SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 19, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Friedman, J.P., Sweeny, Webber, Gesmer, JJ.

1444-
1445 — Index 100546/15, 100641/15

In re The Friends of P.S. 163, Inc., et al.
Petitioners-Respondents,

-against-

Jewish Home Lifecare, Manhattan,
Respondent-Appellant,

New York State Department of Health, et al.,
Respondents.

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In re Matter of Daisy Wright, et al.,
Petitioners-Respondents,

-against-

New York State Department of Health, et al.,
Respondents,

Jewish Home Lifecare, Manhattan,
Respondent-Appellant.

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The Real Estate Board of New York, Inc., City of New York, CaringKind, JCC Manhattan, Services and Advocacy for GLBT Elders and West Side Federation for Senior and Supportive Housing,
Amici Curiae.

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Greenberg Traurig, LLP, New York (Steven C. Russo of counsel), for appellant.

Orrick, Herrington & Sutcliffe LLP, New York (René Kathawala of counsel), for The Friends of P.S. 163 Inc.; The P.S. 163 School Leadership Team; Joshua Kross; Miles Kross, by his father, Joshua Kross; Stella Kross, by her father, Joshua Kross, Eugenia Fingerman; Elijah Fingerman, by his mother Eugenia Fingerman; Giselle Sanchez; Giovanni Feliciano, by his mother, Giselle Sanchez; Lucindy Cuevas; Anneli Lopez, by her mother, Lucindy Cuevas; Kevin Richardson; Cameron Richardson, by his father, Kevin Richardson; Daniel Webster; Daniel J. Webster by his father, Daniel Webster; Daniel Holt; and Rachel Baker-Holt, by her father, Daniel Holt, respondents.

New York Environmental Law & Justice Project, New York (John R. Low-Beer of counsel), for Daisy Wright, Nathaniel Robert Livingston by his parent Daisy Wright, Oliver Wright Livingston by his parent Daisy Wright, Elizabeth Wright, Bernie Wright by his parent Elizabeth Wright, Vivian Dee, Sonia Garcia, Joan Heitner, Patricia Loftman, Lillian Pryor, Eileen Salzig, Valeria Spann and Walter Reinhardt, respondents.

Akerman LLP, New York (Richard G. Leland of counsel), for the Real Estate Board of New York, Inc., amicus curiae.

Zachary W. Carter, Corporation Counsel, New York (Susan E. Amron of counsel), for City of New York, amicus curiae.

Sive, Paget & Reisel, P.C., New York (Michael Bogin of counsel), for CaringKind, JCC Manhattan, Services and Advocacy for GLBT Elders, and West Side Federation for Senior and Supportive Housing, amici curiae.

Order and judgment (one paper), Supreme Court, New York County (Joan B. Lobis, J.), entered on or about December 18, 2015, which granted the petitions seeking to annul a Findings Statement issued by respondent New York State Department of Health (DOH), dated December 10, 2014, approving respondent Jewish Home Lifecare, Manhattan's (JHL) application to construct a 20-story nursing home facility in Manhattan, and remitted the matter to DOH for preparation of an amended Final Environmental Impact Statement (FEIS) to reconsider the findings on the issues of noise and hazardous materials, reversed, on the law, without costs, the petitions denied, the Findings Statement reinstated, and the proceedings brought pursuant to CPLR article 78 dismissed.

It is axiomatic that judicial review of an agency determination under the State Environmental Quality Review Act (SEQRA) is limited to whether the agency procedures were lawful and "whether the agency identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for its determination" (*Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 417 [1986], quoting *Aldrich v Pattison*, 107 AD2d 258, 265 [2d Dept 1985]; *Matter of Chinese Staff and Workers' Assn. v*

Burden, 19 NY3d 922, 924 [2012]). Moreover, "[i]t is not the province of the courts to second-guess thoughtful agency decisionmaking and, accordingly, an agency decision should be annulled only if it is arbitrary, capricious or unsupported by the evidence" (*Matter of Riverkeeper, Inc. v Planing Bd. of Town of Southeast*, 9 NY3d 219, 232 [2007]). Since it is the responsibility of the agency to analyze reports and other documents submitted to it,

> "it is not for a reviewing court to duplicate these efforts. As we have repeatedly stated, '[w]hile judicial review must be meaningful, the courts may not substitute their judgment for that of the agency, for it is not their role to "weigh the desirability of any action or [to] choose among alternatives"'" (*id.*, quoting *Akpan v Koch*, 75 NY2d 561, 570 [1990], quoting *Jackson*, 67 NY2d at 416).

Thus, the court's province is to "assure that the agency itself has satisfied SEQRA, procedurally and substantively" (*Matter of Jackson*, 67 NY2d at 416; *Matter of East End Prop. Co. #1, LLC v Kessel*, 46 AD3d 817, 820 [2d Dept 2007], *lv denied* 10 NY3d 926 [2008]). In this regard, "[d]issatisfaction with an agency's proposed mitigation measures is not redressable by the courts so long as those measures have a rational basis in the record" (*Matter of Jackson*, 67 NY2d at 421).

"An agency's compliance with its substantive SEQRA obligations is governed by a rule of reason and the extent to which particular environmental factors are to be considered varies in accordance with the circumstances and nature of particular proposals" (*Akpan v Koch*, 75 NY2d at 570, citing *Jackson*, 67 NY2d at 417; *Matter of Gernatt Asphalt Prods. v Town of Sardinia*, 87 NY2d 668, 688 [1996]; *Matter of Town of Dryden v Tompkins County Bd. of Representatives*, 78 NY2d 331, 333-334 [1991]). Where "there has been such a reasonable consideration of alternatives, the judicial inquiry is at an end" (*id.* at 334). "Thus the general substantive policy of the act is a flexible one. It leaves room for a reasonable exercise of discretion and does not require particular substantive results in particular problematic instances" (*Coalition Against Lincoln W. v City of New York*, 94 AD2d 483, 492 [1st Dept 1983], *affd* 60 NY2d 805 [1983]).

Furthermore, not every conceivable environmental impact, mitigating measure or alternative must be addressed. "What must be required is that information be considered which would permit a reasoned conclusion" (*id.*; *see also Matter of Residents for Reasonable Dev. v City of New York*, 128 AD3d 609, 610-611 [1st Dept 2015]; *Matter of C/S 12th Ave. LLC v City of New York*, 32

AD3d 1, 7 [1st Dept 2006]). "So long as the officials and agencies have taken [a] 'hard look' at environmental consequences . . . the court does not seek to impose unreasonable extremes or to interject itself within the area of discretion of the executive as to the choice of the action to be taken" (*National Resources Defense Council v Morton*, 458 F2d 827, 838 [DC Cir 1972] [footnote omitted]).

In arriving at its conclusions, "[a]n agency may rely on consultants to conduct the analyses that support their environmental review of proposed projects [citations omitted]. The choice between conflicting expert testimony rests in the discretion of the administrative agency" (*Matter of Brooklyn Bridge Park Legal Defense Fund, Inc. v New York State Urban Dev. Corp.*, 50 AD3d 1029, 1031 [2d Dept 2008], *lv denied* 10 NY3d 714 [2008] [citations omitted]; *Matter of DeFeo v Zoning Bd. of Appeals of Town of Bedford*, 137 AD3d 1123, 1127 [2d Dept 2016]; *Matter of Thorne v Village of Millbrook Planning Bd.*, 83 AD3d 723, 725-726 [2d Dept 2011], *lv denied* 17 NY3d 711 [2011]).

Here, the motion court determined that DOH took a "hard look" at the issues raised by petitioners with the exception of two areas of concern: noise mitigation and off-site migration of lead-bearing dust.

We find that DOH's determination was not arbitrary and capricious or unsupported by the evidence (*see Akpan v Koch*, 75 NY2d at 570). DOH took the requisite "hard look" at the project's anticipated adverse environmental impacts, including noise and hazardous material impacts, and provided a "'reasoned elaboration'" of its basis for approving the project, including the remedial measures to be employed to mitigate adverse impacts (*Matter of Riverkeeper*, 9 NY3d at 231-232, quoting *Matter of Jackson*, 67 NY2d at 417).

With respect to petitioners' objection that the window air conditioning units proposed as an element of noise-mitigating measures at P.S. 163 would not supply adequate fresh air, it was not unreasonable for DOH to rely on a type of ventilation already in wide use at the school. DOH also rationally rejected, as unreasonably expensive and time-consuming, petitioners' request that central air conditioning be installed at the school. The rough cost estimate for such installation obtained by DOH, though far from the result of a detailed study on its feasibility, complied with 6 NYCRR 617.9(b)(5)(v), which requires consideration of "the range of reasonable alternatives to the actions that are feasible, considering the objectives and capabilities of the project sponsor."

Significantly, the record is clear that the air conditioning units were not the only noise mitigation measure required by DOH. It also mandated, among other things, the installation of new acoustical windows on the side of the school facing the project site.[1] As noted above, the mere fact that DOH did not accept or specifically address in the FEIS all the conclusions and recommendations of petitioners' experts with respect to the issue is not tantamount to a failure to take a "hard look" at this issue (*Matter of Brooklyn Bridge Park Legal Defense Fund*, 50 AD3d at 1031; *Coalition Against Lincoln W.*, 94 AD2d at 492).

Moreover, DOH is entitled to rely on the accepted methodology set forth in the City Environmental Quality Review Technical Manual (CEQRTM) with respect to the allowable temporal duration of elevated noise from construction in making its determination (*see Matter of Finn v City of New York*, 141 AD3d 436 [1st Dept 2016], *lv denied* 28 NY3d 906 [2016]; *see also Matter of Chinese Staff*, 88 AD3d at 429). DOH determined that

[1]Respondent was also required by DOH to increase the noise barrier facing the school to 16 feet, double the standard height. It further required respondent to place noisy machinery away from the school, to use less noisy electrical equipment, to ensure that the noisiest work does not take place during the yearly testing period and to make available a construction manager to liaise with P.S. 163 to address any issues as they arise during the construction project.

noise levels would exceed the CEQRTM impact criteria in classrooms along the school's eastern facade facing the construction site for a total of 14 months. However, the manual also provides that such increased noise levels inside the school would not constitute a significant adverse impact if those levels lasted less than two years. DOH also found that the combination of replacement acoustical windows and air conditioning units is estimated to reduce noise levels by 25-30 dBA during the same period of time.

> "SEQRA requires an agency 'to list ways in which any adverse effects . . . might be minimized'(ECL 8-0109[2]), but it does not require an agency to impose every conceivable mitigation measure, or any particular one. Rather, in accordance with its balancing philosophy, SEQRA requires the imposition of mitigation measures only 'to the maximum extent practicable' 'consistent with social, economic and other essential considerations' (ECL 8-0109[8])" (*Matter of Jackson*, 67 NY2d at 421-422).

Thus, although petitioners, the motion court and the dissent do not agree with DOH's findings, the record supports the conclusion that DOH took the requisite "hard look" at this issue.

The record also reflects that DOH took the requisite "hard look" at the issue of containment of hazardous dust from the construction site. While it is true that DOH conceded that there is a controversy over whether any level of exposure to lead dust

is acceptable, it can base its determination as to mitigating measures on currently accepted federal and state mitigating measures. In that respect, DOH reviewed soil sampling from the proposed construction site. It found that 38 samples contained lead levels of 290 parts per million (PPM), and 3 contained levels of over 1,000 PPM. The threshold for child play areas, as per the National Ambient Air Quality Standards, is 400 PPM. As a result, DOH mandated certain remedial measures, including a two-foot cap of clean soil over any ground left exposed after construction and dust control measures including watering of the soil during demolition, excavation, and soil transport to minimize airborne dust.

Although some of the petitioners contend that DOH failed to perform adequate soil sampling, even the motion court determined that DOH conducted a "comprehensive and detailed investigation."

As with the noise mitigation issue, petitioners argue that the reports of their experts as to proposed mitigation measures were not adequately addressed or considered, and that DOH should have set forth measures to prevent, not merely mitigate, migration of lead dust from the project site. Of course, mitigation of adverse environmental impacts is the mandate of SEQRA (ECL 8-0109[2][f]). Petitioners' argument again ignores

well settled precedent, which bears repeating, that the mere fact that an agency accepts its own consultants' recommendations over those of petitioners while not specifically addressing all the conclusions and recommendations of petitioners' consultants does not mean that the agency failed to take a "hard look" at a particular issue (*Matter of Brooklyn Bridge Park Legal Defense Fund*, 50 AD3d at 1031; *Coalition Against Lincoln W.*, 94 AD2d at 492).

DOH reasonably relied on federal standards, including National Ambient Air Quality Standards, in determining what measures to employ to mitigate the possibility of off-site migration of lead-bearing dust (*see Matter of Spitzer v Farrell*, 100 NY2d 186, 191 [2003]). Its mitigation measures reflect its considered judgment and meets the required "hard look" under SEQRA.

In short, we find that the motion court erroneously "substituted its analysis for the expertise of the lead agency" simply because the agency rejected what the court considered to be better measures in mitigation (*Matter of South Bronx Clean Air Coalition v New York State Dept. of Transp.*, 218 AD2d 520, 522 [1st Dept 1995], *lv denied* 87 NY2d 803 [1995], citing *Coalition Against Lincoln W.*, 94 AD2d 483).

We have considered petitioners' remaining arguments, including its contention that JHL has no right to appeal, and find them unavailing.

All concur except Gesmer, J. who dissents in a memorandum as follows:

GESMER, J. (dissenting)

I respectfully dissent, and would affirm the motion court's order and judgment, subject to a small procedural modification.

The Department of Health (DOH) approved a proposal by respondent Jewish Home Lifecare, Manhattan (JHL) to construct a nursing home in Manhattan (the project). Petitioners challenged the approval as arbitrary and capricious and inconsistent with DOH's obligations under the State Environmental Quality Review Act (SEQRA) to take an in-depth look at the environmental consequences of the project. The motion court rejected petitioners' procedural challenge but found that DOH had failed to comply with the substantive requirements of SEQRA with regard to two issues. Specifically, it found that DOH had failed to take the required "hard look" at the environmental effects of, and appropriate mitigation measures for, the noise and the lead-containing airborne dust particles that would be generated during the construction of the project, and failed to provide a reasoned explanation for its findings. Accordingly, the motion court granted the petitions to the extent of vacating DOH's approval of JHL's application and remitting the matter to DOH for the preparation of an amended Final Environmental Impact Statement (FEIS) to reconsider its findings on the issues of noise and

hazardous materials.

In reaching this result, the motion court applied the appropriate deferential standard of review. Accordingly, I would affirm the motion court's findings. However, SEQRA does not use the term "amended FEIS," but rather requires an agency to issue a Supplemental Environmental Impact Statement (SEIS) where the initial FEIS is inadequate (6 NYCRR 617.9[a][7]). Accordingly, I would modify the order and judgment only to the extent of directing DOH to issue a SEIS "limited to the specific significant adverse environmental impacts not addressed or inadequately addressed" in the FEIS (6 NYCRR 617.9[a][7]).

In reaching this result, I would find that the motion court properly applied the statutory standard of review. "The primary purpose of SEQRA is 'to inject environmental considerations directly into governmental decision making'" (*Akpan v Koch*, 75 NY2d 561, 569 [1990], quoting *Matter of Coca-Cola Bottling Co. v Board of Estimate*, 72 NY2d 674, 679 [1988]). "By requiring strict adherence to review procedures, the act forces agencies to 'strike a balance between social and economic goals and concerns about the environment'" (*Matter of Spitzer v Farrell*, 100 NY2d 186, 190 [2003], quoting *Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 414 [1986]). In reviewing an

environmental impact statement under SEQRA, we may

> "first, review the agency procedures to determine whether they were lawful. Second, we may review the record to determine whether the agency identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for its determination. Court review, while supervisory only, insures that the agencies will honor their mandate regarding environmental protection by complying strictly with prescribed procedures and giving reasoned consideration to all pertinent issues revealed in the process"

(*Matter of Jackson*, 67 NY2d at 417 [citations omitted]). I would find that, since the agency did not take the required "hard look" and did not make the required "reasoned elaboration," its action was arbitrary and capricious in these two areas and that therefore the matter must be remanded to the agency for further proceedings. In addition, it is my view that the reversal of the motion court is inconsistent with our obligation to insure that agencies honor their mandate to protect the environment.

Noise

The project is directly adjacent to elementary school P.S. 163. P.S. 163 has classes from pre-kindergarten through fifth grade, and serves approximately 600 students between the ages of 3 and 11, including students with special needs. At least 14% of the students have a learning disability. At every opportunity for public comment on the project, petitioners Friends of P.S.

