SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 28,2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

3257-
3258 Index 652266/10

Building Service Local 32B-J
Pension Fund, et al.,
Plaintiffs-Respondents-Appellants,

-against-

101 Limited Partnership,
Defendant-Appellant-Respondent.

_____

Stempel Bennett Claman & Hochberg, P.C., New York (Richard L. Claman of counsel), for appellant-respondent.

Proskauer Rose, LLP, New York (Michael T. Mervis of counsel), for respondents-appellants.

_____

Judgment, Supreme Court, New York County (Jeffrey K. Oing, J.), entered June 7, 2016, after a nonjury trial, awarding plaintiffs a sum of money, unanimously modified, on the law, to direct that prejudgment interest on the breach of contract claims for the years 2008 and 2009 be calculated based on the accrual dates of May 1, 2009 and May 1, 2010, respectively, and to vacate the dismissal of the first counterclaim and to remand and reopen the trial on that counterclaim, in accordance with this decision, and otherwise affirmed, without costs.

In this commercial landlord-tenant action, the trial court correctly determined that the fair and reasonable meaning of the term "expenses" in the net cash flow provision of the parties' leases did not include reserves required to be set aside by defendant as a condition of refinancing, by considering the term in the context of the parties' negotiation history, as evidenced by earlier drafts of the leases and the testimony of witnesses involved in the negotiations (*see Dorel Steel Erection Corp. v Seaboard Sur. Co.*, 291 AD2d 309 [1st Dept 2002]). Defendant's contention that this interpretation does not make business sense is not a basis on which to rewrite the contract to insert a provision expressly excluded (*see Reiss v Financial Performance Corp.*, 97 NY2d 195, 200-201 [2001]). Moreover, the business context sought to be introduced by defendant had no connection to the parties' dealings (*see Matter of Reuters Ltd. v Dow Jones Telerate*, 231 AD2d 337, 343 [1st Dept 1997]).

The claims for breach of contract for the lease years 2008, 2009, and 2011 accrued on three different dates. Thus, statutory prejudgment interest on the damages for each claim should be computed from the date on which those damages were incurred (CPLR 5001[b]; *see Spodek v Park Prop. Dev. Assoc.*, 96 NY2d 577, 581 [2001]).

The trial court erred in dismissing, at the close of

defendant's case, the counterclaim for breach of the lease requirement to "take good care of the Premises, ... Building-Wide Systems, ... [and] sidewalks" and "make all Repairs ... necessary to keep the same in good and safe order and working condition .... whether ... necessitated by wear and tear, *obsolescence* or defects, latent or otherwise" (emphasis added). The lease itself provided the standard of care, stating that "[t]he necessity and adequacy of Repairs made shall be measured by standards ... appropriate for first class New York City office buildings of similar age, construction and use." Contrary to plaintiff's argument, the lease requires more than just that building wide systems be working. Viewed most favorably to defendant (see CPLR 4401; *City of New York v P.A. Bldg. Co.*, 23 AD3d 240 [1st Dept 2005], *lv denied* 6 NY3d 707 [2006]), the evidence establishes a prima facie case that the building systems at issue and the sidewalks had not remained current, "in touch with the times," during plaintiffs' tenancy and were no longer appropriate for a first class building at the time of defendant's service of the notice of default (*see e.g. People ex rel. Brooklyn Hgts. R.R. Co. v State Bd. of Tax Commrs.*, 69 Misc 646, 659 [Sup Ct, Albany County 1910], *affd* 146 App Div 372 [3d Dept 1911], *affd* 204 NY 648 [1912]). While the failure of defendant to provide evidence of the systems in comparable first class buildings may affect the

ultimate weight given to defendant's evidence, it did not warrant a dismissal for failure to prove a prima facie case. We note that the counterclaim is based upon a December 2010 default notice, which would be the appropriate time period at which the court should determine if plaintiff was in compliance with the lease provision. The trial on the counterclaim is reopened and remanded to the same trial judge for a continued trial at which plaintiff should be given an opportunity to defend.

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

ENTERED: MARCH 28, 2017

CLERK

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

3394 Kiongo W. Maina, Index 652525/11
Plaintiff-Respondent,

-against-

Rapid Funding NYC LLC, et al.,
Defendants-Appellants,

N.Y.C. Taxi & Limousine Commission,
Defendant.

_____

Thomas Torto, New York, for appellants.

Susan M. Russell, New York, for respondent.

_____

Judgment, Supreme Court, New York County (O. Peter Sherwood, J.), entered August 12, 2015, in favor of defendants Rapid Funding NYC, LLC and Signature Bank, to the extent it brings up for review an order, same court and Justice, entered or about April 11, 2014, which denied defendants' request for attorneys' fees, and certain other fees, unanimously modified, on the law, to remand for a determination of reasonable attorneys' fees, and otherwise affirmed, without costs.

While defendants demonstrated their entitlement to attorneys' fees as a matter of law, they offered no evidence from which the reasonableness of the amount they claim could be assessed. Thus, we remand the matter for a determination of defendants' reasonable attorneys' fees (*see Industrial Equip.*

Credit Corp. v Green, 92 AD2d 838 [1st Dept 1983], *affd* 62 NY2d 903 [1984]; *Friedman v Miale*, 69 AD3d 789, 791-792 [2d Dept 2010]).

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: MARCH 28, 2017

CLERK

Tom, J.P., Acosta, Kapnick, Kahn, Gesmer, JJ.

3417-
3418-
3419 In re Anthony S.,
Petitioner-Respondent,

-against-

Monique T. B.,
Respondent-Appellant.
- - - - - -
In re Anthony S.,
Petitioner-Respondent,

-against-

Monique T. B.,
Respondent-Appellant.
- - - - -
In re Monique T. B.,
Petitioner-Appellant,

-against-

Anthony S.,
Respondent-Respondent.

_____

Orrick, Herrington & Sutcliffe LLP, New York (Renè A. Kathawala of counsel), for appellant.

_____

Order, Family Court, Bronx County (Alicea Elloras, J.), entered on or about February 29, 2016, which, to the extent appealed from, awarded respondent mother child support in the amount of $388 per month, unanimously reversed, on the law and the facts, without costs, the award vacated, and the matter remanded for a new child support determination consistent with

this decision. Order, same court and Judge, entered on or about April 4, 2016, which denied the mother's motion to dismiss the father's modification petition, unanimously affirmed, without costs. Appeal from order, same court and Judge, entered on or about February 29, 2016, which denied the mother's motion for attorney's fees, unanimously dismissed, without costs, as superseded by order, same court and Judge, entered on or about April 6, 2016, which, upon reargument, granted the mother's motion for attorney's fees to the extent of awarding fees in the amount of $250.

Family Court improvidently exercised its discretion in not imputing to the father as income the $500 per month he was earning from his part-time employment in 2012 solely on the basis of Family Ct Act § 437-a, which bars the Family Court from requiring a recipient of social security disability benefits to engage in certain employment related activities. That statute is not dispositive in this case where the father had been employed during the pendency of his social security disability benefits application and did not show that he was unable to continue to be employed in any capacity after he began receiving benefits (*see Matter of Gavin v Worner*, 112 AD3d 928, 929 [2d Dept 2013]; *Matter of Mandelowitz v Bodden*, 68 AD3d 871 [2d Dept 2009], *lv denied* 14 NY3d 710 [2010]; *Matter of Bukovinsky v Bukovinsky*, 299

AD2d 786, 787-788 [3d Dept 2002], *lv dismissed* 100 NY2d 534 [2000]). Accordingly, the matter is remanded for a new determination as to the amount of child support, including a new determination as to whether the $500 per month should be imputed to the father.

Family Court providently exercised its discretion in denying the mother's CPLR 3126 motion to dismiss the father's modification petition. The paternal grandmother and the parties' eldest daughter are not parties to the proceeding and there is no evidence that they were under the father's control (*see Fox v Fox*, 9 AD3d 549, 550 [3d Dept 2004]). The parties' daughter was 19 years old and was represented by her own counsel at the time of the motion. Accordingly, there is no basis to sanction the father for the alleged discovery violations of the paternal grandmother and the parties' daughter (*see id.*; *see also* CPLR 3126).

Although this Court may review the order awarding attorney's fees upon reargument of the mother's motion for such fees (*see* CPLR 5517[b]), we decline to review the order because neither the original records nor the appendices submitted on appeal contain

the mother's motion to reargue or the father's opposition papers (*see Kenan v Levine & Blit, PLLC*, 136 AD3d 554, 555 [1st Dept 2016]).

