seek a money judgment in this foreclosure action while also seeking a money judgment in the pending 2011 action. Accordingly, dismissal of the second cause

of action, seeking a money judgment, is warranted (*see* CPLR 3211[a][4]).

Defendant's challenges to the appointment of a receiver are unavailing, since both Real Property Law § 339-aa and section 5.9 of the bylaws provide for the appointment of a receiver in a lien foreclosure action to collect the reasonable rent. Specifically, RPL § 339-aa provides, in relevant part, that the plaintiff in a foreclosure action "shall be entitled to the appointment of a receiver" to collect the reasonable rent for the unit. Similarly, section 5.9(a) of the bylaws provides that "the plaintiff in [a] foreclosure action shall be entitled to the appointment of a receiver."

Defendant's reliance on cases where this Court has held that there was no showing that a receiver was necessary is misplaced. Those cases are factually distinguishable, as they did not involve condominium bylaws authorizing the appointment of a receiver (*see e.g. Matter of Armienti & Brooks*, 309 AD2d 659 [1st Dept 2003]). Defendant claims that although the JHO's recommendation to appoint a receiver was contingent upon his posting the alleged common charge arrears in escrow and his payment of prospective common charges, he was never actually given the chance after confirmation of the report to comply with the JHO's conditions. However, there is no evidence that

defendant ever attempted to place the common charge arrears in escrow, despite having more than 18 months to do so following confirmation of the Report.

Contrary to defendant's contention that he cannot be directed to pay rent for the unit he owns, Real Property Law § 339-aa provides, in relevant part, that in a foreclosure action, "the unit owner shall be required to pay *a reasonable rental for the unit* for any period prior to sale pursuant to judgment of foreclosure and sale" (emphasis added). Further, the court properly accepted the affidavit of plaintiff's property manager in setting defendant's monthly use and occupancy of the unit at $6,500. The property manager's statement that $6,500 was the "reasonable rental" amount for plaintiff's unit was based on comparable rentals in the condominium, and defendant provided no evidence to refute this showing (*see Rose Assoc. v Johnson*, 247 AD2d 222, 223 [1st Dept 1998]).

The receiver's mistaken reliance on RPAPL 221 in connection with the writ of assistance was a technical defect that should be disregarded. RPAPL 221 permits the enforcement of a properly rendered order or judgment "affecting the title to, or the possession, enjoyment or use of, real property" (*see Hudson Riv. Park Trust v Basketball City USA, LLC*, 22 AD3d 422, 423 [1st Dept 2005], *lv denied* 6 NY3d 715 [2006]). Thus, the receiver here

could not obtain possession of the unit pursuant to RPAPL 221 in the absence of a judgment directing the delivery of the property. However, there is no merit to defendant's contention that this defect requires reversal of the order granting the writ of assistance, since he was not prejudiced by this defect (*see Farkas v Tarrytown Lbr.*, 133 AD2d 251, 253 [2d Dept 1987]). Indeed, the receiver was properly granted a writ of assistance ejecting defendant from the unit, since the order of appointment authorized the receiver to take certain actions, including ejectment of defendant from the property (*see Fourth Fed. Sav. Bank v 32-22 Owners Corp.*, 236 AD2d at 301).

Although defendant claims that the receiver could not move for a writ of assistance without instituting a summary proceeding, in *Fourth Federal* we rejected this very argument, finding that the fact that the receiver's motion had been made in the context of a foreclosure action and denominated a motion for a writ of assistance, rather than in the form of a summary proceeding, was "irrelevant" (236 AD2d at 303).

Nor is there merit to defendant's additional attacks on the writ of assistance. The record establishes that the receiver's oath, pursuant to CPLR 6402, in which she faithfully and fairly discharged the trust committed to her, was actually filed at the time of the bond. In any event, the filing of an oath "is a

ministerial act, and, if omitted, it may be done nunc pro tunc" (*NYCTL 2011-A Trust v Da'Jue Props. Inc.*, 132 AD3d 569, 570 [1st Dept 2015], *lv dismissed* 27 NY3d 1029 [2016]). Further, any delay in the receiver filing her bond was unintentional. The receivership order required the receiver to maintain an account with JP Morgan Chase. However, that bank no longer allows receivership accounts and defendant refused to consent to an amendment of the receivership order solely to change the required bank from Chase to Signature Bank. As a result, the receiver had to file an order to show cause to seek an amendment of the receivership order to change banks, which was the cause of the delay.

Ejectment of defendant from the unit was not unconstitutional, since he failed to comply with the court's prior order directing him to pay the "reasonable fair market rent" of $6,500 per month for his use and occupancy of the unit. Contrary to defendant's contentions, he was properly required to pay rent on the unit, regardless of the fact that he was the unit's owner, since both Real Property Law § 339-aa and section 5.9 of the bylaws provide that in a lien foreclosure action, "the Unit Owner shall be required to pay a reasonable rental for the use of said Unit Owner's Unit." It is inconsequential and irrelevant to this action that defendant defeated plaintiff's

motion for summary judgment in the 2011 action. Nor does ejectment under these circumstances deprive defendant of his "real property ownership/occupancy rights without due process of law."

Accordingly, the order of the Supreme Court, New York County (Donna M. Mills, J.), entered on or about November 17, 2014, which granted plaintiff's motion to confirm the January 14, 2014 report of the Judicial Hearing Officer, determining, after a traverse hearing, that process had been properly served, and recommending the appointment of a temporary receiver, and denied defendant's cross motion to reject the report, should be affirmed, without costs. The order of the same court and Justice, entered on or about January 28, 2015, which, inter alia, granted plaintiff's prior motion for the appointment of a receiver and directed defendant to pay monthly rent of $6,500 to the receiver for his use and occupancy of the condominium unit, and denied defendant's cross motion to dismiss the complaint should be modified, on the law, to dismiss the second cause of action, for money damages, and otherwise affirmed, without costs. The order of the same court and Justice, entered September 9,

2015, which granted the court-appointed receiver's motion for a writ of assistance ejecting defendant from his condominium unit, should be affirmed, without costs.

M-5240 - ***The Heywood Condominium v Steven Wozencraft***

Motion to take judicial notice denied.

All concur.

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

ENTERED: JANUARY 12, 2017

CLERK