SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 27, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Mazzarelli, Moskowitz, Renwick, Manzanet-Daniels, JJ.

9862 Raymond Alberto Carreras, et al., Index 17848/05
Plaintiffs-Respondents,

-against-

Morrisania Towers Housing Company
Limited Partnership, et al.,
Defendants-Appellants-Respondents,

McRoberts Protective Agency, Inc.,
Defendant-Respondent-Appellant,

Sonia Meekins, et al.,
Defendants.

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Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Judy C. Selmeci of counsel), for appellants-respondents.

Gallo, Vitucci & Klar, LLP, New York (Chad E. Sjoquist of counsel), for respondent-appellant.

Steven J. Horowitz, New York, for respondents.

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Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered on or about August 23, 2012, which, to the extent appealed from as limited by the briefs, denied the motion of defendants Morrisania Towers Housing Company Limited Partnership and NHPMN Management, LLC, for summary judgment dismissing the complaint as against them, and denied defendant McRoberts Protective Agency, Inc.'s motion for summary judgment dismissing the cross claims against it, unanimously reversed, on the law,

without costs, and the motions granted. The Clerk is directed to enter judgment accordingly.

Defendant Morrisania Towers Housing Company Limited Partnership owns the residential apartment building located at 280/300 East 161st Street in the Bronx, and defendant NHPMN Management, LLC manages the building. Defendant McRoberts Protective Agency, Inc. provides security services for the premises pursuant to an agreement with Morrisania and NHPMN. Plaintiffs, Raymond Carreras and Yolanda Lopez, Carreras's mother, reside in the building.

Although several witnesses described the fight that led to the shooting of Carreras, we will assume for purposes of this motion that Carreras's own version, as related during his deposition, is true. Carreras testified that on May 7, 2005, he was standing in the lobby of the building when he heard a commotion in the rear courtyard involving loud arguing and cursing. He observed a male, who turned out to be defendant Bakim Meekins, with his hands "in [Carreras's] sister's face," and heard his 18-year-old sister calling for their mother. There were other people with Meekins. Carreras immediately walked outside and approached his sister and Meekins. When Carreras arrived in the courtyard, Meekins punched him in the head, sending him to the ground. Carreras got back up and grabbed Meekins and banged his head against the concrete floor several times. Carreras testified that he and Meekins fought for at

least five minutes, and possibly as long as 20 minutes. Carreras stated that he could not have chosen to stop fighting with Meekins because Meekins was holding his head, although he also testified that Meekins only hit him one time. He also said that he could not have let go of Meekins because "[y]ou can't just let go of somebody thinking they are going to stop hitting you."

Eventually, others broke up the fight. Then Carreras saw defendant Sonia Meekins hand Bakim Meekins a gun. Carreras was unable to run from Meekins because of a metal rod in one of his legs, which had been inserted after he had been shot several months earlier in a separate incident. Meekins shot Carreras, paralyzing him.

Carreras's mother, Lopez, who also grappled with someone on the Meekins side of the fight, testified that she came to the courtyard after the physical confrontation began, and saw her son fighting with Bakim Meekins. She asserted that they fought for approximately 15 to 20 minutes and that she decided not to try to break up the altercation because she felt that doing so would hurt Carreras's reputation.

Carreras commenced this action for negligence against Morrisania and McRoberts[1] for failing to secure the premises, and for assault and battery against Sonia and Bakim. Lopez asserted claims for emotional distress. Plaintiffs' bills of particulars

[1] A separate action against the managing agent was consolidated with this one.

alleged that the premises were inadequately secured and that defendants failed to stop the fight and reasonably guard against criminal activity in the building. Morrisania asserted cross claims for contractual indemnification/contribution against McRoberts and common-law indemnification/contribution against McRoberts, Sonia and Bakim.

McRoberts moved for summary judgment dismissing the complaint. It argued that, even if it was negligent in securing the building, its negligence did not proximately cause plaintiffs' injuries, because the injuries were unforeseeable and because plaintiffs' voluntary participation in the fight was a superseding cause of their injuries. McRoberts also sought dismissal of the cross claims on the basis that its only duty was contractual and that at the time of the incident in question it was in full compliance with its contractual obligations to have a guard in a security booth and two guards patrolling the building. McRoberts contended that it had no contractual duty to secure the building or to physically intervene in fights.

Morrisania and NHPMN also moved for summary judgment. They argued that they could not be held liable for a crime committed outside of the building and that they did not have a duty to prevent access to the courtyard, which they characterized as an area open to the public, since it was accessible through an unsecured parking lot. They further contended that Sonia's and Bakim's conduct was intentional and unforeseeable, and

proximately caused plaintiffs' injuries, severing any causal nexus with any negligence of their own. Morrisania and NHPMN also sought summary judgment on their cross claims against McRoberts, asserting that McRoberts assumed all of their security duties in its contract.

Plaintiffs opposed the motions, arguing that Morrisania and NHPMN were liable because the incident occurred on the premises, and that they failed to exercise reasonable care to discover or prevent the Meekinses' conduct. Plaintiffs asserted that a question of fact existed as to the scope of McRoberts's duties and whether it provided comprehensive security, thereby owing plaintiffs a direct duty. They contended that the lack of reasonable security directly caused their injuries, that Morrisania and NHPMN improperly allowed unfettered access to the front and rear of the building, that the Meekinses entered the premises because of these gaps in security, that McRoberts improperly allowed them to enter, and that McRoberts failed to respond to the ensuing violence in a reasonable fashion. Plaintiffs further argued that their injuries were foreseeable, given the extensive history of violent crime in and around the building, and that Carreras's conduct was not a superseding cause of his injuries because he did not willfully precipitate the confrontation.

The motion court denied Morrisania and NHPMN's motion in its entirety, finding that the argument did occur on the premises.

The court found that there was an issue of fact whether the inadequacy of the security proximately caused plaintiffs' injuries. The court dismissed plaintiffs' claims against McRoberts, holding that it did not launch an instrument of harm, that there was no evidence that plaintiffs had relied upon McRoberts, that plaintiffs were not third-party beneficiaries of the contract between McRoberts and Morrisania and NHPMN, and that McRoberts did not entirely assume Morrisania's duty to maintain the premises safely. However, the court refused to dismiss the cross claims against McRoberts, finding that the record was unclear as to whether McRoberts's guards called 911 in a timely fashion, and stated that whether they "allowed the loud argumentation to spiral out of control is a factual issue and cannot be resolved as a matter of law."

Courts in all four judicial departments have found that one who voluntarily participates in a physical fight cannot recover from a party generally charged with ensuring a safe environment. Thus, in *Williams v Board of Educ. of City School Dist. of City of Mount Vernon* (277 AD2d 373 [2d Dept 2000]), the duty of supervision normally imposed on a school was found to have been displaced by the plaintiff student's voluntary participation in a fight. Similar results obtained in *Borelli v Board of Educ. of Highland School Dist.* (156 AD2d 903 [3d Dept 1989) and in *Ruggerio v Board of Educ. of City of Jamestown* (31 AD2d 884, 884 [4th Dept 1969] [holding that "(p)laintiff's conduct,

demonstrating a lack of reasonable regard for his own safety, was a direct cause of the incident resulting in his injury and, as such, defeats his right of recovery against the defendant Board of Education"], *affd* 26 NY2d 849 [1970]).

This Court in *Vega v Ramirez* (57 AD3d 299 [1st Dept 2008]) also held that a plaintiff's willing participation in a fight negates any negligence committed by a defendant with a duty to provide security. There, in a case involving an injury sustained in a bar brawl, we stated that

> "[e]ven assuming a failure to provide reasonable security, any such failure was not a substantial cause of plaintiff's injuries. Plaintiff's own testimony established that he could have remained within the safety of the nightclub at the time the fight broke out and spilled outside, and that he considered such option because of the apparent intensity of the fighting and the overwhelming number of adversaries outside, yet he elected to go outside and join the fight. In so choosing, plaintiff severed any causal connection between the appellants' alleged negligence in providing reasonable security and his injuries (*see generally Turcotte v Fell*, 68 NY2d 432 [1986])" (57 AD3d at 300).

Turcotte v Fell, which this Court relied on in *Vega*, did not involve a fight. Rather, the plaintiff was a professional jockey who was severely injured while riding a horse in a race, his mount having been bumped by a horse in the neighboring lane. The Court of Appeals applied the doctrine of primary assumption of the risk, which, in the context of athletics, recognizes that "[i]f a participant makes an informed estimate of the risks

involved in the activity and willingly undertakes them, then there can be no liability if he is injured as a result of those risks" (68 NY2d at 437). The Court found that the plaintiff obviously assumed the risk of injury, since he made his living riding horses, and that the incident fell within the scope of his consent, since "bumping and jostling are normal incidents of the sport" (*id.* at 441). Of course, the *Turcotte* Court acknowledged that the plaintiff did not assume the risk of sustaining an injury that was intended and that fell outside the accepted boundaries of competition. Accordingly, the doctrine of primary assumption of risk is not completely analogous to the situation where a participant in a brawl is injured by his opponent, because the opponent's purpose is not to compete but to inflict maximum physical harm on him. Nevertheless, this Court appropriately applied the doctrine in *Vega* because, "[a]s a general rule, participants properly may be held to have consented, by their participation, to those injury-causing events which are known, apparent or reasonably foreseeable consequences of the participation" (*68 NY2d* at 439, citing *Maddox v City of New York*, 66 NY2d 270, 277-278 [1985]).

Plaintiffs consented to participating in the brawl in the courtyard, and it was not unforeseeable that the fight would escalate to the point where a gun was fired. Indeed, plaintiffs concede this, asserting that defendants should be held liable because the building was exceedingly dangerous and several

shootings had occurred on the premises before the incident in question. Further, Carreras had been shot in the building's lobby a few months before the incident. Plaintiffs' reliance on *McKinnon v Bell Sec.* (268 AD2d 220 [1st Dept 2000]) is unavailing. In that case, this Court found that an issue of fact existed whether the plaintiff voluntarily participated in a physical fight with another person at a fraternity party. There was evidence in the record that the plaintiff, although he went around a security guard to approach a suspected thief whom the guard was attempting to escort off the premises, merely wanted to ask the suspect a question. The Court thus found that it was premature to conclude that the plaintiff consented to being punched by the suspect. Here, even if Carreras did not initially intend to fight the person who was confronting his sister, that was a highly foreseeable consequence of inserting himself into the situation, especially in the environment plaintiffs depict.

In any event, there can be no question that Carreras voluntarily perpetuated the confrontation after he was first hit by Bakim Meekins. Carreras's testimony that he had to continue slamming Meekins's head on the ground because otherwise Meekins would have continued hitting him is speculative, and in any event does not constitute reasonable justification for his decision to continue fighting. Thus, because he willingly entered and

continued to participate in the fracas, Carreras severed the causal link between his injury and any negligence defendants may have committed in permitting the Meekinses onto the premises (*see Vega*, 57 AD3d at 300).

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

ENTERED: JUNE 27, 2013

CLERK

Gonzalez, P.J., Mazzarelli, Moskowitz, Renwick, Manzanet-Daniels, JJ.

9876N 433 Sutton Corp., Index 110071/11
Plaintiff-Respondent,

-against-

Robert Broder,
Defendant-Appellant.

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Rappaport, Hertz, Cherson & Rosenthal, P.C., Forest Hills (Jeffrey M. Steinitz of counsel), for appellant.

Cantor, Epstein & Mazzola, LLP, New York (Robert I. Cantor of counsel), for respondent.

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Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered February 28, 2012, which denied defendant's motion for attorneys' fees, reversed, on the law and the facts, without costs, the motion granted, and the matter remanded to Supreme Court for a hearing on the amount of reasonable attorneys' fees owed to defendant.

In this dispute between defendant shareholder and plaintiff cooperative association, the tenant shareholder's successful defense against the coop's action and application for a preliminary injunction warrants an award of attorneys' fees in

his favor (Real Property Law § 234; *see Duell v Condon*, 200 AD2d 549 [1st Dept 1994], *affd* 84 NY2d 773 [1995]; *Sperling v 145 E. 15th St. Tenants' Corp.*, 174 AD2d 498, 499 [1st Dept 1991]).

On August 25, 2011, neighboring tenants of defendant complained of a stench emanating from his apartment. Plaintiff's staff did not first attempt to contact defendant, as per the proprietary lease, which provides for notice and an opportunity to cure any condition or effect repairs prior to entry by the owner,[1] but instead used the spare key at the desk to enter the apartment. Upon discovering that the key opened only the bottom and not the top lock, plaintiff's staff engaged a locksmith to drill out the lock. Once inside the apartment, plaintiff's staff ascertained that the source of the odor was defendant's pet cat. The board president instructed a member of the staff to purchase and put in fresh kitty litter. The staff did as they had been instructed and left the apartment, locking the bottom lock.

At the time, defendant was upstate as part of a search and rescue team dispatched in the aftermath of Hurricane Irene. When contacted by the president of the board, on August 26th, he

[1]Paragraph 19 of the proprietary lease, which governs interior repairs, provides that the lessee shall keep the interior of the apartment, including walls, floors and ceilings in good repair and condition. The paragraph further provides that in the event of "the refusal or the neglect of the Lessee, during ten days after notice in writing from the Lessor, to make such repairs or to restore the apartment to good condition, such repairs of restoration may be made by the Lessor, which shall have the right . . . to enter the apartment for that purpose."

responded that he would return to clean the apartment. Defendant returned on August 27th, at approximately 3:00 a.m., and removed the cat. The night doorman informed the president that defendant had brought the cat downstairs in a carrier. The board president testified that following the removal of the cat, "[t]he odor is dissipating, significantly so."

Plaintiff coop commenced an action by order to show cause filed on September 1, 2011, together with the summons and complaint, seeking injunctive relief and damages on account of defendant's alleged violation of the proprietary lease and house rules. Plaintiff sought a preliminary injunction authorizing it to remove "junk and filth" from the apartment, as well as defendant's "neglected" house cat, which plaintiff believed had been "abandoned" in the apartment "for over a week." Plaintiff asserted that the conditions present in the apartment "require an imminent and emergency response . . . because [defendant] seems unwilling or unable to address these conditions."

The court granted the ex parte application for a temporary restraining order pending a hearing on the motion to the extent of allowing plaintiff access to defendant's apartment to, inter alia, "remove all odor producing garbage and food stuffs as well as waste and areas of infestation."

Following the hearing, the court denied plaintiff's motion for a preliminary injunction, finding that plaintiff had violated the proprietary lease by failing to give defendant the requisite

notice and opportunity to cure before resorting to self-help, as set forth in paragraph 19 of the lease. The court noted that while the affidavits offered by plaintiff's representatives in support of the TRO were "equivocal" as to whether the cat remained in the apartment, the testimony of those same individuals at the hearing unequivocally established that the cat had been removed prior to the time the application for a TRO had been made. The court stated, "So it wasn't equivocal, it was very clear that the cat had been removed. That was not presented to this court in anticipation of a TRO, there was not written notice followed by a period to cure. Instead you came running to the court." The court noted that although it had permitted only the removal of organic matter which might have caused the noxious smell, a video recording of the removal showed a "wholesale taking of things . . . not the kind of odor producing organic matter that the court instructed be removed." The court dismissed the action sua sponte and denied plaintiff's motion for attorneys' fees. The court also denied defendant's application for attorneys' fees as the prevailing party, opining that "equitable considerations dictate that the instant motion for attorneys' fees by [defendant tenant] must be denied."