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

ENTERED: MARCH 28, 2017

CLERK

Friedman, J.P., Sweeny, Renwick, Andrias, Manzanet-Daniels, JJ.

3518 In re Igor Oberman, Index 100338/15
Petitioner,

-against-

New York City Conflicts of
Interest Board,
Respondent.

_____

Malvina Lin, P.C., Brooklyn (Malvina Lin of counsel), for petitioner.

Zachary W. Carter, Corporation Counsel, New York (Mackenzie Fillow of counsel), for respondent.

_____

Determination of respondent, dated November 6, 2014, which after a hearing, found that petitioner violated New York City Charter § 2604(b)(2) and 53 RCNY § 1-13(a) and (b), and ordered him to pay a civil penalty of $7,500, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order, Supreme Court, New York County [Alexander W. Hunter, Jr., J.], entered October 15, 2015), dismissed, without costs.

The challenged determination is based on substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 179-182 [1978]). There is no basis to disturb the credibility determinations of the Administrative Law Judge (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444

[1987]). The "strong circumstantial evidence" (*Matter of S & R Lake Lounge v New York State Liq. Auth.*, 87 NY2d 206, 210 [1995]), including records of numerous calls involving petitioner's work telephone and donations to petitioner's political campaign, raised a reasonable inference that petitioner used his public employer's resources for private purposes, in violation of Charter § 2604(b)(2) and 53 RCNY § 1-13(a) and (b). The penalty is not shockingly disproportionate to the offense (*see Matter of Kelly v Safir*, 96 NY2d 32, 38 [2001]), in light of the extent of petitioner's misconduct, the warnings he had received against such misconduct, his failure to accept responsibility, and the high ethical standards to which he was held as an attorney.

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

ENTERED: MARCH 28, 2017

CLERK

CORRECTED ORDER - MARCH 29, 2017

Friedman, J.P., Sweeny, Renwick, Andrias, Manzanet-Daniels, JJ.

3519 In re Lawrence C.,
Petitioner-Respondent,

-against-

Anthea P.,
Respondent-Appellant.

_____

Tennille M. Tatum-Evans, New York, for appellant.

Carol L. Kahn, New York, attorney for the children.

_____

Order, Family Court, New York County (Douglas E. Hoffman, J.), entered on or about August 25, 2014, which granted petitioner father's petition for modification of custody, to the extent of awarding the father primary residential custody of the parties' children, with parenting time to respondent mother, and awarding the father final decision-making authority in all areas of the children's life, except religion, unanimously **affirmed, without costs, as to the child Maria, and the appeal therefrom, as to the child Theo, unanimously dismissed, without costs, as moot.**

The Family Court's determination was based upon an assessment of the parties' credibility, and has a sound and substantial basis in the record (*see Eschbach v Eschbach*, 56 NY2d 167, 173-174 [1982]). The totality of the circumstances supports the determination that a change in custody to the extent

indicated is in the children's best interest (*id.* at 172, 174). As the court found, the children were not thriving in the mother's home or in their former school. The mother also made unilateral decisions regarding the children without informing the father (*see Matter of Mildred S.G. v Mark G.*, 62 AD3d 460, 461 [1st Dept 2009]). Although some concerns were validly raised by Dr. Cohen regarding how the father's negativity toward the mother is impacting the children's perception of her, the father provided a more nurturing home environment, where the children's educational, emotional and social needs were better met (*see Matter of Louise E.S. v W. Stephen S.*, 64 NY2d 946, 947 [1985]).

To the extent the mother argues that it was error to permit the children's treating psychologist to testify as to confidential matters about the children in the absence of a knowing waiver from the children (*see* CPLR 4508[a][1]), the error was harmless (*see Matter of Rutland v O'Brien*, 143 AD3d 1060, 1063 [3d Dept 2016]).

The appeal from the order as it pertains to the male child has been rendered moot by the mother's subsequent consent to the father having custody of that child.

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

ENTERED: MARCH 28, 2017

CLERK

Friedman, J.P., Sweeny, Renwick, Andrias, Manzanet-Daniels, JJ.

3520 Edward Abram, Index 350089/14
Plaintiff-Appellant,

-against-

Joanne Cheung Sui Mei,
Defendant-Respondent.

_____

Law Offices of Peter M. Nissman, New York (Peter M. Nissman of counsel), for appellant.

_____

Order, Supreme Court, New York County (Lori S. Sattler, J.), entered January 20, 2016, which, inter alia, upheld the parties' prenuptial agreement upon inquest, unanimously affirmed, without costs.

Plaintiff husband's efforts to meet his "very high" burden of challenging the parties' prenuptial agreement fail (*Anonymous v Anonymous*, 123 AD3d 581, 582 [1st Dept 2014]). The plain language of the parties' agreement reveals that the husband's assets to be protected were substantial and that the wife received the maintenance award in question as a quid pro quo. Where, as here, a prenuptial agreement and the circumstances surrounding its execution are "fair," there is no further inquiry (*Levine v Levine*, 56 NY2d 42, 47 [1982] [internal quotation marks omitted]). Furthermore, the husband's efforts to establish that the agreement was the product of duress are not persuasive (*see*

Barocas v Barocas, 94 AD3d 551 [1st Dept 2012], *appeal dismissed* 19 NY3d 993 [2012]).

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

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

ENTERED: MARCH 28, 2017

CLERK

Friedman, J.P., Sweeny, Renwick, Andrias, Manzanet-Daniels, JJ.

3521 Ross DiMaggio, Index 150387/13
Plaintiff-Respondent,

-against-

Skanska USA Building, Inc.,
et al.,
Defendants,

Park Avenue Building & Roofing
Supplies, Inc.,
Defendant-Appellant.

_____

McGaw, Alventosa & Zajac, Jericho (Ross P. Masler of counsel), for, appellant.

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

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered October 9, 2015, which, to the extent appealed from as limited by the briefs, denied the branch of defendant Park Avenue Building & Roofing Supplies, Inc.'s (Park Avenue) motion for summary judgment that sought dismissal of the common-law negligence claim and the common-law indemnification and contribution cross claims against it, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of Park Avenue dismissing the complaint and all cross claims against it.

Plaintiff, employed by a nonparty, testified that he fell

after he picked up a pipe, stepped to his right, and slipped on a muddy, softball-sized, chopped-up piece of concrete. Plaintiff never testified that he could not use lifting equipment available to him because of the way the pipes had been stacked. Accordingly, the connection between Park Avenue's alleged negligence in placing the pipes and plaintiff's injury is too attenuated to conclude that Park Avenue's malfeasance proximately caused the accident (*see Escalet v New York City Hous. Auth.*, 56 AD3d 257, 258 [1st Dept 2008]).

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

ENTERED: MARCH 28, 2017

CLERK

Friedman, J.P., Sweeny, Renwick, Andrias, Manzanet-Daniels, JJ.

3523 In re Michael Kunz, M.D., etc., Index 530352/16
Petitioner-Respondent,

-against-

Shahadoth C.,
Respondent-Appellant.

_____

Marvin Bernstein, Mental Hygiene Legal Service, New York (Diane Goldstein Temkin of counsel), for appellant.

Eric T. Schneiderman, Attorney General, New York (Seth M. Rokosky of counsel), for respondent.

_____

Appeal from order, Supreme Court, New York County (Carol Ruth Feinman, J.), entered June 16, 2016, which granted the petition and authorized petitioner to involuntarily retain and administer medical treatment to respondent for up to six months, unanimously dismissed, without costs, as moot.

By its own terms, the order which respondent seeks to challenge expired on December 16, 2016. Furthermore, it is undisputed that, in November 2016, respondent was transferred to another medical facility, and petitioner no longer has any direct stake in respondent's medical treatment. Accordingly, the order is moot, and, under the circumstances presented, the exception to

the mootness doctrine is inapplicable (*see Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]).

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

ENTERED: MARCH 28, 2017

CLERK

Friedman, J.P., Sweeny, Renwick, Andrias, Manzanet-Daniels, JJ.

3524-
3525 Index 653838/14

Fishoff Family Foundation, et al.,
Plaintiffs,

Mark Appel,
Plaintiff-Respondent,

-against-

Jacob Frydman, et al.,
Defendants-Appellants,

Urti GP, LLC, et al.,
Defendants.

_____

Wrobel Markham Schatz Kaye & Fox LLP, New York (M. Katherine Sherman of counsel), for appellants.

Abe George, Brooklyn, for respondent.