163 (Friends) and individual parents raised questions about the noise that would be generated by the Project, and the effect on the children.

DOH issued a Draft Environmental Impact Statement (DEIS) on March 21, 2014 that concluded that the project "would not result in any significant adverse noise impacts."

Friends retained a group of pediatric environmental health experts at the Mount Sinai Children's Environmental Health Center to comment on the DEIS. They submitted a comment stating that studies have shown that "chronic exposure to increased background noise results in impaired reading comprehension" for average schoolchildren, and recommending that ambient noise levels for children with normal speech processing be no more than between 28.5 and 40 dBA, depending on the age group, and, for young children with delayed speech processing, no more than 21.5 dBA. They concluded that "the predicted noise levels during the noisiest 14 months of construction . . . are predicted to be loud enough to potentially interfere with the wellness and the ability to learn of the school children at P.S. 163," and that "the mitigation measures as outlined in the EIS may not be sufficient to fully prevent negative impacts on P.S. 163 students."

Friends also retained an acoustical engineer to review the

DEIS and conduct acoustical testing. In his comments submitted on May 19, 2014, the engineer stated that "additional construction noise mitigation measures must include . . . installation of a central air conditioning HVAC system" on the eastern facade of P.S. 163. One month later, after learning that DOH was considering requiring the installation of new windows on the east side of P.S. 163, he submitted additional comments, which explained that the installation of new windows without central air conditioning would be insufficient to reduce construction noise to acceptable levels because the unregulated heating system and inadequate window air conditioners at P.S. 163 result in windows being left open "virtually every day of the academic year." Friends and individual parents submitted comparable comments.

In the FEIS, DOH provided that JHL would install new acoustical windows along the eastern facade of P.S. 163 and provide new window air conditioning units in each of the eastern facade classroom windows without a functioning unit.[1] These were

[1]In addition, it is not clear whether JHL's agreement to install window air conditioning units in "classrooms" would extend to the school's auditorium, which faces the construction site, has no air conditioning, and is used for classes throughout the school day.

among the considerations that led to DOH's approval of the project.

However, DOH concluded that, even with these measures in place, for 9 consecutive and 14 total months of excavation and foundation work, interior noise levels at P.S. 163 would exceed 50 dBA. That is above the level of 45 dBA, which, according to the City Environmental Quality Review (CEQR) Technical Manual,[2] is the level above which indoor noise achieves a nuisance level, especially for sensitive populations such as children.

With regard to noise, the motion court found that DOH did not adequately address the adverse effects of the elevated noise levels during construction on the learning abilities and school performance of the children at P.S. 163. In reaching this conclusion, the motion court took particular note of four factors: 1) the close proximity of the school to the construction site; 2) DOH's finding that CEQR Technical Manual noise level standards would be exceeded during 9 consecutive and 14 total months of excavation and foundation work, even with DOH's

[2]According to the FEIS, DOH generally used the 2012 CEQR Technical Manual, 2012 edition, revised June 5, 2013 "as a guide with respect to environmental analysis methodologies and impact criteria for evaluating the effects of the Proposed Project, unless . . . determined otherwise."

proposed mitigation measures, including installation of window air conditioners and acoustical windows in some classrooms; 3) DOH's exclusive reliance on the CEQR guidelines, even though those guidelines do not address the special circumstances of proximity of a noisy construction site to young children; and 4) DOH's failure to take a sufficiently hard look at additional noise mitigation measures, including the installation of a central air conditioning system at P.S. 163.

This conclusion by the motion court is based on its review of the record, pursuant to the standard of review set forth above, and therefore, I would affirm it. The majority, in reversing the motion court, does not fully address the first three of the factors that the motion court considered with respect to noise. While the majority does address the last issue, I disagree with its analysis for the reasons set forth below.

First, the majority states that "it was not unreasonable for DOH to rely on a type of ventilation [window air conditioners] already in wide use at the school." However, the suitability of window air conditioners for ventilation under normal circumstances is entirely irrelevant as to whether they are an appropriate method of noise mitigation. Moreover, DOH failed to

respond to the timely comment by petitioner's acoustical engineer that the window air conditioners at P.S. 163 should be removed and replaced with a central HVAC system. As a result, it is not clear why it was reasonable for DOH to rely on the existing window air conditioners to mitigate noise.

Finally, the majority claims that it was rational for DOH to reject central air conditioning as "expensive and time-consuming." However, DOH did not even address in the FEIS, much less reject, the proposal by Friends' acoustical engineer regarding central air conditioning; rather, it addressed it for the first time in the Findings, issued one month later. The Findings stated that central air conditioning would be "very difficult, would take a great amount of time and would be extremely costly" and was therefore "infeasible." Although the Findings claimed to base this conclusion on consultation with the New York School Construction Authority (NYSCA), DOH has not produced any evidence that it received any written communications from NYSCA before issuance of the FEIS concerning central air conditioning. Indeed, the written communication from NYSCA that DOH has identified as the basis for its conclusion is email correspondence from NYSCA to petitioners' counsel containing a "very rough estimate" of the cost of installing central air

conditioning at P.S. 163 and a statement that the "consensus is that this will be very difficult, will take a great amount of time and is extremely costly." Moreover, the record shows that DOH first saw that email one week after issuance of the FEIS.[3] Certainly, the motion court could have reasonably concluded that this was not the "hard look" or "reasoned elaboration" called for by SEQRA.

Accordingly, I would affirm the motion court's finding that DOH failed to take a sufficiently hard look at, and failed to make a reasoned elaboration of the basis for its determination as to, the issue of noise as it may affect the students at P.S. 163, and appropriate noise mitigation measures.

Lead

At every opportunity for public comment on the project, Friends, individual parents, and community members raised questions about airborne toxic substances that would be generated by the project, and the effect on the children.

On the issue of airborne toxic substances, the DEIS stated

[3] It is therefore difficult to understand how JHL could claim in its reply brief that DOH "relied heavily" on the opinion and expertise of NYSCA as to central air conditioning when there is no evidence that it received NYSCA's "very rough cost estimate" until after DOH issued the FEIS.

that the project would disturb soil containing hazardous materials, but, with the implementation of a Remedial Action Plan (RAP) and Construction Health and Safety Plan (CHASP) approved by DOH, "significant adverse impacts related to hazardous materials would not be expected."

During the comment period, petitioners submitted comments highlighting the high levels of lead and the adverse impact it would have on the children nearby. The Environmental Technology Group, an environmental and engineering consulting group retained by Friends, submitted comments stating that "an enclosed area tent should be utilized during excavation to prevent any particles and odors from emanating from the site."

With regard to this issue, the FEIS stated that (1) lead is present in the soil tested from the project site; (2) construction excavation "can create airborne dust . . . that must be appropriately contained to prevent or minimize inhalation or ingestion" of lead; (3) lead exposure places young children at particular risk of long-lasting damage, including learning and behavioral difficulties; (4) "there is controversy as to whether there is any level of lead exposure that can be considered 'safe'"; and (5) there is no reliable technology for real-time measurement of airborne lead. DOH further stated that the RAP

and CHASP it had approved would minimize the impact of the soil disturbance. The RAP and CHASP require wetting of exposed soils, covering trucks with tarpaulins, and air monitoring for small particles, and that construction workers on the project be provided with Tyvek suits, full face monitors and respirators. In the sections of the FEIS concerning hazardous substances and construction, DOH does not discuss the potential effects of any of the substances on the children attending P.S. 163.

Despite the acknowledged uncertainties about safe lead levels and the impossibility of accurately measuring airborne lead levels, DOH concluded that there is no significant threat to public health, and that the CHASP and RAP will be adequate to ensure that lead levels will not exceed the National Ambient Air Quality Standards (NAAQS) of 150 parts per million (ppm). In the FEIS, DOH only explicitly responded to the comments made by petitioners' experts concerning lead by stating that use of a tent was "not warranted" and that the RAP and CHASP would be sufficient to address any problems arising from soil disturbance.

The petitions submitted by the *Wright* petitioners were accompanied by affidavits by three experts who had reviewed the FEIS and explained that it did not adequately address the environmental effects of toxins and the possible methods to

mitigate them. Paul Bartlett, an expert on the emission of toxics, stated that the FEIS estimates of exposure from toxics is incorrect; that the proposed air monitoring is inadequate; and therefore, that "[t]oxics are present at the site at levels of sufficient concern that a sealed tent protocol with negative air pressure and continuous air monitoring is needed to contain the toxics and prevent exposure." Dr. David Carpenter stated that lead dust has a toxic and irreversible effect on children; that children should be protected from exposure to lead by preventing migration of contaminants off-site; that soil wetting and air monitoring are not sufficient to accomplish this; and that migration of the dust must be ensured by means of a full containment system. An affidavit containing a similar opinion was submitted by toxicologist Stephen Lester.

After applying the appropriate standard of review to the facts before it, the motion court found that, in light of DOH's own acknowledgment of the controversy as to whether there is any safe level of lead exposure, and the close proximity of the construction site to the school, DOH had failed to take "a hard enough look at all relevant mitigation measures or made a reasoned elaboration for its failure to consider containment

measures," including tenting.[4]

The majority dismisses this finding, and merely concludes that DOH "reasonably relied on federal standards ... in determining what measures to employ to mitigate the possibility of off-site migration of lead-bearing dust." However, that statement is not supported by the record, since the chapter of the FEIS that addresses mitigation does not even mention the effects of migration of lead-bearing dust. Moreover, the majority fails to acknowledge that DOH failed to comply with the CEQR Technical Manual, which requires, for example, that a public health analysis consider the potential for exposure to contamination by vulnerable populations, including children. A striking example of its failure to do so is that the RAP requires that, under the circumstances, construction workers wear protective clothing but there is no comparable protection for the children attending school next to the construction site.

[4]Thus, respondent JHL is wrong in stating in its brief that the motion court "accept[ed] the demand of petitioners that a tent be included as a mitigation measure." Rather, the motion court said that DOH failed to take a "hard look" at all "relevant mitigation measures," including containment.

Accordingly, I would vote to affirm the motion court's findings, and to modify its order and judgment only to the extent of requiring that DOH adopt a SEIS, rather than an "amended FEIS."

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

ENTERED: JANUARY 19, 2017

CLERK

Acosta, J.P., Richter, Mazzarelli, Kapnick, Gesmer, JJ.

1975 The People of the State of New York, Ind. 2350/09
Respondent,

-against-

Darrell Joe,
Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Eunice C. Lee of counsel) and Covington & Burling LLP, New York (Jonathan D. Cohen of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Emily Anne Aldridge of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Barbara F. Newman, J.), rendered October 4, 2011, convicting defendant, after a jury trial, of attempted murder in the second degree, and sentencing him, as a second violent felony offender, to a term of 16 years, unanimously affirmed.

The charge of attempted murder arose out of allegations that defendant shot Ralph Barry. In the hospital after the shooting, Barry described his assailant to Detective Daniel Brady as "a light-skinned male with braids and a black coat." An eyewitness to the shooting met with Brady several days after the shooting and that meeting, Brady testified, led to the issuance of a "wanted card" for defendant which, he further testified, is

generally issued "when a person gets identified." Defendant was charged with attempted murder when he was arrested for trespass five months after the shooting. A police officer had become suspicious of defendant after observing him engaged in what appeared to be a hand-to-hand drug transaction and approaching him, at which point defendant fled to the roof of a "Clean Halls" building. He then resisted arrest, gave a false name and refused to be fingerprinted or provide an address.

Prior to the trial for the attempted murder charge (the trespass charge having been dropped by the People), defendant moved to exclude, as prejudicial, any evidence regarding the circumstances of the trespass. The court denied the motion, finding that the trespass details were relevant to the People's theory that defendant's flight exhibited his consciousness of guilt for the attempted murder.

Before jury selection, defendant, despite defense counsel's indication that defendant would waive the right to be present at sidebars during jury selection, asserted his right to be present. After each of two bench conferences that were held with prospective jurors, defense counsel confirmed on the record that the court had asked him to confer with his client as to whether the latter wanted to attend and defendant stated that it was

acceptable for the conference to be conducted without his presence. Two days later, a prospective juror informed the court that her fiancée had pleaded guilty to murder, in a gang-related incident. The record does not indicate that the court directed defense counsel to inquire into whether defendant wanted to be present at an ensuing sidebar. Rather, the transcript's only reference to attendance at the sidebar is as follows: "Whereupon, the following discussion takes place on the record, at the sidebar, in the presence of the Court and counsel." During the sidebar, the juror indicated that she was not sure that she could be impartial. The juror was dismissed. The transcript then states: "Whereupon, the following takes place on the record in open Court in the presence of all parties."

Barry did not testify at trial. During Detective Brady's testimony, over defendant's objection as to relevance, the People showed him a photograph of Barry, which was then shown to the jury. The People had argued that the picture was relevant to clarify what Barry meant when, as related to the jury by the detective, he told the detective that the person who shot him was "white complected" or "light-skinned." They explained that this description was meant to be in comparison to his own complexion and so the picture was necessary to portray the contrast. The

court agreed with defendant's position that no inference could be drawn that the victim had been making a comparative description, but allowed the picture to be shown to demonstrate that the victim was "a real person."

During its deliberations, the jury twice submitted a note to the court stating that it was deadlocked. After the second note, the court issued an *Allen* charge, reviewed prior to delivery by defense counsel without objection, which included the following statement:

> "Remember what you promised when you were being selected. You each solemnly promised that you will honestly deliberate. You promised on your oath that you would decide the case only on the evidence in the courtroom and the laws as I told them to you. And you would do so without prejudice, without sympathy, without considering punishment. You each solemnly promised that you would tell the others your views based on the evidence and the law, and you would try to convince the others that you were correct."

Defendant argues that the proceedings were tainted from the very outset by his exclusion from the two sidebars during jury selection. "[A] sidebar discussion with a prospective juror regarding her background, bias and ability to be impartial is considered a material stage of a trial," and "[e]xclusion of a defendant from such a sidebar discussion without first obtaining a knowing, intelligent and voluntary waiver of the right to be

present constitutes per se reversible error where the prospective juror is either seated on the jury, excused on consent, or peremptorily challenged by the defense" (*People v Williams*, 52 AD3d 94, 96 [1st Dept 2008]). Here, given the prospective juror's inability to state unequivocally that she could remain impartial despite her fiancee's having been convicted of murder, her dismissal for cause was ultimately required (*see People v Chambers*, 97 NY2d 417, 419 [2002]; *People v Childs*, 247 AD2d 319, 322 [1st Dept 1998], *lv denied* 92 NY2d 849 [1998]). Thus, *Williams* did not require defendant's presence for the sidebar. Having reached this conclusion, we need not address defendant's contention that the court violated his right to be present, a right that he had affirmatively invoked at the beginning of the proceedings.

Defendant next argues that the court should not have permitted the facts surrounding his trespass arrest to be presented to the jury, since, he states, there was no evidence that he was aware he was being sought for a shooting when he fled the police, or that he fled because of such an awareness. Consciousness-of-guilt evidence may be admitted to establish criminal liability so long as its relevance is not outweighed by its tendency to prejudice the defendant (*see People v Bennett*, 79

NY2d 464, 470 n2 [1992]). We agree with the People that defendant's response to his being arrested for trespassing, including struggling with a police officer, giving a false name, and refusing to submit to fingerprinting or to furnish an address, was disproportionate, and at least suggested a concern that he was soon going to be held to account for the shooting of Barry. *People v Moses* (63 NY2d 299 [1984]), cited by defendant, is distinguishable because it turned specifically on the adequacy of certain consciousness-of-guilt evidence to satisfy the statutory accomplice corroboration requirement. Notably, the Court did not hold that evidence of the defendant's false alibi was inadmissible. *People v Gadsden* (139 AD2d 925 [4th Dept 1988]), also relied on by the defense, does not stand for the proposition that flight can never be probative of guilt, and we find that under the circumstances presented here the court properly admitted the evidence. Defendant's arguments that the court should have at the very least issued a limiting instruction with respect to the consciousness-of-guilt evidence and that the trespass and attempted robbery charges should never have been joined in the first place are unpreserved, and we decline to reach them in the interest of justice.