We now reverse the order, grant the motion, and remand for a hearing on the amount of reasonable attorneys' fees owed to defendant tenant. Defendant was unquestionably the "prevailing party" under the relevant case law. The court sua sponte

dismissed the action upon a finding that plaintiff was not entitled to a preliminary injunction and had in fact breached the lease by failing to give defendant the requisite notice and opportunity to cure before resorting to self-help.

Plaintiff's reliance on *Ram v Stuart* (248 AD2d 255 [1st Dept 1998]), for the proposition that a tenant who breaches the lease is not entitled to an award of attorneys' fees, even if successful, is misplaced. Assuming, arguendo, that defendant breached the lease and/or house rules (which has not been established),[2] plaintiff's remedy in the event of breach, as set forth in the lease, was to give 10 days' written notice and an opportunity to cure prior to entering the premises and resorting to self-help. Plaintiff having failed to comply with its duties under paragraph 19, any alleged nuisance in the apartment had not ripened into a breach of the lease.

The testimony was unequivocal that the cat had been removed in the early morning hours of August 27th, shortly after defendant had been contacted by the board president; accordingly, there was no continuing nuisance (and arguably no breach of the proprietary lease) at the time plaintiff made an application for a TRO. Indeed, the court noted that "[p]laintiff's representations in support of interim relief were not entirely forthright . . . . Plaintiff made much of the cat being a

[2]Plaintiff maintains that defendant is responsible for a continuing nuisance and for harboring a cat without permission.

continuing source of odors, and alluded to the dangers to the animal itself in not having water and being trapped without care."

Plaintiff acted improperly by failing to give defendant the requisite notice and opportunity to cure and resorting to self-help before it commenced the action. Plaintiff failed to advise the court that defendant had removed the cat from the premises prior to the making of the motion, thereby ameliorating any alleged nuisance. Because plaintiff disingenuously chose not to disclose significant facts at the time it made an application for a TRO – facts that ultimately came to light during the course of the hearing – plaintiff was required to retain counsel and incur costs in defending the action and opposing plaintiff's motion for a preliminary injunction.

Since the court not only denied plaintiff's action for injunctive relief, but dismissed the action, the ultimate outcome was in defendant's favor and defendant is entitled to an award of attorneys' fees (*see 25 East 83 Corp. v 83rd St. Assocs.*, 213 AD2d 269 [1st Dept 1995]).

All concur except Mazzarelli and Moskowitz, JJ. who dissent in a memorandum by Moskowitz, J. as follows:

MOSKOWITZ, J. (dissenting)

In my view, defendant is not entitled to an award of attorneys' fees because he did not prevail in this action. Thus, I respectfully dissent.

Plaintiff 433 Sutton Corp. (the cooperative) is the owner of a cooperative apartment building located in Manhattan. Defendant is a tenant shareholder of the cooperative and resides in an apartment on the third floor of the building, pursuant to his proprietary lease. On August 18, 2011, neighboring tenants on the third floor began complaining of an overpowering stench emanating from defendant's apartment and throughout the hallway. The tenants reported that they had not seen defendant around the building in weeks and that the odor was growing worse each day.

On August 25, 2011, obtaining no response from inside defendant's apartment and fearing that he had died in the apartment, plaintiff's president authorized a locksmith's services, as defendant had not given plaintiff the correct key as the proprietary lease required. Plaintiff's representatives and the locksmith, in the presence of a police officer, entered the apartment only to encounter an overwhelming, "gag-inducing" stench. They discovered a house cat that had apparently been alone in the apartment for some time without water or a clean litter box; the cat had relieved itself throughout the apartment. Even apart from the cat waste, plaintiff's representatives found the apartment in a "repugnant state," with mouse droppings on the

floor and piles of garbage, papers, clothing and food, leaving only narrow pathways in between. They promptly changed the litter box and left water for the cat. The following day, plaintiff's president spoke with defendant by phone, after locating him upstate. In the early hours of the next morning, August 27, 2011, upon returning to the apartment, defendant removed the cat and some garbage before leaving to go back upstate.

After that, plaintiff cooperative commenced this action for injunctive relief, alleging that defendant's remedial actions had not eliminated the odor and the apartment remained an immediate and serious health hazard. Plaintiff further alleged that defendant had violated several provisions of the proprietary lease, including paragraph 19 that required him to "keep the interior of the apartment . . . in good repair and good condition" and paragraph 17 that prohibited him from doing anything that would "interfere with" or "annoy" other tenants. In addition, plaintiff noted, defendant had violated the building's "no pet" rule.[1] Plaintiff requested interim relief consisting of permission to gain access to defendant's apartment to clean it and to remove all odor-producing garbage, food stuffs, waste and areas of infestation. Despite notice, defendant chose not to appear. On September 8, 2011, following

[1] The lease also includes notice and cure provisions for the co-op to follow, in the event of a tenant's violation.

the motion court's grant of interim relief, plaintiff's representatives, with a professional cleaner, entered the apartment to clean it and to remove all noxious material and filth. Thereafter, the odor dissipated considerably.

On September 26, 2011, after a hearing on the preliminary injunction, the motion court denied plaintiff's application, finding no evidence of continuing harm because plaintiff had removed the odor-producing material and defendant had not returned the cat to the apartment. The court also denied plaintiff's application for attorneys' fees. Defendant then moved for an award of attorneys' fees, arguing that, as the prevailing party, he was entitled to an award. The court denied the motion. In doing so, the court found that the nuisance matter had been resolved, and the injunction denied, because plaintiff had entered the apartment to remove the offending material. This result, the court concluded, did not render defendant the prevailing party. The court noted that defendant did not appear at the request for interim relief, but instead chose to fetch the cat from the apartment, leaving plaintiff's representations uncontested.

Generally, where, as here, a lease provides for the landlord's entitlement to attorneys' fees in an action involving the tenant's breach, the tenant is entitled to a reciprocal award in an action involving the landlord's breach (*see* Real Property Law § 234). However, a party may generally recover these fees

only if that party "prevails" with respect to the central relief sought (*Nestor v McDowell*, 81 NY2d 410, 415-16 [1993]), and the judgment must be substantially favorable (*Walentas v Johnes*, 257 AD2d 352, 354 [1st Dept 1999], *lv dismissed* 93 NY2d 958 [1999]; *Lynch v Leibman*, 177 AD2d 453 [1st Dept 1991]; *see Pelli v Connors*, 7 AD3d 464 [1st Dept 2004] [no party entitled to recover attorneys' fees where court granted owner access to loft to make repairs, thus resolving controversy, since "mixed outcome . . . was not substantially favorable to either party"]). A court's determination of whom to accord the status of prevailing party "requires an initial consideration of the true scope of the dispute litigated, followed by a comparison of what was achieved within that scope" (*see Excelsior 57th Corp. v Winters*, 227 AD2d 146, 147 [1st Dept 1996]).

Courts have discretion to deny attorneys' fees to a party based on equitable considerations and fairness (*see Kralik v 239 E. 79th St. Owners Corp.*, 93 AD3d 569, 570 [1st Dept 2012]; *Solow Mgt. Corp. v Lowe*, 1 AD3d 135 [1st Dept 2003]). In my view, the motion court properly exercised its discretion in denying defendant's application. Indeed, as the court noted, plaintiff received essentially the relief it requested in its application – namely, "permission to enter the apartment . . . and remove the noxious producing organic matter." Thus, on this basis, it is reasonable to conclude that plaintiff substantially prevailed, notwithstanding the court's ultimate dismissal of the action.

Defendant and the majority insist that defendant was the prevailing party, focusing on plaintiff's alleged violation of the notice and cure provisions of the proprietary lease and the motion court's dismissal of the action. However, although it failed to follow the notice and cure procedures before initially entering defendant's apartment, plaintiff was faced with an emergency situation that defendant himself brought about with his own violations of the lease. As the motion court explained, "plaintiff was forced to take action to protect complaining neighbors from what was described as 'this stench [that] had started a week prior and had grown progressively worse during the course of that week.'" Indeed, not only was the odor emanating from defendant's apartment because he had left the cat, but also because of the presence of the odor-producing organic matter throughout the apartment, as illustrated in photographs and a video recording in the record.

In any event, contrary to the majority's assertion that the motion court denied the preliminary injunction because plaintiff breached the notice and cure provisions of the lease, the court actually denied that relief, as it restated in its February 28, 2012 order, because plaintiff had removed the "noxious causing

matter" and "there was no demonstrated continuing harm." Accordingly, under the circumstances of this case, I see no reason to overturn the motion court's sound decision based on equitable considerations.

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

ENTERED: JUNE 27, 2013

CLERK

Gonzalez, P.J., Renwick, DeGrasse, Manzanet-Daniels, Feinman, JJ.

10468 The People of the State of New York, Ind. 3412/07
Respondent,

-against-

Jose Galindo,
Defendant-Appellant.

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

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

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Order, Supreme Court, New York County (Ruth Pickholz, J.), entered on or about October 4, 2011, which adjudicated defendant a level three sex sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Defendant should have been assessed 15 points, instead of 30, for a prior robbery committed in Pennsylvania. The risk assessment guidelines define a "violent felony," warranting 30 points under risk factor nine, as having the same meaning as in Penal Law § 70.02(1), and the People do not dispute that defendant's Pennsylvania robbery conviction would have constituted only third-degree robbery in New York, an offense not listed in Penal Law § 70.02(1). Nevertheless, the record shows that the conduct underlying defendant's foreign conviction was within the scope of a New York felony offense, warranting the

assessment of 15 points under risk factor nine (*see generally Matter of North v Board of Examiners of Sex Offenders of State of N.Y.*, 8 NY3d 745, 752 [2007]).

In any event, even without assessing points for a felony conviction of any kind, the record supports the court's discretionary upward departure to level three. Clear and convincing evidence established aggravating factors that were not otherwise adequately taken into account by the risk assessment guidelines (*see e.g. People v Larkin*, 66 AD3d 592 [1st Dept 2009], *lv denied* 14 NY3d 704 [2010]). The underlying sex crime was very serious, as was the Pennsylvania incident, which had a sexual component. Defendant has demonstrated a high risk of sexual recidivism, which outweighs the mitigating factors he cites.

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

ENTERED: JUNE 27, 2013

CLERK

Gonzalez, P.J., Renwick, DeGrasse, Manzanet-Daniels, Feinman, JJ.

10470 In re Dimitrios Tsamos, Index 113072/11
Petitioner-Appellant,

-against-

The Department of Citywide
Administrative Services, et al.,
Respondents-Respondents.

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Law Office of Gregory T. Chillino, New York (Christopher M. Slowik of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Scott Shorr of counsel), for respondents.

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Judgment, Supreme Court, New York County (Paul Wooten, J.), entered October 4, 2012, which denied the petition seeking to annul a determination of respondent Department of Buildings ("DOB"), dated July 26, 2011, denying petitioner's application for a master fire suppression piping contractor license, and dismissed the proceeding brought pursuant to CPLR Article 78, unanimously affirmed, without costs.

DOB's determination that petitioner failed to supply satisfactory proof of at least seven years of experience in the design and installation of fire suppression systems is rationally based in the record and is not arbitrary and capricious (*see Arbuiso v New York City Dept. of Bldgs.*, 64 AD3d 520, 522 [1st Dept 2009]). The evidence establishes that prior to the proceedings at issue here, DOB granted petitioner's application for a license as a master plumber, crediting him with, among

other things, experience gained during full-time employment as a plumber between March 29, 1999, and October 7, 2004. Although petitioner and the master fire suppression piping contractor who supervised his work maintain that during that same period, petitioner worked up to 70 hours a week, including working "on and off" and "sporadically" on three fire suppression projects, they concede that he worked "primarily" as a plumber. The record therefore does not establish the requisite full-time employment in fire suppression during the 7 years preceding his application for a license.

Petitioner contends that DOB's conclusion that his salary range during the relevant period was not high enough to support a determination that he "worked double shifts" is "inconsistent with the facts." However, DOB rationally concluded that the range of total annual wages during the relevant period was not sufficient to support the equivalent of full-time employment both in plumbing and fire suppression. We note that the governing rules clearly contemplate that the members of the Master Plumbers & Fire Suppression Piping Contractors License Board, whose determination was adopted by DOB, have sufficient knowledge of

the plumbing and fire suppression industries to be familiar with the prevailing "wages appropriate for the trade" (1 RCNY § 104-01[c][2]).

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

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

ENTERED: JUNE 27, 2013

CLERK

Gonzalez P.J., Renwick, DeGrasse, Manzanet-Daniels, Feinman, JJ.

10471 In re Shariah T.,

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

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Law Office of Cabelly & Calderon, Jamaica (Lewis S. Calderon of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Deborah A. Brenner of counsel), for presentment agency.

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Order of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about August 22, 2012, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that she had committed acts that, if committed by an adult, would constitute the crime of attempted assault in the third degree, and placed her on probation for a period of 12 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's determinations concerning credibility.

The court properly exercised its discretion in adjudicating appellant a juvenile delinquent and placing her on probation. The court adopted the least restrictive dispositional alternative consistent with appellant's needs and those of the community (*see Matter of Katherine W.*, 62 NY2d 947 [1984]). Although, like the

appellant in *Matter of Tyttus D.* (__ AD3d __, 2013 NY Slip Op 03939 [1st Dept 2013]), this was the appellant's first interaction with the juvenile justice system, here, unlike *Tyttus D.*, the appellant neither expressed remorse nor demonstrated any insight into the wrongfulness of her conduct. During this assault, appellant encouraged her accomplice to hit the victim. Although the victim attempted to defend herself, after the exchange of several punches, the accomplice pulled the victim to the ground by her hair. As the victim tried to stand up, and the accomplice continued to hold her by the hair, appellant, while wearing hard toed boots, kicked the fallen victim twice in the head. Appellant's poor school attendance (39 absences and 21 latenesses), which her mother thought satisfactory, and other behavioral issues were additional reasons to impose a period of probationary supervision rather than an adjournment in contemplation of dismissal.

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

ENTERED: JUNE 27, 2013

CLERK

Gonzalez, P.J., Renwick, DeGrasse, Manzanet-Daniels, Feinman, JJ.

10472-
10473 Index 100847/09

1400 Broadway Associates LLC,
Plaintiff-Respondent,

-against-

112-1400 Trade Properties LLC,
Defendant-Appellant.

_____

Edwards Wildman Palmer LLP, New York (Anthony J. Viola of counsel), for appellant.