_____

Orders, Supreme Court, New York County (Saliann Scarpulla, J.), entered October 22, 2015, which, insofar as appealed from, denied defendants' motion for sanctions, unanimously affirmed, with costs.

Insofar as relevant here, to be liable for sanctions, a party or attorney must knowingly submit or sign pleadings or papers containing materially false statements of fact (Rules of Chief Admin of Cts [22 NYCRR] § 130-1 *et seq.*). Whether to impose sanctions, even in such a case, is left to the discretion of the court (*see e.g. Weisburst v Dreifus*, 89 AD3d 536 [1st Dept 2011]). Here, plaintiffs stated that they relied on prior

counsel for the allegations raised in the complaint after counsel's investigation. Given that many of the facts in the complaint were a matter of public record, and that defendants never deposed prior counsel or otherwise established that he lacked a good faith basis for the allegations, the court did not abuse its discretion in denying the motion.

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

ENTERED: MARCH 28, 2017

CLERK

Friedman, J.P., Sweeny, Renwick, Andrias, Manzanet-Daniels, JJ.

3526 The People of the State of New York, Respondent, Ind. 6190/02

-against-

Norgado Vazquez, Defendant-Appellant.

_____

Arnold & Porter Kaye Scholer, New York (David A. Kerschner of counsel), and Robert S. Dean, Center for Appellate Litigation, New York (Abigall Everett of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Gregory Carro, J.), entered February 9, 2016, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The People obtained records of defendant's prison sex offender treatment by serving a subpoena on the Department of Corrections and Community Supervision that was neither court-ordered nor on notice to defendant. However, we find that, to the extent there was any violation of the Health Insurance Portability and Accountability Act of 1996 (Pub L 104-191, 110 US Stat 1936) and its accompanying privacy rules (45 CFR parts 160, 164), there is no basis for a remand for further proceedings.

In a letter to the court requesting a downward departure from his presumptive risk level, defendant relied heavily on his completion of sex offender treatment as a mitigating factor, specifically asserting that the treatment changed his outlook and behavior, and caused him to accept responsibility for the sex crimes he committed against two children. Accordingly, although defendant did not rely on the treatment records themselves, he affirmatively put his treatment in issue and thus waived his claim that the records were improperly obtained (*see Matter of State of N.Y. Off. of Mental Health v Dennis J.*, 126 AD3d 537, 537-538 [1st Dept 2015]; *Matter of State of New York v Enrique T.*, 114 AD3d 618, 619 [1st Dept 2014], *appeal dismissed* 23 NY3d 1011 [2011]).

In any event, we find that any error was harmless. The treatment records contained evidence that defendant continued to blame one or both of his child victims for the crimes he committed, and failed to truly accept responsibility. However, defendant, who was assessed an undisputed 125 points, was assessed no points for failing to accept responsibility. Furthermore, the court had ample grounds on which to deny a downward departure, and its remarks, when viewed as a whole, indicate that the records contributed little or nothing to its sound determination.

In light of the foregoing, we find it unnecessary to reach the People's other arguments for affirmance.

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

ENTERED: MARCH 28, 2017

CLERK

Friedman, J.P., Sweeny, Renwick, Andrias, Manzanet-Daniels, JJ.

3527 In re MJ Cahn Co., Index 158607/15
Petitioner-Respondent,

-against-

New York State Division of Human Rights,
Respondent-Appellant,

Maimouna Kamate,
Respondent.

_____

Caroline J. Downey, Bronx (Michael K. Swirsky of counsel), for appellant.

Bonnaig & Associates, New York (Mahima Joishy of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Manuel J. Mendez, J.), entered February 22, 2016, granting the petition to annul the determination of respondent New York State Division of Human Rights (DHR), dated July 17, 2015, which dismissed respondent Maimouna Kamate's complaint on the ground that her election of an administrative remedy was annulled, unanimously reversed, on the law, without costs, the petition denied and the proceeding brought pursuant to CPLR article 78 dismissed.

DHR properly dismissed Kamate's complaint on the ground that her election of remedies was annulled (*see* Executive Law § 297[9]), notwithstanding that she sought dismissal of the DHR

complaint only after commencing a state court action alleging the same claims (*Kamate v MJ Cahn Co.*, 147 AD3d 573, [1st Dept 2017]; *see generally Eastman Chem. Prods. v New York State Div. of Human Rights*, 162 AD2d 157 [1st Dept 1990]; *see also Mitsubishi Bank v New York State Div. of Human Rights*, 176 AD2d 689 [1st Dept 1991]). "The only prerequisite to dismissal of the DHR complaint on this ground is that dismissal be sought 'prior to a hearing before a hearing examiner' in the DHR proceeding (Executive Law § 297[9]). The statute does not require that dismissal be obtained prior to commencement of the state court action. [Kamate] made her request prior to a hearing before a hearing examiner, and her election of remedies was annulled upon DHR's dismissal of her complaint" (*Kamate*, 147AD3d at _).

Under these circumstances, DHR's dismissal was not, as Supreme Court found, purely arbitrary (*see Acosta v Loews Corp.*, 276 AD2d 214, 220-221 [1st Dept 2000]).

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

ENTERED: MARCH 28, 2017

CLERK

Friedman, J.P., Sweeny, Renwick, Andrias, Manzanet-Daniels, JJ.

3528 Lanmark Group, Inc., Index 650060/15
Plaintiff-Appellant-Respondent,

-against-

New York City School Construction Authority,
Defendant-Respondent-Appellant.

_____

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

Zachary W. Carter, Corporation Counsel, New York (Jeremy W. Shweder of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered on or about January 26, 2016, which, to the extent appealed from as limited by the briefs, granted defendant's motion to dismiss plaintiff's fourth cause of action and denied defendant's motion to dismiss plaintiff's third, fifth, and seventh causes of action, unanimously modified, on the law, to dismiss the third and seventh causes of action, and otherwise affirmed, without costs.

Pursuant to the terms of the parties' contract, plaintiff sought reimbursement for "extra work" relating to the removal of lead paint on spandrel beams (third cause of action), custom brickwork (fourth cause of action), removal of a cornice including structural steel framing (fifth cause of action), and removal of loose lintels (seventh cause of action).

The third cause of action should have been dismissed, as the contract clearly contemplates that the spandrel beams were to be "scrape[d], clean[ed], prime[d] and paint[ed]." As part of that procedure, the specifications provide that plaintiff was to remove all loose paint, and that untested paint was to be assumed to be lead paint. As a result, the contract contemplated the removal of loose lead paint from the spandrel beams, and such work was not beyond the scope of the contract.

The fourth cause of action, seeking reimbursement for custom brickwork, was properly dismissed. The contract explicitly states that "there are multiple types of brick masonry on the elevations and the Contractor shall match color, size, shape & texture of each. Refer to drawings for size of brick." While the drawings only contained the "typical" size of the bricks, plaintiff was on notice that it would need to customize "multiple types of brick masonry" and that such work was contemplated by the contract.

The fifth cause of action, regarding the removal of cornice including structural steel framing, was properly retained. While the contract states that the cornice was to be removed, there is no reference to any sort of structural steel framing within the cornice. Accordingly, there is a factual issue as to what the parties' reasonable expectations were with respect to the cornice

removal. A "contract should not be interpreted to produce a result that is absurd, commercially unreasonable or contrary to the reasonable expectations of the parties" (*Matter of Lipper Holdings v Trident Holdings*, 1 AD3d 170, 171 [1st Dept 2003] [internal citations omitted]).

The seventh cause of action, for removal of loose lintels, should have been dismissed. The contract provided that Lanmark was to "remove all loose and hung steel lintel angles at 1929 Building as noted on the drawings." At least one set of drawings specifically indicate which loose lintels needed to be replaced. Accordingly, plaintiff's claim was utterly refuted by the documentary evidence (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *see Greenapple v Capital One, N.A.*, 92 AD3d 548, 550 [1st Dept 2012]).

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

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

ENTERED: MARCH 28, 2017

CLERK

Friedman, J.P., Sweeny, Renwick, Andrias, Manzanet-Daniels, JJ.

3530 The People of the State of New York, Ind. 952/14
Respondent,

-against-

Nickolas Moorman,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Daniel P. Conviser, J. at hearing; Arlene D. Goldberg, J. at jury trial and sentencing), rendered December 11, 2014, convicting defendant of 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 7 years, unanimously affirmed.

