SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 17, 2015

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Friedman, Andrias, Gische, Kapnick, JJ.

14085 Paulo DaSilva, Index 109258/11
Plaintiff-Appellant,

-against-

Haks Engineers, Architects
and Land Surveyors, P.C., et al.,
Defendants-Respondents.

_____

Davidson & Cohen, P.C., Rockville Center (Robin Mary Heaney of counsel), for appellant.

Law Office of Charles J. Seigel, New York (Reed M. Podell of counsel), for Haks Engineers, Architects and Land Surveyors, P.C., respondent.

Colleran, O'Hara & Mills L.L.P., Woodbury (Michael D. Bosso of counsel), for Earth Tech Northeast, Inc. and Haks Et Joint Venture, respondents.

_____

Order, Supreme Court, New York County (Donna M. Mills, J.), entered October 8, 2013, which granted defendants' motions for summary judgment dismissing the complaint, unanimously affirmed, without costs.

In this action alleging violations of Labor Law §§ 200, 240(1) and 241(6), plaintiff, a construction worker employed by

nonparty Yonkers Contracting, Inc., was injured when, while working on the construction of the Croton Falls Dam, a project undertaken by nonparty Department of Environmental Protection (DEP), the plank of the scaffold he was standing on shifted, causing him to fall to the concrete below. DEP had entered into a construction management services contract (CMS) with defendant Haks Et Joint Venture which constituted of co-defendants Earth Tech Northeast, Inc. and Haks Engineers, Architects and Land Surveyors, P.C. pursuant to which defendants had project management responsibilities which included providing a resident engineer and making sure that construction contractors had necessary permits and maintained their records in accordance with standard practice. The construction manager was also responsible for reviewing the health and safety plans of contractors, as well as "develop[ing] and implement[ing] an overall Health and Safety Plan addressing activities associated with existing on-site conditions." However, the CMS specified that "[t]he [construction manager] will not supervise, direct, control or have authority over or be responsible for each contractor's means, methods, techniques, sequences or procedures of construction or the safety precautions and programs incident thereto. If it became apparent that the means and methods of

construction proposed by the construction contractors would constitute or create a hazard, then the construction manager was required to "notify the Commissioner, or . . . his/her duly authorized representative."

Where a claim under Labor Law § 200 is based on alleged defects or dangers arising from a subcontractor's methods or materials, liability cannot be imposed on an owner or general contractor unless it is shown that it exercised some supervisory control over the work (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505 [1993]; *Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143-144 [1st Dept 2012]). Defendants established that under the CMS they were not obligated to exercise supervisory control over the construction contractor's means or methods of work, nor did they assume such responsibility (*see Suconota v Knickerbocker Props., LLC*, 116 AD3d 508 [1st Dept 2014]). Although under the CMS the construction manager had some general duties to monitor safety at the work-site, and defendants' personnel were on site on a daily basis, these general supervisory duties are insufficient to form a basis for the imposition of liability (*Suconota v Knickerbocker Props., LLC*, 116 AD3d at 508 [internal citation omitted]).

Defendants also established that they were not the property owner's statutory agent for purposes of Labor Law §§ 240(1) or 241(6) such that they should be held vicariously liable for plaintiff's injuries (*see Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864 [2005]). The CMS did not confer upon the construction manager the right to exercise supervisory control over the individual contractors, nor were defendants authorized to stop the work if their personnel observed an unsafe practice (*see Walls v Turner Constr. Co.*, 4 NY3d at 864). The construction manager was only obligated to notify the project owner or its duly authorized representative of such a situation. Accordingly, defendants established their entitlement to summary judgment.

In opposition, plaintiff argues that, despite the terms of the CMS, defendants actually functioned as a general contractor and/or that defendants actually supervised the work. Plaintiff does not offer any facts to support this claim and it is contradicted by the terms of the CMS. There is no evidence that plaintiff interacted with defendants' personnel, that they supervised his work, or that he ever reported to them.

Since plaintiff failed to raise a triable issue of fact regarding defendants' authority to supervise and control the work, defendants were properly granted summary judgment.

Contrary to plaintiff's contention, defendants' motions were not premature although discovery was incomplete. "A grant of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence" (*Bailey v New York City Transit Authority*, 270 AD2d 156, 157 [1st Dept 2000]). Plaintiff's argument, that he had no access to vital information about defendants' actual roles and duties at the job site, or that he was deprived of an opportunity to elicit material facts, only expresses a mere hope or speculation that discovery might turn up some evidence giving rise to a triable issue of fact. Thus, there is no basis for denial or continuance of the motion pursuant to CPLR 3212(f) (*Cooper v 6 West 20th Street Tenants Corp.*, 258 AD2d 362, 362 [1st Dept 1999]).

We have considered plaintiff's additional arguments and find them unavailing.

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

ENTERED: FEBRUARY 17, 2015

CLERK

Gonzalez, P.J., Acosta, Saxe, Manzanet-Daniels, Clark, JJ.

14210 The People of the State of New York, Ind. 1761/12
Respondent,

-against-

John Thompson, etc.,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Marcy L. Kahn, J.), rendered on or about February 8, 2013, unanimously affirmed.

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

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

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

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

ENTERED: FEBRUARY 17, 2015

CLERK

Gonzalez, P.J., Acosta, Saxe, Manzanet-Daniels, Clark, JJ.