We agree with defendant that the admission of the photograph

of Barry served no practical purpose, and that the court properly declined to admit it for the proffered purpose of permitting a comparison between Barry's skin color and defendant's. However, to the extent that the court admitted it to satisfy any desire the jury may have had to visualize the nontestifying victim, it was harmless error. It is widely recognized that in a *homicide* case, it is prejudicial to place a picture of the deceased before the jury in a case with less than overwhelming evidence of guilt, since doing so can "inflame the jury's emotions and . . . introduce into the trial an impermissible sympathy factor" (*People v Donohue* (229 AD2d 396, 398 [2nd Dept 1996], *lv denied* 88 NY2d 1020 [1996]). Indeed, each of the cases cited by defendant is a homicide case. Here, Barry was alive when the case was tried. Had he come to court to testify, certainly the defense could not have been heard to argue that his presence in the courtroom would have had a prejudicial impact on the jury. Further, even though Barry was seriously wounded, the picture shown to the jury was not one showing him performing an activity he might no longer be able to engage in since he was shot. Rather, it was an innocuous headshot. Accordingly, it could not have elicited feelings of sympathy so strong as to dispose the jury to convicting defendant.

Defendant further claims that the People should not have been allowed to elicit hearsay testimony from Detective Brady concerning Barry's description of defendant, since Barry did not later make a corporeal identification (*see People v Huertas*, 75 NY2d 487 [1990]). This argument is unpreserved, and we decline to reach it in the interest of justice. Discussion of admissibility of the photograph and of the *Huertas* issue occurred simultaneously before the court, and, while defense counsel clearly objected to the photograph and took an exception to the court's ruling, at no time did he expressly protest admission of the testimony concerning Barry's description. Defendant's argument that he should have been permitted to impeach the description testimony by questioning Brady about Barry's inconsistent grand jury testimony is unavailing. Barry would have had to testify directly, and defendant did not establish that he was unavailable.

Defendant also contends that the court, instead of simply striking Brady's testimony that, upon interviewing the eyewitness after the shooting, he issued a "wanted card" and that wanted cards are issued "when a person gets identified," should have declared a mistrial. We find that the overall impact of the suggestion that the eyewitness identified defendant was

insufficient to warrant a mistrial. To the extent defendant complains that the prosecutor referenced the testimony during his summation, it is noted that this echoed defense counsel's own reference to the wanted card during his summation.

We reject defendant's position that the *Allen* charge, to the extent it reminded the jurors that they "each solemnly promised that you would tell the others your views based on the evidence and the law, and you would try to convince the others that you were correct" was coercive and impermissibly shifted the burden of proof to him from the People. Read as a whole, the instruction was balanced and it did not exert untoward pressure on the jury, since it adequately conveyed the principle that a juror should not abandon his or her conscientiously held beliefs in reaching a verdict. This case contrasts with *People v Aponte* (2 NY3d 304 [2004]), relied on by defendant, in which the Court of Appeals recognized a host of elements that rendered the charge unbalanced and coercive, and observed that "the charge here did not include any encouraging language to balance its instruction that the jury needed to 'decide this case'" (2 NY3d at 309).

Defendant's argument that the charge impermissibly shifted the burden of proof is similarly unavailing (*see People v Antommarchi*, 80 NY2d 247 [1992]). In *Antommarchi*, the court's

Allen charge contained the following language:

> "You swore that, if you have a reasonable doubt, I repeat, a reasonable doubt, on any relative point or material element or on the evidence or lack of it, and when one or more of your fellow jurors questioned you about it, you would be willing and able to give him what you believe is a fair, calm explanation for your position based upon the evidence or the lack of evidence in this particular case" (*id.* at 251).

The Court concluded that this language impermissibly shifted the People's burden, finding that it "plac[ed] on each juror the express duty of giving a 'fair, calm explanation for your position,'" and "require[d] jurors to supply concrete reasons 'based upon the evidence'" (*id.* at 252). Other cases have reversed convictions based on similar language (*see People v Arce*, 215 AD2d 277 [1st Dept 1995] ["(I)f you had a reasonable doubt on any relative point . . . and one or more of your fellow jurors questioned you about it, he [sic] would be willing and able to give what you believe is a fair, calm explanation of your position based upon the evidence or lack of evidence"]; *People v Henry*, 283 AD2d 587 [2d Dept 2001]["try to convince the others, if you could, that you're correct and show them why you're correct. Show them the law. Show them the evidence."]).

The sentence complained of here, although it did use the word "convince," is distinguishable from the language found

improper in *Antommarchi* and similar cases. Considered in context, it does not rise to the level of "impos[ing] an affirmative obligation on the juror to specifically articulate the basis for such doubt" (*Antommarchi*, 80 NY2d at 251).

Finally, we find that certain statements made by the prosecutor during his summation did not rise to the level of misconduct, and we perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 19, 2017

CLERK

Acosta, J.P., Renwick, Moskowitz, Feinman, Kahn, JJ.

2237 & M-5235 Roslyn Curry, Plaintiff-Appellant, Index 101192/12

-against-

Hundreds of Hats, Inc., et al., Defendants-Respondents,

"John and/or Jane Doe," etc., Defendants.

_____

Profeta & Eisenstein, New York (Fred R. Profeta, Jr. of counsel), for appellant.

Lester Schwab Katz & Dwyer, LLP, New York (Daniel S. Kotler of counsel), for respondents.

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Order, Supreme Court, New York County (Donna M. Mills, J.), entered September 18, 2014, which granted defendants-respondents' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied as premature.

Plaintiff, an experienced background actress, seeks damages in connection with injuries sustained when she was struck by an

ATVC camera truck during the filming of the movie, "The Adjustment Bureau." Plaintiff sues George Nolfi, the director and producer of the movie, as well as various companies, including Hundreds of Hats, Inc., Gambit Productions, Inc. and Electric Shepherd Productions, that allegedly had a role in the production of the movie. At this incipient stage of discovery in this action, however, defendants' respective roles, if any, in the production of the movie are unclear.

Nevertheless, defendant Hundreds of Hats, Inc. moved for summary judgment dismissing the claims asserted against it on the ground that it was plaintiff's employer during the relevant time period and thus protected from liability under the Worker's Compensation Law. Defendant Nolfi also moved for summary judgment dismissing the claims asserted against him citing the Worker's Compensation Law. Nolfi argues that pursuant to some agreement, not identified or produced, Gambit Productions, Inc. "loaned" his services to Hundred of Hats, Inc. for the production of the movie and that as an employee of Hundred of Hats he is shielded from liability as plaintiff's co-employee.

Gambit Productions, Inc. and Electric Shepherd Productions moved for summary judgment dismissing the claims against them on the ground that neither corporation had any connection to the

production of the movie. However, this Court takes judicial notice of materials provided by plaintiff, which are not part of the record on appeal, concerning a California copyright infringement action, in which both companies appear to have acknowledged a connection to the movie, albeit the true nature and extent of their involvement with the movie is unclear (*see Long v State*, 7 NY3d 269 [2006] [Court takes judicial notice of records of other proceedings]). Supreme Court granted defendants summary judgment dismissing the complaint against them. We now reverse.

We agree with plaintiff that the motion should have been denied as premature. Plaintiff is entitled to complete discovery in her effort to establish the precise relationships among the various entities and their relationships to Nolfi. Significantly, this information is solely within the control of defendants. Yet, not only have defendants not been produced for court-ordered depositions, but they have also failed to produce many of the relevant written agreements. "Where essential facts to justify opposition to a motion for summary judgment might exist, but cannot be stated because they are in the moving party's exclusive

knowledge or control, summary judgment must be denied (CPLR 3212[f])" *(Ciaffaglione v Rabiner*, 202 AD2d 373, 373 [1st Dept 1994]).

M—5235 ***Roslyn Curry v Hundreds of Hats***

Motion to take judicial notice of certain documents granted to the extent of taking judicial notice of complaint in *Coelho v MRC II Distribution Company, L.P., No. CV 11-8913-ODW (JCGx) [CD Cal]* (*see* 2011 WL 5103069) and of corporate filings submitted by Hundreds of Hats to the Delaware Secretary of State.

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

ENTERED: JANUARY 19, 2017

CLERK

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

2449 Luigi Fidanza, et al., Index 307989/12
Plaintiffs, 83816/13

-against-

Bravo Brio Restaurant
Group, Inc., et al.,
Defendants.

- - - - -

Bravo Brio Restaurant
Group, Inc., et al.,
Third-Party Plaintiffs-Respondents,

-against-

Spectrum Painting Corp.,
Third-Party Defendant-Appellant.

_____

Mauro Lilling Naparty LLP, Woodbury (Anthony F. DeStefano of counsel), for appellant.

Cartafalsa, Slattery, Turpin & Lenoff, New York (Michael J. Lenoff of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered February 1, 2016, which, to the extent appealed from as limited by the briefs, granted defendant-third-party plaintiff RCC Associates, Inc.'s motion for summary judgment on its third-party claims against Spectrum Painting Corp. for contractual indemnification and failure to procure insurance, and denied Spectrum's motion to dismiss the third-party complaint, unanimously modified, on the law, to deny RCC summary judgment on

its third-party claims, and to limit Spectrum's liability for contractual indemnification, if any, to $2 million, and otherwise affirmed, without costs.

Plaintiff, an employee of Spectrum, a painting subcontractor, was injured while working on a project for which RCC was the general contractor. On this record, neither RCC nor Spectrum was entitled to summary judgment on RCC's third-party claim against Spectrum for contractual indemnification. Initially, an issue of fact exists as to whether the work plaintiff was performing at the time of his accident was within the scope of Spectrum's work, so as to render the contract's indemnification provision applicable. Specifically, Spectrum's contract was unclear with respect to whether the window frame plaintiff was painting when he was injured was included in the scope of work. Further, assuming that plaintiff was performing work within the scope of Spectrum's contract, the contract's indemnification provision is enforceable under General Obligations Law § 5-322.1(1) only to the extent that RCC is found to have been free of negligence itself (*see Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786, 795 n 5 [1997]; *Naughton v City of New York*, 94 AD3d 1, 12 [1st Dept 2012]; *Macedo v J.D. Posillico, Inc.*, 68 AD3d 508, 510-511 [1st Dept

2009]). Here, the record raises an issue of fact as to whether any negligence by RCC contributed to the causation of the accident. Because the foregoing issues must be resolved at trial, we modify to deny RCC summary judgment on its third-party claim for contractual indemnification. In addition, based on the express terms of the contract, we further modify to limit Spectrum's potential liability for such indemnification to $2 million.

Finally, RCC is not entitled to summary judgment on its third-party claim for failure to procure insurance because it failed to demonstrate prima facie that Spectrum did not obtain insurance coverage naming it as an insured party.

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

ENTERED: JANUARY 19, 2017

CLERK

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

2488 Joyce Meshel, Index 350604/04
Plaintiff-Appellant,

-against-

Jeffrey Meshel,
Defendant-Respondent.

_____

Cox Padmore Skolnik & Shakarchy LLP, New York (Steven D. Skolnik of counsel), for appellant.

Mark S. Helweil, New York, for respondent.

_____

Order, Supreme Court, New York County (Lori S. Sattler, J.), entered March 9, 2016, which, to the extent appealed from as limited by the briefs, denied plaintiff mother's motion to direct defendant father to cease deducting the parties' son's college expenses for room and board from defendant's child support payments for the parties' daughter and to direct him to pay the resulting child support arrears in the amount of $3,073, and granted defendant's cross motion to direct plaintiff to pay defendant's counsel fees of $3,000, unanimously modified, on the law and the facts, to deny defendant's cross motion for attorneys' fees, and otherwise affirmed, without costs.

The parties entered into a stipulation of settlement regarding permanent custody, pursuant to which plaintiff had sole

legal and primary residential custody of the parties' two children. The parties further entered into a stipulation resolving the parties' financial issues, which provided that defendant would pay $6,000 per month for the support of the children. Both the custody and financial stipulations were incorporated into, but not merged with, the judgment of divorce, which provided, inter alia, that defendant shall be entitled to a full credit against all such monthly child support payments for any and all amounts he contributes toward the cost of the son's room and board while away at college, provided, however, that the annual amount of the credit shall not exceed $24,000 per year until the son's graduation from college.

On July 9, 2013, the parties entered into a stipulation (revised stipulation), which, among other things, modified the custody and financial stipulations and judgment of divorce by granting defendant sole legal and physical custody of the parties' son, and providing that, for the support of the parties' daughter, defendant would pay the sum of $5,000 per month instead of the $6,000 per month for the support of both children.

In September 2015, after the parties' son began attending college in Florida, defendant notified plaintiff that he would be deducting the amount of $1,473 from his monthly child support

payments, representing certain of the parties' son's college expenses in the purported amount of $16,205 per year, amortized over 11 months. In October 2015, defendant deducted an additional $127 from his payment, purportedly for an unauthorized purchase at a clothing store made on his credit card.

We find that the motion court correctly concluded that the revised stipulation did not modify the divorce judgment's provision regarding college room and board credit. A stipulation in a matrimonial action is a contract subject to the principles of contract interpretation (*see Rainbow v Swisher*, 72 NY2d 106, 109 [1988]). Thus, where the terms of a written contract are clear and unambiguous, and the intent of the parties can be gleaned from the four corners of the document, the contract should be enforced in accordance with its plain meaning (*see Lobacz v Lobacz*, 72 AD3d 653, 654 [2d Dept 2010]; *Colucci v Colucci*, 54 AD3d 710, 712 [2d Dept 2008]). Here, the revised stipulation was completely unambiguous and clear that the only modification made was the $1,000 reduction in child support. As such, defendant was entitled to deduct the room and board charges set forth in the collge billing statement from his monthly child support payments.

Finally, we find that the motion court improvidently awarded

defendant attorneys' fees (22 NYCRR 130.1-1). Although plaintiff did not prevail on the central issue in this enforcement proceeding, we do not find her motion to be frivolous (*see e.g. Grossman v Pendent Realty Corp.*, 221 AD2d 240 [1st Dept 1995], *lv dismissed* 88 NY2d 919 [1996]).

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

ENTERED: JANUARY 19, 2017

CLERK

Sweeny, J.P., Renwick, Richter, Manzanet-Daniels, Kapnick, JJ.

2508 Victor Caminito, et al., Index 105387/11
Plaintiffs-Respondents,

-against-

Douglaston Development, LLC, et al.,
Defendants-Appellants.

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Cornell Grace, P.C., New York (Amy L. Schaefer of counsel), for appellants.

Grey & Grey, L.L.P., Farmingdale (Robert Grey of counsel), for respondents.

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Order, Supreme Court, New York County (Debra A. James, J.), entered November 2, 2015, which, insofar as appealed from as limited by the briefs, upon reargument, denied defendants' motion for summary judgment dismissing plaintiffs' Labor Law § 241(6) claim to the extent it is predicated on a violation of Industrial Code (12 NYCRR) § 23-1.7(e)(2), unanimously affirmed, without costs.

Plaintiff Victor Caminito was employed by nonparty Port Morris as a marble setter. Port Morris was a subcontractor on a 30-story building under construction that was ultimately going to be a condominium with retail space on the first floor.

On the day of the accident, plaintiff spent the morning

setting marble in the lobby of the building. After lunch, he was instructed by Paul Signorelli, the project supervisor for the construction site, to clear out a room that was off the lobby, where many of the trades had stored their equipment and materials. This room was variously described as approximately 10' X 15' or 20' X 40' and had only one entrance/exit. Both plaintiff and Signorelli testified at their depositions that the material in the room needed to be removed to complete its construction. Signorelli testified that this room was part of the overall building construction project. In the process of removing material stored in it, plaintiff was injured when, while walking backwards with a wheelbarrow, he tripped and fell over a stack of metal studs located on the floor.

The motion court properly denied defendants' motion to dismiss the Labor Law § 241(6) claim. That statute imposes on owners and contractors a nondelegable duty to "provide reasonable and adequate protection and safety for workers and to comply with the specific safety rules and regulations" contained in the New York State Industrial Code (*Ross v Curtis Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993] [internal quotation marks omitted]; *see also Misicki v Caradonna*, 12 NY3d 511, 515 [2009]).

To the extent plaintiff's claim was predicated on Industrial Code (12 NYCRR) § 23-1(e)(2), the court properly found that there is an issue of fact as to whether the studs were scattered in plaintiff's work area. That section provides, in pertinent part, that work areas "shall be kept free from accumulations of dirt and debris and from scattered tools and materials" (*id.*; *Militello v 45 W. 36th St. Realty Corp.*, 15 AD3d 158, 160 [1st Dept 2005]).

Here, although defendants contend that the room where the accident occurred was a storage room and thus not a work area as defined by the statute (*see Dacchille v Metropolitan Life Ins. Co.*, 262 AD2d 149 [1st Dept 1999]; *Conway v Beth Israel Med. Ctr.*, 262 AD2d 345, 346 [2nd Dept 1999]), the testimony of both plaintiff and Signorelli clearly stated that construction was going to take place in that room. Indeed, the purpose of removing the material stored in that room was to enable the construction work to take place. Although plaintiff was not actually performing his job as a marble setter at the time of the

accident, under these circumstances his activities bring him within the ambit of the statute (*see Gherardi v City of New York*, 49 AD3d 280 [1st Dept 2008]).