The hearing court properly denied defendant's motion to suppress physical evidence. When, in a drug-prone area, an officer saw defendant holding a palm-sized plastic bag that the officer recognized from his experience as a possible container for drugs, and when, after the officer merely approached, defendant exhibited a startled expression and appeared to be hiding the bag, the officer had, at least, a founded suspicion of

criminal activity warranting a common-law inquiry (*see People v Loretta*, 107 AD3d 541 [1st Dept 2013], *lv denied* 22 NY3d 1157 [2014]). The officer did not explicitly or implicitly demand that defendant surrender the bag, but only asked what was in it, leading defendant to open his hand and reveal the presence of drugs (*see People v Carrasquillo*, 54 NY2d 248, 253 [1981]; *see also People v Bora*, 83 NY2d 531, 532-535 [1994]).

The hearing court, which suppressed defendant's brief and limited statement made at the scene of the arrest as the product of a custodial interrogation, properly denied suppression of defendant's subsequent statement given at the police station made after *Miranda* warnings following a pronounced break of at least four hours, as well as his subsequent statement made at the District Attorney's office. Based on the totality of the relevant factors, we find that the statements were sufficiently attenuated from the suppressed statement (*see People v White*, 10

NY3d 286, 291 [2008], *cert denied* 555 US 897 [2008]; *People v Paulman*, 5 NY3d 122, 130-131 [2005]).

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

ENTERED: MARCH 28, 2017

CLERK

Friedman, J.P., Sweeny, Renwick, Andrias, Manzanet-Daniels, JJ.

3531 The People of the State of New York, Ind. 5023/14
Respondent,

-against-

Xue Fang Zhou,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Jeffrey A. Wojcik of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Bonnie Wittner, J.), rendered June 26, 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: MARCH 28, 2017

CLERK

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

Friedman, J.P., Sweeny, Renwick, Andrias, Manzanet-Daniels, JJ.

3532 Michelle N. Buffa, Index 21019/14E
Plaintiff-Respondent,

-against-

Ian James Carr, et al.,
Defendants-Appellants,

Leo Castillo,
Defendant-Respondent.

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Gorton & Gorton, LLP, Mineola (John T. Gorton of counsel), for appellants.

Omrani & Taub, P.C., New York (James L. Forde of counsel), for Michelle N. Buffa, respondent.

Adams & Kaplan, Yonkers (Jeffrey A. Domoto of counsel), for Leo Castillo, respondent.

_____

Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered August 17, 2016, which denied defendants-appellants' (the Carr defendants) motion for summary judgment dismissing the complaint, and granted plaintiff's cross motion for summary judgment on the issue of liability, unanimously modified, on the law, to grant plaintiff's cross motion for summary judgment only to the extent of finding no culpable conduct by plaintiff on the issue of liability, and otherwise affirmed, without costs.

Plaintiff, a passenger in a car driven by defendant Ian James Carr, allegedly sustained injuries when Carr's vehicle and the vehicle driven by defendant Leo Castillo collided in an

intersection.

The motion court correctly denied the Carr defendants' motion, as issues of fact exist as to which defendant driver had the right-of-way (*see* Vehicle and Traffic Law § 1141; *Espinal v Volunteers of Am.-Greater N.Y., Inc.*, 121 AD3d 558 [1st Dept 2014]). Given that issues of fact exist as to which vehicle was responsible for the accident, it is not appropriate to grant plaintiff summary judgment on the issue of liability as against any defendant, and we thus modify to the extent indicated (*see Oluwatayo v Dulinayan*, 142 AD3d 113, 119 [1st Dept 2016]).

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

ENTERED: MARCH 28, 2017

CLERK

Richter, J.P., Mazzarelli, Kahn, Gesmer, JJ.

3536 The People of the State of New York, Respondent, Ind. 5774/11

-against-

Andres Suarez, Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Samuel Z. Goldfine of counsel), for respondent.

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Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered March 19, 2013, as amended April 4, 2013, convicting defendant, after a jury trial, of predatory sexual assault, rape in the first degree, burglary in the first degree as a sexually motivated felony, burglary in the first degree, attempted rape in the first degree and sexual abuse in the first degree, and sentencing him to an aggregate term of 25 years to life, unanimously modified, as a matter of discretion in the interest of justice, to the extent of vacating the convictions of rape in the first degree and burglary in the first degree as inclusory concurrent offenses of the convictions of predatory sexual assault and burglary in the first degree as a sexually motivated felony, respectively, and otherwise affirmed.

Defendant did not preserve his hearsay and Confrontation

Clause challenges to testimony by a forensic witness, based solely on paperwork he received, regarding the specific location in the victim's apartment building where a cigarette butt containing defendant's DNA had been found, and we decline to review it in the interest of justice. "We note that where a defect may be readily corrected by calling additional witnesses or directing the People to do so, requiring a defendant to call the defect to the court's attention at a time when the error complained of could readily have been corrected serves an important interest" (*People v Rios*, 102 AD3d 473, 474-475 [1st Dept 2013], *lv denied* 20 NY3d 1103 [2013][internal quotation marks and citation omitted]). As an alternative holding, we find that this testimony was inadmissible, but that the error was harmless under the standards for constitutional and nonconstitutional error (*see People v Crimmins*, 36 NY2d 230 [1975]). The only issue at trial was whether the sexual activity was forcible or consensual. Although the location of the cigarette butt had some bearing on the credibility of defendant's testimony, and although no one with personal knowledge testified about where the butt was recovered, there was overwhelming evidence of force, including powerful prompt-outcry evidence, and there is no reasonable possibility that the offending testimony contributed to the verdict.

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

lack of preservation may be excused on the ground of ineffective assistance.

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 28, 2017

CLERK

Richter, J.P., Mazzarelli, Kahn, Gesmer, JJ.

3537 Enrique Bayona, Index 107919/11
Plaintiff-Respondent,

-against-

The Hertz Corporation,
Defendant-Appellant.

_____

Rubin, Fiorella & Friedman LLP, New York (Paul Kovner of counsel), for appellant.

Pollack, Pollack, Isaac & DeCicco, LLP, New York (Denise A. Rubin of counsel), for respondent.

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Order, Supreme Court, New York County (Debra A. James, J.), entered on July 7, 2016, which denied defendant's summary judgment motion, and sua sponte granted plaintiff partial summary judgment to the extent of finding that plaintiff was not a special employee of defendant, and that the action is not barred under Workers Compensation Law, unanimously affirmed, without costs.

The parties do not dispute the facts in this action. The record establishes that plaintiff, a maintenance worker, is an employee of nonparty CB Richard Ellis. Plaintiff was assigned to work at two Hertz locations. Although Hertz management generally directed the manner, details, and result of plaintiff's work, there is no evidence that Hertz had "complete and exclusive control" over such work or that CB Richard Ellis surrendered its

right to control and direct plaintiff's work (*see Holmes v Business Relocation Servs., Inc.*, 117 AD3d 468, 468 [1st Dept 2014], *affd* 25 NY3d 955 [2015]; *Bharat v Bronx Lebanon Hosp. Ctr.*, 106 AD3d 540, 540 [1st Dept 2013]; *Bellamy v Columbia Univ.*, 50 AD3d 160, 165 [1st Dept 2008]).

Rather, the evidence demonstrates that CB Richard Ellis retained some control over plaintiff. CB Richard Ellis paid plaintiff's wages, had the right to hire or discharge him, had the right to reassign him, and retained control over him with respect to assigned tasks outside his normal daily activities. In addition, plaintiff reported back to CB Richard Ellis supervisors on a regular basis, and spoke with them about numerous things, including obtaining certain tools and assigning someone else to help him. Plaintiff also wore a uniform daily that identified him as an CB Richard Ellis employee, and the contract between CB Richard Ellis and Hertz explicitly stated that CB Richard Ellis retained "sole control" of management of personnel, including plaintiff.

In addition to correctly denying Hertz's summary judgment motion, Supreme Court properly searched the record to find that,

as a matter of law, plaintiff was not a special employee of Hertz (*see Siegel Consultants, Ltd. v Nokia, Inc.*, 85 AD3d 654, 656-657 [1st Dept 2011], *lv denied* 18 NY3d 809 [2012]).

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

ENTERED: MARCH 28, 2017

CLERK

Richter, J.P., Mazzarelli, Kahn, Gesmer, JJ.

3538 In re Aranessa L.,
Petitioner-Respondent,

-against-

Isaac C.,
Respondent-Appellant.

_____

Richard L. Herzfeld, P.C., New York (Richard L. Herzfeld of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for respondent.

Geoffrey P. Berman, Larchmont, attorney for the child.