14211 In re Vito Lombard, Index 402420/12
Petitioner-Appellant,

-against-

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

_____

The Bronx Defenders, Bronx (Karen Maxim of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Jane L. Gordon of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Carol E. Huff, J.), entered July 2, 2013, denying the petition to annul a determination of respondent New York City Department of Education (DOE), which limited petitioner's access to a New York City elementary school attended by his children, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

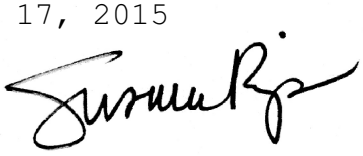
DOE's June 18, 2012 statement that it would permit petitioner to attend his children's graduation ceremonies that month on condition that petitioner be escorted by a plain-clothes school safety agent constituted a facially final statement of its position, and started the applicable four-month limitations

period (*see* CPLR 217[1]; *Matter of Best Payphones, Inc. v Department of Info. Tech. & Telecom. of City of N.Y.*, 5 NY3d 30, 34 [2005]). Petitioner's counsel's July 24, 2012 inquiry to DOE, asking if it had "finalized its new policies" for petitioner to pick up his children at the school, was a request for reconsideration which did not suffice to extend the limitations period (*see Matter of Baloy v Kelly*, 92 AD3d 521 [1st Dept 2012]). DOE's response on July 27, 2012, that petitioner would not be allowed to pick up his children at the school, merely reiterated the position it had first laid out in May 2011. The parties' "correspondence" to "ascertain the factual particulars" did not further extend petitioner's time to commence proceedings under CPLR article 78 (*Matter of M & D Contrs. v New York City Dept. of Health*, 233 AD2d 230, 231 [1st Dept 1996]).

Accordingly, the proceeding, filed on November 20, 2012, over five months after DOE's June 18, 2012 statement, was untimely (*see* CPLR 217[1]).

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

ENTERED: FEBRUARY 17, 2015



CLERK

Gonzalez, P.J., Acosta, Saxe, Manzanet-Daniels, Clark, JJ.

14212 In re Albertina C.,
Petitioner-Appellant,

-against-

Administration for Children's Services,
Respondent-Respondent,

Jamar J., et al.,
Respondents.

_____

Leslie S. Lowenstein, Woodmere, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Ronald E. Sternberg of counsel), for respondent.

Kenneth M. Tuccillo, Hastings on Hudson, attorney for the child.

_____

Order, Family Court, Bronx County (Carol R. Sherman, J.), entered on or about October 25, 2013, which denied petitioner grandmother's petition for custody and motion for visitation with the subject child, unanimously affirmed, without costs.

There is no presumption that it is in a child's best interest for custody to be awarded to a relative, and the sole issue in a custody proceeding is the best interests of the child (*see* Domestic Relations Law § 72[2][a]; Family Court Act § 631; *Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). The court properly found that it was not in the child's best interests to award the grandmother custody because the

grandmother failed to appreciate the danger to the child in permitting the mother access, where the mother viciously beat the child's five-year old brother and failed to provide him with medical assistance for four days, until he died. The grandmother refused to acknowledge the mother's role in the sibling's demise, and testified that her daughter was an "excellent" mother.

With respect to visitation, the court properly undertook a two-part inquiry, and found, first, that the grandmother had established the right to be heard based on her testimony concerning her relationship with the child. However, the court also properly concluded that visitation was not in the child's best interests because of the grandmother's flawed understanding of the death of the child's brother, the testimony of the foster mother that, following visits, the child became defiant and aggressive, and the child's therapists' report that the visits were detrimental to the child (*see Matter of Wilson v McGlinchey*, 2 NY3d 375, 380 [2004]).

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

ENTERED: FEBRUARY 17, 2015

CLERK

Gonzalez, P.J., Acosta, Saxe, Manzanet-Daniels, Clark, JJ.

14213 In re Darlene Gumbs, Index 104277/12
Petitioner-Appellant,

-against-

Board of Education of the
City School District of the
City of New York, et al.,
Respondents-Respondents.

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Office of Richard E. Casagrande, New York (Lori M. Smith of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Emma Grunberg of counsel), for respondents.

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Judgment, Supreme Court, New York County (Alexander W. Hunter, Jr., J.), entered June 13, 2013, denying the petition to annul petitioner's unsatisfactory rating for the 2011-2012 school year and discontinuance of her probationary employment as a guidance counselor, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously reversed, on the law, without costs, the petition granted, the unsatisfactory rating and discontinuance of employment annulled, and the matter remanded to respondents for further proceedings.

The record demonstrates deficiencies in the performance review process resulting in petitioner's unsatisfactory rating (U-rating) for the 2011-2012 school year that were not merely

technical, but undermined the integrity and fairness of the process (*see Matter of Kolmel v City of New York*, 88 AD3d 527, 529, 930 NYS2d 573 [1st Dept 2011]; *Matter of Brown v City of New York*, 111 AD3d 426 [1st Dept 2013]). Petitioner had received a satisfactory rating for the 2010-2011 school year. She did not receive the disciplinary letters underlying the U-rating for the 2011-2012 school year until June 20, 2012, at the end of the school year. Moreover, her receipt of the letters was contemporaneous with the issuance of the U-rating and recommendation of discontinuance. Thus, petitioner received scant notice of respondents' concerns about her performance and had little opportunity to improve her performance.

Even assuming petitioner was aware, via certain email and other correspondence, of the facts and circumstances underlying the respective disciplinary letters, there is no evidence to suggest that these communications, made in the ordinary course of petitioner's employment as a probationary guidance counselor, would have alerted her that her year-end rating or her employment was at risk. We note also, in light of the range of dates of the

incidents referred to in the disciplinary letters, that no explanation has been given for respondents' failure to bring their concerns to petitioner's attention before June 2012.