Stern Tannenbaum & Bell LLP, New York (David S. Tannenbaum of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Jeffrey K. Oing, J.), entered July 31, 2012, inter alia, declaring that plaintiff tenant is not in default under or in breach of the parties' lease as alleged in the December 2, 2008 notice to cure, dismissing defendant landlord's counterclaims, and discharging and releasing plaintiff's undertaking, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered June 19, 2012, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The work identified in defendant's December 2, 2008 notice to cure was not subject to the notice and consent requirements of article 9 of the parties' commercial lease, which, read as a whole, requires notice to, and the consent of, the lessor only with respect to work that (1) constitutes a structural change, alteration or restoration to the building; (2) costs more than

$200,000 in the aggregate; and (3) is not a necessary repair or required to comply with the law, pursuant to articles 7 and 8 of the lease (*see 112 W. 34th St. Assoc., LLC v 112-1400 Trade Props. LLC*, 95 AD3d 529, 533 [1st Dept 2012] [interpreting a lease containing materially indistinguishable provisions], *lv denied* 20 NY3d 854 [2012]). Defendant does not dispute that the work described in Items 1 through 7 of the notice to cure fell within the purview of article 7 or article 8 and therefore is not subject to the notice and consent requirements of article 9. Rather, it argues that the notice and consent requirements of article 9 are applicable to all alterations and all restorations of whatever kind, regardless of whether they were performed pursuant to plaintiff's obligations under article 7 or article 8 or whether they involved a "structural" change, alteration or restoration. This argument ignores the plain terms of the lease.

The motion court properly calculated the total estimated cost of the work described in Items 8 and 9 of the notice to cure by aggregating the costs associated with those items only. Since Items 1 through 7 were not subject to the notice and consent requirements of section 9.01(a) of the lease, which pertains to "any structural change or alteration or restoration involving in the aggregate an estimated cost of more than [$200,000.00]," to include their costs would impermissibly rewrite the terms of the lease (*see Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004]). Moreover, defendant offered no competent

evidence to refute plaintiff's showing that the estimated cost of the work described in Items 8 and 9 was no more than $45,000. Given that the challenged work did not meet the required monetary threshold, we need not consider defendant's argument that its expert's affidavit raised an issue of fact whether the installation of a new canopy in front of the building constituted "structural" work.

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: JUNE 27, 2013

CLERK

Gonzalez, P.J., Renwick, DeGrasse, Manzanet-Daniels, Feinman, JJ.

10474 In re Ghislaine Auguste, Index 113359/11
Petitioner,

-against-

Matthew M. Wambua, etc., et al.,
Respondents.

_____

Law Offices of Karen Takach, PLLC, New York (Karen Takach of counsel), for petitioner.

Michael A. Cardozo, Corporation Counsel, New York (Susan Paulson of counsel), for municipal respondents.

Gutman, Mintz, Baker & Sonnenfeldt, P.C., New Hyde Park (Arianna Gonzalez-Abreu of counsel), for Tower West Assocs. LP, respondent.

_____

Determination of the New York City Department of Housing Preservation and Development respondents (HPD), dated September 7, 2011, which, after a hearing, granted landlord respondent Tower West Associates, LP a certificate of eviction to evict petitioner from her rent-subsidized apartment, 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 [Joan B. Lobis, J.], entered January 26, 2012), dismissed, without costs.

Petitioner admittedly submitted false information to respondents, denying that her daughter was employed in 2008, 2009 and 2010, which was utilized to determine her annual rent and subsidy. As a result, after a hearing at which petitioner was represented by counsel and where she presented evidence, HPD

determined that eviction was warranted. Petitioner contends that given her long-term tenancy, age, health and alleged lack of fluency in English, this penalty is so disproportionate to the offense as to shock the conscience (*see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 233 [1974]).

The hearing officer properly determined that petitioner's testimony, that she was unaware that her daughter, who lived with her, was employed in 2008, 2009 and 2010 because she, petitioner, was ill from July 2007 to July 2008, was not credible and rejected her explanation for submitting falsified letters attesting to her daughter's status as a student. Given the limited public housing available and waiting lists of other families in need of homes, and petitioner's repeated disregard for HPD's rules, termination of her tenancy is not disproportionate to her misconduct (*see Matter of Perez v Rhea*, 20 NY3d 399, 405 [2013]).

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

ENTERED: JUNE 27, 2013

CLERK

Gonzalez, P.J., Renwick, DeGrasse, Feinman, JJ.

10475-
10476 Illinois National Insurance Company,
Plaintiff-Respondent-Appellant,

-against-

Zurich American Insurance Company,
Defendant-Appellant-Respondent,

Hayward Baker Inc., et al.,
Defendants.

Index 603184/08

Coughlin Duffy LLP, New York (Adam M. Smith of counsel), for appellant-respondent.

Law Offices of Michael F. Klag, Brooklyn (Charmagne A. Padua of counsel), for respondent-appellant.

Order, Supreme Court, New York County (Donna M. Mills, J.), entered January 20, 2012, which granted plaintiff Illinois National Insurance Company's motion for summary judgment, denied defendant Zurich American Insurance Company's cross motion for summary judgment, and declared that Zurich is obligated to defend and indemnify nonparty Schiavone Construction Co., Inc./Granite Halmar Construction Company Inc. (Schiavone) in an underlying personal injury action, and order, same court and Justice, entered April 23, 2012, which denied Zurich's motion for leave to renew the prior motions, unanimously affirmed, with costs.

Nonparty Schiavone is a defendant in an underlying personal injury action brought by defendant Robert Boyd, an employee of one of Schiavone's subcontractors, defendant Hayward Baker, Inc., who was injured when a drilling rig fell on him while he was

working on a construction site. As part of the terms of the subcontract between Schiavone and Hayward Baker, Schiavone was to be named as an additional insured under the policy Hayward Baker obtained from defendant Zurich. Hayward Baker complied with this requirement.

After Boyd's injury, Schiavone received notice of his claim in a letter from Boyd's counsel on March 29, 2007. The letter named only Boyd and accused Schiavone of negligence. Schiavone and its insurer, plaintiff Illinois National, undertook an investigation of the claim, eventually determining the Zurich was the proper insurer. On June 29, 2007, Illinois National demanded that Zurich defend and indemnify Schiavone in the underlying action. Zurich disclaimed coverage on the ground of late notice.

The motion court correctly determined that, under the standard "grouping of contacts" analysis, New York law, rather than Maryland law, applies in this case (*see Zurich Ins. Co. v Shearson Lehman Hutton*, 84 NY2d 309, 317 [1994][internal quotation marks omitted]). Indeed, the subcontract between Hayward Baker and Schiavone involved construction services at a site located in New York, Schiavone formed a joint venture in New York to perform those services, the accident and resulting litigation occurred in New York, Zurich asserts that it is a New York corporation with a home office in New York, Illinois National is licensed to do business in New York, and the demand letters and responses were sent from the parties' New York

offices (*id.* at 317-318).

Illinois National, in arguing that Maryland law applies, heavily relies on this Court's decision in *Certain Underwriters at Lloyd's, London v Foster Wheeler Corp.* (36 AD3d 17 [1st Dept 2006], *affd* 9 NY3d 928 [2007]). *Foster Wheeler*, however, is not applicable to the facts of this case, as it involved asbestos claims that were spread throughout multiple jurisdictions in the United States (*see* 36 AD3d at 19). Here, Schiavone was added to the Zurich policy as an additional insured to cover a specific risk, the risk arising from Hayward Baker's performance of its subcontract for work at a New York site. While, in theory, the Zurich policy provides to Keller, Hayward Baker's parent company, insurance covering risks in multiple states, it is clear that the parties understood, in adding Schiavone as an additional insured, that the "principal location of the insured risk" was in New York, where the work took place (*id.* at 21-22). Accordingly, New York law should apply.

The motion court correctly declared that Zurich is required to defend and indemnify Schiavone. Schiavone's three-month delay in notifying Zurich of the underlying claim is excusable, given that Schiavone needed to investigate the claim in order to determine basic facts, such as where the claim occurred, the nature of the injury, and the insurer responsible for covering

the claim (*see State of New York v American Natl. Fire Ins. Co.*, 193 AD2d 996, 998 [3d Dept 1993]).

The motion court properly denied Zurich's motion for leave to renew, as Zurich failed to proffer a reasonable excuse for not presenting the allegedly new facts on the initial motions (*see* CPLR 2221[e]; *Sullivan v Harnisch*, 100 AD3d 513, 514 [1st Dept 2012]).

We have considered the appealing parties' remaining arguments for affirmative relief and find them unavailing.

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

ENTERED: JUNE 27, 2013

CLERK

Gonzalez, P.J., Renwick, DeGrasse, Manzanet-Daniels, Feinman, JJ.

10477 Farrokh D. Kamdin, et al., Index 108039/11
Plaintiffs-Appellants,

-against-

The City of New York,
Defendant,

The New York City Department
of Education,
Defendant-Respondent.

_____

Paul W. Siegert, New York, for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Janet L. Zaleon of counsel), for respondent.

_____

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered June 19, 2012, which granted defendant the New York City Department of Education's (DOE) motion to dismiss the complaint, unanimously affirmed, without costs.

In this declaratory judgment action, plaintiffs challenge the DOE's rescission of an offer to their youngest son of placement in the Gifted and Talented (G&T) kindergarten class at P.S. 77 for the 2011-2012 school year. The DOE extended its offer because of a preference given to plaintiffs' son based upon an inaccurate statement in the G&T application that his brother would be attending the school in the 2011-2012 school year. Upon learning that the younger child was not entitled to a sibling priority, the DOE rescinded its offer.

The court system is not the proper forum for this dispute,

as it was within the DOE's discretion to rescind the offer (*see Matter of Older v Board of Educ., Union Free School Dist. No. 1, Town of Mamaroneck*, 27 NY2d 333, 337 [1971]) and such matters can best be resolved by seeking review through the statutory administrative process (*see Hoffman v Board of Educ. of City of N.Y.*, 49 NY2d 121, 127 [1979]). Moreover, plaintiffs' challenge to the propriety of the DOE's rescission ignores the fact that, but for the erroneous information contained in the application, the subject offer would not have been made.

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

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

ENTERED: JUNE 27, 2013

CLERK

Gonzalez, P.J., Renwick, DeGrasse, Manzanet-Daniels, Feinman, JJ.

10478 The People of the State of New York, Respondent, Ind. 2468/10

-against-

Victor Vataj, Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Allen Fallek of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered June 1, 2011, convicting defendant, after a jury trial, of grand larceny in the fourth degree, and sentencing him, as a second felony offender, to a term of 1½ to 3 years, unanimously affirmed.

The court properly declined to submit petit larceny as a lesser included offense No reasonable view of the evidence, viewed in the light most favorable to defendant, supported the conclusion that defendant and his codefendants picked up the victim's cell phone from the floor rather than stealing it from his person by removing it from the victim's hand while he was sleeping (*see e.g. People v Miranda*, 66 AD3d 509 [1st Dept 2009], *lv denied* 13 NY3d 909 [2009]; *People v Holloway*, 45 AD3d 477 [1st Dept 2007], *lv denied* 10 NY3d 766 [2008]). The victim testified that he had fallen asleep with the phone in his hand, and the

police officer testified, without contradiction, that he saw one of the codefendants remove it from the victim's hand while defendant served as a lookout. No evidence supported an inference that anyone picked the phone up from the floor.

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

ENTERED: JUNE 27, 2013

CLERK

Gonzalez, P.J., Renwick, DeGrasse, Manzanet-Daniels, Feinman, JJ.

10479 In re Richard Depamphilis, Index 104116/11
Petitioner-Appellant,

-against-

Raymond W. Kelly, etc., et al.,
Respondents-Respondents.

_____

Karasyk & Moschella, LLP, New York (Philip Karasyk of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Michael D. Stallman, J.), entered May 29, 2012, denying the petition seeking, among other things, to annul respondents' summary termination of petitioner's employment, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Petitioner's conviction, upon his guilty plea, of offering a false instrument for filing in the second degree (Penal Law § 175.30) constitutes a violation of the oath of office, since the offense involves willful deceit. Accordingly, his office was vacated automatically upon conviction, pursuant to Public Officers Law § 30(1)(e) (*see Matter of Feola v Carroll*, 10 NY3d 569, 572-573 [2008]; *Matter of Bowman v Kerik*, 271 AD2d 225 [1st Dept 2000]). We do not reach respondents' argument that petitioner violated New York City Charter § 1116(a) and (b), as it was improperly raised for the first time in their answer in

the article 78 proceeding (*see generally Matter of National Fuel Gas Distrib. Corp v Public Serv. Commn. of the State of N.Y.*, 16 NY3d 360, 368 [2011]).

We have considered all other claims and find them unavailing.

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

ENTERED: JUNE 27, 2013

CLERK

Gonzalez, P.J., Renwick, DeGrasse, Manzanet-Daniels, Feinman, JJ.

10480 Kevin R. Foster, Index 110365/11
Plaintiff-Appellant,

-against-

Lashonda J. Matlock, et al.,
Defendants,

Sandra M. Rose, etc.,
Defendant-Respondent.

_____

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Joan M. Kenney, J.), entered on or about May 22, 2012,

And said appeal having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated June 5, 2013,

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

ENTERED: JUNE 27, 2013

CLERK

Gonzalez, P.J., Renwick, DeGrasse, Manzanet-Daniels, Feinman, JJ.

10481 The People of the State of New York, Ind. 1711/08
Respondent,

-against-

James Gonzalez,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Jane Levitt 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 (Michael J. Obus, J.), rendered on or about February 2, 2009,

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: JUNE 27, 2013

CLERK

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

Gonzalez, P.J., Renwick, DeGrasse, Manzanet-Daniels, Feinman, JJ.

10482 In re The City of New York, et al., Index 400177/10
Petitioners-Appellants,

-against-

The Board of Collective Bargaining
of the City of New York, et al.,
Respondents-Respondents.

_____

Michael A. Cardozo, Corporation Counsel, New York (Julian L. Kalkstein of counsel), for appellants.

John F. Wirenius, New York, for The Board of Collective Bargaining of the City of New York and Marlene A. Gold, respondents.

The Law Offices of Fausto E. Zapata, Jr., P.C., New York (Fausto E. Zapata, Jr. of counsel), for Local 333, United Marine Division, International Longshoremen's Association, AFL-CIO, and William Harrigan, respondents.

_____

Order and judgment (one paper), Supreme Court, New York County (Alice Schlesinger, J.), entered November 4, 2010, which denied the petition brought pursuant to CPLR article 78 seeking to annul the decision of respondent Board of Collective Bargaining of the City of New York to grant the union respondents' improper practice petition, and granted respondents' cross motions to dismiss the proceeding, unanimously affirmed, without costs.

The federal regulations relied on by petitioners did not preempt their obligation to collectively bargain and permit them to unilaterally impose the disputed requirement of a doctor's "fit for duty" statement following an employee's absence from

work for three or more days (*see Matter of City of Watertown v State of N.Y. Pub. Empl. Relations Bd.*, 95 NY2d 73, 77 [2000]). Nor were petitioners absolved from bargaining on "public policy" grounds based on the Department of Transportation's (DOT) mission of providing safety in the ferry system. The record neither establishes that the rule unilaterally imposed by DOT would substantially further its core mission of safety (*see Matter of New York City Tr. Auth. v New York State Pub. Empl. Relations Bd.*, 19 NY3d 876 [2012]), nor that any demonstrable need for the new standard outweighed its adverse impact on the collectively-bargained rights of the employees to whom it would apply (*see Matter of New York City Tr. Auth. v New York State Pub. Empl. Relations Bd.*, 78 AD3d 1184, 1186 [2nd Dept 2010], *affd* 19 NY3d 876 [2012], citing *Matter of Lippman v Publ. Empl. Relations Bd.*, 296 AD2d 199, 209 [3rd Dept 2002]).