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

ENTERED: JANUARY 19, 2017

CLERK

Andrias, J.P., Saxe, Feinman, Gische, Kahn, JJ.

2780 The People of the State of New York, Ind. 5241/12
Respondent,

-against-

Ronald Villarreal,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Lauren Stephens-Davidowitz of counsel) and Wachtell, Lipton, Rosen & Katz, New York (Steven Winter of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Rena K. Uviller, J. at suppression hearing; Ronald A. Zweibel, J. at plea and sentencing), rendered April 18, 2013, convicting defendant of attempted criminal possession of a weapon in the second degree, and sentencing him, as a second felony offender, to a term of 3½ years, unanimously affirmed.

Defendant made a valid waiver of the right to appeal that forecloses review of his suppression claim (*see People v Lopez*, 6 NY3d 248, 256-257 [2006]). The court elicited the appeal waiver separately from its discussion of the rights automatically forfeited upon a guilty plea, and defendant also signed a valid written waiver (*see People v Sanders*, 25 NY3d 337, 340-342

[2015]; *People v Ramos*, 7 NY3d 737 [2006]).

Regardless of whether defendant made a valid waiver of his right to appeal, we find that the court properly denied his suppression motion. The record supports the conclusion that the police encounter with defendant was not an arrest requiring probable cause, but a forcible detention within the parameters of *People v Allen* (73 NY2d 378 [1979]), in the lawful course of which the police conducted a thorough patdown search of defendant's clothing, resulting in the discovery of a firearm. Defendant did not preserve his claim that the police lacked reasonable suspicion to support a forcible detention, and we decline to review it in the interest of justice. As an alternative holding, we find it unavailing.

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

ENTERED: JANUARY 19, 2017

CLERK

Andrias, J.P., Saxe, Feinman, Gische, Kahn, JJ.

2781 George Sylvester, Index 157938/12
Plaintiff-Appellant,

-against-

Emilio Velez,
Defendant-Respondent.

_____

Sweetbaum & Sweetbaum, Lake Success (Marshall D. Sweetbaum of counsel), for appellant.

Marjorie E. Bornes, Brooklyn, for respondent.

_____

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered on or about December 22, 2015, which granted defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff pedestrian testified that he was struck by defendant's vehicle while crossing the street within the crosswalk, but conceded that he did not have the right of way when he entered the street (*see Santo-Perez v Enterprise Leasing Co.*, 126 AD3d 621 [1st Dept 2015]; Vehicle and Traffic Law § 1112; 34 RCNY 4-04[b][2]). Nevertheless, when viewing the evidence in the light most favorable to plaintiff, triable issues of fact exist as to the relative positions of plaintiff and defendant at the time of the accident, and whether defendant

could have seen plaintiff before the accident and failed to exercise due care to avoid the accident (*see Santo-Perez* at 621; *Moreira v Ramos*, 95 AD3d 561 [1st Dept 2012]; *Romeo v DeGennaro*, 255 AD2d 208 [1st Dept 1998]; Vehicle and Traffic Law § 1146).

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

ENTERED: JANUARY 19, 2017

CLERK

Andrias, J.P., Saxe, Feinman, Gische, Kahn, JJ.

2782-
2783 In re Emily S., and Another,

Children Under the Age of Eighteen Years, etc.,

Jorge S.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

The Feinman Law Firm, White Plains (Steven N. Feinman of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Ellen Ravitch of counsel), for respondent.

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

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Order of disposition, Family Court, New York County (Susan K. Knipps, J.), entered on or about September 1, 2015, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about July 24, 2015, which found that respondent father neglected the subject children, unanimously affirmed, without costs. Appeal from the fact-finding order, unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

The finding of neglect was supported by a preponderance of

the evidence (*see* Family Ct Act § 1046[b][i]*; Nicholson v Scoppetta*, 3 NY3d 357, 368 [2004]). Exposure to domestic violence is a proper basis for a neglect finding where the violence occurred in the child's presence and resulted in physical, mental or emotional impairment or imminent danger thereof (*see Matter of Gianna A. [Jashua A.]*, 132 AD3d 855, 856 [2d Dept 2015]*; Matter of Christy C. [Jeffrey C.],* 74 AD3d 561, 562 [1st Dept 2010]). Both of these conditions are satisfied here.

Although the children were not present for the most recent incident of abuse, the out-of-court statements of one of the children indicating that she and her sister had witnessed prior episodes, as corroborated by two prior orders of protection and the father's own admissions, were sufficient to demonstrate exposure to domestic violence (*see* Family Ct Act § 1046[a][vi]; *Matter of Nicole V.*, 71 NY2d 112, 117-119 [1987]). That the child made consistent statements to more than one person also enhances the credibility of these statements, although repetition is not itself sufficient corroboration (*see Matter of David R. [Carmen R.]*, 123 AD3d 483, 484 [1st Dept 2014]). That these statements were somewhat lacking in detail is consistent with the child's assertion that she kept herself safe by hiding when her

father hit her mother. The parents' assertions that the children had never been present during their arguments were found not credible by the hearing court; there is no basis to overturn this credibility determination (*see Matter of Sonia C. [Juana F.]*, 70 AD3d 468, 468 [1st Dept 2010]).

Further, the child's out-of-court statement that she was "scared" and would hide when her father hit her mother demonstrates an imminent risk of emotional and physical impairment (*see Matter of Serenity H. [Tasha S.]*, 132 AD3d 508, 509 [1st Dept 2015]; *Matter of Krystopher D'A [Amakoe D'A]*, 121 AD3d 484, 485 [1st Dept 2014]).

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

ENTERED: JANUARY 19, 2017

CLERK

Andrias, J.P., Saxe, Feinman, Gische, Kahn, JJ.

2784 Osmarie Encarnacion, Index 303494/13E
Plaintiff-Respondent,

-against-

Luis R. Castillo,
Defendant-Appellant,

Micky Santiago-Gonzalez,
Defendant.

_____

Robert A. Peirce & Associates, White Plains (Julie L. Mer of counsel), for appellant.

The Law Office of Robert E. Schleier, Jr., PLLC, Huntington (Robert E. Schleier, Jr. of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Mary Ann Brigantti, J.), entered on or about August 17, 2016, which, insofar as appealed from as limited by the briefs, denied defendant's motion for summary judgment dismissing the claims of serious injury of a permanent nature within the meaning of Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendant established prima facie that plaintiff did not sustain a serious injury involving significant or permanent consequential limitations of use of her cervical and lumbar spine through the affirmed report of an orthopedist who found normal ranges of motion, negative test results, and resolved

strains/sprains in those parts (*see Reyes v Se Park*, 127 AD3d 459 [1st Dept 2015]; *Rickert v Diaz*, 112 AD3d 451 [1st Dept 2013]). Defendant's expert did not dispute that MRI studies of plaintiff's spine revealed disc herniations impinging on the thecal sac at multiple levels, and that her spinal injuries were causally related to the motor vehicle accident, which involved a head-on collision on a highway.

In opposition, plaintiff raised an issue of fact through the affirmed report of a physician who found continuing limitations in range of motion and objective indications of injury to her cervical and lumbar spine, and opined that the injuries were causally related to the accident and permanent in nature (*see DaCosta v Gibbs*, 139 Ad3d 487 [1st Dept 2016]; *Santana v Tic-Tak Limo Corp.*, 106 AD3d 572 [1st Dept 2013]). Defendant's treatment-gap argument is unpreserved for review (*see Tadesse v Degnich*, 81 AD3d 570 [1st Dept 2011]). In any event, plaintiff provided an adequate explanation by averring that her insurance

carrier ceased to pay for her treatment, which she could not cover out of her own pocket (*see Ramkumar v Grand Style Transp. Enters. Inc.*, 22 NY3d 905 [2013]; *Serbia v Mudge*, 95 AD3d 786, 787 [1st Dept 2012]).

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

ENTERED: JANUARY 19, 2017

CLERK

Andrias, J.P., Saxe, Feinman, Gische, Kahn, JJ.

2785 The People of the State of New York, Ind. 4147/13
Respondent,

-against-

Saul Fernandez,
Defendant-Appellant.

_____

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

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Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered February 26, 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 19, 2017

CLERK

Andrias, J.P., Saxe, Feinman, Gische, Kahn, JJ.

2788 The People of the State of New York, Ind. 5444/12
Respondent,

-against-

Kevin Goodman,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Jessica Olive 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 (Charles Solomon, J.), rendered April 30, 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 19, 2017

CLERK

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

Andrias, J.P., Saxe, Feinman, Gische, Kahn, JJ.

2789 Joseph Cook, Index 101907/10
Plaintiff-Respondent, 156885/12

-against-

Supreme Systems, Inc.,
Defendant-Appellant.

- - - - -

Joseph Cook,
Plaintiff-Respondent,

-against-

Supreme Building Messengers, Inc.,
Defendant-Appellant,

Supreme Business Management Systems, Inc., et al.,
Defendants.

_____

Eustace, Marquez, Epstein, Prezioso & Arciold, New York (Christopher M. Yapchanyk of counsel), for appellant.

Steve S. Efron, New York, for respondent.

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Order, Supreme Court, New York County (Carol R. Edmead, J.), entered January 8, 2016, which, to the extent appealed from, denied the motion of defendants Supreme Systems, Inc. (Supreme) and Supreme Building Messengers, Inc., for summary judgment dismissing the complaint as against Supreme, unanimously affirmed, without costs.

Plaintiff testified at his deposition that he was injured

when he was struck by a bicyclist carrying a messenger bag with the word "Supreme" on it, and who told plaintiff that he worked "there," while pointing toward the building where Supreme has its offices. In support of the motion for summary judgment, defendants submitted the testimony of Supreme's employee and of plaintiff. While Supreme's employee testified that his investigation determined that none of Supreme's employees could have been the bicyclist involved in the accident based on their physical appearances and whereabouts at the time of the accident, his testimony did not foreclose the possibility that one of the messengers was the one described by plaintiff and had returned to the office during the day between deliveries. Furthermore, plaintiff's testimony provides sufficient circumstantial evidence to permit a jury to rationally infer that the unidentified bicyclist was an employee of Supreme and acting within the scope of his employment at the time of the accident (*see Jones v Hiro Cocktail Lounge*, 139 AD3d 608 [1st Dept 2016]; *Uttaro v Staten Is. Univ. Hosp.*, 77 AD3d 916 [2d Dept 2010]).

Defendants waived any hearsay objection to plaintiff's testimony when they submitted it in support of their motion without limitation (*see Shinn v Catanzaro*, 1 AD3d 195, 198 [1st Dept 2003]). Any inconsistencies in plaintiff's description of

the messenger bag go to his credibility, which is an issue for the jury to resolve (*see generally Pena v Penny Lane Realty, Inc.*, 129 AD3d 441, 442 [1st Dept 2015]).

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

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

ENTERED: JANUARY 19, 2017

CLERK

Andrias, J.P., Saxe, Feinman, Gische, Kahn, JJ.

2790 U.S. Bank National Association, Index 653140/15
solely in its capacity as Trustee
of the Asset Backed Securities Corporation
Home Equity Loan Trust, Series AMQ 21006-HE7
(ABSHE 2006-HE7),
Plaintiff-Respondent,

-against-

DLJ Mortgage Capital, Inc.,
Defendant,

Ameriquest Mortgage Company,
Defendant-Appellant.

_____

Knuckles, Komosinki & Manfro, LLP, Elmsford (John E. Brigandi of counsel), for appellant.

Kasowitz, Benson, Torres & Friedman, LLP, New York (Hector Torres of counsel), for respondent.

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Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered on or about April 6, 2016, which, to the extent appealed from as limited by the briefs, denied defendant Ameriquest Mortgage Company's (Ameriquest) motion to dismiss the complaint, unanimously affirmed, with costs.

The heart of Ameriquest's appeal is premised on a provision of the parties' Mortgage Loan Purchase and Interim Servicing Agreement (MLPA) that was not raised before the motion court. Ameriquest contends that this provision, found in the fourth

paragraph of Section 7.04 of the MLPA (the Notice Restriction Provision), bars plaintiff's claims because it purportedly required plaintiff to notify Ameriquest within 90 days of discovery of any breach of the representations and warranties found in that agreement, which plaintiff failed to do. On this basis, Ameriquest contends that the action should be dismissed.

We decline to consider Ameriquest's new theory, which is not a purely legal argument, and was waived due to Ameriquest's failure to raise it below (*Facie Libre Assoc. I, LLC v SecondMarket Holdings, Inc.*, 103 AD3d 565 [1st Dept 2013], *lv denied* 21 NY3d 866 [2013]).

We have considered Ameriquest's remaining contentions, including the argument raised below that CPLR 205(a) is unavailable to plaintiff because the original action was a nullity by virtue of the plaintiff's failure to identify itself in the caption of the summons, and find them unavailing. We also

find the bulk of Ameriquest's contentions to be at odds with our prior ruling in the earlier-filed prior action (*U.S. Bank N.A. v DLJ Mtge. Capital, Inc.*, 141 AD3d 431 [1st Dept 2016]).

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

ENTERED: JANUARY 19, 2017

CLERK

Andrias, J.P., Saxe, Feinman, Gische, Kahn, JJ.

2791 The People of the State of New York, Respondent, Ind. 968/14

-against-

Maurice Johnson, 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 (Ann Donnelly, J. at suppression hearing; Jill Konviser, J. at plea and sentencing), rendered April 9, 2015, 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 19, 2017

CLERK

Andrias, J.P., Saxe, Feinman, Gische, Kahn, JJ.

2792-
2793 The People of the State of New York, Respondent,

Ind. 1162/07
4304/06

-against-

Jason Thomas,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Beth Kublin of counsel), for respondent.

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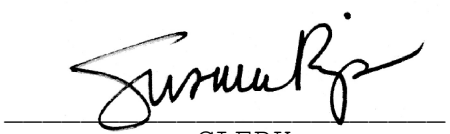
Appeals having been taken to this Court by the above-named appellant from judgments of the Supreme Court, Bronx County (Efrain Alvarado, J. at plea; John W. Carter, J. at sentencing), rendered February 21, 2013,

Said appeals 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 judgments so appealed from be and the same are hereby affirmed.

ENTERED: JANUARY 19, 2017



CLERK

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

Andrias, J.P., Saxe, Feinman, Gische, Kahn, JJ.

2794 Carlos E. Ruiz, M.D., Ph.D, Index 160377/15
Plaintiff-Respondent-Appellant,

-against-

Lenox Hill Hospital, et al.,
Defendants-Appellants-Respondents.

_____

Nixon Peabody LLP, Jericho (Christopher G. Gegwich of counsel), for appellants-respondents.

Pryor Cashman LLP, New York (Eric M. Fishman of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered on or about April 4, 2016, which, to the extent appealed from as limited by the briefs, denied defendants' motion to dismiss insofar as they sought to dismiss the Labor Law §§ 740 and 741 causes of action, and granted the motion to dismiss insofar as defendants sought dismissal of the declaratory judgment cause of action, unanimously modified, on the law, to grant the motion to dismiss the Labor Law causes of action as against defendant Dr. S. Jacob Scheinerman, and to declare on the declaratory judgment cause of action that plaintiff is not entitled to the severance package set forth in his employment contract or severance agreement unless he executes a general release, and otherwise affirmed, without costs.

Plaintiff alleges that, as soon as he took over as Chair of defendant Lenox Hill Hospital's Department of Cardiovascular and Thoracic Surgery, Dr. Scheinerman began signing medical procedure reports for procedures which he had neither performed nor witnessed, contrary to the usual practice of having the performing physicians sign those reports. Plaintiff also alleges that, contrary to accepted postoperative protocol that the lead surgeon report the results of a surgical procedure to the patient's family, Dr. Scheinerman reported the results of a valve implant procedure on which plaintiff had been the lead surgeon. Plaintiff reported Dr. Scheinerman's actions to Lenox Hill's human resources department, and he alleges that, because of that report, he was terminated.