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

ENTERED: FEBRUARY 17, 2015

CLERK

Gonzalez, P.J., Acosta, Saxe, Manzanet-Daniels, Clark, JJ.

14214 The People of the State of New York, Ind. 4421/10
Respondent,

-against-

Jason Jackson,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Marc I. Eida of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Patricia Anne Williams, J.), rendered June 15, 2012, convicting defendant, after a jury trial, of auto stripping in the second degree, attempted assault in the second degree, criminal possession of a weapon in the fourth degree, and petit larceny, and sentencing him to an aggregate term of 2⅔ to 8 years, unanimously reversed, on the law, and the matter remanded for a new trial.

The court erred in denying, without further inquiry, defendant's challenges for cause to three prospective jurors, against whom defendant ultimately exercised peremptory challenges. In response to defense counsel's questioning during jury selection, the panelists at issue expressed, in one form or other, that it would be difficult for them to decide the case if

they did not "hear from" defendant or hear his "side of the story." The court did not instruct the panel on the People's exclusive burden of proof and a defendant's right not to testify, and it did not elicit from the panelists at issue "some unequivocal assurance" that they would be "able to reach a verdict based entirely upon the court's instructions on the law" (*People v Bludson*, 97 NY2d 644, 646 [2001]).

A prospective juror's statement to the effect that it is "important to hear both sides" raises the "appear[ance of] assertion of a defendant's obligation to present a defense" (*People v Feliciano*, 285 AD2d 371, 371 [1st Dept 2001], *lv denied* 96 NY2d 939 [2001]). Here, although the court had not yet instructed the jurors on the relevant legal principles, defense counsel framed several of her questions in terms of the "right to remain silent." Further, counsel's several other attempts to place her questioning in the context of the legal instructions the jurors would receive were cut short by the court, which indicated that it would instruct the jurors "at the appropriate time." However, the circumstances called for a prompt instruction on the relevant principles regarding the burden of proof and a defendant's right not to testify or present evidence, along with the elicitation of unequivocal assurances that the

panelists would follow that charge.

Since we are ordering a new trial, we find it unnecessary to reach defendant's remaining contentions.

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

ENTERED: FEBRUARY 17, 2015

CLERK

Gonzalez, P.J., Acosta, Saxe, Manzanet-Daniels, Clark, JJ.

14215- Index 650089/11
14216-
14217-
14218 U.S. Legal Support, Inc.,
Plaintiff-Respondent-Appellant,

-against-

Eldad Prime, LLC,
Defendant-Appellant-Respondent.

_____

Lipsky Bresky & Lowe, LLP, Garden City (Michael Lowe of counsel), for appellant-respondent.

Benowich Law, LLP, White Plains (Leonard Benowich of counsel), for respondent-appellant.

_____

Judgment, Supreme Court, New York County (Carol R. Edmead, J.), entered January 14, 2014, awarding plaintiff the principal sum of $630,909.46, unanimously affirmed, with costs. Appeals from the underlying order and amended supplemental order, same court and Justice, entered November 25, 2013 and December 15, 2013, respectively, unanimously dismissed, without costs, as subsumed in the appeal from the aforesaid judgment. Judgment, same court (Ira Gammerman, J.H.O.), entered April 11, 2014, after a hearing, awarding defendant, on its counterclaim for unpaid rent, the principal sum of $72,000, unanimously modified, on the law, to provide that the principal sum be offset by the amount of

interest on plaintiff's security deposit, and the Clerk is directed to recalculate the security-deposit interest at the rate of 9% per annum from December 1, 1999 to April 11, 2014, and to amend the judgment accordingly, and otherwise affirmed, without costs.

Defendant landlord failed to demonstrate that it was entitled to reformation of the lease amendment providing that it would reimburse plaintiff tenant the total cost of its alterations, rather than a capped amount as had been set forth in drafts circulated during negotiations over the renewal lease. Defendant's failure to read the final document before signing it precludes its claim of unilateral mistake induced by fraud based on plaintiff's failure to highlight its deletion of the portion of the provision capping the reimbursement amount, before presenting it to defendant's in-house counsel for defendant's signature (*see e.g. Hutchinson Burger, Inc. v Hutch Rest. Assoc., L.P.*, 100 AD3d 531 [1st Dept 2012], *lv denied* 21 NY3d 858 [2013]). Defendant failed to exercise ordinary diligence (*see DDJ Mgt., LLC v Rhone Group L.L.C.*, 15 NY3d 147, 153-154 [2010]). Contrary to this sophisticated defendant's contention, the justifiability of its reliance does not present an issue of fact

barring summary disposition (*see Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 99 [1st Dept 2006], *lv denied* 8 NY3d 804 [2007]). Even assuming an obligation to conduct pre-contractual negotiations in good faith in appropriate circumstances, such as would enable a party to rely on the adverse party negotiating in good faith and to assume that there are no new changes to earlier drafts unless the change is highlighted, defendant's claim for reformation based on the allegation of fraud cannot stand. Defendant simply may not justifiably rely on the absence of such highlighting for its failure to fully review the final version of this four-page document before signing it, especially since the change is on the first page.

Plaintiff submitted admissible business records to support its claim for reimbursement (*see One Step Up, Ltd. v Webster Bus. Credit Corp.*, 87 AD3d 1, 11-12 [1st Dept 2011]). It also satisfied the other lease conditions for reimbursement. We note that defendant failed to raise any specific objections to plaintiff's evidence of compliance with those conditions until it moved for summary judgment more than three years after plaintiff had submitted the evidence to it with a demand for reimbursement.