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

ENTERED: JUNE 27, 2013

CLERK

Gonzalez, P.J., Renwick, DeGrasse, Manzanet-Daniels, Feinman, JJ.

10483 The People of the State of New York, Respondent, Ind. 4234/09

-against-

Kenith Agard, Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Susan H. Salomon of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered May 25, 2010, convicting defendant, after a jury trial, of robbery in the first and third degrees, and sentencing him, as a second violent felony offender, to consecutive terms of 12 years and 2 to 4 years, unanimously affirmed.

The court properly exercised its discretion in denying defendant's application to substitute new counsel after giving him repeated opportunities to explain why he wanted a different lawyer (*see People v Porto*, 16 NY3d 93, 100 [2010]). Defendant was not prevented from explaining why he wanted a new lawyer (*compare e.g. People v Branham*, 59 AD3d 244 [1st Dept 2009]). On the contrary, the court considered and rejected defendant's explanation. At most, defendant's allegations evinced disagreements with counsel over strategy on the eve of trial, which were not sufficient grounds for substitution (*see People v Linares*, 2 NY3d 507, 510-511 [2004]).

The court also properly responded to defendant's motion to proceed pro se. The record belies his contention that the court coerced him to withdraw his application, and instead demonstrates that the court fulfilled its obligation to undertake a "searching inquiry" to ascertain whether defendant's waiver of his right to counsel was knowing, voluntary and intelligent, and to confirm that defendant was "aware of the dangers and disadvantages of proceeding without counsel" (*People v Crampe*, 17 NY3d 469, 481 [2011]; *People v Arroyo*, 98 NY2d 101, 104 [2002]). The court's inquiry into the extent of defendant's knowledge of criminal law and procedure properly served to warn defendant that his lack of knowledge, relative to that of his attorney, could be detrimental if he chose to waive his right to counsel (*see People v Sealy*, 102 AD3d 591 [1st Dept 2013]).

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

ENTERED: JUNE 27, 2013

CLERK

Gonzalez, P.J., Renwick, DeGrasse, Manzanet-Daniels, Feinman, JJ.

10484 Douglas Flynn, Index 107370/09
Plaintiff-Appellant-Respondent, 591063/09
590869/10
591007/10

-against-

835 6th Avenue Master L.P., etc., et al.,
Defendants-Respondents-Appellants.

- - - - -

835 6th Avenue Master L.P., etc., et al.,
Third-Party Plaintiffs-
Respondents-Appellants,

-against-

Century-Maxim Construction Corp., et al.,
Third-Party Defendants-Respondents.

- - - - -

Century-Maxim Construction Corp.,
Second Third-Party
Plaintiff-Respondent,

-against-

Rebar Lathing Corp.,
Second Third-Party
Defendant-Respondent.

- - - - -

835 6th Avenue Master L.P., etc., et al.,
Third Third-Party Plaintiffs-
Respondents-Appellants,

-against-

Rebar Lathing Corp.,
Third Third-Party
Defendant-Respondent.

_____

Alexander J. Wulwick, New York, for appellant-respondent.

Marshall Dennehey Warner Coleman & Goggin, P.C., New York (John T. Cofresi of counsel), for respondents-appellants.

Milber, Makris, Plousadis & Seiden, LLP, Woodbury (Lorin A. Donnelly of counsel), for Century-Maxim Construction Corp., respondent.

Camacho Mauro Mulholland, LLP, New York (Peter J. LoPalo of counsel), for Spieler & Ricca Electrical Co., Inc., respondent.

Newman Myers Kreines Gross Harris, P.C., New York (Olivia M. Gross and Adrienne Yaron of counsel), for Rebar Lathing Corp., respondent.

_____

Order, Supreme Court, New York County (Judith J. Gische, J.), entered July 3, 2012, which, to the extent appealed from as limited by the briefs, granted plaintiff's cross motion for leave to amend his bill of particulars, granted defendants', third-party defendants', and second and third third-party defendants' motions for summary judgment dismissing plaintiff's Labor Law § 241(6) claim, and denied defendants' motion for summary judgment on their contractual indemnification claims against third-party defendants Century-Maxim Construction Corp. and Spieler & Ricca Electrical Co., Inc. (Spieler), unanimously modified, on the law, to grant defendants' motion for summary judgment on their contractual indemnification claims against Century-Maxim and Spieler, and otherwise affirmed, without costs.

The court properly permitted plaintiff to amend the bill of particulars, since no prejudice accrued from plaintiff's late invocation of violations of 12 NYCRR 23-1.7(e)(2) and

23-2.1(a)(1), and the claims entailed no new factual allegations or theories of liability (*see Burton v CW Equities, LLC*, 97 AD3d 462, 463 [1st Dept 2012]; *Latchuk v Port Auth. of N.Y. & N.J.*, 71 AD3d 560, 560-561 [1st Dept 2010]).

The court also properly granted summary judgment dismissing plaintiff's § 241(6) claim, amendment notwithstanding. Plaintiff's testimony showed that the rebar that allegedly caused him to fall was in the process of being installed and thus integral to the ongoing work, defeating his claim of a violation of 12 NYCRR 23-1.7(e)(2) (*see Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 383 [1st Dept 2007]). Moreover, given plaintiff's vague and inconsistent testimony concerning the condition of the stacked rebar, his claim that the accident was caused by the rebar being stored in an unstable manner in violation of 12 NYCRR 23-2.1(a)(1) is based on mere speculation (*compare Castillo v 3440 LLC*, 46 AD3d 382, 383 [1st Dept 2007]).

However, pursuant to their contracts with Century-Maxim and Spieler, defendants are entitled to the costs and attorneys' fees incurred by them in defense of this action. The clauses at issue provide for indemnification, including costs and fees arising from "any act or omission," and do not require proof of negligence to be enforced (*Matter of New York City Asbestos*

Litig., 41 AD3d 299, 302 [1st Dept 2007]). Moreover, the record does not contain any evidence that defendants were negligent (*see Alarcon v UCAN White Plains Hous. Dev. Fund Corp.*, 100 AD3d 431, 432 [1st Dept 2012]).

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

ENTERED: JUNE 27, 2013

CLERK

Gonzalez, P.J., Renwick, Manzanet-Daniels, Feinman, JJ.

10485 In re David Kassel, Index 600005/12
Petitioner-Appellant,

-against-

Citrin Cooperman and Co. LLC,
Respondent-Respondent.

_____

Thomas D. Shanahan, P.C., New York (Thomas D. Shanahan of counsel), for appellant.

Jaffe, Ross & Light LLP, New York (Lawrence Fechner of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Carol E. Huff, J.), entered January 11, 2013, which, to the extent appealed from, denied the petition to stay arbitration and dismissed the proceeding, unanimously affirmed, with costs.

Respondent Citrin Cooperman and Co. LLC, an accounting firm, demanded arbitration pursuant to the parties' "Engagement Letter," to recover approximately $30,000 in fees it claims petitioner owes for services provided by one of its employees as an expert witness in commercial litigation in which petitioner was involved. Petitioner refused to arbitrate and commenced this proceeding, based, primarily, on allegations that his former counsel acted improperly by, among other things, ignoring petitioner's request to terminate respondent's services. That petitioner may have a claim against his former counsel does not warrant a stay of the arbitration proceeding (*see Silverman v Benmor Coats, Inc.*, 61 NY2d 299, 302-303 [1984]).

We have considered respondent's request for attorneys' fees in connection with this appeal and find it unavailing. This is not an action to collect unpaid fees as contemplated by the engagement letter. This proceeding was commenced solely for the purpose of staying the arbitration pending a determination of the arbitral issues.

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

ENTERED: JUNE 27, 2013

CLERK

Gonzalez, P.J., Renwick, DeGrasse, Manzanet-Daniels, Feinman, JJ.

10486N Macy's Inc., et al., Index 652861/12
Plaintiffs-Respondents,

-against-

J.C. Penny Corporation, Inc.,
Defendant-Appellant.

_____

Nixon Peabody LLP, New York (Frank H. Penski of counsel), for appellant.

Jones Day, New York (Michael A. Platt of counsel), for respondents.

_____

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered October 11, 2012, which, to the extent appealable, denied defendant's motion to disqualify plaintiffs' counsel, unanimously affirmed, with costs.

The portion of the subject order that denied defendant's oral application to supplement the record did not resolve a motion made on notice, so no interlocutory appeal lies therefrom as of right (CPLR 5701[a][2]; *see Sholes v Meagher*, 100 NY2d 333, 336 [2003]; *Smith v United Church of Christ*, 95 AD3d 581 [1st Dept 2012], *lv denied and dismissed* 19 NY3d 940 [2012]; *Manning v City of New York*, 29 AD3d 361 [1st Dept 2006], *lv denied* 7 NY3d 708 [2006]). Defendant's remedy was to either move Supreme Court to vacate the order that denied its application, the denial of which would have been appealable (*see Sholes*, 100 NY2d at 335),

or to move for leave to appeal to this Court by permission (*see* CPLR 5701[c]; *AllianceBernstein L.P. v Atha*, 100 AD3d 499 [1st Dept 2012]; *Manning*, 29 AD3d at 361), and defendant did not avail itself of either remedy.

Supreme Court providently exercised its discretion in denying defendant's motion to disqualify Jones Day from representing plaintiffs in this action because Jones Day informed defendant about potential conflicts, and defendant waived its right to protest thereto (*see McElduff v McElduff*, 101 AD3d 832, 833 [2d Dept 2012]; *Harris v Sculco*, 86 AD3d 481 [1st Dept 2011]). By agreement dated March 7, 2008 Jones Day undertook to represent defendant regarding certain "intellectual property litigation and trade mark registration" in Asia. That agreement expressly informed defendant about the possibility that Jones Day's present or future clients "may be direct competitors of [defendant] or otherwise may have business interests that are contrary to [defendant]'s interests," and "may seek to engage [Jones Day] in connection with an actual or potential transaction or pending or potential litigation or other dispute resolution proceeding in which such client's interests are or potentially may become adverse to [defendant]'s interests." That agreement unambiguously explained that Jones Day could not represent defendant unless defendant confirmed this arrangement was amenable to defendant, thereby "waiv[ing] any conflict of interest that exists or might be asserted to exist and any other

basis that might be asserted to preclude, challenge or otherwise disqualify Jones Day in any representation of any other client with respect to any such matter." The agreement also provided, "However, please note that your instructing us or continuing to instruct us on this matter will constitute your full acceptance of the terms set out above and attached." It is undisputed that Jones Day continued to represent defendant with respect to defendant's Asian trademark portfolio thereafter and, thus, defendant accepted the terms of the agreement, including waiver of the alleged conflict at issue.

Moreover, the interests of defendant that Jones Day represents, namely intellectual property litigation and trademark registration exclusively in Asia, do not conflict with defendant's interests at issue here (*see Develop Don't Destroy Brooklyn v Empire State Dev. Corp.*, 31 AD3d 144, 152 [1st Dept 2006], *lv denied* 8 NY3d 802 [2007]; *Asset Alliance Corp. v Ervine*, 279 AD2d 365 [1st Dept 2001], *lv denied* 96 NY2d 792 [2001]), and are entirely unrelated (*see Tekni-Plex, Inc. v Meyner & Landis*, 89 NY2d 123, 130 [1996]; *Reem Contr. Corp. v Resnick Murray St. Assoc.*, 43 AD3d 369, 371 [1st Dept 2007]; *Medical Capital Corp. v MRI Global Imaging, Inc.*, 27 AD3d 427, 428 [2d Dept 2006]; *St. Barnabas Hosp. v New York City Health & Hosps. Corp.*, 7 AD3d 83, 89 [1st Dept 2004]).

Plaintiffs' argument that this appeal should be dismissed on the ground of "laches" is without merit. Laches is an

affirmative defense to an equitable claim that is stale and is not a proper ground for dismissal of an appeal, and, in any event, defendant timely noticed and perfected this appeal (*see Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 816 [2003], *cert denied* 540 US 1017 [2003]; 22 NYCRR 600.11 [a][3]). Also unavailing is plaintiffs' argument that this appeal should be dismissed as moot because it was not heard until after the trial commenced (*see Magjuka v Greenberger*, 46 AD2d 867 [1st Dept 1974]).

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

ENTERED: JUNE 27, 2013

CLERK

Gonzalez, P.J., Renwick, DeGrasse, Manzanet-Daniels, Feinman, JJ.

10488N Definitions Personal Fitness, Inc., Index 653736/12
Plaintiff-Appellant,

-against-

133 E. 58th Street LLC.,
Defendant-Respondent.

_____

Robert M. Olshever, P.C., New York (Robert M. Olshever of counsel), for appellant.

Jaffe, Ross & Light, LLP, New York (Bill S. Light of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered December 19, 2012, which denied plaintiff's motion for a *Yellowstone* injunction, unanimously affirmed, without costs.

The record demonstrates that plaintiff chronically failed to pay its rent, having forced defendant to bring 10 nonpayment proceedings over the last seven years. This is a breach of a substantial obligation under the lease (*see Adam's Tower Ltd. Partnership v Richter,* 186 Misc 2d 620, 621 [App Term, 1st Dept 2000]), and is a type of default that plaintiff cannot cure within the 15-day cure period provided for in the lease (*see id.* at 622). Accordingly, plaintiff was properly denied a *Yellowstone* injunction, since that relief requires a showing that plaintiff is able to cure (*see Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assoc.,* 93 NY2d 508, 514 [1999]).

Defendant was not limited to a nonpayment proceeding under

the term of the lease that provided for such proceedings for nonpayment. Chronic nonpayment is a violation of a different type than occasional nonpayment (*see 326-330 E. 35th St. Assoc. v Sofizade,* 191 Misc 2d 329, 331-332 [App Term, 1st Dept 2002]). Nor can plaintiff rely on any defect of the notice of default, since no such notice is even necessary for an action based on chronic nonpayment (*see 3363 Sedgwick v Medina,* 187 Misc 2d 421 [App Term, 1st Dept 2000]). Furthermore, contrary to plaintiff's contention, there are no equitable considerations that would require a different result.

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

ENTERED: JUNE 27, 2013

CLERK

Mazzarelli, J.P., Saxe, DeGrasse, Manzanet-Daniels, Clark, JJ.

9498 Jose Aquino Rodriguez, etc., et al.,
Plaintiffs-Appellants,

-against-

Board of Education of the City of New York,
Defendant-Respondent.

Index 350367/08

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

Michael A. Cardozo, Corporation Counsel, New York (Janet L. Zaleon of counsel), for respondent.