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Order, Family Court, New York County (Susan K. Knipps, J.), entered on or about March 10, 2016, which, after a hearing, declared respondent to be the father of the subject child, unanimously affirmed, without costs.

The Family Court properly concluded that the best interests of the child required that respondent be equitably estopped from obtaining DNA testing and denying paternity. The record established that he assumed the role of a parent, albeit in a somewhat limited way, and led the child to believe that he was

her father for the next 15 years of her life (*see Matter of Glenda G. v Mariano M.*, 62 AD3d 536 [1st Dept 2009], *lv denied* 13 NY3d 708 [2009]).

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

ENTERED: MARCH 28, 2017

CLERK

Richter, J.P., Mazzarelli, Kahn, Gesmer, JJ.

3539-
3540 — Index 152906/12, 651232/12

The Board of Managers of the Saratoga Condominium,
Plaintiff-Respondent,

-against-

Nir Shuminer,
Defendant-Appellant.

- - - - -

Scanio Movers, Inc., etc,
Plaintiff-Appellant,

-against-

The Saratoga New York LLC, doing business as The Saratoga Condominium, et al.,
Defendants-Respondents.

_____

The Law Office of Bennett D. Krasner, Atlantic Beach (Elizabeth Mark Meyerson of counsel), for appellants.

Smith, Buss & Jacobs, LLP, Yonkers (Ryan P. Kaupelis of counsel), for respondents.

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Judgment, Supreme Court, New York County (Ellen M. Coin, J.), entered June 5, 2015, in favor of plaintiff the Board of Managers of the Saratoga Condominium (the Landlord), and against defendant Nir Shuminer in the total amount of $133,735.21, and bringing up for review an order, same court and Justice, entered February 20, 2013, insofar as it granted the Landlord's motion for summary judgment in lieu of complaint; and judgment, same court and Justice, entered June 8, 2016, against plaintiff Scanio

Movers Inc., t/a Scanio Moving & Storage, Inc. (Scanio), and in favor of defendants the Saratoga New York LLC d/b/a the Saratoga Condominium and the Saratoga Condominium (together the Landlord) in the total amount of $618,640.41, and bringing up for review an order, same court and Justice, entered July 30, 2015, which, among other things, granted said defendants' motion for summary judgment dismissing the complaint and for summary judgment on their counterclaims, unanimously affirmed, without costs.

In these consolidated appeals, Scanio, a commercial tenant, claimed that it was constructively evicted due to scaffolding and sidewalk sheds around its store, which were erected in preparation for facade work to the Saratoga Condominium. Scanio vacated the premises and commenced an action alleging, among other things, constructive eviction against the Landlord. The Landlord counterclaimed for, among other things, the remaining rent due, and commenced a separate action against Scanio's president and guarantor, Shuminer.

The motion court correctly granted the Landlord's motions for summary judgment. Scanio's claim for constructive eviction is barred by the exculpatory provisions of the lease. Those provisions provide that the Landlord is not liable for "inconvenience, annoyance or injury to business" caused by the erection of scaffolding and sidewalk sheds (*Cut-Outs, Inc. v Man*

Yun Real Estate Corp., 286 AD2d 258, 260 [1st Dept 2001], *lv denied* 100 NY2d 507 [2003]). In any event, the erection of temporary scaffolding and sidewalk sheds does not constitute constructive eviction, because the scaffolding and sheds are authorized by the lease (*Carlyle, LLC v Beekman Garage LLC*, 133 AD3d 510, 510 [1st Dept 2015]).

To the extent Scanio has not abandoned its remaining causes of action, the motion court correctly dismissed those claims as well. In the absence of a constructive eviction, there is no breach of the covenant of quiet enjoyment (*Dave Herstein Co. v Columbia Pictures Corp.*, 4 NY2d 117, 121 [1958]). The exculpatory provisions also barred Scanio's claim for lost profits (*see Hooters of Manhattan, Ltd. v 211 W. 56 Assoc.*, 51 AD3d 410, 411-412 [1st Dept 2008]). To the extent that Scanio and Shuminer assert that the Landlord breached the lease because it did not promptly proceed with facade repairs, that argument is unavailing because the Landlord was not required under the lease to minimize interference with Scanio's use and occupancy (*cf. Incredible Christmas Store-N.Y. v RCPI Trust*, 307 AD2d 816, 817 [1st Dept 2003] [lease required the landlord to use reasonable efforts to minimize interference], *and Union City Union Suit Co. v Miller*, 162 AD2d 101, 104 [1st Dept 1990] [same], *lv denied* 77 NY2d 804 [1991]).

Because Scanio was not constructively evicted from its premises, Shuminer had no valid defense to recovery of the unpaid rent against him as guarantor. Contrary to Shuminer's argument, "[a]n unconditional guaranty is an instrument for the payment of 'money only' within the meaning of CPLR 3213" (*Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A., "Rabobank Intl.," N.Y. Branch v Navarro*, 25 NY3d 485, 492 [2015]). Shuminer may not dispute the amount of the judgment rendered against him, because he himself had successfully moved to amend the judgment to reflect that amount; thus, he is not aggrieved by the judgment (*see* CPLR 5511; *Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 544 [1983]). Further, his appeal from the judgment did not bring up for review the part of the order entered February 20, 2013 that denied his cross motion for consolidation or a joint trial (*Fonda Mfg. Corp. v Lincoln Laminating Corp.*, 72 AD2d 522, 523 [1st Dept 1979], *appeal dismissed* 51 NY2d 727 [1980], *appeal dismissed* 51 NY2d 768 [1980]; *see also* CPLR 5501[a][1]).

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

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

ENTERED: MARCH 28, 2017

CLERK

Richter, J.P., Mazzarelli, Kahn, Gesmer, JJ.

3541 The People of the State of New York, Respondent, Ind. 3581/09

-against-

Leigh Morse, Defendant-Appellant.

_____

Weiner Lesniak, LLP, New York (Ronald A. Berutti of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Marc Frazier Scholl of counsel), for respondent.

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Appeal from order, Supreme Court, New York County (Michael J. Obus, J.), entered on or about July 17, 2015, which, upon defendant's CPL 420.10(5) application for reduction of restitution, adjusted the terms of payment to the extent of vacating a payment schedule and directed defendant to make "best efforts" to pay the ordered restitution, unanimously dismissed, as taken from a nonappealable paper.

"[N]o appeal lies from an order arising out of a criminal proceeding absent specific statutory authorization" (*People v Santos*, 64 NY2d 702, 704 [1984]), and "a denial of a CPL 420.10(5) resentencing application is not appealable" (*People v Vasquez*, 74 AD3d 462, 463 [1st Dept 2010]). Furthermore, inasmuch as the order that defendant seeks to challenge adjusted the terms of payment, but did not "[r]evoke the entire sentence

imposed and resentence the defendant" (CPL 420.10[5][a],[d]), it did not constitute a "sentence or resentence" for appealability purposes (*see* CPL 450.10[2], 450.30[3]; *People v Pagan*, 19 NY3d 368, 370-71 [2012]). Contrary to defendant's assertion, the issue of whether this appeal should be dismissed on the ground of nonappealability was not decided by this Court in its orders granting and denying defendant's motions for certain relief.

In any event, defendant's attempt to relitigate the sentencing court's calculation of restitution is procedurally improper for various reasons, including the fact that this Court already decided that issue on defendant's direct appeal (111 AD3d 569 [1st Dept 2013], *lv denied* 22 NY3d 1157 [2014]).

Even if we were to reach the merits, Supreme Court's decision to vacate the payment schedule, but leave the total amount of restitution unchanged, subject to "best efforts" at full payment by defendant, was a provident exercise of discretion.

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

ENTERED: MARCH 28, 2017

CLERK

Richter, J.P., Gische, Kahn, Gesmer, JJ.

3542- Index 805358/13
3543-
3544 Charles Steinberg, et al.,
Plaintiffs-Appellants,

-against-

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

_____

Ginsberg & Wolf, P.C., New York (Robert M. Ginsberg of counsel), for appellants.

Lewis Johs Avallone Aviles, LLP, New York (Robert A. Lifson of counsel), for respondents.

_____

Order, Supreme Court, New York County (Alice Schlesinger, J.), entered February 1, 2016, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered February 1, 2016, which denied plaintiffs' motion for leave to submit a surreply affirmation, unanimously dismissed, without costs, as abandoned. Appeal from order, same court and Justice, entered on or about July 15, 2016, which, upon reargument, adhered to its original determination dismissing the complaint, unanimously dismissed, without costs, as academic.