The defense of unconscionability lacks merit, since defendant could have walked away from the bargaining table (*see*

Dabriel, Inc. v First Paradise Theaters Corp., 99 AD3d 517, 521 [1st Dept 2012]). That the transaction ultimately proved somewhat one-sided – the cost of renovations approached the annual rent under the renewal lease – is insufficient to show that the lease amendment was unconscionable when made (*see Gillman v Chase Manhattan Bank*, 73 NY2d 1, 10 [1988]).

The defense that plaintiff, a foreign corporation, was unauthorized and therefore lacked capacity to sue pursuant to Business Corporation Law § 1312(a), if it ever was valid, was rendered ineffectual by plaintiff's cure of the alleged defect (*see Uribe v Merchants Bank of N.Y.*, 266 AD2d 21 [1st Dept 1999]). Defendant failed to carry its burden of demonstrating, in the first instance, that plaintiff was required to comply with Business Corporation Law § 1301(d).

Defendant's failure to deposit plaintiff's security in an interest-bearing account created a presumption that the funds were commingled from the first day they were provided, so the interest rate paid on accounts in which defendant deposited other tenants' funds is irrelevant (*see Tappan Golf Dr. Range, Inc. v Tappan Prop., Inc.*, 68 AD3d 440 [1st Dept 2009]). Notably, it was defendant's burden to prove that it did not commingle the

funds (*see 225 E. 64th St., LLC v Janet H. Prystowsky, M.D. P.C.*, 96 AD3d 536, 537-538 [1st Dept 2012]).

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

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

ENTERED: FEBRUARY 17, 2015

CLERK

Gonzalez, P.J., Acosta, Saxe, Manzanet-Daniels, Clark, JJ.

14219 The People of the State of New York, Ind. 4661N/11
Respondent,

-against-

Valentin Garcia,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered May 3, 2012, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the third degree and criminal possession of a controlled substance in the third degree and sentencing him, as a second felony drug offender, to an aggregate term of two to four years, unanimously affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility

determinations. The officer's account of the incident was not inherently unbelievable, and defendant's own testimony at the suppression hearing tended to corroborate the officer's testimony in material respects.

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

ENTERED: FEBRUARY 17, 2015

CLERK

Gonzalez, P.J., Acosta, Saxe, Manzanet-Daniels, Clark, JJ.

14220 Mintz & Gold LLP, Index 104699/11
Plaintiff-Appellant,

-against-

Fred A. Daibes,
Defendant-Respondent.

_____

Mintz & Gold LLP, New York (Scott Klein of counsel), for appellant.

Abrahamsen Law Firm, LLC, New York (Richard J. Abrahamsen of counsel), for respondent.

_____

Order, Supreme Court, New York County (Paul Wooten, J.), entered on or about December 19, 2013, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for summary judgment on its account stated claim, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiff made a prima facie showing of entitlement to judgment as a matter of law by demonstrating that it entered into a retainer agreement with defendant and sent him regular invoices pursuant to that agreement, to which he did not object (*see Jaffe v Brown-Jaffe,* 98 AD3d 898, 899 [1st Dept 2012]; *Bartning v Bartning,* 16 AD3d 249, 250 [1st Dept 2013]). In opposition, defendant failed to raise a triable issue of material fact.

Although defendant claims he signed the retainer agreement only in his capacity as agent and principal for nonparties River Lookout Associates, LLC and 1275 River Road Associates, LLC, the agreement is addressed to defendant individually, and he signed it individually, not on behalf of the LLCs. Accordingly, he can be held liable for the legal fees (*see Epstein Becker & Green, P.C. v Amersino Mktg. Group, LLC,* 111 AD3d 428, 429 [1st Dept 2013]). Defendant's contention that plaintiff sent bills to River Lookout is belied by the record.

Further, defendant did not object to the invoices in a timely manner. The parties' agreement provided that "[f]ailure to object to any bill within thirty days from the mailing shall be deemed an acknowledgment of the amount owed ...." Plaintiff sent defendant regular invoices, with the most recent invoice having been sent on July 13, 2010. Defendant did not make any objections until plaintiff's commencement of a prior action filed on August 27, 2010. Such belated protest is insufficient to ward off summary judgment (*see Lapidus & Assoc., LLP v Elizabeth St., Inc.,* 92 AD3d 405 [1st Dept 2012]). Notably, the only evidence in the record of a protest is defendant's affidavit, sworn to on May 6, 2011, asserting, without any details, that he advised plaintiff that its invoices were incorrect. This is insufficient

to raise a triable issue of fact (*see Darby & Darby v VSI Intl.*, 95 NY2d 308, 315 [2000]; *Thelen LLP v Omni Contr. Co., Inc.*, 79 AD3d 605, 606 [1st Dept 2010], *lv denied* 17 NY3d 713 [2011]).

Defendant challenges the reasonableness of plaintiff's fees. However, plaintiff does not have to establish the reasonableness of its legal services in an action for an account stated (*Emery Celli Brinckerhoff & Abady, LLP v Rose*, 111 AD3d 453, 454 [1st Dept 2013], *lv denied* 23 NY3d 904 [2014]), since plaintiff's failure to object to the invoice is "construed as acquiescence as to its correctness" (*see Lapidus*, 92 AD3d at 405-406).