Liberally construing the complaint, presuming its factual allegations to be true, and giving the allegations every favorable inference, as we must on a CPLR 3211 motion to dismiss (*see Webb-Weber v Community Action for Human Servs., Inc.*, 23 NY3d 448, 453 [2014]; *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]), plaintiff has adequately pleaded a claim for retaliatory termination in violation of Labor Law § 740 as against the hospital and corporate defendants. Defendants' contention that plaintiff has failed to sufficiently

allege facts constituting a specific or substantial danger to public health is without merit. Falsification of medical records, including a physician's false claim to have performed a procedure, has been held to establish a violation of section 740 (*see Kraus v New Rochelle Hosp. Med. Ctr.*, 216 AD2d 360, 361-365 [2d Dept 1995], *lv dismissed* 86 NY2d 885 [1995]).

Plaintiff also adequately stated a claim under Labor Law § 741 as against the hospital and corporate defendants. At this early juncture, it is too soon to decide whether reports to a patient's family constitute improper care of the patient himself (*see Von Maack v Wyckoff Hgts. Med. Ctr.*, 140 AD3d 1055, 1057-1058 [2d Dept 2016]). As with his claim under Labor Law § 740 (*see Webb-Weber*, 23 NY3d at 453), plaintiff need not identify the specific rule that had been violated (*see Blashka v New York Hotel Trades Council & Hotel Assn. of N.Y. Health Ctr.*, 126 AD3d 503, 503 [1st Dept 2015]). Moreover, plaintiff need only allege, for his Labor Law § 741 claim, that he reasonably believed that there had been such a violation, not that there was an actual violation (*see Pipia v Nassau County*, 34 AD3d 664, 666 [2d Dept 2006]).

The motion court should have dismissed the Labor Law claims as against Dr. Scheinerman individually, since he is not an

"employer" within the meaning of Labor Law §§ 740 and 741 (*see Ulysse v AAR Aircraft Component Servs.*, 128 AD3d 1053, 1054 [2d Dept 2015]; *Geldzahler v New York Med. Coll.*, 746 F Supp 2d 618, 632 [SD NY 2010]).

The motion court correctly determined the plaintiff is not entitled to a severance payment under his employment contract or severance agreement unless he executes the general release provided in the severance agreement (*see Kaul v Hanover Direct, Inc.*, 148 Fed Appx 7, 9 [2d Cir 2005]; *Mullinix v Mount Sinai Sch. of Med.*, 2015 US Dist LEXIS 7965, *5 [SD NY, Jan. 23, 2015, No. 12-cv-8659 (PKC)]). Rather than dismiss the declaratory judgment cause of action, however, the court should have declared in defendants' favor (*see Maurizzio v Lumbermens Mut. Cas. Co.*, 73 NY2d 951, 954 [1989]; *Allstate Ins. Co. v Pierre*, 123 AD3d 618, 619 [1st Dept 2014]).

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

ENTERED: JANUARY 19, 2017

CLERK

Andrias, J.P., Saxe, Feinman, Gische, Kahn, JJ.

2795 Molly Hamrick, et al., Index 650802/14
Plaintiffs-Appellants,

-against-

Schain Leifer Guralnick,
Defendant,

Matthew Barnes, et al.,
Defendants-Respondents.

_____

Fee, Smith, Sharp & Vitullo, LLP, Dallas, TX (Anthony L. Vitullo of the bar of the State of Texas, admitted pro hac vice, of counsel), for appellants.

Law Offices of Robert L. Plotz, New York (Robert L. Plotz of counsel), for respondents.

_____

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered on or about September 3, 2015, which, to the extent appealed from, granted defendants Matthew Barnes and Montcalm Co., LLC's motion to dismiss the complaint as against them, unanimously affirmed, without costs.

The fraudulent inducement, negligent misrepresentation, and breach of fiduciary duty claims are time-barred. These claims accrued upon plaintiffs' making their investments (*Prichard v 164 Ludlow Corp.*, 49 AD3d 408 [1st Dept 2008]). Plaintiffs were placed on inquiry notice of the alleged fraud, negligent misrepresentation, and breach of fiduciary duty when they

received the private placement memorandum, which expressly contradicted defendants' alleged oral representations that the investments' tax strategy was tested and valid, when they saw – immediately – that they were not receiving the promised returns, and when they learned that the tax strategy was ultimately repudiated by the IRS (*see Gutkin v Siegal*, 85 AD3d 687 [1st Dept 2011]). Since plaintiffs commenced this action more than six years after the date of their investments and more than two years after they had constructive knowledge of the alleged fraud, negligent misrepresentation, and breach of fiduciary duty, these claims are time-barred (CPLR 213[8]).

These claims also fail to meet the pleading requirements of CPLR 3016(b). The complaint does not allege who made the misrepresentations or when or where they were made (*see Eastman Kodak Co. v Roopak Enters.*, 202 AD2d 220 [1st Dept 1994]).

The aiding and abetting claims fall with the primary torts.

The claim for breach of an oral contract fails to state a cause of action since it does not allege any direct oral communication at all with defendants.

The unjust enrichment and constructive trust claims fail to

state a cause of action since the subject matter thereof is governed by express written contracts – the partnership agreements and the subscription agreements (*Simkin v Blank*, 19 NY3d 46, 55 [2012]).

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

ENTERED: JANUARY 19, 2017

CLERK

Andrias, J.P., Saxe, Feinman, Gische, Kahn, JJ.

2796 The People of the State of New York, Ind. 1032/14
Respondent,

-against-

Edgardo Lambert,
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.

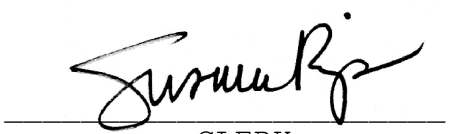
_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Gregory Carro, J. at plea; Daniel P. Fitzgerald, J. at sentencing), rendered April 8, 2015,

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 19, 2017



CLERK

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

Andrias, J.P., Saxe, Feinman, Gische, Kahn, JJ.

2797 Joel Roth, Index 151854/13
Plaintiff-Appellant,

Mary Roth,
Plaintiff,

-against-

Lenox Terrace Associates, et al.,
Defendants-Respondents.

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

Gallo Vitucci Klar LLP, New York (William Parra of counsel), for respondents.

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered September 17, 2015, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing plaintiff Joel Roth's Labor Law § 240(1) claim, unanimously reversed, on the law, without costs, and the motion denied.

Issues of fact exist as to whether plaintiff was performing routine maintenance, which would not implicate the protections of Labor Law § 240(1), or a repair within the meaning of the statute (*see Santiago v Fred-Doug 117, L.L.C.*, 68 AD3d 555 [1st Dept 2009]), when he diagnosed an air conditioning unit's malfunction,

and replaced a component part. Although plaintiff testified that the compressor contactor malfunctioned due to normal wear and tear (*see Esposito v New York City Indus. Dev. Agency*, 1 NY3d 526, 528 [2003]), making it a worn-out component in an otherwise operable air conditioning unit (*see Soriano v St. Mary's Indian Orthodox Church of Rockland County, Inc.*, 118 AD3d 524, 526-527 [1st Dept 2014]), and that the entire replacement took only 20 minutes, he also stated that this is not a part that would ordinarily require inspection, adjustment or replacement, and that it generally lasts as long as the compressor and can last the life of the unit, indicating that it was not a recurring event, and that the component was not intended to have a limited life (*id.*). Under these circumstances, issues of fact exist as to whether plaintiff was performing routine maintenance or a repair within the meaning of the statute.

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

ENTERED: JANUARY 19, 2017

CLERK

Andrias, J.P., Saxe, Feinman, Gische, Kahn, JJ.

2798 The People of the State of New York, Ind. 1741/13
Respondent,

-against-

Khalid McMillian,
Defendant-Appellant.

_____

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

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Judgment, Supreme Court, New York County (Jill Konviser, J.), rendered April 14, 2015, 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 19, 2017

CLERK

Andrias, J.P., Saxe, Feinman, Gische, JJ.

2799 The People of the State of New York, Ind. 2788/13
Respondent,

-against-

Daniel Nieves,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Andrew E. Seewald 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 (Robert Stolz, J.), rendered April 1, 2015,

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 19, 2017

CLERK

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

Andrias, J.P., Saxe, Feinman, Gische, Kahn, JJ.

2800 International Asbestos Removal, Inc., Index 652494/12
Plaintiff-Respondent,

-against-

Beys Specialty, Inc., et al.,
Defendants-Appellants.

_____

Milber Makris Plousadis & Seiden, LLP, Woodbury (Joseph J. Cooke of counsel), for appellants.

Robinson Brog Leinwand Greene Genovese & Gluck, PC, New York (Matthew C. Capozzoli of counsel), for respondent.

_____

Order, Supreme Court, New York County (Marcy S. Friedman J.), entered on or about June 24, 2006, which, to the extent appealed from, denied defendants' motion for partial summary judgment dismissing the claim for compensation owed for certain asbestos abatement work, unanimously affirmed, without costs.

Ambiguities in the prime contract, which was incorporated into the subcontract, present issues of fact whether plaintiff subcontractor's installation of additional asbestos decontamination units constituted "extra work," thereby triggering contractual notice provisions as a prerequisite to payment for such work (*see Discovision Assoc. v Fuji Photo Film Co., Ltd.*, 71 AD3d 488 [1st Dept 2010]). The record also presents issues of fact whether plaintiff substantially complied

with the "extra work" notice provisions contained in the subcontract (*see F. Garafalo Elec. Co. v New York Univ.*, 300 AD2d 186, 188-189 [1st Dept 2002]).

Defendant's argument that plaintiff is bound by the prime contract's dispute resolution provisions is also rejected at this time based on the ambiguities in the scope of extra work under the contract.

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

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

ENTERED: JANUARY 19, 2017

CLERK

Andrias, J.P., Saxe, Feinman, Gische, Kahn, JJ.

2801-
2802 Index 152773/12

Gurpreet Singh,
Plaintiff-Respondent-Appellant,

-against-

Alliance Building Services, LLC, et al.,
Defendants-Appellants-Respondents.

_____

Lewis Brisbois Bisgaard & Smith, LLP, New York (Michael Zisser of counsel), for appellants-respondents.

The Bostany Law Firm PLLC, New York (John P. Bostany of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered on or about January 12, 2016, which denied as moot plaintiff's motion for summary judgment dismissing defendant David Diaz's counterclaims on the ground of noncompliance with discovery orders, unanimously affirmed, without costs. Order, same court (Arlene P. Bluth, J.), entered on or about May 4, 2016, which, to the extent appealed from as limited by the briefs, denied defendants' motion for summary judgment dismissing the respondeat superior claim, unanimously reversed, on the law, without costs, and the motion granted.

Defendants established a reasonable excuse for Diaz's failure to provide unrestricted medical authorizations before the

deadline set by the court's conditional order of preclusion and meritorious counterclaims (*see Gibbs v St. Barnabas Hosp.*, 16 NY3d 74 [2010]).

Here, there is no evidence that Diaz's assault was motivated by a desire to further any interest of his employer whatsoever, nor is there any evidence that the employer condoned, instigated, or authorized the assault (*Taylor v United Parcel Serv., Inc.*, 72 AD3d 573 [1st Dept 2010], *lv denied* 15 NY3d 705 [2010]; *compare Ramos v Jake Realty Co.*, 21 AD3d 744, 745 [1st Dept 2005]). Accordingly, the employer cannot be held vicariously liable on a respondeat superior theory.

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

ENTERED: JANUARY 19, 2017

CLERK

Andrias, J.P., Saxe, Feinman, Gische, Kahn, JJ.

2803N & M-5760 & M-5897 — Index 260551/14

East Fordham DE LLC,
Plaintiff-Respondent,

-against-

U.S. Bank National Association, as Trustee, as Successor in Interest to Bank of America, N.A., etc., et al.,
Defendants-Appellants.

Kilpatrick Townsend & Stockton LLP, New York (Ian M. Goldrich of counsel), for appellants.

Oquendo Deraco PLLC, New York (Ricardo E. Oquendo of counsel), for respondent.

Order, Supreme Court, Bronx County (John A. Barone, J.), entered on or about August 12, 2015, which, inter alia, directed defendants to close on the subject refinancing transaction based upon the value of the property as established by the parties' completed appraisals, unanimously reversed, on the law, without costs, and the order vacated.

In deciding plaintiff's motion for a preliminary injunction, the court erred in reaching a determination on the merits of the ultimate relief sought (*see Residential Bd. of Mgrs. of Columbia Condominium v Alden*, 178 AD2d 121 [1st Dept 1991]). Issues of fact exist, including whether defendants

waived their right to contest the method used by the parties' appraisers to determine the value of the property.

M-5760 &
M-5897 - ***East Fordham DE LLC v U.S. Bank National Association, as Trustee, as Successor in Interest to Bank of America, N.A.***

Motion to strike portions of briefs and for sanctions denied. Cross motion to file supplemental record and for sanctions granted as to the supplemental record, and otherwise denied.

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

ENTERED: JANUARY 19, 2017

CLERK

Friedman, J.P., Renwick, Richter, Moskowitz, Kapnick, JJ.

2805-
2806 Ind. 1028N/10

The People of the State of New York,
Respondent,

-against-

Kain Melendez,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Clark S. Abrams of counsel), for respondent.

_____

Judgment, Supreme Court, New York County, (Bonnie G. Wittner, J.), rendered November 1, 2011, as amended July 31, 2014, convicting defendant, upon his plea of guilty, of attempted criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender previously convicted of a violent felony, to a term of five years, unanimously affirmed.

The court correctly adjudicated defendant a second felony drug offender previously convicted of a violent felony, on the basis of his 1990 juvenile offender conviction of attempted murder in the second degree. In general, under Penal Law § 60.10(2), a juvenile offender conviction (not resulting in

youthful offender treatment) may be used as a predicate felony to enhance a sentence, and that provision lists the various multiple felony offender statuses in existence at the time of its enactment. Defendant argues that his present adjudication is illegal because when the Legislature subsequently created the status of second felony drug offender (*see* Penal Law § 70.70), it did not specify that a juvenile offender conviction would qualify in this situation as well. We find this argument unavailing. "Penal Law § 70.70(1)(b) cross-references Penal Law § 70.06(1) when defining a '[s]econd felony drug offender'" (*People v Yusuf*, 19 NY3d 314, 319 [2012]), a definition that includes a person such as defendant whose prior conviction is for violent felonies (Penal Law § 70.70[4][a]), and section 70.06 is one of the sections plainly listed in section 60.10(2).

The 1990 conviction was not rendered unconstitutional (*see* CPL 400.21[7][b]) by the fact that the sentencing court did not undertake a sua sponte inquiry into defendant's postplea, out-of-court assertion of a possible justification defense, as reflected

in the presentence report (*see e.g. People v Brimmage*, 143 AD3d 624 [1st Dept 2016]). Nothing in the plea allocution raised such a defense, and defendant did not move to withdraw the plea.

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 19, 2017

CLERK

Friedman, J.P., Renwick, Richter, Moskowitz, Kapnick, JJ.

2807 Lydia Gyamfi, Index 300856/14
Plaintiff-Appellant,

-against-

Citywide Mobile Response Corp., et al.,
Defendants-Respondents.

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Glenn Roy Cooper, P.C., New York (Glenn Roy Cooper of counsel), for appellant.

White Fleischner & Fino, LLP, New York (Jason S. Steinberg of counsel), for respondents.

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Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered January 29, 2016, which, insofar as appealed from as limited by the briefs, in this action for personal injuries sustained in a motor vehicle accident, denied plaintiff's motion for partial summary judgment on the issue of liability, unanimously affirmed, without costs.

Plaintiff's motion was properly denied since triable issues of fact exist as to how the accident occurred in light of the conflicting accounts of the accident provided by plaintiff and defendant Carrigan (*see Lewis v Konan*, 39 AD3d 319 [1st Dept 2007]). In addition, the affidavits of the parties' experts raise triable issues as to which parties' conduct proximately caused the accident (*see Kumar v Stahlunt Assoc.*, 3 AD3d 330 [1st

Dept 2004]). The motion court properly considered the affidavit of defendant's expert even though it was notarized in New Jersey and lacked a certificate of conformity. The document states that the oath was duly given and the authentication of the oathgiver's authority can be secured later and given nunc pro tunc effect if necessary (*see Matapos Tech. Ltd. v Compania Andina de Comercio Ltda*, 68 AD3d 672, 673 [1st Dept 2009]).

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

ENTERED: JANUARY 19, 2017

CLERK

Friedman, J.P., Renwick, Richter, Moskowitz, Kapnick, JJ.

2808-
2808A In re Maranda R., and Others,

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

Susan R.,
Respondent-Appellant,

Catholic Guardian Society and
Home Bureau,
Petitioner-Respondent.

_____

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), for appellant.