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered May 7, 2012, which granted defendant Board of Education of the City of New York's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

In this negligence action, it is alleged that the infant plaintiff was injured when he slipped and fell on liquid on the stairs of an elementary school. The notice of claim limited plaintiffs' theory of liability to negligent maintenance, upkeep and repair of the subject staircase, asserting that the infant plaintiff was caused to slip and fall due to a liquid substance on the floor and inadequate lighting. The infant plaintiff testified that he was caused to fall by "slippery juice" that was "all over the stairs." He testified that he wasn't able to see all of the juice due to insufficient lighting. Plaintiffs' new

theory, in opposition to the motion for summary judgment, that the infant plaintiff was caused to slip and fall due to various design defects including, inter alia, treads and risers of insufficient length, an improperly placed handrail and stairs not coated with nonskid materials, is precluded (*see Rosenbaum v City of New York*, 8 NY3d 1, 11-13 [2006]; *Sutin v Manhattan & Bronx Surface Tr. Operating Auth.*, 54 AD3d 616 [1st Dept 2008] [plaintiff who asserted in notice of claim that bus driver had failed to stop the bus at a place from which she could safely disembark was precluded from raising the new theory, in opposition to the defendant's motion for summary judgment, that the bus driver failed to "kneel" the bus prior to letting her off]; *Chieffet v New York City Tr. Auth.*, 10 AD3d 526 [1st Dept 2004] [where notice of claim alleged injury due to slippery condition on staircase, plaintiff precluded from later asserting in opposition to summary judgment that the staircase was in a "broken" condition]; *accord Barksdale v New York City Tr. Auth.*, 294 AD2d 210 [1st Dept 2002] [where notice of claim alleged negligent maintenance of safety chains between subway cars, plaintiff precluded from later asserting design defects in the gates "or other devices" between subway cars]).

The order appealed from should nonetheless be reversed and the motion denied because defendant failed to meet its prima facie burden on a motion for summary judgment of establishing that it neither created nor had constructive notice

of the hazardous condition (*see e.g. Sabalza v Salgado*, 85 AD3d 436, 437-438 [1st Dept 2011]; *Rodriguez v 705-7 E. 179th St. Hous. Dev. Fund Corp.*, 79 AD3d 518, 519 [1st Dept 2010]). Defendant's supervising engineer testified only as to a general cleaning routine, but had no personal knowledge as to whether the cleaning schedule was adhered to on the day of the accident, and he could not state when the staircase in question had last been cleaned or inspected prior to the accident. Moreover, he did not know whether the custodian responsible for cleaning the staircase worked on the day of the accident and the custodian did not testify or submit an affidavit (*see Williams v New York City Hous. Auth.*, 99 AD3d 613 [1st Dept 2012]; *Peters v Trammell Crow Co.*, 47 AD3d 419, 420 [1st Dept 2008]; *Deluna-Cole v Tonali, Inc.*, 303 AD2d 186 [1st Dept 2003]). In addition, there is a question of fact as to whether defendant created the hazardous condition since defendant failed to address the evidence of insufficient lighting, the use of semi-gloss paint on the steps and their worn treads, all of which plaintiff alleges contributed to the accident.

We note that defendant improperly challenges the substantive merit of plaintiffs' expert opinion for the first time on appeal.

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

ENTERED: JUNE 27, 2013

CLERK

Friedman, J.P., Acosta, Moskowitz, Manzanet-Daniels, Clark, JJ.

10000-
10000A 45 Broadway Owner LLC,
Plaintiff-Respondent,

-against-

NYSA-ILA Pension Trust Fund,
Defendant-Appellant.

Index 108603/10

_____

Lester Schwab Katz & Dwyer, LLP, New York (Howard R. Cohen of counsel), for appellant.

Cozen O'Connor, New York (Amanda L. Nelson of counsel), for respondent.

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Judgment, Supreme Court, New York County (Paul Wooten, J.), entered September 6, 2012, awarding plaintiff-landlord the total amount of $166,013.96, and bringing up for review an order, same court and Justice, entered August 27, 2012, which granted plaintiff's motion for summary judgment in its favor, dismissed defendant-tenant's affirmative defenses, and denied defendant's cross motion for summary judgment dismissing the complaint, unanimously reversed, on the law, with costs, the judgment vacated, plaintiff's motion denied, and defendant's cross motion granted. The Clerk is directed to enter judgment dismissing the complaint. Appeal from the foregoing order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff is the owner and landlord of a building located at 45 Broadway in Manhattan, and defendant was a commercial tenant

in the building. When defendant's predecessor was the building tenant, it installed a supplemental HVAC system; that system connected to the building's water risers and remained in operation after defendant took possession of the premises in or around March 2002.

The parties' lease addressed their responsibilities in the event of damage to the premises. Specifically, in section 7.03 of the lease, the parties agreed that their insurance policies would each contain an endorsement in which their respective insurance companies would "waive subrogation or permit the insured, prior to any loss, to waive any claim it might have against the other." Further, section 7.04 of the lease provided, "each party releases the other with respect to any claim (including a claim for negligence) which it might otherwise have against the other party for loss, damage or destruction with respect to its property by fire or other casualty . . . occurring during the terms of this Lease" (emphasis added).

In April 2010, plaintiff informed all building tenants that building management intended to shut down the building's water condenser, and therefore, that tenants should shut down any supplemental HVAC systems. Immediately after the "drain down" of the building's water, the lobby flooded. Building personnel discovered that a rusted and corroded pressure gauge on defendant's supplemental HVAC system had burst off a supply pipe, allowing water to gush out. The flood damaged several floors of

the building, as well as the elevator, mezzanine, lobby, and basement.

The repairs and restoration to the building cost plaintiff $76,760.14, and plaintiff gave injured tenants around $60,000 worth of monetary concessions to compensate for their damages. Thus, plaintiff's total damages from the flood came to around $136,055.22, not including legal fees and costs. Plaintiff commenced this action, alleging that defendant failed to meet its lease obligation to maintain the supplemental HVAC system and is therefore responsible for the damages resulting from the flood.

After discovery, plaintiff moved for summary judgment and defendant cross-moved for the same relief. The IAS court granted plaintiff's summary judgment motion in its entirety, denied defendant's cross motion, and set the matter down for a hearing before a special referee to determine the amount of plaintiff's counsel fees. The court ultimately entered a judgment in plaintiff's favor in the amount of $166,013.96.

We find that in the context of the relevant lease provision, the concept of "casualty" does, in fact, encompass the flood resulting from the rusted gauge on the supplemental HVAC system, and thus, that the IAS court erred in awarding judgment against defendant. To begin, as noted above, in section 7.04 of the lease, each party releases the other with respect to claims for damage, including damage caused by a party's negligence. This clause constitutes an enforceable reflection of the parties'

decision to allocate the risk of liability for these claims to third parties through the device of insurance – a choice that contracting parties are permitted to make as long as their intent to do so is clear and unequivocal (*see Great N. Ins. Co. v Interior Constr. Corp.*, 18 AD3d 371, 372 [1st Dept 2005], *affd* 7 NY3d 412 [2006]; *Periphery Loungewear v Kantron Roofing Corp.*, 190 AD2d 457, 460 [1st Dept 1993]).

Even so, under the language of lease section 7.04, the releases will be effective only if the flood constitutes damage by "fire or other casualty." Citing 1 *Friedman on Leases* (§ 9.4 [5th ed.]), plaintiff argues that the flood in this case was not, in fact, a "casualty" because it was not an "act of God," but rather, an act of human beings – namely, the failure to perform maintenance on the HVAC system, leading to the rusted and corroded pressure gauge and the ensuing flooding.

The lease's language, however, does not suggest that "casualty" is an event resulting only from an "act of God." Nor under the relevant case law is the definition so limited. To be sure, we have previously noted that the word "casualty" may be defined as an "accident" or an "unfortunate occurrence" (*see I Q Originals v Boston Old Colony Ins. Co.*, 85 AD2d 21, 22 [1st Dept 1982], *affd* 58 NY2d 651 [1982]). Certainly, the flood and resulting damage to the building can fairly be classified under either one of those categories.

What is more, where a clause is unambiguous, contract

language and terms are to be given their plain and ordinary meaning (*Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 [2002]; *TDX Const. Corp. v Dormitory Auth. of State of N.Y.*, 306 AD2d 115, 116 [1st Dept 2003]). Here, the lease provides that the parties agreed on mutual releases in case of damage "by fire or other casualty." In light of this phrasing, in which "other casualty" is placed in the same category as "fire," it cannot be said that the word "casualty" excludes events resulting from human error. On the contrary, a fire might have myriad causes, many of which do result from human error. However, the parties did not restrict the types of fires that would fall under the release – for example, by stating that only fires caused by severe weather or other natural causes would trigger a release from liability. Accordingly, the phrase "fire or other casualty," as construed by an ordinary business person, would describe an event, rather than the cause of that event.

A plain reading of section 7.04 also shows that if defendant negligently caused a fire in the building, plaintiff could not look to defendant to recover for the resulting property damage, but would have to look to its own insurer for coverage. If the provision cannot be read to limit the meaning of "fire" to acts of God not involving negligent actions, then "other casualty" – an event that the lease places in the same category as "fire" – also cannot be interpreted to include that limitation. Thus, contrary to plaintiff's argument, section 7.04, read as a whole,

makes clear that the "fire or other casualty" clause does not apply only to events free from negligence.

Plaintiff, relying on the decision by the United States Court of Appeals for the Second Circuit in *Fay v Helvering* (120 F2d 253 [2d Cir 1941]), argues that even if a negligently caused flood could be a casualty, a flood resulting from gradual damage, such as corrosion of the pipe, cannot be one. This argument is not persuasive. While the damage caused by corrosion would not itself be considered a casualty, a sudden and unexpected flood such as the one that occurred here does, in fact, fall under the definition of "casualty," even if gradual corrosion triggers the sudden event.

Finally, despite plaintiff's assertions otherwise, a finding that "fire and other casualty" encompasses claims based on negligence does not render meaningless certain other sections of the lease. The other lease provisions address defaults or negligent acts that do not rise to the level of fire or other casualty, and they are simply subject to the exception set forth

in section 7.04.

Accordingly, defendant's timely filed cross motion for summary judgment is granted, and the claims are dismissed.

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

ENTERED: JUNE 27, 2013

CLERK

Sweeny, J.P., Saxe, Moskowitz, Gische, Clark, JJ.

10252 In re John Gil, Index 114360/11
Petitioner-Appellant,

-against-

New York City Department
of Buildings, et al.,
Respondents-Respondents.

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Fahringer & Dubno, New York (Herald Price Fahringer of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Tahirih Sadrieh of counsel), for respondents.

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Judgment, Supreme Court, New York County (Manuel J. Mendez, J.), entered June 18, 2012, denying the petition to annul respondents' determination, dated August 25, 2011, which denied petitioner's application to renew his stationary engineer license, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously reversed, on the law, without costs, the judgment vacated, the petition granted, and the matter remanded to respondents for further proceedings consistent herewith.

The determination to deny petitioner's renewal application for a stationary engineer license was in violation of lawful procedure and did not have a rational basis (*see* CPLR 7803[3]). Respondents arbitrarily found that petitioner's then nine-year old federal convictions of mail fraud (18 USC § 1341) and money laundering (18 USC § 1957) bore a direct relationship to the duties and responsibilities attendant to a stationary engineer,

the license for which he sought renewal after having his license renewed twenty-six consecutive times (*see* Correction Law § 750[3]; 752[2]; *Dellaporte v New York City Dept. of Bldgs.*, __ AD3d __, 965 NYS2d 44, [1st Dept 2013]). In 1996, petitioner contracted with the New York City Off-Track Betting Corporation (OTB) to install and/or renovate heating ventilation and air-conditioning (HVAC) units in OTB's offices. The conviction at issue arose from petitioner's submission of inflated invoices to OTB in 1997 and 1998, so as to be compensated for extra-contractual design work related to, but not included in, the installation/renovation contract, an action apparently designed, with agency approval, to compensate him for extra work actually performed. These actions bore no direct relationship to the equipment maintenance duties and responsibilities inherent in the stationary engineer license, and thus did not satisfy the first exception to the general prohibition against discrimination against persons previously convicted of criminal offenses (*see* Correction Law § 752[1]).

Respondents also erred in concluding that petitioner posed an unreasonable risk to public safety or welfare so as to satisfy the second exception to the general prohibition (*see* Correction Law § 752[2]). There was no evidence in the record that petitioner ever submitted false documents that related to his stationary engineer responsibilities or implicated public safety, and he disclosed his 2002 conviction on at least two prior

license renewal applications, each of which was granted. It is also undisputed that petitioner lived a law-abiding life in the decade after the conviction, and his renewal application included several letters verifying his character and fitness, including from business persons and directors of charitable organizations, indicating that petitioner was always dependable, his honesty and integrity were "beyond reproach," and he provided his professional services for free or at minimum cost, whenever needed, to organizations serving the neediest members of the community. Respondents provided no evidence suggesting that petitioner has not been rehabilitated (*see Matter of Bonacorsa v Van Lindt*, 71 NY2d 605, 612 [1988]), but instead offered only "speculative inferences unsupported by the record" to raise an issue concerning potential risk to the public arising out of conduct similar to that for which petitioner had been previously convicted (*see Matter of Marra v City of White Plains*, 96 AD2d 17, 25 [2d Dept 1983] [internal quotation marks omitted]).

We note that petitioner's original conviction on fourteen counts of mail fraud was unanimously reversed and vacated due to the suppression of material and exculpatory evidence tending to support petitioner's trial defense of authorization, which seriously undermined confidence in the conviction (*see United States v Gil*, 297 F3d 93, 105 [2d Cir 2002]). We further note the extenuating, mitigating circumstances behind his subsequent plea, including his familial and financial distress, and the fact

that the sentencing court was informed that the plea was necessary because the previously suppressed evidence would make it particularly challenging to obtain a new guilty verdict (*see Matter of Gallo v LiMandri*, 102 AD3d 621, 625 [1st Dept 2013]). Under all of the circumstances, including the rather unusual facts underlying the conviction, "there is virtually no justification for the claim that the conviction demonstrates poor moral character adversely reflecting on [petitioner's] fitness to hold [a stationary engineer] license" (*id.* at 621).

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

ENTERED: JUNE 27, 2013

CLERK

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

10489 The People of the State of New York, Respondent,

-against-

Angela Hernandez, Defendant-Appellant.

Ind. 6261/09

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Steven Banks, The Legal Aid Society, New York (Jonathan Garelick of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Jill Konviser, J.), rendered December 7, 2010, convicting defendant, after a jury trial, of forgery in the second degree and criminal possession of forged instrument in the second degree, and sentencing her, as a second felony offender, to concurrent terms of three to six years, unanimously affirmed.