Defendant contends that the motion court properly denied summary judgment because discovery was incomplete. This argument is unavailing (*see Thelen*, 79 AD3d at 606; *Duane Morris LLP v Astor Holdings Inc.*, 61 AD3d 418 [1st Dept 2009]).

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

ENTERED: FEBRUARY 17, 2015

CLERK

Gonzalez, P.J., Acosta, Manzanet-Daniels, Clark, JJ.

14222 Facie Libre Associates I, L.L.C., et al., Plaintiffs-Appellants, Index 651064/13

-against-

Littman Krooks, L.L.P., Defendant-Respondent.

Mintz Levin Cohn Ferris Glovsky and Popeo, P.C., New York (Dominic J. Picca of counsel), for appellants.

Abrams, Gorelick, Friedman & Jacobson, LLP, New York (Barry Jacobs of counsel), for respondent.

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered September 11, 2013, which granted defendant's motion to dismiss the complaint, unanimously modified, on the law, to deny the motion as to the legal malpractice cause of action, and otherwise affirmed, without costs.

The legal malpractice cause of action should not be dismissed because it cannot be concluded as a matter of law from the allegations in the complaint that defendant had no duty to monitor the transaction at issue for plaintiffs, including requesting copies of and ascertaining the status of documents

required by the issuer for the stock sale to go forward (*see Katz v Paul, Hastings, Janofsky & Walker LLP*, 19 Misc 3d 1121(A), 2008 NY Slip Op 50796[U] [Sup Ct, NY County 2008]). In particular, plaintiffs allege that there were indications that the legal opinion necessary for the transaction had not been sent to the issuer and that those indications should have triggered an inquiry by defendant (*see Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP*, 115 AD3d 228, 240-241 [1st Dept 2014]). The complaint adequately alleges that but for defendant's failure to make inquiry as to the status of the legal opinion, the opinion would have been delivered by the seller (*see Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442 [2007]). Plaintiffs' claim for lost profits is not barred by the settlement with the seller for the return of the purchase price since no election of remedies against defendant is involved (*see Rennie v Pierce Cards*, 65 AD2d 527, 528 [1st Dept 1978]).

The fiduciary duty claim is duplicative of the legal malpractice claim (*see Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 271 [1st Dept 2004]).

Were we to consider defendant's argument, raised for the first time on appeal, that this action is precluded by the

judgment in *Facie Libre Assoc. I, LLC v Secondmarket Holdings, Inc.* (36 Misc 3d 1229[A], 2012 NY Slip Op 51545[U] [Sup Ct, NY County 2012], *revd* 103 AD3d 565 [1st Dept 2013], *lv denied* 21 NY3d 866 [2013]), we would reject it.

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

ENTERED: FEBRUARY 17, 2015

CLERK

Gonzalez, P.J., Acosta, Saxe, Manzanet-Daniels, Clark, JJ.

14223 The People of the State of New York, Ind. 10263/95
Respondent,

-against-

Pedro Rodriguez,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Yuval Simchi-Levi of counsel), for respondent.

_____

Order, Supreme Court, New York County (Marcy L. Kahn, J.), entered on or about December 23, 2011, which denied defendant's CPL 440.46 motion for resentencing, unanimously affirmed.

The court properly determined that substantial justice dictated the denial of defendant's resentencing application. Resentencing is a discretionary determination (*see People v Sosa*, 18 NY3d 436, 442-443 [2012]), and courts may deny the applications of persons who "have shown by their conduct that they do not deserve relief from their sentences" (*People v*

Paulin, 17 NY3d 238, 244 [2011]). Here, defendant's pattern of violence, multiple felony convictions, history of absconding and failure to attempt rehabilitation while incarcerated militated against resentencing.

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

ENTERED: FEBRUARY 17, 2015

CLERK

Gonzalez, P.J., Acosta, Saxe, Manzanet-Daniels, Clark, JJ.

14224 Sophia Figueroa, Index 307658/11
Plaintiff-Appellant,

-against-

Gilbert Ortiz,
Defendant-Respondent.

_____

Sim & Record, LLP, Bayside (Sang J. Sim of counsel), for appellant.

Russo, Apoznanski & Tambasco, Melville (Susan J. Mitola of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered September 9, 2013, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant established entitlement to judgment as a matter of law in this action where plaintiff alleges that, as a result of a motor vehicle accident, she suffered serious injuries to her spine, right shoulder and right hip. Regarding the "permanent consequential" and "significant" limitations-in-use categories of Insurance Law § 5102(d), defendant demonstrated that plaintiff did not suffer a serious injury causally related to the accident. Defendant submitted, inter alia, the affirmed report of an orthopedic surgeon, who found normal range of motion in all

parts, and a radiologist, who opined that the conditions shown in the MRI taken of plaintiff's cervical spine were degenerative and preexisted the accident (*see Cruz v Martinez*, 106 AD3d 482 [1st Dept 2013]).

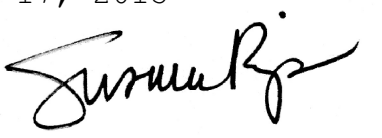
In opposition, plaintiff failed to raise a triable issue of fact. Although her doctor measured limitations in range of motion of all parts, plaintiff offered no objective medical evidence of injury to her right hip, and her doctor's narrative report acknowledged that the reports of MRIs performed on her lumbar spine, thoracic spine and right shoulder were all normal (*see Thomas v City of New York*, 99 AD3d 580 [1st Dept 2012]). Her radiologist's affirmed report of the MRI performed on her cervical spine confirmed the presence of dessication in the affected discs, and her doctor failed to address those findings or explain why the degenerative findings were not the cause of the claimed injuries (*see Dawkins v Cartwright*, 111 AD3d 559 [1st Dept 2013]; *Gorden v Tibulcio*, 50 AD3d 460, 464 [1st Dept 2008]).