Joseph T. Gatti, New York, for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Diane Pazar of counsel), attorney for the children.

_____

Orders, Family Court, Bronx County (Joan L. Piccirillo, J.), entered on or about August 11, 2014, which, insofar as appealed from, upon findings of permanent neglect, terminated respondent mother's parental rights to the subject children, and committed custody and guardianship of the children to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The findings of permanent neglect were supported by clear and convincing evidence (*see* Social Services Law 384-b[7]). The

record demonstrates that the agency made diligent efforts to strengthen the parental relationship between respondent and the children by referring respondent to mental health treatment, drug treatment programs, and domestic violence counseling; encouraging her to leave the father; assisting her in seeking stable housing; and scheduling supervised visitation with her two younger children, and therapeutic visitation with her two older children. The agency's progress notes were properly authenticated, and were sufficient to establish diligent efforts (*see Matter of Sharon Crystal F. [Nicole Valerie D.]*, 89 AD3d 639, 640 [1st Dept 2011], *lv denied* 18 NY3d 808 [2012]).

While respondent completed some of the goals in her service plan, and many of the visits with her children were positive, she failed to gain insight into the problems that led to the children's removal from her care in the first instance (*see Matter of Marissa Tiffany C-W. [Faith W.]*, 125 AD3d 512 [1st Dept 2015]). Respondent never followed through on her promise to separate from the father, whose presence scared two of the children. Accordingly, her completion of the programs did not equate to her planning for the return of her children (*see Matter of Kimberly C.*, 37 AD3d 192 [1st Dept 2007]).

A preponderance of the evidence shows that it was in the

children's best interests to terminate respondent's parental rights and free them for adoption (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). A suspended judgment was not warranted under the circumstances, including respondent's failure to address the issues that led to the children's placement in foster care, and her inability to care for the children who have special needs (*see Matter of Charles Jahmel M. [Charles E.M.]*, 124 AD3d 496 [1st Dept 2015], *lv denied* 25 NY3d 905 [2015]).

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

ENTERED: JANUARY 19, 2017

CLERK

Friedman, J.P., Renwick, Richter, Moskowitz, Kapnick, JJ.

2809 In re Detective Rafael Astacio, Index 100283/14
Petitioner,

-against-

William Bratton, Police Commissioner
of the City of New York, etc., et al.,
Respondents.

_____

Brill Legal Group, P.C., New York (Peter E. Brill of counsel), for petitioner.

Zachary W. Carter, Corporation Counsel, New York (Jonathan A. Popolow of counsel), for respondents.

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Determination of respondent Commissioner, dated October 15, 2013, which imposed a 30-day suspension and one-year dismissal probation on petitioner, based upon a finding that petitioner engaged in conduct prejudicial to the good order, efficiency, or discipline of the New York City Police Department; determination of respondent Commissioner, dated November 12, 2013, which terminated petitioner's employment, based upon a finding that he engaged in criminal activity and conduct prejudicial to the good order, efficiency, or discipline of the NYPD; and determination of respondents Commissioner, New York City Police Pension Fund, Subchapter Two, and the Board of Trustees of the New York City Police Pension Fund, Subchapter Two, which denied petitioner a

service retirement pension, unanimously confirmed, the petition denied, and this proceeding (transferred to this Court by order of Supreme Court, New York County [Margaret A. Chan, J.], entered on or about December 29, 2014), dismissed, without costs.

Respondents have waived the defense of the statute of limitations by failing to interpose it in their answer or in a pre-answer motion to dismiss (*see* CPLR 3211[a][5]; [e]; *Dougherty v City of Rye*, 63 NY2d 989, 991-992 [1984]; *Matter of Johnson v Civilian Complaint Review Bd.*, 30 AD3d 201, 202 [1st Dept 2006]). Were it not for this waiver, the challenge to the Commissioner's October 2013 determination would be untimely (*see* CPLR 217[1]).

At the hearing underlying the October 2013 determination, petitioner admitted having failed to investigate the claim of a rape victim, after which he prematurely closed the investigation. In light of this admission, the finding that petitioner was guilty of failing to look for evidence is clearly supported by substantial evidence (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443 [1987]); *300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181-182 [1978]). The penalty of a 30-day suspension for conduct that allowed a predator to remain at large does not shock the conscience (*see Matter of Kelly v Safir*, 96 NY2d 32, 38 [2001]). This is especially so given that "[i]n

matters of police discipline, we must accord great leeway to the Commissioner's determinations concerning appropriate punishment" (*Berenhaus*, 70 NY2d at 445).

Likewise, the subsequently imposed discipline of termination, as a penalty for petitioner's participation in a burglary, does not shock the conscience (*see e.g. Matter of Harp v New York City Police Dept.*, 96 NY2d 892, 894 [2001]; *Kelly v Safir* at 38).

Assuming arguendo that petitioner's challenge to the denial of a retirement service pension is not precluded by his withdrawal of the entire balance of his pension contributions and criminal conviction (*see* Administrative Code §§ 13-242[2], 13-256.1[b]), the determination must stand, as it was not arbitrary and capricious (*see Flacke v Onondaga Landfill Sys.*, 69 NY2d 355, 363 [1987]). The denial was based upon the Pension Fund's calculation of creditable service time.

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

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

ENTERED: JANUARY 19, 2017

CLERK

Friedman, J.P., Renwick, Richter, Moskowitz, Kapnick, JJ.

2810-
2811-
2812 Index 151000/13

Joseph Kellogg,
Plaintiff-Respondent,

-against-

All Saints Housing Development Fund Co., Inc.,
Defendant,

1916 Partners, et al.,
Defendants-Respondents-Appellants,

Plaza Homes LLC, et al.,
Defendants-Respondents,

Artec Construction and Development Corp.,
Defendant-Appellant-Respondent.

_____

Law Office of James J. Toomey, New York (Eric P. Tosca of counsel), for appellant-respondent.

Lyman & Lyman, LLC, Ithaca (Nathan M. Lyman of counsel), for 1916 Park, LLC d/b/a 1916 Partners and Jason H. Fane, respondents-appellants.

Montfort, Healy, McGuire & Salley, Garden City (Donald S. Neumann, Jr. of counsel), for 45 East 131st Street Housing Development Fund Corporation, respondent-appellant.

Mirman, Markovits & Landau, New York (Ephrem J. Wertenteil of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered April 10, 2015, which denied defendant Artec Construction and Development Corp.'s motion to strike the note of issue,

unanimously reversed, on the law, without costs, and the motion granted. Orders, same court and Justice, entered February 16 and 18, 2016, which denied the motions brought by Artec Construction and Development Corp., 45 East 131st Street Housing Development Fund Corporation, 1916 Park, LLC d/b/a 1916 Partners, and Jason Fane for summary judgment and for leave to file late dispositive motions, unanimously modified, on the law, to grant leave to file the untimely motions, and to grant summary judgment in favor of 45 East 131st St. Housing Development Fund Corporation, Fane, and Artec Construction and Development Corp, and otherwise affirmed, without costs. The Clerk is directed to enter judgment dismissing the complaint against 45 East, Fane, and Artec.

Plaintiff seeks damages in connection with injuries allegedly sustained when he tripped on a defect in the sidewalk abutting a parking lot owned by 1916 Park, LLC d/b/a 1916 Partners (1916 Park).

Summary judgment dismissing the complaint and all cross claims should be granted in favor of defendant 45 East 131st St. Housing Development Fund Corporation. Its motion, premised on its lack of any connection to the subject sidewalk, is unopposed.

The motion court erred in not granting the motion by Artec Construction and Development Corp. to strike the note of issue or

extend its time to move for summary judgment where Artec demonstrated that it would otherwise be deprived of a reasonable opportunity to complete discovery (*see Lipson v Dime Sav. Bank of N.Y.*, 203 AD2d 161, 162 [1st Dept 1994]). For the same reason, the motion court should have considered all of defendants' summary judgment motions, although technically untimely. The fact that key party depositions were still outstanding constituted "good cause" for the delay in filing (*see Butt v Bovis Lend Lease LMB, Inc.*, 47 AD3d 338, 339-340 [1st Dept 2007]).

Summary judgment was properly denied as to 1916 Park. As the admitted owner of the property abutting the subject sidewalk, 1916 Park had a nondelegable duty to maintain it in "reasonably safe condition" (Administrative Code of City of NY § 7-210; *accord Torres v Visto Realty Corp.*, 106 AD3d 645, 645-646 [1st Dept 2013]). Contrary to 1916 Park's assertions, plaintiff's allegations in the related action filed at Index No. 150864/15 were either not inconsistent or else merely created issues of fact and credibility not appropriately resolved on summary judgment, and plaintiff did not secure a ruling in its favor based on inconsistent factual allegations (*see Becerril v City of N.Y. Dept. of Health & Mental Hygiene*, 110 AD3d 517, 519 [1st

Dept 2013], *lv denied* 23 NY3d 905 [2014]), as no final resolution has yet been reached in the related action.

1916 Park's CPLR 3211(a) arguments are likewise unavailing. The arguments advanced in support of its CPLR 3211(a)(1) motion are substantially the same as the arguments advanced in support of summary judgment, and fail for the same reasons. We decline to consider 1916 Park's 3211(a)(7) defense, which was first raised in reply (*see Ritt v Lenox Hill Hosp.*, 182 AD2d 560, 562 [1st Dept 1992]). Even if considered, it is without merit. The standard on a CPLR 3211(a)(7) motion is "whether the proponent of the pleading has a cause of action, not whether he has stated one" (*High Definition MRI, P.C. v Travelers Cos., Inc.*, 137 AD3d 602, 602 [1st Dept 2016]) and "[a]ffidavits and other evidence may be used freely to preserve inartfully pleaded but potentially meritorious claims" (*R.H. Sanbar Projects v Gruzen Partnership*, 148 AD2d 316, 318 [1st Dept 1989]). Plaintiff's complaint, bills of particulars, and deposition testimony, taken together, were sufficient to state a claim for negligence.

Contrary to 1916 Park's assertion, dismissal is also not appropriate pursuant to CPLR 1001(a) and 1003 for failure to join a necessary party. P&P Contracting Corp., which rented the subject parking lot at the time of the accident, was not a

necessary party. Rather, as an entity "against whom there is asserted a[] right to relief jointly, severally, or in the alternative, arising out of the same transaction [or] occurrence," P&P falls in the category of parties who may, but are not required, to be joined (*see* CPLR 1002[b]; *see also Torres*, 106 AD3d at 645-646).

Summary judgment dismissing the complaint and all cross claims should, however, have been granted in favor of Fane. Plaintiff has not shown any basis for individual liability and Fane cannot be held liable solely by virtue of his status as a member of 1916 Park LLC (Limited Liability Company Law § 609[a]).

Summary judgment dismissing the complaint and all cross claims should also have been granted in favor of Artec. Because Artec was a tenant, and not the owner, of the relevant property, it cannot be held liable to a third party in tort absent a showing that (a) it affirmatively caused or created the defect that caused plaintiff to trip, or (b) put the subject sidewalk to a "special use" for its own benefit, thus assuming a responsibility to maintain the part used in reasonably safe condition (*see Collado v Cruz*, 81 AD3d 542, 542 [1st Dept 2011]; *Balsam v Delma Eng'g Corp.*, 139 AD2d 292, 298 [1st Dept 1988], *lv denied, lv dismissed* 73 NY2d 783 [1988]). Artec met its prima

facie burden of showing that the hazardous condition did not exist when its lease expired and it left the premises in 2009 - over two years prior to the subject accident. Before the motion court, plaintiff did not submit any evidence in opposition, and the evidence plaintiff points to on appeal is not properly considered, as it is dehors the record.

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

ENTERED: JANUARY 19, 2017

CLERK

Friedman, J.P., Renwick, Richter, Moskowitz, Kapnick, JJ.

2813 The People of the State of New York, Ind. 2088N/13
Respondent,

-against-

Anonymous,
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.

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Judgment, Supreme Court, New York County (Robert M. Stolz, J. at plea; James M. Burke, J. at sentencing), rendered October 8, 2014, convicting defendant of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree, and sentencing him to concurrent terms of five years, with three years' postrelease supervision, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the prison

terms to concurrent terms of three years, and otherwise affirmed.

We do not find that defendant made a valid waiver of his right to appeal, and 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 19, 2017

CLERK

Friedman, J.P., Renwick, Richter, Moskowitz, Kapnick, JJ.

2814 Gila Rubinstein, et al., Index 113320/11
Plaintiffs-Respondents,

-against-

115 Spring Street Owners Corp., et al.,
Defendants-Appellants-Respondents,

Opera Gallery, Inc.,
Defendant-Respondent-Appellant.

_____

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

Law Offices of Charles J. Siegel, New York (Heather M. Palmore of counsel), for respondent-appellant.

The Rothenberg Law Firm LLP, New York (Adam Drexler of counsel), for respondents.

_____

Order, Supreme Court, New York County (Robert D. Kalish, J.), entered July 28, 2015, which denied defendant Opera Gallery, Inc.'s motion for summary judgment dismissing the complaint, and, to the extent appealed from as limited by the briefs, denied defendant 115 Spring Street Company's motion for summary judgment seeking contractual indemnification against Opera Gallery, unanimously affirmed, without costs.

"A landlord is generally not liable for negligence with respect to the condition of the property after the transfer of possession and control to a tenant unless the landlord is either

contractually obligated to make repairs or maintain the premises, or has a contractual right to reenter, inspect and make needed repairs at the tenant's expense, and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision" (*Babich v R.G.T. Rest. Corp.*, 75 AD3d 439, 440 [1st Dept 2010]).

Here, paragraph 4 of the lease, "Repairs," states that "Owner shall maintain and repair the public portions of the building, both exterior and interior. . . . Tenant shall, throughout the term of this lease, take good care of the demised premises and the fixtures and appurtenances therein, and the sidewalks adjacent thereto, and at its sole cost and expense, make all non-structural repairs thereto as and when needed to preserve them in good working order and condition, reasonable wear and tear, obsolescence and damage from the elements, fire or other casualty, excepted."

Testimony that the exterior stairs were exclusive to Opera Gallery established that the stairs were not a public portion of the building (*cf. Rothstein v 400 E. 54th St. Co.*, 51 AD3d 431, 431-432 [1st Dept 2008]). Nevertheless, testimony that 115 Spring Street replaced the bottom step, and did so with no charge to Opera Gallery, suggests that, in "actual practice," 115 Spring

Street may have retained the duty to make inspections and periodic repairs (*see Vushaj v Insignia Residential Group, Inc.*, 50 AD3d 393, 394 [1st Dept 2008]).

The affidavit of plaintiff's safety expert, who inspected the stairs and found a variety of defects and building code violations, particularly with regard to the absence of handrails, and the tread and riser differentials, when read in combination with plaintiff's testimony stating the stairs felt slippery, and identifying on a photograph the spot where she slipped, "was sufficient to raise triable issues as to whether defective conditions at the identified location caused plaintiff to fall" (*Rodriguez v Leggett Holdings, LLC*, 96 AD3d 555, 556 [1st Dept 2012]).

An agreement to indemnify another through insurance is enforceable as an appropriate loss allocation device, which does not implicate any statutory prohibition against indemnifying another for that party's negligence (*see Kinney v Lisk Co.*, 76 NY2d 215, 218 [1990]). The motion court correctly denied the

motion as to the duty to indemnify, however, because at this juncture, absent a finding of liability, and absent an insurance policy, 115 Spring Street cannot place itself within the ambit of any additional insured endorsement procured by Opera Gallery.

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

ENTERED: JANUARY 19, 2017

CLERK

Friedman, J.P., Renwick, Richter, Moskowitz, Kapnick, JJ.

2815 In re Probate Proceeding, Will of Emilie Martin also known as Emilie Brod, etc., Deceased. Index 3596/11

- - - - -

Kevin Pei, Petitioner-Respondent,

-against-

Claudia DiFabrizio, et al., Objectants-Appellants.

_____

Greenfield Stein & Senior, LLP, New York (Angelo M. Grasso of counsel), for appellants.

Jules A. Epstein, P.C., Jericho (Jules A. Epstein of counsel), for respondent.

_____

Order, Surrogate's Court, New York County (Nora S. Anderson, S.), entered November 25, 2015, which granted petitioner's motion for summary judgment, and admitted for probate decedent's will dated May 6, 2011, unanimously affirmed, without costs.

It is proponent's burden, in the first instance, to make a prima facie showing that decedent possessed testamentary capacity, i.e., that she understood the nature and extent of her property, was aware of the natural objects of her bounty, and understood that she was disposing of her property through the will (*see Matter of Kumstar,* 66 NY2d 691, 692 [1985]).