Since defendant objected to the relevance of an uncharged crime on significantly different grounds from those raised on appeal, her present claim is unpreserved (*see e.g. People v Kelly*, 82 AD3d 508, 509 [1st Dept 2011], *lv denied* 16 NY3d 896 [2011]), and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits, and we also find that the court properly exercised its discretion in receiving this evidence, because its probative value of outweighed its potential for prejudice. Given the defense theory that defendant wrote out a check from her victim's account

believing that she had permission to spend his money without his prior consent, the evidence of defendant's prior act of forgery was probative of her intent and absence of mistake (*see People v Alvino*, 71 NY2d 233, 242 [1987]). The court minimized the potential prejudice by limiting the amount of evidence that could be introduced and by way of suitable limiting instructions (*see People v Versage*, 48 AD3d 254, 255 [1st Dept 2008], *lv denied* 10 NY3d 871 [2008]).

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

ENTERED: JUNE 27, 2013

CLERK

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

10491-
10491A In re Dina Loraine P., and Another,

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

Ana C.,
Respondent-Appellant,

Catholic Guardian Society and Home
Bureau,
Petitioner-Respondent.

_____

Andrew J. Baer, New York, for appellant.

Magovern & Sclafani, New York (Joanna M. Roberson of counsel), for respondent.

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

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Orders of disposition, Family Court, Bronx County (Anne-Marie Jolly, J.), entered on or about April 16, 2012, which, to the extent appealed from as limited by the briefs, following a fact-finding hearing, found that respondent mother permanently neglected the two subject children, unanimously affirmed, without costs.

The finding of permanent neglect is supported by clear and convincing evidence that petitioner agency made diligent efforts to encourage and strengthen the parental relationship by, among other things, scheduling visitation with the children, providing respondent with referrals for services, and assisting her with

her immigration status (*see* Social Services Law § 384-b[7][a], [f]; *Matter of Aliyah Julia N.* [*Cecelia Lee N.*], 81 AD3d 519, 519 [1st Dept 2011]). Respondent failed, during the statutorily relevant period, to meaningfully avail herself of the services deemed essential to prepare her to assume custodial parenting responsibilities by failing to complete mental health services and obtain suitable housing for the children (*see Matter of Racquel Olivia M.*, 37 AD3d 279, 280 [1st Dept 2007], *lv denied* 8 NY3d 812 [2007]). Although respondent completed an anger management program and a parenting skills class, the testimony demonstrates that she failed to gain insight into her inability to control her anger and thus failed to adequately plan for the children's future (*see Matter of Janell J.* [*Shanequa J.*], 88 AD3d 512 [1st Dept 2011]).

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

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

ENTERED: JUNE 27, 2013

CLERK

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

10492 & M-2565 Jean M. Emery, Plaintiff-Appellant-Respondent, Index 116082/10

-against-

Roger N. Parker, etc., et al., Defendants-Respondents-Appellants.

_____

Victor M. Serby, Woodmere, for appellant-respondent.

Garfunkel Wild, P.C., Great Neck (Kevin G. Donoghue of counsel), for respondents-appellants.

_____

Judgment, Supreme Court, New York County (Paul Wooten, J.), entered April 16, 2012, dismissing the complaint pursuant to an order, same court and Justice, entered March 23, 2012, which granted defendants' motion for summary judgment, awarded costs to defendants, and denied defendants' request for sanctions pursuant to 22 NYCRR 130-1.1, unanimously affirmed, without costs.

In this action against defendants, attorneys who represented Memorial Sloan Kettering Cancer Center ("MSKCC") in litigation before the Department of Labor disputing plaintiff's application for unemployment insurance after she resigned from MSKCC, the motion court properly granted defendants' motion to dismiss the claim made pursuant Judiciary Law § 487(1). Defendants did not engage in conduct amounting to a "'chronic and extreme pattern of legal delinquency'" to support such a claim (*see Kinberg v Opinsky*, 51 AD3d 548, 549 [1st Dept 2008] [quoting *Nason v Fisher*, 36 AD3d 486, 48 [1st Dept 2007]). Notably, defendants

made no misstatements to the Administrative Law Judge (ALJ), the Unemployment Insurance Appeals Board or the Appellate Division, Third Department, and plaintiff consistently prevailed in those proceedings. Additionally, defendants cited a credible basis for their claims of bias by the ALJ, which plaintiff does not refute. Even assuming that the bias claims are meritless, that alone does not amount to conduct supporting a Judiciary Law § 487(1) claim.

Plaintiff does not cite any facts suggesting that she should have been afforded discovery pursuant to CPLR 3212(f). On the contrary, the record is complete on all material issues. Plaintiff's request for discovery relating to a handwritten annotation on a form that was relevant to her claim for unemployment insurance before the Department of Labor is not relevant to her § 487 claim, the only claim at issue here.

The motion court properly denied defendants' request for sanctions. Although plaintiff's claims are meritless, plaintiff's pursuit of the instant lawsuit is not frivolous within the meaning of 22 NYCRR 130-1.1(c). Defendants' renewed request for sanctions based on plaintiff's submission of an

incomplete appendix is also denied. Defendants' request for costs associated with their Respondents' Appendix is denied.

M-2565 - ***Jean M. Emery v Roger N. Parker, etc., et al.***

Motion to file supplemental appendix granted to the extent of deeming pages of transcripts from the underlying hearing and emails between plaintiff and Parker, attached as an exhibit to the motion, filed as plaintiff's supplemental appendix, and otherwise denied.

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

ENTERED: JUNE 27, 2013

CLERK

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

10493 The People of the State of New York, Respondent, Ind. 2448/09 2682/09

-against-

Ramon Berrios, Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Alexandra Keeling of counsel), and Debevoise & Plimpton LLP, New York (John Nichols of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Marcy L. Kahn, J.), rendered April 20, 2010, as amended May 6, 2010 and June 15, 2010, convicting defendant, after a jury trial, of robbery in the first degree, assault in the second degree, and attempted robbery in the first and second degrees, and sentencing him, as a persistent violent felony offender, to an aggregate term of 36 years to life, unanimously affirmed.

Since defendant never argued that he was constitutionally entitled to introduce the grand jury testimony of an unavailable witness, and instead offered the evidence on grounds not relevant to this appeal, his present constitutional claim under *Chambers v Mississippi* (410 US 284 [1973]; *see also People v Robinson*, 89 NY2d 648 [1997]) is unpreserved (*see People v Lane*, 7 NY3d 888, 889 [2006]; *People v Gonzalez*, 54 NY2d 729 [1981]; *see also Smith v Duncan*, 411 F3d 340, 348-349 [2d Cir 2005]), and we decline to

review it in the interest of justice. This claim is unpreserved for the additional reason that defendant did not explain to the court what was exculpatory about the grand jury testimony. Further, the court did not "expressly decide[]" (CPL 470.05 [2]) the particular issues raised on appeal (*see People v Turriago*, 90 NY2d 77, 83-84 [1997]; *see also People v Colon*, 46 AD3d 260, 263 [2007]). As an alternative holding, we find that any error in excluding this evidence was harmless beyond a reasonable doubt because there was overwhelming evidence of defendant's guilt and "the omitted evidence [did not] create[] a reasonable doubt that did not otherwise exist" (*Robinson*, 89 NY2d at 657).

Defendant's claim that he received ineffective assistance of counsel at sentencing is generally unreviewable on direct appeal (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). To the extent the existing record permits review, we find that defendant received effective assistance at sentencing under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). Defendant claims that his

attorney should have made additional arguments at sentencing. However, we conclude that counsel made an argument for leniency that came within an objective standard of reasonableness, and that additional arguments would have been futile.

We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 27, 2013

CLERK

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

10494 Marc Jancou Fine Art Ltd., etc., Index 650316/12
Plaintiff-Appellant,

-against-

Sotheby's, Inc.,
Defendant-Respondent,

Cady Noland,
Defendant.

_____

Hanley Conroy Bierstein Sheridan Fisher & Hayes LLP, New York (Thomas I. Sheridan, III of counsel), for appellant.

Stroock & Stroock & Lavan LLP, New York (Charles G. Moerdler and Daniel N. Bertaccini of counsel), for respondent.

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Order, Supreme Court, New York County (Ellen M. Coin, J.), entered November 14, 2012, which granted the motion of defendant Sotheby's, Inc. for summary judgment dismissing the complaint as against it, and denied plaintiff's cross motion for summary judgment on its breach of contract cause of action against Sotheby's, unanimously affirmed, with costs.

The consignment agreement between plaintiff and Sotheby's permitted Sotheby's to withdraw the artwork owned by plaintiff from auction if Sotheby's had any doubt, in its sole judgment, as to the work's "attribution" as defined in the Federal Visual Artists Rights Act of 1990 (17 USC § 106A). After the artwork was scheduled to be auctioned, defendant Noland, the author of the artwork, demanded that Sotheby's withdraw the work from auction, asserting that her honor and reputation would be

prejudiced if the artwork were offered for sale with her name associated with it in light of material and detrimental changes to the work that had occurred since its creation, in violation of her rights under the Federal Visual Artists Rights Act of 1990 (17 USC § 106A; *see generally Carter v Helmsley-Spear, Inc.*, 71 F3d 77, 81 [2d Cir 1995], *cert denied* 517 US 1208 [1996]). In light of Noland's assertion and a report showing that the work had been damaged and restoration had been performed on it, Sotheby's did not breach the contract or its fiduciary duty to plaintiff by withdrawing the work from auction.

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

ENTERED: JUNE 27, 2013

CLERK

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

10495 Sofia Bogdanova, Index 105975/10
Plaintiff-Respondent,

-against-

Falcon Meat Market, et al.,
Defendants-Respondents-Appellants,

188 St. Nicholas Associates, LLC, et al.,
Defendants,

Margis Realty Company, LLC, et al.,
Defendants-Appellants-Respondents.

_____

Newman Myers Kreines Gross Harris, P.C., New York (Olivia M. Gross and Patrick M. Caruana of counsel), for appellants-respondents.

Kim Patterson & Sciarrino, L.L.P., Bayside (Stephen E. Kwan of counsel), for respondents-appellants.

Vouté, Lohrfink, Magro & McAndrew, LLP, White Plains (Laura K. Silverstein of counsel), for respondent.

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Order, Supreme Court, New York County (Anil C. Singh, J.), entered August 13, 2012, which, to the extent appealed from, denied defendants Margis Realty Company, LLC and Milbrook Properties, Ltd.'s motion for summary judgment dismissing the complaint as against Margis and on their cross claim against defendants Falcon Meat Market and Falcon Meat Market, Inc. (together, Falcon) for contractual indemnification, denied Falcon's motion for summary judgment dismissing the complaint as against it, and granted plaintiff's motion for summary judgment on the issue of liability as against Margis and Falcon, unanimously modified, on the law, to grant Margis's motion for

conditional summary judgment on its contractual indemnification claim against Falcon, and to deny plaintiff's motion, and otherwise affirmed, without costs.

Plaintiff slipped and fell on snow and ice on the sidewalk allegedly in front of a building owned by Margis and managed by Milbrook in which Falcon leases premises for its store. Pursuant to its lease agreement, Falcon agreed to provide public liability insurance naming Margis as an additional insured party and to indemnify Margis from all claims, losses, actions, costs and expenses, including, without limitation, reasonable attorneys' fees.

Margis and Falcon established prima facie that they had no obligation to remove the snow from the sidewalk in front of Margis's building until 11 a.m. (nearly three hours after plaintiff's accident occurred) because it had snowed the night before (*see* Administrative Code of City of NY § 16-123[a]; *Rodriguez v New York City Hous. Auth.*, 52 AD3d 299 [1st Dept 2008]). However, plaintiff submitted a meteorologist's affidavit, together with certified meteorological records, indicating that 10 inches of snow had fallen two days before her accident, thereby raising an issue of fact whether Margis and Falcon had failed to clear the snow that fell days before her accident, not the night before.

Plaintiff's motion for summary judgment on the issue of

liability was timely (*see Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 AD3d 446, 448-449 [1st Dept 2013]). However, plaintiff's expert meteorologist failed to take into account the parties' competing testimony as to snow conditions the night before the accident, and his opinion is therefore not persuasive (*see Massey v Newburgh W. Realty, Inc.*, 84 AD3d 564, 566 [1st Dept 2011]; *Neidert v Austin S. Edgar, Inc.*, 204 AD2d 1030 [4th Dept 1994]). In addition, an issue of fact is raised by the testimony of Falcon's owner that plaintiff fell not in front of his store but in front of another building.

The indemnification clause in the lease agreement between Margis and Falcon, as superseded by the lease rider, is not against public policy (*see Amill v Lawrence Ruben Co., Inc.*, 100 AD3d 458, 460 [1st Dept 2012]). Pending a determination as to negligence on Margis's part, Margis is entitled to conditional summary judgment against Falcon on its claim for indemnification (*see Masciotta v Morse Diesel Intl.*, 303 AD2d 309, 310 [1st Dept 2003]). However, Milbrook's claim for indemnification and attorneys' fees and expenses is denied.

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

ENTERED: JUNE 27, 2013

CLERK

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

10497 Bruce Edwards, Jr., Index 307537/08
Plaintiff-Respondent,

-against-

W.K. Nursing Home Corporation,
doing business as West Kingsbridge
Apt. Co., et al.,
Defendants-Appellants.

_____

Wenick & Finger, P.C., New York (Frank J. Wenick of counsel), for appellants.

Robert I. Elan, New York, for respondent.

_____

Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered on or about November 29, 2012, which, to the extent appealed from, denied defendants' motion for summary judgment dismissing the Labor Law § 200 and common-law negligence causes of action, unanimously affirmed, without costs.

Plaintiff was allegedly injured when a coworker who was assisting him in manually lowering heavy cabinetry from the back of a delivery truck, lost his grip on the furniture piece, causing plaintiff to absorb the full weight of the cabinet. Plaintiff testified that his coworker lost his grip on the cabinet and was caused to fall when he stepped backward from the street, onto a defective portion of curb and sidewalk in front of defendants' premises.

Defendants established their entitlement to judgment as a matter of law. Defendants submitted evidence indicating that

plaintiff was injured due to an alleged defect in a curb; that the alleged defect was not clearly identified since plaintiff never testified that he observed the spot where his coworker lost his footing; and that the cause of plaintiff's injury was grounded in speculation.

In opposition, plaintiff raised a triable issue as to the common-law negligence claim. A photograph marked by plaintiff as the location where his coworker stumbled, taken together with plaintiff's testimony regarding where he saw the coworker step up onto the sidewalk and that the defective condition spanned from the curb over to the immediate adjoining sidewalk, raise triable issues as to where the coworker was caused to fall. While defendants, as landowners, would not have a duty to maintain the curb (*see Garris v City of New York*, 65 AD3d 953 [1st Dept 2009]), they would have a duty to maintain the abutting sidewalk (*see Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517 [2008]).

The court also properly declined to dismiss the Labor Law § 200 claim. The record presents questions as to whether defendants had constructive notice of the alleged defective condition in front of its premises where deliveries of renovation

materials were made (*see Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 555-556 [1st Dept 2009]; *McLean v 405 Webster Ave. Assoc.*, 98 AD3d 1090 [2d Dept 2012]).

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: JUNE 27, 2013

CLERK

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

10498 Raquel Schraub, Index 310636/10
Plaintiff-Respondent,

-against-

Howard Schraub,
Defendant-Appellant.

_____

William S. Beslow, New York, for appellant.