Dismissal of plaintiff's 90/180-day claim was appropriate in light of plaintiff's testimony that she was able to leave home two months after the accident, and where her doctor cleared her

to return to work less than 90 days after the accident even though she chose not to return to work (*see Galarza v J.N. Eaglet Publ. Group, Inc.*, 117 AD3d 488 [1st Dept 2014]; *Merrick v Lopez-Garcia*, 100 AD3d 456, 457 [1st Dept 2012]).

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

ENTERED: FEBRUARY 17, 2015



CLERK

Gonzalez, P.J., Acosta, Saxe, Manzanet-Daniels, Clark, JJ.

14225-
14226 Index 104611/10

The Bank of New York Mellon
formerly know as The Bank of New York,
as Successor to JP Morgan Chase
Bank, NA, etc.,
Plaintiff-Respondent,

-against-

Keith Arthur,
Defendant-Appellant,

New York City Environmental
Control Board, et al.,
Defendants.

_____

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

Bryan Cave LLP, New York (Suzanne M. Berger of counsel), for respondent.

_____

Orders, Supreme Court, New York County (Cynthia S. Kern, J.), entered October 24, 2013, and November 27, 2013, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for summary judgment on its mortgage foreclosure claim and to dismiss defendant's affirmative defenses and counterclaims, and denied defendant's cross motion for summary judgment, unanimously affirmed, without costs.

Contrary to plaintiff's argument, the arguments raised by defendant for the first time on appeal may be considered since the issues raised are determinative and present purely legal arguments without raising new facts (*Seldon v Allstate Ins. Co.*, 107 AD3d 424 [1st Dept 2013]; *Facie Libre Associates I, LLC v SecondMarket Holdings, Inc.*, 103 AD3d 565 [1st Dept 2013], *lv denied* 21 NY3d 866 [2013]). Having considered these arguments, we find that the motion court properly found that plaintiff established its prima facie right to foreclosure by producing the note, mortgage and undisputed evidence of nonpayment (*see 71 Clinton St. Apts. LLC v 71 Clinton Inc.*, 114 AD3d 583, 584 [1st Dept 2014]; *Red Tulip, LLC v Neiva*, 44 AD3d 204, 209 [1st Dept 2007], *lv dismissed* 10 NY3d 741 [2008]), and that, in opposition, defendant failed to raise a triable issue regarding his affirmative defenses and counterclaims. Defendant failed to establish a triable issue regarding plaintiff's standing based on

improper indorsement or physical delivery of the loan documents, or plaintiff's notice to defendant pursuant to Real Property Actions and Proceedings Law § 1304.

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

ENTERED: FEBRUARY 17, 2015

CLERK

Gonzalez, P.J., Acosta, Saxe, Manzanet-Daniels, Clark, JJ.

14227 The People of the State of New York, Ind. 4578/11
Respondent,

-against-

Michael Poole,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (David Crow of counsel), and Patterson Belknap Webb & Tyler LLP, New York (Susan Millenky of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered January 15, 2013, convicting defendant, after a jury trial, of assault in the second degree, and sentencing him, as a second felony offender, to a term of six years, unanimously affirmed.

Defendant's legal sufficiency claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Contrary to defendant's argument, the evidence established that defendant acted with intent to prevent the victim, a police officer, from

performing a lawful duty, namely placing defendant in a police vehicle immediately after he had been arrested. The arrest was lawful, because the officer had probable cause to arrest defendant for harassment in the second degree, disorderly conduct, or both.

With regard to harassment, the injured officer and other officers were investigating defendant's alleged possession of a firearm, as reported in a 911 call, and confirmed through an interview with the caller on the scene. Once the officers detained defendant in a hotel hallway and began to frisk him, he resisted by moving his body around, made violent gestures, said that he would be able to beat up an officer if there were not so many of them around, and stated that he was going to kill a particular officer. Defendant's argument that he merely used harsh language against the police is unavailing, since the circumstances established that a reasonable officer would interpret his statements as genuine threats, based on all the preceding circumstances (*compare People v Baker*, 20 NY3d 354, 362 [2013][abusive, but nonthreatening language]).

As for disorderly conduct, contrary to defendant's argument, there was probable cause with respect to the public harm element, given that defendant's loud and tumultuous conduct occurred in

the hallway of a hotel at a time when many guests would presumably be in their rooms (*see People v Weaver*, 16 NY3d 123, 128-129 [2011]). Indeed, defendant's "very vocal and aggressive confrontation" (*id.* at 129) with the police caused a commotion prompting multiple hotel guests to peer out of their rooms at the incident.

We perceive no basis for reducing the sentence.

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: FEBRUARY 17, 2015

CLERK

Gonzalez, P.J., Acosta, Saxe, Manzanet-Daniels, Clark, JJ.

14229 In re Ramon A.,

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

_____

Law Office of Thomas R. Villecco, P.C., Jericho (Thomas R. Villecco of counsel), for appellant.

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

_____

Order, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about September 12, 2013, which adjudicated appellant a juvenile delinquent, upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of attempted criminal sexual act in the first degree (two counts) and sexual abuse in the first degree (two counts), and placed him on enhanced supervised probation for a period of 18 months, unanimously affirmed, without costs.