Petitioner met this burden with the self-proving affidavits of the attesting witnesses, stating that decedent was of sound mind, memory and understanding, and was not incompetent (*see Matter of Schlaeger,* 74 AD3d 405, 406 [1st Dept 2010]).

Objectants asserted that decedent lacked testamentary capacity because she suffered from insane delusions related to a companion, who regaled her with tales of his exploits and influential friends. However, the record reflects that decedent stated to many people that she wanted to disinherit her daughters because they had brought an action against her that resulted in the breakup of her company, and had received in settlement what she intended to leave to them in her will. The court properly concluded that, although decedent may have been gullible and fallen victim to a con man, her rationale for disinheriting objectants was based in reality (*cf. Matter of Brush*, 1 AD2d 625, 628 [1st Dept 1956]). The right of a testator to dispose of her estate does not depend on the soundness of her reasoning or the justice of her prejudices (*see Clapp v Fullerton,* 34 NY 190, 197 [1866]).

With respect to objectants' claims that attorneys involved in drafting the will exerted undue influence on her, they failed to present evidence sufficient to raise a triable issue of fact

as to any action by these attorneys that restrained decedent's independent action or destroyed her free will (*see Children's Aid Socy. of City of N.Y. v Loveridge*, 70 NY 387, 394-395 [1877]; *Matter of Aoki*, 99 AD3d 253, 265 [1st Dept 2012]). Moreover, a prior will prepared by an attorney not accused of undue influence also disinherited them. Decedent's attorneys had no duty to attempt to dissuade her from acting on her ill feelings toward objectants.

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

ENTERED: JANUARY 19, 2017

CLERK

Friedman, J.P., Renwick, Richter, Moskowitz, Kapnick, JJ.

2816 The People of the State of New York, Ind. 2282/12
Respondent,

-against-

Lamont Jackson,
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 (Bonnie Wittner, J.), rendered May 23, 2013, as amended June 5, 2013, 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 19, 2017

CLERK

Friedman, J.P., Renwick, Richter, Moskowitz, Kapnick, JJ.

2818 The People of the State of New York, Respondent, Ind. 4624/14 5110/14

-against-

Darnell Smith, 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 (Gregory Carro, J.), rendered September 8, 2015, as amended September 25, 2015, 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 19, 2017

CLERK

Friedman, J.P., Renwick, Richter, Moskowitz, Kapnick, JJ.

2819- Ind. 4222/13
2820- 1195/13
2820A The People of the State of New York, 1345/13
Respondent,

-against-

Dexter Betancourt, also known
as Dester Bentancourt,
Defendant-Appellant.

_____

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

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

_____

Judgments, Supreme Court, New York County (Charles Solomon, J.), rendered May 16, 2014, unanimously affirmed.

Although we do not find that defendant made a valid waiver of the right to appeal, we perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 19, 2017

CLERK

Friedman, J.P., Renwick, Richter, Moskowitz, Kapnick, JJ.

2821 In re Dennis S.,
Petitioner-Respondent,

-against-

Tanya P.,
Respondent-Appellant.

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Leslie S. Lowenstein, Woodmere, for appellant.

_____

Order, Family Court, Bronx County (Bonnie Cohen-Gallet, Referee), entered on or about May 30, 2014, which, upon a finding that respondent had committed acts constituting numerous family offenses, granted petitioner a one-year order of protection against respondent, unanimously affirmed, without costs.

A fair preponderance of the evidence included in the appellate record supports the court's finding that respondent committed acts constituting the family offense of attempted assault in the third degree (*see* Penal Law §§ 110.00/120.00). There is no basis to disturb the court's credibility determinations (*see e.g. Matter of Marisela N. v Lacy M.S.*, 101 AD3d 425 [1st Dept 2012]).

We do not address whether respondent's actions constitute any further family offenses, in light of the incomplete record on appeal.

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

ENTERED: JANUARY 19, 2017

CLERK

Friedman, J.P., Renwick, Richter, Moskowitz, Kapnick, JJ.

2826 The People of the State of New York, Ind. 3510/10
Respondent,

-against-

Victor Gomez,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (John T. Hughes of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Patricia Nunez, J.), rendered April 2, 2015,

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 19, 2017

CLERK

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

Friedman, J.P., Renwick, Richter, Moskowitz, Kapnick, JJ.

2827-
2827A Index 650503/13

Eastern Consolidated Properties, Inc.,
Plaintiff-Respondent,

-against-

5 East 59 Realty Holding Company, LLC, et al.,
Defendants-Appellants,

MIP 5 East 59th Street, LLC, et al.,
Defendants.

_____

Hirschel Law Firm, P.C., Garden City (Daniel Hirschel of counsel), for appellants.

Goetz Fitzpatrick LLP, New York (Douglas A. Gross of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Jeffrey K. Oing, J.), entered September 24, 2015, in favor of plaintiff, against defendant 5 East 59 Realty Holding Company, LLC, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered on or about July 7, 2015, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Contrary to the contentions of defendants 5 East 59 Realty Holding Company, LLC and Alexandros Demetriades, the language of the written commission agreement is unambiguous. Pursuant to the agreement, defendant 5 East 59 Realty Holding expressly agreed to

pay plaintiff a fee of 1.75% of the purchase price if plaintiff introduced defendants to the party (and any related entities) that ultimately purchased the property at a closing. Plaintiff introduced Paulo Agnelo Malzoni to defendants. Malzoni was the principal of the ultimate purchaser of the property. Thus, plaintiff is entitled to its fee.

Defendants' argument that plaintiff is not entitled to a fee because it was not the "procuring cause" or "direct and proximate link" for the sale is unavailing, because the parties entered into an agreement that did not make the fee contingent on plaintiff's negotiation of the transaction (*see Northeast Gen. Corp. v Wellington Adv.*, 82 NY2d 158, 162-163 [1993]; *Matter of TBA Global, LLC v Fidus Partners, LLC*, 132 AD3d 195, 205 [1st Dept 2015]).

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

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

ENTERED: JANUARY 19, 2017

CLERK

Friedman, J.P., Renwick, Richter, Moskowitz, Kapnick, JJ.

2829 Louis M. Atlas, Index 301091/06
Plaintiff-Respondent,

-against-

Frances Smily,
Defendant-Appellant.

_____

Frances Smily, appellant pro se.

Louis M. Atlas P.C., New York (Louis M. Atlas of counsel), for respondent.

_____

Order, Supreme Court, New York County (Matthew F. Cooper, J.), entered March 4, 2016, which denied defendant wife's motion to vacate the parties' stipulation of settlement, unanimously affirmed, without costs.

The motion court properly denied defendant's motion to set aside the open-court stipulation of settlement, as there was no showing of fraud, overreaching, mistake, or duress (*see Hallock v State of New York*, 64 NY2d 224, 230 [1984]; *Matter of Strang v Rathbone*, 108 AD3d 565, 565-566 [2d Dept 2013]). The parties were represented by able and experienced counsel, and had negotiated the agreement for a period of time. Further, the motion court conducted a proper allocution of defendant and properly determined that she voluntarily and knowingly accepted

the terms of the stipulation (*see Matter of Strang*, 108 AD3d at 566).

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

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

ENTERED: JANUARY 19, 2017

CLERK

Friedman, J.P., Renwick, Richter, Moskowitz, Kapnick, JJ.

2830 Abe Jeremias, et al., Index 106841/10
Plaintiffs-Appellants,

-against-

Bernd H. Allen, Esq., et al.,
Defendants-Respondents,

The Herrick Group, LLC,
Defendant.

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Borenstein, McConnell & Calpin, P.C., Brooklyn (Abraham Borenstein of counsel), for appellants.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Anastasios P. Tonorezos of counsel), for respondents.

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Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered July 14, 2015, which, to the extent appealed from as limited by the briefs, granted the motion by the attorney defendants for summary judgment dismissing the malpractice complaint against them, unanimously affirmed, without costs.

The attorney defendants represented plaintiffs in a commercial real estate transaction whereby plaintiffs took an assignment of a purchase and sale agreement that involved a commercial building. Defendants established their prima facie entitlement to summary judgment through documentary evidence and deposition testimony that demonstrated that plaintiffs' claimed

damages, in the form of lost rent and building revenue attributable to a primary commercial tenant's lease having expired just days before the closing on the assignment, were not proximately caused by defendants' alleged negligence in failing to properly conduct due diligence on the transaction or in failing to procure renewal leases or estoppel certificates from existing tenants or upon counsel's purported representations to secure renewal leases.

Rather, the sole cause of the damages was shown to result from the sophisticated plaintiffs-investors' informed choice to take the calculated risk of closing on the assignment transaction prior to procuring a renewal lease from the primary tenant, whose governing body subsequently chose not to enter into a renewal lease (*see Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP*, 26 NY3d 40 [2015]; *Stolmeier v Fields*, 280 AD2d 342

(1st Dept 2001), *lv denied* 96 NY2d 714 [2001]).

The burden having shifted on the motion, plaintiffs failed to raise a triable issue as to the proximate cause element.

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

ENTERED: JANUARY 19, 2017

CLERK

Friedman, J.P., Renwick, Richter, Moskowitz, Kapnick, JJ.

2833 In re Samuel Encarnacion, Index 84/16
[M-6002] Petitioner,

-against-

Hon. Richard Price, etc.,
Respondent.

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Samuel Encarnacion, petitioner pro se.

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

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

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

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

ENTERED: JANUARY 19, 2017

CLERK

Tom, J.P., Renwick, Manzanet-Daniels, Gische, Webber, JJ.

1909-
1910 Index 161520/13

204 Columbia Heights, LLC,
Plaintiff-Appellant-Respondent,

-against-

Anthony Manheim,
Defendant-Respondent-Appellant.

_____

Belkin Burden Wenig & Goldman, LLP, New York (Magda L. Cruz of counsel), for appellant-respondent.

Savona, D'Erasmo & Hyer, LLC, New York (Joseph F. X. Savona of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered November 6, 2014, unanimously modified, on the law, to grant plaintiff's motion and declare that the lease and rider provisions, with respect to defendant's obligation to repair and maintain tenant-made improvements and be responsible for resultant damages, if any, are enforceable, and to grant the cross motion as to the second cause of action, and otherwise affirmed without costs. Order, same court and Justice, entered on or about February 24, 2016, affirmed, without costs.

Opinion by Tom, J.P. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Dianne T. Renwick
Sallie Manzanet-Daniels
Judith J. Gische
Troy K. Webber, JJ.

1909-1910
Index 161520/13

_____x

204 Columbia Heights, LLC,
Plaintiff-Appellant-Respondent,

-against-

Anthony Manheim,
Defendant-Respondent-Appellant.

_____x

Cross appeals from the order of the Supreme Court, New York County (Nancy M. Bannon, J.), entered November 6, 2014, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for summary judgment on its first cause of action and defendant's cross motion for summary judgment dismissing the first, second, and fourth causes of action. Defendant appeals from the order, same court and Justice, entered on or about February 24, 2016, which denied his motion to renew.

Belkin Burden Wenig & Goldman, LLP, New York (Magda L. Cruz, Sherwin Belkin, Robert A. Jacobs and Matthew Brett of counsel), for appellant-respondent.

Savona, D'Erasmo & Hyer, LLC, New York (Joseph F. X. Savona and Raymond M. D'Erasmo of counsel), for respondent-appellant.

TOM, J.P.

The central issue in these appeals concerns the validity of a 1975 lease agreement for three combined apartments that provided, inter alia, that the rent-regulated status of the combined unit would be changed from rent-controlled to rent stabilized. While we do not depart from longstanding precedent holding that leases that attempt to circumvent the rent laws or remove an apartment from rent regulation are void as against public policy, statute, and code (*see Drucker v Mauro*, 30 AD3d 37 [1st Dept 2006], *appeal dismissed* 7 NY3d 844 [2006]; *390 W. End Assoc. v Harel*, 298 AD2d 11 [1st Dept 2002]; Rent Stabilization Code [9 NYCRR] 2520.13; Rent Control Law [Administrative Code of City of NY] § 26-412), we find the lease in this case, which explicitly contemplated the possibility that the apartment would not be decontrolled and expressly stated that the status of the apartment would be determined by the appropriate authority, which will bind the parties, to be valid.

In or about 1963, defendant moved into apartment 4B at 204 Columbia Heights, Brooklyn, as a rent-controlled tenant. In 1966, he also rented apartment 4C. He obtained permission from his then-landlord, nonparty Columbia Terrace, Inc., to combine apartments 4B and 4C and make certain improvements, such as installing a shower/sauna in place of one of the bathrooms.

When apartment 4A became vacant, defendant desired to rent it so that he could eventually combine it with apartments 4B-C. However, because the landlord had a couple ready to rent the apartment, it was agreed that defendant would be the prime tenant for that apartment and the couple would sublet the unit and actually live in it.

Although defendant continued to have subtenants in apartment 4A through 1975, at that point he was ready to combine all three apartments. Accordingly, by a lease dated as of September 1, 1975 but not executed until July 19, 1977, Columbia Terrace agreed to rent apartments 4A-C to defendant from September 1, 1975 to August 31, 1977 for $650 per month, with an option to renew for an additional three years. The printed (form) part of the lease says the following about repairs:

> "Tenant shall take good care of the demised premises . . . [A]t Tenant's own cost and expense, Tenant shall make all repairs thereto and to any other part of the building which are necessitated by the misuse, negligence, carelessness, neglect or improper conduct of Tenant [or] Tenant's family . . . . If Tenant fails to proceed to make such repairs . . . within 7 days after notice from Landlord, . . . the same may be made by Landlord at the expense of Tenant and the cost thereof shall be collectible as additional rent."

The printed part of the lease also contains the following attorneys' fee provision:

> "If tenant shall default in the observation or performance of any term or covenant on tenant's part to

> be observed or performed . . ., landlord may . . . perform the obligation of tenant . . . . [I]f landlord, in connection therewith . . ., makes any expenditures or incurs any obligations for the payment of money, including . . . attorney's fees, in instituting, prosecuting or defending any action or proceeding, such sums so paid or obligations incurred . . . shall be deemed to be additional rent hereunder."

A typewritten rider to the lease shows that it was contemplated that apartments 4A-C would move from rent control to rent stabilization:

> "[T]he provisions of this lease respecting length of term, renewal options and amount of rent, have been agreed upon . . . on the express understanding that the former three apartments comprising the area which is being leased to the Tenant . . . will be recognized by the appropriate authority having jurisdiction to be free of the restraints and limitations of the provisions of the Rent Control Laws . . . and to be subject only to the Rent Stabilization Act."

However, the parties also recognized that the entire apartment might not be decontrolled. After two paragraphs (30[i] and [ii]) setting forth the rent for the renewal period if the premises were decontrolled, paragraph 30(iii) states:

> "[I]f . . . the parties are prohibited or precluded from following the procedure described under (i) or (ii) . . . the rent will be determined by treating the unit as though (a) the separate decontrolled rent for former apartment 4A[1] . . . for the Basic Term [i.e., Sept. 1, 1975 - Aug. 31, 1977] is $270.00 per month and (b) the monthly rent for the Renewal Term for that

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[1]Defendant "acknowledge[d] that former apartment 4A was decontrolled by reason of its having been vacated and having remained vacant between January and May, 1975."

> former apartment 4A would be $270.00 plus the maximum allowable increase under Rent Stabilization . . . and (c) the rents for the former apartments 4B and 4C shall be equal to the maximum collectible rents that would be permitted . . . under the . . . rent control laws."

Paragraph 31 of the rider, titled "Tenant Improvements" explicitly provides defendant with permission to perform certain renovation and alteration work in the combined apartment, with the costs to be borne by defendant. That paragraph also says, "Landlord shall be under no obligation, of any kind, to make any repairs to any equipment, fixtures, furnishings, or facilities constructed, altered, [or] erected by the Tenant or installed by [him] . . . or any repairs made necessary by reason of [his] acts or omissions." Similarly, paragraph 33 says that after May 1975, "Tenant will . . . maintain all of [his] own installations without any obligation on the part of Landlord with respect thereto." Notwithstanding the foregoing, the Landlord agreed to paint the apartment at three-year intervals.

Prior to the execution of the lease at issue, in September 1976, a District Rent Director found that "it appears that Apt. 4-A is decontrolled under Section 2f(17) of the regulations." Then, in January 1980, the District Rent Director of the Brooklyn District Rent Office decontrolled the entire apartment (4A-C). However, in April 1981, the Commissioner of the Department of Housing Preservation and Development (HPD) revoked the January

1980 order. In particular, the Commissioner determined that "[t]he fact that the tenant may not have had the full use of any of the former apartments while they were undergoing alteration did not constitute a vacating within the ambit of Section 2f(17) of the Regulations. The tenant continued in occupancy and the accommodation remained subject to control."