In this action for medical malpractice, plaintiffs claim that defendants were negligent in the performance of a cardiac catheterization, thereby causing an arterial perforation, which

in turn caused ischemia and loss of vision in plaintiff Charles Steinberg's right eye.

The affirmation of defendants' neuro-ophthalmologist expert was sufficient to meet their burden of demonstrating that the alleged negligence did not proximately cause plaintiff's visual impairment (*see Anyie B. v Bronx Lebanon Hosp.*, 128 AD3d 1, 3 [1st Dept 2015]). The expert opined that the objective evidence indicated that plaintiff's vision did not worsen post-surgery but that even if it did, this was attributable not to the surgery but to the advancement of plaintiff's preexisting glaucoma.

To the extent plaintiffs now point to additional injuries apart from vision loss, we decline to consider the additional injuries, as they were not alleged in the complaint or the bills of particulars. Plaintiffs' contention that defendants' expert failed to consider the reports of two ophthalmologists who examined plaintiff post-surgery is not supported by the record, as defendants' expert expressly addressed the findings set forth in those reports.

In opposition to defendants' motion, plaintiffs failed to demonstrate the existence of any issues of fact with respect to proximate cause (*see Anyie B.*, 128 AD3d at 3). Although plaintiffs' expert opined that defendants' negligence caused the perforation, which in turn caused ischemia and diminished vision,

he did not explain how the perforation caused these injuries. Nor did he respond to or even acknowledge the opinions of defendants' expert regarding causation (*see Pripkhan v Karmon*, 140 AD3d 634, 635 [1st Dept 2016]). Plaintiffs' expert was also not qualified to offer an opinion as to causation. He specializes in cardiovascular surgery, not neurology or ophthalmology. Moreover, he failed to "profess the requisite personal knowledge" necessary to make a determination on the issue of whether the perforation was responsible for plaintiff's visual impairment (*Colwin v Katz*, 122 AD3d 523, 524 [1st Dept 2014]; *see also Limmer v Rosenfeld*, 92 AD3d 609, 609 [1st Dept 2012]). Plaintiffs cannot circumvent the infirmities in their expert's affirmation by relying on the unsworn statements of other treating ophthalmologists (*see Pena v Slater*, 100 AD3d 488, 489 [1st Dept 2012]).

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

ENTERED: MARCH 28, 2017

CLERK

Richter, J.P., Mazzarelli, Kahn, Gesmer, JJ.

3546 The People of the State of New York, Dkt. 68602C/09
Respondent,

-against-

Meliza Torres,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, Bronx County (Leonard Livote, J.), rendered May 30, 2012, convicting defendant, upon her plea of guilty, of attempted criminal possession of a weapon in the fourth degree, and sentencing her to a conditional discharge for a period of one year, unanimously affirmed.

The court properly denied defendant's suppression motion. Initially, we find no basis for disturbing the court's credibility determinations, which are supported by the record (*see People v Prochilo*, 41 NY2d 759, 761 [1977]).

The police were entitled to pass through the unlocked gate to defendant's yard, approach the front door, and knock. Where there is no "evidence of intent to exclude the public, the entryway to a person's home offers implied permission to approach and knock on the front door" (*People v Kozlowski*, 69 NY2d 761,

763 [1987]). The fact that the police visit occurred at 1:30 a.m. does not provide a basis for distinguishing *Kozlowski* (which also apparently involved a nighttime incident). While uninvited visits are most likely to occur during the day, a caller on urgent business, such as a safety concern, that cannot wait until the morning may need to knock on a door at night, and we do not find that the occupant has a reasonable privacy expectation to the contrary. Furthermore, we conclude that *Florida v Jardines* (569 US, 133 S Ct 1409 [2013]), which reiterated that "a police officer not armed with a warrant may approach a home and knock, precisely because that is no more than any private citizen might do" (133 S Ct at 1415 [internal quotation marks omitted]), did not promulgate any per se rule excluding night visits from the ambit of this principle. We have considered and rejected defendant's remaining arguments on this issue.

The People met their burden of establishing, by clear and convincing evidence, that defendant voluntarily consented to the search of her home. Defendant was not restrained or in police custody at the time she allowed the officers inside, and she emphatically urged the officers to enter. The circumstances,

viewed as a whole, support a finding of voluntary consent (*see generally People v Gonzalez*, 39 NY2d 122, 128-131 [1976]).

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

ENTERED: MARCH 28, 2017

CLERK

Richter, J.P., Mazzarelli, Kahn, Gesmer, JJ.

3547-
3548-
3549-
3550-
3551 Index 151160/14

Nicholas Romanoff, etc,
Plaintiff-Appellant,

-against-

Sheryl Romanoff, etc, et al.,
Defendants-Respondents.

John and Jane Does "1" through "10", etc.,
Defendants.

_____

Law Office of James M. Haddad, New York (James M. Haddad of counsel), for appellant.

Venturini & Associates, New York (August C. Venturini of counsel), for Sheryl Romanoff, GHC NY Corp. and New Roads Realty Corp., respondents.

Lewis Brisbois Bisgaard & Smith LLP, New York (Cristina R. Yannucci of counsel), for Michael A. Zimmerman, respondent.

Loeb & Loeb LLP, New York (David M. Satnick of counsel), for 55 Gans Judgment LLC, 55 Gans Lender LLC and Griffon Gansevoort Holdings LLC, respondents.

Abrams Garfinkel Margolis Bergson LLP, New York (Robert J. Bergson of counsel), for Frank Platt, respondent.

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Order, Supreme Court, New York County (Anil C. Singh, J.), entered September 29, 2014, which granted the motion by defendants 55 Gans Judgment LLC (Gans Judgment), 55 Gans Lender LLC (Gans Lender), Griffon Gansevoort Holdings LLC's (Griffon, together with Gans Judgment and Gans Lender, the Gans defendants)

to dismiss the fourth cause of action for rescission, unanimously affirmed. Orders, same court and Justice, entered February 5, 2015, which, insofar as appealed from as limited by the briefs, (a) granted defendant Michael Zimmerman's motion to dismiss the complaint, (b) granted so much of the motion by defendants Gerald Romanoff[1] (Gerald), Sheryl Romanoff (Sheryl), New Roads Realty Corp. (New Roads), and GHC NY Corp.'s (GHC) to dismiss the complaint as sought dismissal of the complaint as against Sheryl, those portions of the first cause of action that seek recovery for wrongs that occurred before February 7, 2011, those portions of the third cause of action that seek recovery against Gerald in relation to GHC and for transactions preceding January 4, 2009, and the fourth, fifth, and sixth causes of action; and (c) denied plaintiff's motion for leave to amend the complaint, unanimously affirmed, without costs. Order, same court and Justice, entered October 22, 2015, which, to the extent appealed from as limited by the briefs, granted the Gans defendants' motion for summary judgment dismissing the complaint against them, unanimously affirmed, without costs.

In this derivative action, plaintiff Nicholas Romanoff, a 1%

[1]Sheryl Romanoff, as executor of the estate of Gerald Romanoff, deceased, has been substituted as defendant in place of defendant Gerald Romanoff.

shareholder in New Roads, which entity, through a wholly owned subsidiary, GHC, owns a five-story commercial building in Manhattan, seeks damages and to set aside a conveyance of real property based upon, inter alia, alleged breaches of fiduciary duty by his now deceased grandfather, Gerald Romanoff, whose action were allegedly aided and abetted by the other defendants.

The court properly applied the doctrine of in pari delicto to dismiss the fourth cause of action for rescission and second cause of action for aiding and abetting, and to deny leave to amend the second cause of action. "The doctrine of in pari delicto mandates that the courts will not intercede to resolve a dispute between two wrongdoers" (*Kirschner v KPMG LLP*, 15 NY3d 446, 464 [2010]). Under the doctrine, which operates under agency principles, "the acts of a corporation's authorized agents, such as its officers, are imputed to the corporation 'even if [the] particular acts were unauthorized'" (*New Greenwich Litig. Trustee, LLC v Citco Fund Servs. (Europe) B.V.*, 145 AD3d 16, 23 [1st Dept 2016] [quoting *Kirschner*, 15 NY3d at 465]). The doctrine "requires immoral or unconscionable conduct that makes the wrongdoing of the party against which it is asserted at least equal to that of the party asserting it" (*Chemical Bank v Stahl*, 237 AD2d 231, 232 [1st Dept 1997][citation omitted]).