The court's finding was not against the weight of the evidence. The court had the advantage of seeing and hearing the

witnesses, and there is no basis for disturbing its credibility determinations. The evidence fails to support appellant's suggestion that the victim's mother may have induced the victim to make false accusations.

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

ENTERED: FEBRUARY 17, 2015

CLERK

Gonzalez, P.J., Acosta, Saxe, Manzanet-Daniels, Clark, JJ.

14230 Salimou Souare, et al., Index 309839/09
Plaintiffs-Respondents,

-against-

Port Authority of New York
and New Jersey,
Defendant-Respondent,

Greyhound Lines, Inc.,
Defendant-Appellant.

_____

Ahmuty, Demers & McManus, Albertson (Glenn A. Kaminska of counsel), for appellant.

Jacob Fuchsberg Law Firm, New York (Walter Osuna of counsel), for Salimou Souare and Melinda Souare, respondents.

James M. Begley, Port Authority of New York and New Jersey, New York (Cheryl Alterman of counsel), for Port Authority of New York and New Jersey, respondent.

_____

Order, Supreme Court, Bronx County (Julia I. Rodriquez, J.), entered April 15, 2013, which granted defendants' motions to reargue, and upon reargument, granted defendant Port Authority of New York and New Jersey's motion for summary judgment on its cross claim against defendant Greyhound Lines, Inc. for breach of contract for failure to procure insurance, and denied Greyhound's motion for summary judgment its contractual indemnification cross claims, unanimously modified, on the law, to deny the Port Authority's motion for summary judgment on its breach of contract

cross claim, and otherwise affirmed, without costs.

In this premises liability action, the motion court correctly denied both defendants' motions as to contractual indemnification on the ground that it was unable to determine which entity controlled the location where plaintiff fell. Although the Space and Services Agreement provided that the Port Authority would provide general maintenance for the terminal, the Bus Carrier License Agreement obligated Greyhound to indemnify the Port Authority for all third party claims arising out of its use of the space defined as the area where passengers loaded, and to "take the precautions at the gates and platforms adjacent to the Space reasonably necessary to assure the safety of its passengers and other persons" (*see Rubin v Port Auth. of N.Y. & N.J.*, 49 AD3d 422, 422 [1st Dept 2008]).

The motion court also correctly held that the Bus Carrier License Agreement between the Port Authority and Greyhound required Greyhound to procure insurance covering the Port Authority for all liabilities arising out of Greyhound's use of the "Space" under that agreement; that Greyhound failed to provide evidence (a certificate of insurance) demonstrating compliance with its contractual requirements; and that Greyhound therefore breached the contract (*see Bachrow v Turner Constr.*

Corp., 46 AD3d 388, 388 [1st Dept 2007]). Accordingly, the Port Authority is entitled to recover any losses caused by this breach of contract (*see id.*). Nevertheless, the motion court's grant of summary judgment was premature, as it has yet to be determined that Greyhound's failure to procure the agreed-upon insurance caused the Port Authority any losses (*see id.*).

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

ENTERED: FEBRUARY 17, 2015

CLERK

Gonzalez, P.J., Acosta, Saxe, Manzanet-Daniels, Clark, JJ.

14231 The People of the State of New York, Ind. 4673/12
Respondent,

-against-

Mohammed Osman,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Claudia Trupp of counsel), and DLA Piper LLP, New York (Nicholas Aldrich of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Ross D. Mazer of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Robert M. Stolz, J.), rendered July 2, 2013, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of three years, unanimously affirmed.

The court properly denied defendant's suppression motion. In an area known for drug activity, a police officer trained and experienced in the detection of narcotics transactions observed defendant, whom the officer had previously arrested for a drug sale, make a hand gesture to another man. The two men then walked away together, and the man then gave money to defendant in exchange for an unidentified object, which defendant transferred

by way of a closed fist. We have repeatedly held that such circumstances may provide probable cause for a defendant's arrest (*see e.g. People v Frierson*, 61 AD3d 448 [1st Dept 2009], *lv denied* 12 NY3d 915 [2009]). "Street sellers of narcotics should not enjoy an immunity from arrest or search merely because they are able to conceal their wares during the exchange; concealment is itself a common characteristic of illegal conduct. . . . (*People v Graham*, 211 AD2d 55, 59 [1st Dept 1995], *lv denied* 86 NY2d 795 [1995]). In this case, even without police training, "any person observing defendant . . ., using good common sense" would have concluded that he had sold drugs to the other man (*id.* at 60).

At the very least, the officer had a founded suspicion of criminality that justified his common-law inquiry. Even if defendant's behavior did not already provide the officer with probable cause, that level of suspicion was reached when defendant gave a false or suspicious explanation of his

interaction with the other man, and then acknowledged having pills, which, in context, could reasonably be interpreted as referring to illegal drugs.

We perceive no basis for reducing the sentence.

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

ENTERED: FEBRUARY 17, 2015

CLERK

Gonzalez, P.J., Acosta, Saxe, Moskowitz, Clark, JJ.

14232-
14232A Nancy Loughlin,
Plaintiff-Appellant,

-against-

New York City Transit
Authority, et al.,
Defendants-Respondents.

Index 400461/13

_____

Miller Eisenman & Kanuck, LLP, New York (Jonathan M. Kanuck of counsel), for appellant.