In addition, the Commissioner found, "[T]he maximum rent for the subject accommodation as of September 1, 1975, was $650 per month." In that regard, he noted, "Since there are no comparable units within the subject building and since the alteration was made after arms length negotiations and agreements were entered into between the tenant herein and the former landlord, . . . the lease executed by the parties is the best indicia of the rental value of the accommodation."

Both defendant and Brian Donovan, who had purchased the building in 1977, filed article 78 petitions with respect to the 1981 order. Supreme Court remitted the article 78 proceedings to the administrative agency and in November 1984, the Deputy Commissioner of the Division of Housing and Community Renewal (DHCR) found that defendant's protest regarding the amount of rent set in the 1981 order should be granted and the proceeding remanded to the District Rent Administrator. However, DHCR rejected the landlord's arguments about decontrol, saying:

> "The landlord contends that the present apartment should be decontrolled because it necessarily had to be vacated by the tenant while the alterations were being made, and, in addition, . . . the tenant agreed to such decontrol in the lease . . . [T]hese arguments [are] without merit.
>
> "If the tenant did temporarily have to live elsewhere during the alteration of the new unit, this is not such vacating as contemplated by the Rent Law.
>
> "As to the landlord's reliance on the agreement embodied in the lease, Section 2201.1b of the Rent Regulations . . . provides . . . that '. . . an agreement by the tenant to waive the benefit of any provision of the Rent Law or regulations is void.'"

In May 1985, the District Rent Administrator set the controlled maximum rent for the apartment. The Administrator

> 'established the maximum rent on the basis of the . . . "first" rent of $650 [set forth in the parties' lease] but . . . updated it to reflect annual Maximum Base Rent adjustments from 1976 through 1985 plus certain service increases resulting in a rent of $1,184.01 per month plus a $57.00 per month fuel cost adjustment."

Defendant appealed, but in a January 15, 1987 order DHCR affirmed the Administrator's order. In particular, DHCR said, "It was reasonable for the District Rent Administrator to choose the 'first rent,' which reflects a straight forward [sic] opinion of what the parties thought the apartment was worth at the time, rather than any of the somewhat tortuous methods suggested by" defendant.

Although defendant appealed to the Second Department, he ultimately reached a settlement agreement with Donovan in

December 1987, and thus withdrew his appeal. The agreement included provisions regarding the painting of the apartment.

In 1992, defendant and Donovan began having disputes regarding repairs and maintenance to defendant's apartment. In a series of letters, Donovan refused to reimburse defendant for work done on his shower-sauna or for his awnings. Donovan asserted that he was not legally required to pay for these items because defendant "installed [these] improvement[s] for your own use and benefit and you are responsible for its maintenance and repair." Defendant disagreed, replying, "Once installed, these permanent structural components are legally yours [the landlord's], as is the responsibility for their maintenance."

In October 2002, Donovan requested an advisory opinion from DHCR as to who is responsible for repair, maintenance and replacement of tenant improvements, fixtures or equipment. DHCR issued an opinion letter stating, "Where a tenant installs his or her own fixtures and equipment, the responsibility to maintain or repair such items rests exclusively with that tenant until his or her vacatur." However, DHCR stressed, "[T]his opinion letter is not a substitute for a formal agency order issued upon prior notice to all parties and with all parties having been afforded

an opportunity to be heard."[2]

On October 31, 2013, a section of the bathroom ceiling of apartment 3C fell due to water damage. Plaintiff maintains that the water damage was caused by defendant's shower in apartment 4C while defendant maintains that it was caused by a clogged and/or defective drain pipe.

Plaintiff commenced this action in 2013. In the first two causes of action plaintiff sought a declaration that defendant "has an obligation to make repairs in his Apartment concerning improvements made by him or damage to the building" and an injunction "compelling Defendant to make all repairs concerning improvements made by him or damage to the building . . . and uphold his obligations under the Lease." The third cause of action, which seeks damages for the water leak, is not at issue on appeal. The fourth cause of action is for attorneys' fees.

In March 2014, plaintiff moved for summary judgment on its first cause of action for a declaratory judgment and its second cause of action for a permanent injunction. Defendant cross-moved for summary judgment dismissing this action. In particular, defendant asserted that the lease upon which plaintiff relied is void ab initio and unenforceable because it

[2]In July 2010, Brian Donovan sold the building to plaintiff.

was an "improper attempt to decontrol" the apartment. Defendant also asserted that plaintiff's causes of action for declaratory relief and injunction should be denied as plaintiff has an adequate legal remedy.

Supreme Court denied both motions, finding that both parties failed to meet their respective burdens and that triable issues of fact precluded summary judgment being granted in either party's favor.

Because neither side had presented any of the DHCR orders postdating 1981, defendant moved to renew his cross motion for summary judgment based on these orders. Defendant's counsel excused the failure to present these orders on the prior motion, saying "At the time that the underlying motions were made . . ., [he] believed that no appeal [had been] taken from" the 1981 order. Counsel noted he received the 1984 and 1987 orders in October 2015 from nonparty David Ng. Ng, who has "represented . . . defendant on a number of personal matters related to his landlord-tenant situation," affirmed that he "[r]ecently" discovered the 1984 order and 1987 stipulation.

Supreme Court denied defendant's motion to renew, holding that defendant "failed to present any new facts not offered on the prior motion that would change the prior determination" and failed to provide a reasonable justification for the failure to

present the proffered evidence on the prior motion.

On these appeals, defendant contends that the 1975 lease is void as against public policy because it tried to move his apartment from rent control to rent stabilization. Plaintiff, on the other hand, argues that Supreme Court should have granted it summary judgment and declared the lease and its repair and maintenance provisions valid.

We must begin by once again reiterating that "parties to a lease governing a [rent-regulated] apartment cannot, by agreement, incorporate terms that compromise the integrity and enforcement of the Rent Stabilization Law [and Rent Control Law]" (*Drucker*, 30 AD3d at 39). For this reason, "this Court has uniformly thwarted attempts, whether by mutual consent or by contract of adhesion, to circumvent regulated rent maximums" (*id; see Georgia Props., Inc. v Dalsimer*, 39 AD3d 332, 333 [1st Dept 2007] [landlord and tenant stipulated that apartment would be permanently deregulated and that an office lease – as opposed to a residential lease – would be signed]; *390 W. End Assoc. v Harel*, 298 AD2d 11 [1st Dept 2002] [consent judgment]; *390 W. End Assoc. v Baron*, 274 AD2d 330 [1st Dept 2000] [same]; *Draper v Georgia Props.*, 230 AD2d 455 [1st Dept 1997], *affd* 94 NY2d 809 [1999] [nonprimary residence]; *Abright v Shapiro*, 214 AD2d 496 [1st Dept 1995] [residential space leased for professional

purposes]; *Matter of Yanni v New York State Div. of Hous. & Community Renewal*, 194 AD2d 375 [1st Dept 1993], *lv denied* 82 NY2d 662 [1993] [residential premises leased in corporate name]; *Bruenn v Cole*, 165 AD2d 443 [1st Dept 1991] [illusory tenancy]; *Urban Assoc. v Hettinger*, 177 AD2d 439, 440 [1st Dept 1991], *lv denied* 79 NY2d 759 [1992] [landlord and tenant tried to deregulate apartment]).

We have previously explained that the prohibition against avoiding the rent stabilization scheme is stated plainly in the Rent Stabilization Code (*see Drucker*, 30 AD3d at 40). Rent Stabilization Code (9 NYCRR) § 2520.13 provides: "An agreement by the tenant to waive the benefit of any provision of the [Rent Stabilization Law] or this Code is void." Similarly, as pertains to rent controlled apartments, the Rent Control law is clear that

> "[i]t shall be unlawful, regardless of any contract, lease or other obligation heretofore or hereafter entered into, for any person to demand or receive any rent for any housing accommodations in excess of the applicable maximum rent established therefor by the city rent agency or otherwise to do or omit to do any act, in violation of any regulation, order or requirement of the city rent agency under the state enabling act or under this chapter, or to offer, solicit, attempt or agree to do any of the foregoing" (Administrative Code of City of NY § 26-412[a]).

Because "[a] policy of addressing the contemporary need to ensure an adequate supply of affordable housing retains a continuing vitality" (*Harel*, 298 AD2d at 15), it remains

essential to ensure that landlords not be permitted to "exceed the legal regulated rent on the flimsy premise that a negotiated lease represents the settlement of a dispute with a tenant" as this "would invite ready circumvention of the regulatory scheme through selective invalidation of provisions of the Rent Stabilization Law, severely compromising the protection it was intended to afford and eventually eviscerating the entire rent stabilization scheme" (*Drucker*, 30 AD3d at 39-40). Indeed, "[c]entral to the statutory scheme is preventing the exaction of excessive rents by landlords" (*Drucker*, 30 AD3d at 40). This is precisely why "deregulation is available only by statutorily specified means" (*Harel*, 298 AD2d at 15), and "not by private compact . . . a means expressly forbidden" (*Draper v Georgia Props.*, 94 NY2d at 811). As we have stated, "[A]n apartment cannot be deregulated by private contract" (*Baron*, 274 AD3d at 332). This is to further reinforce the policy of rent regulation which "is to provide an adequate supply of affordable housing in the City of New York" (*Drucker*, 30 Ad3d at 40).

Nor can tenants evade the rent regulation laws "by the expedient of entering private agreements purporting to take a lease out of the rent-regulation schema" (*Harel*, 298 AD2d at 16). Indeed, even where such leases inure to the benefit of the tenant we have invalidated them because the "point is not to protect

just a tenant, but to ensure the viability of the rent regulation system which protects tenancies in general, provides predictability to landlords, and significantly enhances the social, economic and demographic stability of New York City" (*id.* at 16). In other words, these illegal leases present a serious threat to the viability of New York's rent regulation laws because they "affect both the legal rent and the regulated status of the dwelling unit for future occupants" (*Drucker*, 30 AD3d at 40). In sum, "[r]egardless of whether the tenant or the landlord makes the overture, we have developed consistent decisional law, in furtherance of this explicit policy, of prohibiting landlords and tenants from making private agreements to effectively deregulate applicable housing units" (*Harel*, 298 Ad2d at 16).

While we do not waver from the strong public policy and this Court's consistent precedent in this area, we reject defendant's claim that the lease that he entered into with plaintiff's predecessor is void as against public policy. Unlike the leases invalidated in the foregoing cases, the subject lease did not seek to completely deregulate the apartment (*see e.g. Georgia Props., Inc. v Dalsimer*, 39 AD3d 332 [landlord and tenant stipulated that apartment would be permanently deregulated and that an *office* lease – as opposed to a residential lease – would be signed]; *390 W. End Assoc. v Baron*, 274 AD2d 330 [landlord and

tenant stipulated that "apartment was exempted from the Rent Stabilization Law" because it was not primary residence]). Rather, the parties to this lease agreement who did not know the rent regulation status of this apartment merely tried to move the apartment from rent control to rent stabilization with certain concessions, and set out terms for such a transition, if possible.

More significantly, this case is clearly unique because unlike the many cases where we invalidated leases seeking to circumvent the rent laws, here the parties truly did not know the rent-regulated status of the combined apartments. It appears that there were two rent-controlled apartments that were combined with a rent-stabilized apartment sometime in 1977. Fundamentally, in the foregoing cases there was no uncertainty about the rent-regulated status of the apartments and no question that the parties knowingly attempted to circumvent the rent laws. In contrast, the parties in this matter were unsure about the status of the combined apartment. This confusion was well founded and even supported by the fact that the parties received conflicting determinations concerning the legal status of this apartment from Rent Administrators, HPD's Commissioner and DHCR regarding the apartment's status. Furthermore, the lease contemplated the possibility that the apartment could not be

treated as intended by the parties. Indeed, while the lease provided for the combined apartments to move from rent control to rent stabilization, the parties explicitly recognized that they might be "prohibited or precluded" from enforcing their intended procedure. This is quite different from those leases which purposely sought to skirt the law and had no regard for the rent regulation scheme whatsoever. In other words, this agreement contemplated not that both parties would evade regulatory coverage but that they would seek approval of their agreement by the DHCR. Thus, this case is distinguishable from those involving leases which knowingly and purposely sought to evade the rent laws. Here, there was no intent by the parties to the lease agreement to circumvent the rent laws.

Relatedly, it is significant to note that following years of proceedings before the DHCR, the landlord complied with the ultimate determination by DHCR that the apartment was not decontrolled and charged defendant the legal rent set forth by the rent administrator and DHCR. Accordingly, unlike those cases where we found the lease to be void as against public policy, here there was never any risk or intention to either completely deregulate the apartment or to circumvent regulated rent maximums.

Even assuming, arguendo, that the section of the lease

trying to move the apartment from rent control to rent stabilization were void, the rest of the lease (including the paragraph requiring defendant to repair damage caused by him) would still be valid. In *Rima 106 v Alvarez* (257 AD2d 201 [1st Dept 1999]) we invalidated clauses which gave the tenants unlimited subletting and assignment rights and the right to occupy their apartments as nonprimary residences as "violative of public policy and the rent control and stabilization statutes and code," but we found the remainder of the leases to be valid (257 AD2d at 204, 206-207).

Nor can it be concluded that the main objective of this agreement was to illegally deregulate the apartment thereby voiding the entirety of the lease (*see Georgia Props*, 39 AD3d at 334). The lease here had multiple objectives, one of which was confirmation of the landlord's permission of defendant's renovation and alteration of apartments 4A-C.

Because we find the lease to be valid, we need not consider plaintiff's argument that defendant should be equitably estopped from denying the lease's enforceability. That claim is academic, and, in any event, unpreserved.

Plaintiff seeks a declaration that the lease provisions regarding defendant's obligation to repair and maintain improvements that he made to his apartment are enforceable.

Since we find the lease to be valid and seek to eliminate or reduce future disputes between the parties, we modify to declare that the lease and rider provisions, with respect to defendant's obligation to repair and maintain tenant-made improvements and be responsible for resultant damages, if any, are valid and enforceable.

The second cause of action for a permanent injunction should have been dismissed because "plaintiff failed to establish that it does not have an adequate remedy at law, namely monetary damages" (*Mini Mint Inc. v Citigroup, Inc.*, 83 AD3d 596, 597 [1st Dept 2011]). Supreme Court's determination of the breach of contract claim will "sufficiently guide the parties on their future performance of the contract[], thereby obviating any need for" other alternative relief (*Apple Records v Capitol Records*, 137 AD2d 50, 54 [1st Dept 1988]). Thus, we dismiss plaintiff's second cause of action seeking declaratory and injunctive relief.

With respect to the fourth cause of action (for attorneys' fees), defendant's only argument is that the lease containing that provision is void. Since we have ruled that the lease is valid, defendant's argument is unavailing.

Finally, Supreme Court providently exercised its discretion (*see Tishman Constr. Corp. of N.Y. v City of New York*, 280 AD2d 374, 377 [1st Dept 2001]) by denying defendant's motion to renew.

He failed to show that the supposedly new evidence – documents dated 1984 and 1987 – "could not with due diligence have been presented on the original motion" (*Wright v C.H. Martin of White Plains Rd., Inc.*, 23 AD3d 295, 296 [1st Dept 2005]). Defendant himself was a party to the administrative proceedings that led to the 1984 and 1987 orders of the DHCR and to the litigation that led to the 1987 stipulation. Under these circumstances, the DHCR orders and the stipulation did not constitute "new facts" within the meaning of CPLR 2221(e)(2) (*see William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992], *lv dismissed in part and denied in part* 80 NY2d 1005 [1992]). Nor would they "change the prior determination" (CPLR 2221[e][2]).

Accordingly, the order of the Supreme Court, New York County (Nancy M. Bannon, J.), entered November 6, 2014, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for summary judgment on its first cause of action and defendant's cross motion for summary judgment dismissing the first, second, and fourth causes of action, should be modified, on the law, to grant plaintiff's motion and declare that the lease and rider provisions, with respect to defendant's obligation to repair and maintain tenant-made improvements and be responsible for resultant damages, if any, are enforceable, and to grant the cross motion as to the second cause of action, and

otherwise affirmed, without costs, and the order, same court and Justice, entered on or about February 24, 2016, which denied defendant's motion to renew, should be affirmed, without costs.

All concur.

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

ENTERED: JANUARY 19, 2017

CLERK