Absent the application of an exception to the in pari

delicto rule, Gerald's conduct, as an officer and director of GHC and New Roads, is imputed to the corporations. While the other defendants are alleged to have aided and abetted Gerald's conduct, those defendants' culpability is at most equal to that of Gerald. The "adverse interest" exception does not apply as Gerald, by the complained of conduct, did not "*totally abandon[]* his principal's interests" or act "entirely for his own or another's purposes" (*Kirschner*, 15 NY3d at 466 [emphasis in original; *see also Concord Capital Mgt., LLC v Bank of America, N.A.*, 102 AD3d 406 [1st Dept 2013], *lv denied* 21 NY3d 851 [2013]). Plaintiff's contention that "GHC received absolutely no benefit from this arrangement" is belied by the settlement agreement at issue, which resolved a foreclosure action, releasing $9 million in debt that was incurred by GHC, resolved a judgment of over $16 million entered against GHC as guarantor, and provided GHC with a $245,000 payment.

The remedy of rescission is unavailable because money damages are available and will make plaintiff whole (*Rudman v Cowles Communications*, 30 NY2d 1, 13 [1972]; *Lichtyger v Franchard Corp.*, 18 NY2d 528, 537 [1966]). Any right to redeem the mortgaged property was extinguished upon conveyance of the property to a subsequent grantee, which terminated the grantor's interest in the premises (*see Josephson v Ginsburg Realty Co.*,

169 AD 189, 190-191 [1st Dept 1915], *affd* 222 NY 609 [1918]; *Bancplus Mtge. Corp. v Galloway*, 203 AD2d 222, 223 [2d Dept 1994]).

The court properly dismissed so much of plaintiff's breach of fiduciary duty claim as was premised on acts and/or omissions occurring prior to February 7, 2011, as time-barred. Where, as here, the remedy sought is purely or primarily monetary, a breach of fiduciary duty claim is governed by a three-year statute of limitations (*see* CPLR 214[4]; *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 139 [2009]; *Carlingford Ctr. Point Assoc. v MR Realty Assoc., LP*, 4 AD3d 179, 179-180 [1st Dept 2004]). Incidental allegations of fraud do not extend the statute (*see Powers Mercantile Corp. v Feinberg*, 109 AD2d 117, 120 [1st Dept 1985], *affd* 67 NY2d 981 [1986]).

Plaintiff's failure to allege that he demanded an accounting and that Gerald refused to comply with the request warranted dismissal of the claim for an accounting from GHC (*see Unitel Telecard Distrib. Corp. v Nunez*, 90 AD3d 568, 569 [1st Dept 2011]; *Adam v Cutner & Rathkopf*, 238 AD2d 234, 241 [1st Dept 1997]).

Plaintiff is collaterally estopped from asserting a proposed cause of action under Business Corporation Law § 909 and Delaware General Corporation Law § 271, as the issue of plaintiff's

standing to bring individual claims as a shareholder was necessarily decided in a prior proceeding (*see generally D'Arata v New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659, 664 [1990]). Moreover, the proposed claim is without merit (*see* CPLR 3025[b]; *MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499 [1st Dept 2010]). Actions brought pursuant to Business Corporation Law § 909 must be commenced within one year of the challenged conveyance (*see* Business Corporation Law § 909[c]). The Delaware General Corporation Law § 271 claim fails as the conveyance was made pursuant to the written consent of the holders of 99% of the shares, satisfying the "consents in writing" requirement of Delaware General Corporation Law § 228(a) (*see Klotz v Warner Communications, Inc.*, 674 A2d 878, 881 [Del 1995]).

Finally, the viability of plaintiff's trust-based claims was determined in a 2011 action brought by his father, Robert Romanoff, and plaintiff is collaterally estopped from raising them here. Privity between plaintiff and his father exists based upon their familial relationship and the nature of their statuses as contingent beneficiary and beneficiary, respectively, and is evidenced by the father's initial commencement of this action as his then minor son's parent and natural guardian (*see e.g. Matter of Bethea v Scoppetta*, 275 AD2d 651, 651-652 [1st Dept 2000]).

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

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

ENTERED: MARCH 28, 2017

CLERK

Richter, J.P., Mazzarelli, Kahn, Gesmer, JJ.

3554 Jose Cruz, Index 24850/14
Plaintiff-Appellant,

-against-

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

_____

Law Office of K.C. Okoli, P.C., New York (K.C. Okoli of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Ingrid R. Gustafson of counsel), for respondents.

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Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered August 17, 2015, which, insofar as appealed from as limited by the briefs, granted the branch of defendant City of New York's motion that sought dismissal of plaintiff's 42 USC § 1983 cause of action, and denied plaintiff's request for a default judgment, unanimously affirmed, without costs.

The three-year limitations period on a section 1983 claim based on false arrest begins to run "when the alleged false imprisonment ends" — that is, when the arrestee becomes subject to the legal process such as being "bound over by a magistrate or arraigned on charges" (*Wallace v Kato*, 549 US 384, 389 [2007]). Here, because plaintiff was arraigned on July 16, 2011, the limitations period on his section 1983 claim based on false arrest ended on July 16, 2014, approximately three months before

plaintiff filed this action. Accordingly, the claim is time-barred.

To the extent plaintiff's complaint alleges a section 1983 cause of action based on malicious prosecution, the claim is insufficient because it fails to state nonconclusory allegations of malice and lack of probable cause for plaintiff's arrest (*see Savino v City of New York*, 331 F3d 63, 72 [2d Cir 2003]). Nor does it allege that the individual defendants acted pursuant to a municipal policy or custom (*see Monell v New York City Dept. of Social Servs.*, 436 US 658, 691 [1978]).

We have considered the remaining contentions and find them unavailing.

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

ENTERED: MARCH 28, 2017

CLERK

Richter, J.P., Mazzarelli, Kahn, Gesmer, JJ.

3555 New York City School Construction Authority, Plaintiff-Appellant, Index 450572/15

-against-

Ennead Architects LLP, Defendant-Respondent.

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

Zetlin & De Chiara LLP, New York (Bill P. Chimos of counsel), for respondent.

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Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered January 15, 2016, which granted defendant's motion to dismiss pursuant to CPLR 3211(a)(5) on statute of limitations grounds, unanimously reversed, on the law, without costs, the motion denied and the complaint reinstated.

On this CPLR 3211(a)(5) motion, defendant did not meet its initial burden of "establishing, prima facie, that the time in which to sue has expired" (*Benn v Benn*, 82 AD3d 548, 548 [1st Dept 2011]). A cause of action to recover damages against an architect for professional malpractice is governed by a three-year statute of limitations, which accrues upon "termination of the professional relationship" – that is, when it "completes its performance of significant (i.e., non-ministerial) duties under

the parties' contract" (*Sendar Dev. Co., LLC v CMA Design Studio P.C.*, 68 AD3d 500, 503 [1st Dept 2009]). As this action was brought on February 27, 2015, plaintiff's claims were timely so long as they accrued on or after February 27, 2012.

Here, defendant continued to carry out its contractual duties well after February of 2012 by, for example, assisting plaintiff with obtaining a final certificate of occupancy (*see e.g. Seradilla v Lords Corp.*, 50 AD3d 345, 346 [1st Dept 2008]). Defendant was contractually obligated to review "as built" drawings under the relevant agreement, which it continued to do after February of 2012 (*Parsons, Brickerhoff, Quade & Douglas, Inc. v EnergyPro Constr. Partners*, 271 AD2d 233, 234 [1st Dept 2000]). The provisions of the parties' contract that the IAS court relied upon in determining that the parties' relationship ended in 2009 when the work was "substantially completed" were at best ambiguous, and certainly not sufficient to satisfy defendant's threshold burden of establishing untimeliness (*Benn*, 82 AD3d at 548; *Rosalie Estates v Colonia Ins. Co.*, 227 AD2d 335, 336 [1st Dept 1996]).

As an alternative holding, we conclude that the continuous representation doctrine toll applies, at least with respect to defendant's attempts after February 2012 to remedy the faulty

design of the custom etched-glass windows (*City of New York v Castro-Blanco, Piscioneri & Assoc.*, 222 AD2d 226, 227-228 [1st Dept 1995]). Defendant does not dispute that it performed these services within three years of the action being commenced.

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

ENTERED: MARCH 28, 2017

CLERK

Richter, J.P., Mazzarelli, Kahn, Gesmer, JJ.

3556 Index 24098/13
84008/14

Mark A. Solano, et al.,
Plaintiffs-Respondents,

-against-

Skanska USA Civil Northeast Inc., et al.
Defendants,

Durr Mechanical Construction, Inc., also known as "DMC" also known as "Durr," Durr Mechanical Contracting, Inc., also known as Durr Mechanical Cont. Inc., et al.,
Defendants-Appellants.