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Order, Supreme Court, New York County (Ellen Gesmer, J.), entered on or about December 12, 2012, which, among other things, declared defendant husband guilty of contempt for failing to pay support arrears, unanimously affirmed, with costs.

Defendant's bare, conclusory assertion of his inability to pay the support obligation was insufficient to warrant a hearing (*Farkas v Farkas*, 209 AD2d 316, 317-318 [1st Dept 1994]). Although given ample opportunity by way of a briefing schedule set by the court, defendant failed to cross-move for a downward modification, submit an affidavit setting forth his alleged inability to pay, or oppose plaintiff's motion by requesting a hearing on his inability to pay. Thus, defendant failed to raise

any issue of fact requiring a hearing on his alleged inability to pay (*id.*).

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

ENTERED: JUNE 27, 2013

CLERK

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

10499 The People of the State of New York, Respondent, Ind. 1421/10

-against-

Keith Bacote, Defendant-Appellant.

_____

Hughes Hubbard & Reed LLP, New York (Jordan E. Pace of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered January 23, 2011, convicting defendant, after a jury trial, of robbery in the second degree, and sentencing him, as a second felony offender, to a term of eight years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Initially, we find no basis for disturbing the jury's credibility determinations.

Defendant's entire course of conduct, beginning with the fact that he and an unapprehended companion suspiciously tarried in a restaurant men's room without using its facilities, supports an inference that he was an intentional participant in the robbery of a man who emerged from the restroom's stall (*see People v Jackson*, 44 NY2d 935 [1978]). When, at the unapprehended robber's direction, defendant made the victim go

back into the stall, this was in such close temporal and spatial proximity to the preceding theft of the victim's money that it can be reasonably viewed as aiding the commission of the robbery (*see* Penal Law § 20.00), rather than as acting as an accessory after the fact, now known as hindering prosecution (*see* Penal Law § 205.30). Defendant's theory that he never expected his companion to commit the robbery and never intended to participate, but suddenly agreed to help his companion escape, makes little sense under the evidence presented.

Moreover, the evidence also supports the inference that defendant took part in the actual taking of the victim's money. The victim's testimony, viewed as a whole, warrants an inference that defendant positioned himself so as to intimidate the victim by his presence and to be ready to render immediate aid to the unapprehended robber (*see e.g. People v Burgess*, 90 AD3d 531 [1st Dept 2011] [and cases cited therein], *lv denied* 19 NY3d 958 [2012]). Indeed, since the other robber neither displayed nor threatened the use of a weapon, the intimidating presence of a second man, to deter resistance, was essentially the means by which the robbery was accomplished. Finally, defendant's conduct in fleeing from the scene with the other robber provided some additional proof of his accessorial liability.

Defendant's challenges to the People's summation are unpreserved, and we decline to review them in the interest of

justice. As an alternative holding, we find no basis for reversal (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]).

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

ENTERED: JUNE 27, 2013

CLERK

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

10500 In re Joel Hand, et al., Index 116270/08
Petitioners-Appellants,

-against-

The Hospital for Special Surgery, et al.,
Respondents-Respondents.

_____

Jack L. Lester, New York, for appellants.

Fried, Frank, Harris, Shriver & Jacobson, LLP, New York (Richard G. Leland of counsel), for The Hospital for Special Surgery, respondent.

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth S. Natrella of counsel), for municipal respondents.

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Judgment, Supreme Court, New York County (Michael D. Stallman, J.), entered February 3, 2012, denying the petition which sought to annul the determinations by the City respondents approving the proposed expansion of The Hospital For Special Surgery's (HSS) campus, and dismissing the proceeding brought pursuant to CPLR Article 78, unanimously affirmed, without costs.

The record establishes that the municipal respondents' took a "hard look" at the anticipated adverse environmental impact of HSS's planned expansion and provided a "reasoned elaboration" of the basis for its determination (*see Matter of Riverkeeper, Inc. v Planning Bd. of Town of Southeast*, 9 NY3d 219, 231-232 [2007]; *Akpan v Koch*, 75 NY2d 561, 570 [1990]). We conclude that its determination permitting the proposed expansion is not arbitrary and capricious.

Contrary to petitioners' contention, the Final Environmental Impact Statement (FEIS) considered the special modification of the loading berths requirement, reviewed the issues of traffic, noise, air pollution and pedestrian flow and safety, and concluded that no significant adverse impacts will result from additional deliveries. The FEIS also considered and responded to all of petitioners' concerns regarding the adequacy of current loading facilities for the expansion.

The City Planning Commission's (CPC) determination to grant HSS's special permit application to allow a modification to off-street loading requirements pursuant to ZR § 74-682 is rational and not arbitrary and capricious (*see Kettaneh v Board of Stds. & Appeals of the City of N.Y.*, 85 AD3d 620, 621 [1st Dept 2011], *lv dismissed in part, denied in part* 18 NY3d 919 [2012]; *Matter of Sasso v Osgood*, 86 NY2d 374, 384 n2 [1995]). CPC rationally found that HSS's loading berths are adequate to service the needs of the institution and accessible to all uses in HSS without the need to cross any street at grade. CPC also rationally found that the loading berths are located so as not to adversely affect the movement of pedestrians or vehicles on the streets surrounding HSS.

Contrary to petitioners' contentions, the operational condition of the loading berths was considered by CPC and any issues relating thereto were addressed by HSS. Petitioners' challenge to the size of the loading berths is also unavailing.

Although they do not meet the size regulations provided in ZR § 25-74, those requirements are inapplicable to buildings such as the one in question built prior to 1961. CPC properly determined that the two berths comply with the provisions of the Zoning Resolution for off-street loading berths in effect at the time the building was constructed (*see* ZR § 25-72).

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

ENTERED: JUNE 27, 2013

CLERK

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

10501 The People of the State of New York, Ind. 2437/08
Respondent,

-against-

Louise Rander,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Ravi Kantha 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, Bronx County (Seth L. Marvin, J.), rendered on or about April 4, 2011,

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

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

ENTERED: JUNE 27, 2013

CLERK

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

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

10502N JPMorgan Chase Bank, N.A., Index 117146/09
Plaintiff-Appellant,

-against-

Low Cost Bearings NY Inc., et al.,
Defendants,

Harriet Stathakos,
Defendant-Respondent.

_____

Satterlee Stephens Burke & Burke LLP, New York (Walter A. Saurack of counsel), for appellant.

Lewis Brisbois Bisgaard & Smith, LLP, New York (Nicholas P. Hurzeler of counsel), for respondent.

_____

Order, Supreme Court, New York County (Richard F. Braun, J.), entered June 13, 2012, which, to the extent appealed from, denied plaintiff's cross motion for leave to amend the complaint to add three defendants and additional claims, unanimously reversed, on the law, the facts, and in the exercise of discretion, without costs, and the cross motion granted.

Plaintiff seeks recovery for property damage sustained to its bank branch located at 2084-2090 Linden Boulevard, in Brooklyn, as a result of a June 10, 2008 fire, which originated in a portion of the premises leased to defendant Chatkhan. At the time of the fire, the premises were owned by defendant Harriet Stathakos, together with her father, Bill Stathakos, and her uncle, Nick Stathakos.

Plaintiff's cross motion sought to add the premises' other

owners, who were similarly situated to the defendant-owner, and the managing agent for the premises, as defendants, and to amplify the allegations of negligence to include, inter alia, a claim that the premises contained inadequate firestopping and that firewalls had been improperly removed. Plaintiff made the requisite evidentiary showing of the viability of its proposed amendments via the submission of, inter alia, deposition testimony of one of the parties, affidavits from the proposed additional parties, the lease, and evidence of fire safety violations. Accordingly, leave to amend should have been granted in the absence of evidence of substantial prejudice or surprise (*see* CPLR 3025[b]; *Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983]) or that the proposed amendments were "palpably insufficient or patently devoid of merit" (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 499 [1st Dept 2010]).

The sufficiency of plaintiff's proposed amendments was implicitly recognized by the court in denying the defendant-owner's motion for summary judgment dismissing the complaint. In opposition, defendant Harriet Stathakos failed to "overcome a

presumption of validity in [plaintiff's] favor" (*Peach Parking Corp. v 346 W. 40th St., LLC*, 42 AD3d 82, 86 [1st Dept 2007]).

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

ENTERED: JUNE 27, 2013

CLERK

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

10503N Guy J. Jacobson, etc., Index 600886/07
Plaintiff-Appellant,

-against-

Steven Croman, et al.,
Defendants-Respondents,

99-105 Third Avenue Realty, LLC,
Nominal Defendant.

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Herzfeld & Rubin, P.C., New York (Herbert Rubin of counsel), for appellant.

Meister Seelig & Fein LLP, New York (Kevin A. Fritz of counsel), for respondents.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered March 6, 2012, which denied plaintiff's motion for leave to serve a third amended complaint, unanimously reversed, on the law and the facts and in the exercise of discretion, without costs, and the motion granted.

The primary reason the IAS court denied plaintiff's motion was that he had failed to vacate his note of issue. However, the fact that a motion to amend is made after a note of issue "does not of necessity call for its denial" (*Smith v Industrial Leasing Corp.*, 124 AD2d 413, 415 [3d Dept 1986]).

To be sure, "where the amendment is sought after a long delay, and a statement of readiness has been filed, judicial discretion in allowing the amendment should be discreet, circumspect, prudent and cautious" (*Cseh v New York City Tr.*

Auth., 240 AD2d 270, 272 [1st Dept 1997] [internal quotation marks omitted]). However, the delay in *Cseh* – more than ten years (*id.* at 270-271) – was far longer than in the case at bar.

Another reason the IAS court denied plaintiff's motion was the passage of time. However, "[m]ere lateness is not a barrier to . . . amendment. It must be lateness coupled with significant prejudice to the other side . . ." (*Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983] [internal quotation marks omitted]). "The kind of prejudice required to defeat an amendment . . . must . . . be a showing of prejudice traceable not simply to the new matter sought to be added, but also to the fact that it is only now being added. There must be some special right lost in the interim, some change of position or some significant trouble or expense that could have been avoided had the original pleading contained what the amended one wants to add" (*A.J. Pegno Constr. Corp. v City of New York*, 95 AD2d 655, 656 [1st Dept 1983] [internal quotation marks omitted]; *see also e.g. Valdes v Marbrose Realty*, 289 AD2d 28, 29 [1st Dept 2001]). Defendants failed to show such prejudice.

For example, defendants contend that they are prejudiced because they tailored their extensive preparations during a year-long mediation to the claims that plaintiff had asserted in his second amended complaint. However, plaintiff submitted evidence that the mediation did not require extensive preparation. In any event, "[p]rejudice does not occur simply because a defendant . .

. has to expend additional time preparing its case" (*Jacobson v McNeil Consumer & Speciality Pharms.*, 68 AD3d 652, 654 [1st Dept 2009]).

Defendants also contend that they will be prejudiced because they will be forced to conduct further discovery. However, "the need for additional discovery does not constitute prejudice sufficient to justify denial of an amendment" (*id.*; *see also e.g. Smith*, 124 AD2d at 414). According to plaintiff – and not denied by defendants – the new claim that he seeks to add in the third amended complaint is based on facts and documents within defendants' knowledge and possession. In any event, if defendants need discovery, they can obtain it (*see e.g. Cherebin v Empress Ambulance Serv., Inc.*, 43 AD3d 364, 365 [1st Dept 2007]; *Adams v Hilton Hotels*, 4 AD3d 232, 232-233 [1st Dept 2004]).

Finally, the motion court apparently believed that plaintiff's proposed cause of action for distributions lacked merit because nominal defendant 99-105 Third Avenue Realty, LLC's liabilities exceeded its assets, and the operating agreement for nominal defendant said that no distributions could be made unless its assets exceeded its liabilities. However, the only support for the proposition that nominal defendant's liabilities exceeded its assets was an affidavit from defendant Steven Croman and an unaudited balance sheet for nominal defendant, which showed numerous intercompany loans. Under the circumstances, plaintiff

is not bound by these documents; he should be permitted to probe the facts. Unlike *Bishop v Maurer* (83 AD3d 483, 485 [1st Dept 2011]), this is not a case where "the proposed amendment is palpably insufficient to state a cause of action or is patently devoid of merit" (internal quotation marks omitted).

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

ENTERED: JUNE 27, 2013

CLERK

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

10504N-
10505N-
10505NA

Index 104289/10

Sutton Apartments Corporation, et al.,
Plaintiffs-Appellants,

-against-

Bradhurst 100 Development LLC, et al.,
Defendants-Respondents.

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Wolf Haldenstein Adler Freeman & Herz LLP, New York (Christopher Cobb of counsel), for appellants.

Silverman Shin & Byrne PLLC, New York (Michael Byrne of counsel), for Bradhurst 100 Development LLC and Pennrose Properties LLC, respondents, and (Donald F. Schneider of counsel), for Richard Barnhart and Mark Dambly, respondents.

Babchik & Young, LLP, White Plains (Siobhan A. Healy of counsel), for Duvernay + Brooks, LLC and Joni Brooks, respondents.

Gogick, Byrne & O'Neill, LLP, New York (Elaine C. Gangel of counsel), for Magnusson Architecture & Planning, PC, respondent.

McElroy, Deutsch, Mulvaney & Carpenter, LLP, New York (John P. Cookson of counsel), for West Manor Construction Corp., respondent.

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Order, Supreme Court, New York County (Joan M. Kenney, J.), entered June 7, 2012, which, to the extent appealed from, granted defendants' motions to strike the amended complaint dated April 24, 2012, unanimously affirmed, without costs. Order, same court and Justice, entered January 25, 2013, which granted defendants' motions to dismiss the amended complaint dated July 11, 2012, unanimously modified, on the law, to reinstate the breach of contract action asserted against defendant Bradhurst 100

Development LLC seeking to recover damages for alleged defects to the common areas, to reinstate the breach of contract cause of action asserted against defendant West Manor Construction Corp., and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered June 27, 2012, which granted in part defendants' motions to dismiss the original complaint, unanimously dismissed, without costs, as academic.

Plaintiff Sutton Apartments Corporation commenced this action on behalf of the proprietary leaseholders/shareholders of a "condop" to recover damages allegedly sustained as a result of purported defects in the design and construction of the building. It asserts claims for breach of contract, negligence, fraud, negligent misrepresentation, professional malpractice, fraudulent conveyance, and violation of General Obligations Law §§ 349 and 350. Defendant Bradhurst 100 Development, LLC was the sponsor; defendants Pennrose Properties, LLC (Pennrose) and Duvernay + Brooks, LLC (Duvernay) were the sponsor's members; defendant Joni Brooks was a member of Duvernay; and defendants Richard Barnhart and Mark Dambly were presidents of Pennrose (collectively the sponsor defendants). Plaintiff also sued Magnusson Architecture and Planning, PC (the architect), and general contractor West Manor Construction Corp. (the contractor).

The court properly granted defendants' motions to strike the amended complaint dated April 24, 2012. That complaint was served after defendants' motions to dismiss the original

complaint had been submitted for consideration. The amended complaint was not served as of right, as it was served outside the time period for amendments without leave under CPLR 3025(a).