- - - - -

[And a Third-Party Action]

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Bartlett, McDonough & Monaghan, LLP, White Plains (David C. Zegarelli of counsel), for appellants.

Pirrotti & Glatt Law Firm PLLC, Scarsdale (Anthony Pirrotti, Jr. of counsel), for respondents.

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Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered February 24, 2016, which denied the motion of defendants Durr Mechanical Construction, Inc. and Durr Mechanical Contracting, Inc. (collectively Durr) for summary judgment dismissing the complaint and all cross claims as against them, unanimously modified, on the law, to the extent of dismissing the Labor Law § 241(6) claim as against Durr, and otherwise affirmed, without costs.

Plaintiff Mark Solano was injured when, while working on the

roof of a water treatment plant, he tripped and fell on two metal pipes protruding from the surface of the roof as he was stepping back to close the lid of a gang box.

Because discovery has not been completed, and depositions have yet to be taken, Durr's motion, to the extent it sought dismissal of the common-law negligence and Labor Law § 200 claims, was properly denied as premature (CPLR 3212[f]). Durr may be held liable as a statutory agent if it had been delegated authority to supervise and control the work that brought about plaintiff's injury (*see Barreto v Metropolitan Transp. Auth.*, 25 NY3d 426, 434 [2015]; *Fraser v Pace Plumbing Corp.*, 93 AD3d 616 [1st Dept 2012]). Plaintiff has demonstrated that further discovery may lead to evidence showing that Durr had supervisory authority over work involving the pipes and the area where plaintiff fell (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 506 [1993]; *Barrios v Boston Props. LLC*, 55 AD3d 339 [1st Dept 2008]).

Nevertheless, the Labor Law § 241(6) claim should have been dismissed, since the Industrial Code (12 NYCRR) section cited by plaintiff as a predicate for this claim is inapplicable. While plaintiff argues that 12 NYCRR 23-1.7(e)(1) applies, his own submissions, including a photograph of the area where he fell, establish that the accident occurred in an open area, as opposed

to a "passageway" (*DePaul v NY Brush LLC*, 120 AD3d 1046, 1047 [1st Dept 2014]).

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

ENTERED: MARCH 28, 2017

CLERK

Richter, J.P., Mazzarelli, Kahn, Gesmer, JJ.

3557 The People of the State of New York, Respondent, Ind. 1947/11

-against-

Tyshell Williams, Defendant-Appellant.

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John S. Campo, Hempstead, for appellant.

Darcel D. Clark, District Attorney, Bronx (Andrew J. Zapata of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Eugene Oliver, J.), rendered September 30, 2015, convicting defendant, after a jury trial, of criminal possession of a weapon in the second degree, and sentencing her to a term of five years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility. The evidence established that defendant furnished a weapon to the codefendant, who fired it at the victims.

The court providently exercised its discretion in permitting the People to introduce a diagram for the purpose of aiding the jury in understanding the complex relationship among various persons involved in the incident (*see People v Del Vermo*, 192 NY 470, 482 [1908]; *People v Shields*, 100 AD3d 549, 550-551 [1st

Dept 2012]), and in admitting evidence of a prior altercation that provided relevant background to the charged crime (*see People v Dorm*, 12 NY3d 16, 19 [2009]).

The court did not err in giving the jury a lunch recess during the prosecutor's summation, which had followed summations by the attorneys for defendant and the codefendant. Such scheduling matters are addressed to the court's sound discretion (*see People v Spears*, 64 NY2d 698, 699-700 [1984]), and defendant has not shown any resulting prejudice.

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

ENTERED: MARCH 28, 2017

CLERK

Richter, J.P., Mazzarelli, Kahn, Gesmer, JJ.

3558 ESRT 250 West 57th St., L.L.C., Index 158006/15
Plaintiff-Respondent,

-against-

13D/West 57th LLC, et al.,
Defendants-Appellants.

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13D/West 57th LLC,
Counterclaim Plaintiff-Appellant,

-against-

ESRT 250 West 57th St., L.L.C., et al.,
Counterclaim Defendants-Respondents.

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Westerman, Ball, Ederer, Miller, Zucker & Sharfstein, LLP, Uniondale (Jeffrey A. Miller of counsel), for appellants.

Sternbach, Lawlor & Rella LLP, New York (Anthony J. Rella of counsel), for respondents.

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Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered March 4, 2016, which, insofar as appealed from as limited by the briefs, granted the motion of plaintiff and counterclaim defendants' to dismiss the first, second and third counterclaims and the fourth, fifth and part of the third affirmative defenses, unanimously affirmed, without costs.

Defendants, a commercial tenant and its principal, asserted counterclaims and affirmative defenses predicated on the violation of the covenant of quiet enjoyment or constructive eviction. Those claims were properly dismissed, as the only harm

suffered was by tenant's purported subtenant, which subtenancy was wholly unauthorized, in violation of the lease (*see Excel Graphics Tech. v CFG/AGSCB 75 Ninth Ave.*, 1 AD3d 65, 70 [1st Dept 2003], *lv dismissed* 2 NY3d 794 [2004]). Tenant cannot recover for interference by landlord with an unlawful subtenancy (*cf. 150 Greenway Terrace, LLC v Cullen*, 14 Misc 3d 130[A], 2007 NY Slip Op 50020[U] [App Term, 2d Dept 2007]). Defendants' claims are further barred by the clause in the lease that prohibits landlord from being liable for the acts of other tenants (*see Alpha Holding Corp. v Brescio*, 2009 NY Slip Op 30936[U] [Sup Ct, NY County 2009]).

The counterclaim and affirmative defense based on fraud were also properly dismissed. While landlord allegedly knew that the neighboring unit's marijuana smoking would impair defendants' use of the premises, the landlord made no actionable misstatement, and it had no duty to speak, given the arm's length nature of the

landlord-tenant relationship (*see Sehera Food Servs. Inc. v Empire State Bldg. Co. L.L.C.*, 74 AD3d 542 [1st Dept 2010]).

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

ENTERED: MARCH 28, 2017

CLERK

Richter, J.P., Mazzarelli, Kahn, Gesmer, JJ.

3559 Anthony J. Palmiotto, et al., Index 112185/10
Plaintiffs-Respondents,

-against-

Wooster Parking Corp.,
Defendant-Appellant.

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An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Shlomo S. Hagler, J.), entered on or about March 15, 2016,

And said appeal having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated March 7, 2017.

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

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

ENTERED: MARCH 28, 2017

CLERK

Richter, J.P., Mazzarelli, Kahn, Gesmer, JJ.

3560 The People of the State of New York, Ind. 2419/14
Respondent,

-against-

Olga Acevedo,
Defendant-Appellant.

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Ronald Zweibel, J.), rendered March 14, 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: MARCH 28, 2017

CLERK

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

Richter, J.P., Mazzarelli, Kahn, Gesmer, JJ.

3561N Jimmy Macias, Index 306584/10
Plaintiff-Respondent,

-against-

ASAL Realty, LLC,
Defendant-Appellant.

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Law Office of Steven G. Fauth, LLC, New York (Steven G. Fauth of counsel), for appellant.

Friedman, Levy, Goldfarb & Green, P.C., New York (Andrew J. Windman of counsel), for respondent.

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Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered November 9, 2015, which, in this action for personal injuries sustained when plaintiff slipped and fell in defendant's building, granted plaintiff's motion to strike defendant's answer to the extent of directing that an adverse inference charge be given at trial, unanimously affirmed, without costs.

The motion court exercised its discretion in a provident manner in ordering the lesser sanction of an adverse inference charge. Defendant's principal testified that the building superintendent regularly viewed the lobby surveillance tapes, and the superintendent admitted knowing that the video automatically erased itself approximately every two weeks. This knowledge, coupled with the superintendent being at the scene of plaintiff's fall in defendant's building immediately after it occurred, was a

sufficient showing that defendant's destruction of the evidence was, at a minimum, negligent (*see e.g. 320 W. 13th St., LLC v Wolf Shevack, Inc.*, 105 AD3d 586 [1st Dept 2013]). Defendant's argument that a videotape of the entranceway where plaintiff fell is not relevant to his claim, is unpersuasive (*see e.g. Gogos v Modell's Sporting Goods, Inc.*, 87 AD3d 248 [1st Dept 2011]).

We have considered the remaining arguments and find them unavailing.

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

ENTERED: MARCH 28, 2017

CLERK