The court, however, erred in dismissing the amended complaint dated July 11, 2012, filed after disposition of the motions to dismiss. Contrary to the court's conclusion, the amended complaint did not merely reassert the dismissed claims, but also raised new claims for consideration. We also note that the June 7, 2012 order striking the prior amended complaint granted leave to re-serve an amended complaint 10 days after service of entry of the decision on the motions to dismiss.

The court also erred in dismissing the claim for breach of contract as asserted against the contractor. While the court reasoned that the contracts submitted did not refer to prospective leaseholders as beneficiaries of an agreement between the contractor and the sponsor, it is undisputed that the contractor-sponsor agreement had not been submitted with the motions. Accordingly, the court could not have ascertained the terms of that agreement. Accordingly, we reinstate the claim to permit the matter to proceed to discovery.

To the extent the court partially dismissed the breach of contract claim against the sponsor on the ground that Sutton Apartments Corporation lacked standing to bring claims to recover

damages for defects to common elements of the building (*see Kerusa Co. LLC v W10Z/515 Real Estate Ltd. Partnership*, 50 AD3d 503, 504 [1st Dept 2008]), the second amended complaint naming the Board of Managers of the Sutton Condominium as a plaintiff sufficiently addressed this deficiency (*Residential Bd. of Mgrs. of Zeckendorf Towers v Union Sq.-14th St. Assoc.*, 190 AD2d 636 [1st Dept 1993]). Accordingly, the breach of contract claim against the sponsor regarding the common elements is reinstated.

The dismissal of the remaining claims are affirmed. While the Martin Act does not preclude the fraud claims, which allege affirmative misrepresentations as opposed to omissions of information required by the Act (*see Bhandari v Ismael Leyva Architects, P.C.*, 84 AD3d 607, 607 [1st Dept 2011]), plaintiffs failed to plead those claims with sufficient particularity to permit an inference of fraud (*see Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486 [2008]; *Ford v Sivilli*, 2 AD3d 773, 775 [2d Dept 2003]; *Wildman & Bernhardt Constr. v BPM Assoc.*, 273 AD2d 38, 38-39 [1st Dept 2000]). The court properly dismissed plaintiffs' claims alleging constructive fraudulent conveyance and fraudulent conveyance causing unreasonably small capital, as plaintiffs did not allege facts showing a fiduciary or confidential relationship between them and the sponsor defendants (*see Levin v Kitsis*, 82 AD3d 1051, 1054 [2d Dept 2011]).

The court also properly dismissed the claims alleging violation of General Obligations Law §§ 349 and 350, as this

action is limited to the parties in the subject building and does not involve "the public at large" (*Merin v Precinct Devs. LLC*, 74 AD3d 688, 689 [1st Dept 2010]; *Thompson v Parkchester Apts. Co.*, 271 AD2d 311, 311-312 [1st Dept 2000]). Plaintiffs failed to allege facts sufficient to support piercing the corporate veil to reach Pennrose and Duvernay or the individual defendants, Brooks, Barnhart, and Dambly (*see Morpheus Capital Advisors LLC v UBS AG*, 105 AD3d 145, 153 [1st Dept 2013]; *Retropolis, Inc. v 14th St. Dev. LLC*, 17 AD3d 209, 210-211 [1st Dept 2005]). Further, plaintiffs' aiding and abetting fraud claim fails, as their conclusory allegations are insufficient to show "actual knowledge" (*Oster v Kirschner*, 77 AD3d 51, 55 [1st Dept 2010]). The court properly dismissed the negligence claims against the sponsor defendants and the contractor, as they are duplicative of the breach of contract claims against those defendants (*see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 390 [1987]).

The tort claims against the architect fail for lack of contractual privity, or the functional equivalency of privity (*see Ossining Union Free School Dist. v Anderson LaRocca Anderson*, 73 NY2d 417, 421, 424 [1989]; *Bri-Den Constr. Co., Inc. v Kapell & Kostow Architects, P.C.*, 56 AD3d 355 [1st Dept 2008], *lv denied* 12 NY3d 703 [2009]). Because the agreement between the architect and the sponsor does not reflect an intent that proprietary leasholders be beneficiaries of the agreement, the

court properly dismissed the breach of contract claim against the architect (*see Port Chester Elec. Constr. Corp. v Atlas*, 40 NY2d 652, 655 [1976]).

We have reviewed plaintiffs' remaining contentions, including its argument regarding punitive damages, and find them unavailing.

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

ENTERED: JUNE 27, 2013

CLERK

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

10506N-
10507N

Index 602913/08

New York University,
Plaintiff-Appellant,

-against-

Cliff Tower, LLC,
Defendant-Respondent.

_____

Bonnie Brier, New York (Nancy Kilson of counsel), for appellant.

Arent Fox LLP, New York (Bernice K. Leber of counsel), for respondent.

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Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered July 17, 2012, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for partial summary judgment dismissing defendant's second through tenth defenses and counterclaims (counterclaims), granted in part defendant's cross motion for summary judgment as to defendant's tenth counterclaim, and referred the issue of damages on the tenth counterclaim to a special referee, unanimously modified, on the law, to grant plaintiff's motion for partial summary judgment dismissing the tenth counterclaim to the extent that it seeks lost rent, deny defendant's cross motion as to its tenth counterclaim, and remand the matter for further proceedings, and otherwise affirmed, without costs. Appeal from order on reargument, same court and Justice, entered September 27, 2012, unanimously dismissed, without costs, as academic.

Plaintiff correctly argues that the motion court erroneously

failed to grant partial summary judgment dismissing the tenth counterclaim to the extent that defendant Cliff Tower sought lost rent from plaintiff in the amount of more than $1.5 million based on plaintiff's alleged failure to return the dormitory apartments in good repair. Nothing in the relevant lease provisions provided for additional rent beyond the term of the lease as part of the damages for restoring the premises to the agreed upon condition (*Solow Mgt. Corp. v Hochman*, 191 AD2d 250, 251 [1st Dept 1993], *lv dismissed* 82 NY2d 802 [1993]; *see also Chemical Bank v Stahl*, 255 AD2d 126, 127 [1st Dept 1998]).

Regarding plaintiff's motion for partial summary judgment on the tenth counterclaim seeking to limit any potential recovery by defendant for damages to the apartments to $137,606, Supreme Court correctly reasoned that plaintiff failed to meet its burden of eliminating any triable issue of fact as to the extent of plaintiff's liability and the amount of damages.

Specifically, the relevant lease provisions make clear that plaintiff is liable for damage beyond ordinary wear and tear, and for leaving the dormitory apartments, including the walls, floors, and appliances, in substantially the same condition in which they were received. The court did not focus excessively on these provisions, as this is precisely the situation those provisions were intended to address. Plaintiff cites other provisions that merely prohibit the apartment occupants from refinishing floors and do not oblige plaintiff to repaint walls,

but these sections do not absolve plaintiff of liability for damage beyond ordinary wear and tear.

Supreme Court also correctly noted that defendant did not impermissibly seek reimbursement for upgrades and other expenses not covered by the lease terms. Rather, defendant sought the cost of replacing damaged kitchen counters but did not pass on the additional cost of upgrading to granite countertops. Regarding the other disputed costs, such as the Christmas lights, payroll expenses and janitorial supplies, the court correctly concluded that triable issues of fact existed regarding whether plaintiff's conduct caused Cliff Tower to incur these expenses, as Cliff Tower claims it did.

As Supreme Court correctly found in its July 17, 2012 order that triable issues of fact exist regarding plaintiff's liability for damage to the apartments, it should have denied defendant's motion for summary judgment as to liability as well as damages and proceeded to trial on those issues.

Contrary to plaintiff's assertion, the record does not suggest that Supreme Court issued any one-sided rulings, and there is no need for reassignment to a different Justice for further proceedings.

As neither party is the prevailing party with regard to its "central claim," neither is entitled to attorneys' fees in connection with its motion (*Sykes v RFD Third Ave. I Assoc., LLC*, 39 AD3d 279, 279 [1st Dept 2007]).

Finally, the remaining counterclaims at issue were labeled alternatively as affirmative defenses, and dismissal was not warranted based merely on defendant's grouping them together.

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

ENTERED: JUNE 27, 2013

CLERK

Tom, J.P., Mazzarelli, Moskowitz, Feinman, JJ.,

8758 The People of the State of New York, Ind. 1740/02
Appellant,

-against-

Alvaro Verdejo,
Defendant-Respondent.

_____

Robert T. Johnson, District Attorney, Bronx (Justin J. Braun of counsel), for appellant.

Lamis J. Deek, New York, for respondent.

_____

Order, Supreme Court, Bronx County (Caesar Cirigliano, J.), entered November 15, 2011, reversed, on the law, the motion denied, and the judgment reinstated.

Opinion by Tom, J.P. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Angela M. Mazzarelli
Karla Moskowitz
Paul G. Feinman, JJ.

8758
Ind. 1740/02

_____x

The People of the State of New York,
Appellant,

-against-

Alvaro Verdejo,
Defendant-Respondent.

_____x

The People of the State of New York appeal from the order of the Supreme Court, Bronx County (Caesar Cirigliano, J.), entered November 15, 2011, which granted defendant's CPL 440.10 motion to vacate a judgment of the same court (Edward Davidowitz, J.), rendered October 17, 2002, convicting defendant of criminal possession of a weapon in the third degree, and imposing sentence.

Robert T. Johnson, District Attorney, Bronx (Justin J. Braun and Joseph N. Ferdenzi of counsel), for appellant.

Lamis J. Deek, New York, and Joshua E. Bardavid, New York, for respondent.

TOM, J.P.

Over nine years after pleading guilty to criminal possession of a weapon in the third degree, defendant brought this motion to vacate the judgment of conviction, from which no appeal was ever taken, on the ground that he was denied effective assistance of counsel. In granting the motion pursuant to CPL 440.10(h), the court gave retroactive application to *Padilla v Kentucky* (559 US 356 [2010]), in which the United States Supreme Court added to the obligations imposed on an attorney the requirement to accurately advise an immigrant defendant about the consequences of pleading guilty to a criminal offense, particularly the risk of deportation.

Removal proceedings against defendant, a permanent resident of the United States, were instituted by Immigration and Customs Enforcement on September 19, 2010. The notice to appear states that defendant, who was accorded lawful permanent resident status on September 21, 1990, is subject to removal from the United States under Immigration and Nationality Act § 237(a)(2)(C)(8 USC § 1227 [a][2][C]) on the basis of his conviction for unlawful possession of a firearm. Defendant interposed the instant motion to vacate his conviction on June 2, 2011.

In opposition to the motion, the People argued that, at the time defendant entered his plea (August 5, 2002), only an

affirmative misrepresentation of the immigration consequences of pleading guilty would be construed as falling below the objective standard of reasonableness governing an attorney's representation of his client (citing *People v McDonald*, 1 NY3d 109, 115 [2003] [defendant told that he would not be deported because he was a long-term resident and his children were born and resided in the United States]). Defendant submitted an affirmation from his former attorney stating only that, while aware that defendant was a Mexican national, it was counsel's practice not to dispense any advice regarding the immigration consequences of entering into a negotiated plea because prevailing Court of Appeals' precedent did not require it. Thus, the People contended, having failed to demonstrate counsel imparted any erroneous advice concerning defendant's immigration status, defendant had failed to establish that counsel's representation fell below the standard required by the Sixth Amendment under *Strickland v Washington* (466 US 668 [1984]). The People further argued that defendant had failed to meet the second prong of the *Strickland* test by demonstrating that it would have been rational to have rejected the offered plea (citing *Padilla*, 559 US at __ , 130 S Ct at 1485). Thus, they asserted, defendant made no factual allegation that, "'but for counsel's error [], he would not have pleaded guilty and would have insisted on going to trial'" (quoting *McDonald*, 1 NY3d

at 115).

The motion court noted that defendant had entered a guilty plea in exchange for an intermittent sentence of six months, to be served on weekends. The plea minutes reflect that defendant was living with and supporting his family, including a gravely ill son, and the sentencing court deemed it important that defendant be able to continue working. In vacating the judgment of conviction, the motion court found *Padilla* to be retroactive and, without addressing the issue of prejudice, granted the motion.

On appeal, the People contend that the motion court erred in giving retroactive application to *Padilla* and in neglecting to consider whether defendant sustained prejudice by entering into the negotiated plea agreement. Since the appeal was argued, the Supreme Court has decided the former issue, holding that a defendant whose conviction has become final may not take advantage of *Padilla* to collaterally attack a conviction. Following the analysis applied in *Teague v Lane* (489 US 288 [1989]), the Court concluded that *Padilla* had broken new ground (*Chaidez v United States*, __ US __, 133 S Ct 1103, 1110 [2013]). The Court reasoned that in rejecting the distinction between direct and collateral consequences of a conviction, *Padilla* represented the announcement of new law with respect to a

defendant's Sixth Amendment rights as construed in both state and federal jurisdictions, which "almost unanimously concluded that the Sixth Amendment does not require attorneys to inform their clients of a conviction's collateral consequences, including deportation" (*id.* at 1109).

Padilla has been accorded retroactive application by this Court (*People v Baret*, 99 AD3d 408 [1st Dept 2012]; *see also People v Ramos*, 100 AD3d 487 [1st Dept 2012], *lv denied* 20 NY3d 1103 [2013]) and the Third Department (*People v Rajpaul*, 100 AD3d 1183 [3rd Dept 2012]; *People v Oouch*, 97 AD3d 904 [3rd Dept 2012]). However, since *Padilla* "marks a break from both Federal and State law precedents . . . and fundamentally alters the Federal constitutional landscape, the principles of retroactivity developed by the Supreme Court in construing Federal constitutional law govern the disposition of this case" (*People v Eastman*, 85 NY2d 265, 275 [1995]).

The holding that *Padilla* announced new law, by which this Court is bound, dictates the conclusion that it has no retroactive application. As *Eastman* explains:

> "Pursuant to *Teague*, new rules of constitutional criminal procedure are applied retrospectively in one of two situations: (1) where the new rule places 'certain kinds of primary, private individual conduct beyond the power of the criminal law making authority to proscribe' or (2) where the new

> rule alters a bedrock procedural element of criminal procedure which implicates the fundamental fairness and accuracy of the trial" (*Eastman*, 85 NY2d at 275, quoting *Teague*, 489 US at 311-312).

The rule announced in *Padilla* does neither, merely prescribing a duty imposed on counsel, and does not warrant retroactive application. Thus, defendant may not avail himself of the ruling, and it is unnecessary to reach the issue of prejudice raised by the People.

Accordingly, the order of the Supreme Court, Bronx County (Caesar Cirigliano, J.), entered November 15, 2011, which granted defendant's CPL 440.10 motion to vacate a judgment of the same court (Edward Davidowitz, J.), rendered October 17, 2002, convicting defendant of criminal possession of a weapon in the third degree, and sentencing him to a term of 4 months' intermittent imprisonment concurrent with five years' probation, including participation in an alcohol treatment program, should

be reversed, on the law, the motion denied, and the judgment reinstated.

All concur.

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

ENTERED: JUNE 27, 2013

CLERK