Lawrence Heisler, Brooklyn (Anna J. Ervolina of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Michael D. Stallman, J.), entered March 12, 2014, dismissing the complaint, unanimously reversed, on the law, without costs, the judgment vacated, and the motion denied. Appeal from the underlying order, same court and Justice, entered December 26, 2013, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

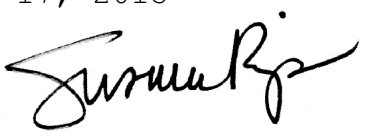
Plaintiff alleges that on December 10, 2011 she sustained personal injuries while a passenger on a New York City Transit Authority bus, when the bus suddenly stopped short, causing her to be thrown to the ground. Plaintiff's attorney's correspondence to the Authority, which enclosed, inter alia,

plaintiff's no-fault application and a narrative report from plaintiff's physician, together satisfied the form and contents requirements of a notice of claim, pursuant to General Municipal Law § 50-e(2), and placed the Authority on notice that plaintiff intended to commence a personal injury action (*see Losada v Liberty Lines Tr.*, 155 AD2d 337 [1st Dept 1989]). Unlike in *Richardson v New York City Tr. Auth.*, 210 AD2d 38, 39 [1st Dept 1994]), relied upon by the motion court, here, plaintiff was represented by counsel at the time of the submission of her no-fault application and her attorney's correspondence made it clear that plaintiff was not limiting her claim to no-fault benefits. The letters clearly informed the Authority that counsel had also been retained to represent plaintiff in a separate and distinct claim for "personal injuries." The attorney's letters and enclosures provided the Authority with sufficient information "of

the place, time and nature of her accident in order to investigate, collect evidence and evaluate the merit of [the] claim" (*Bennett v New York City Tr. Auth.*, 3 NY3d 745, 746 [2004] [internal quotation marks and citation omitted]).

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

ENTERED: FEBRUARY 17, 2015



CLERK

Gonzalez, P.J., Acosta, Saxe, Manzanet-Daniels, Clark, JJ.

14233N Deidre Holmes Clark, Index 106717/11
Plaintiff-Appellant,

-against-

Allen & Overy, LLP,
Defendant-Respondent.

_____

Deidre Holmes Clark, appellant pro se.

Proskauer Rose LLP, New York (Kathleen M. McKenna of counsel), for respondent.

_____

Order, Supreme Court, New York County (Louis B. York, J.), entered July 28, 2014, which granted defendant law firm's motion to compel plaintiff to submit to a mental examination, unanimously affirmed, without costs.

Following the termination of her employment as a senior attorney in defendant's Moscow office, plaintiff commenced this action asserting causes of action for, among other things, sexual harassment, retaliatory discharge, and intentional infliction of emotional distress. She alleges that defendant caused her to suffer "extreme mental and physical anguish" and "severe anxiety," and seeks to recover $15 million for emotional distress damages. Although plaintiff denies that defendant's actions caused any diagnosed psychiatric condition and does not

anticipate presenting an expert in support of her emotional distress claims, she testified at her deposition that her emotional distress has included experiencing eczema all over her body, hair pulling, anxiety, depression and suicidal feelings. Under these circumstances, the court providently exercised its discretion in determining that defendant had demonstrated that plaintiff had placed her mental condition "in controversy" by alleging unusually severe emotional distress, so that a mental examination by a psychiatrist is warranted to enable defendant to rebut her emotional distress claims (CPLR 3121[a]; *see Spierer v Bloomingdale's*, 37 AD3d 371 [1st Dept 2007]). Although plaintiff asserts that an examination would be unduly intrusive into private matters, she did not propose conditions or seek a protective order limiting the scope or extent of the examination (*see Matter of Carrier Corp. v New York State Div. of Human Rights*, 224 AD2d 936 [4th Dept 1996]).

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

ENTERED: FEBRUARY 17, 2015

CLERK

Gonzalez, P.J., Acosta, Saxe, Manzanet-Daniels, Clark, JJ.

14234N Ervin Johnson, Index 106510/11
Plaintiff-Appellant,

-against-

Banner International Corp.,
Defendant-Respondent,

"John Doe," etc.,
Defendant.

_____

Rimland & Associates, New York (Edward Rimland of counsel), for appellant.

Cobert, Haber & Haber, Garden City (David C. Haber of counsel), for respondent.

_____

Appeal from order, Supreme Court, New York County (Arlene P. Bluth, J.), entered October 11, 2013, which denied plaintiff's motion to reargue, denominated a motion to vacate, unanimously dismissed, without costs, as taken from a nonappealable paper.

Plaintiff never filed a notice of appeal from the court's March 22, 2013 order dismissing his complaint pursuant to CPLR 3126. Although denominated a motion to vacate, plaintiff's subsequent motion was, in actuality, one to reargue the prior order that had dismissed his complaint. Accordingly, the order denying plaintiff's subsequent motion is nonappealable (*see Steinhardt Group v Citicorp*, 303 AD2d 326, 326-327 [1st Dept

2003], *lv denied* 100 NY2d 506 [2003]; *Federation of Puerto Rican Orgs. of Brownsville v Mateo*, 235 AD2d 326 [1st Dept 1997], *lv dismissed* 90 NY2d 844 [1997]). If we were to review the order, we would affirm the denial of the subsequent motion, as plaintiff failed to provide a reasonable excuse for his noncompliance with the court's numerous discovery orders (*see Gibbs v St. Barnabas Hosp.*, 16 NY3d 74, 80 [2010]).

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

ENTERED: FEBRUARY 17, 2015

CLERK

Mazzarelli, J.P., Acosta, Saxe, Clark, Kapnick, JJ.

13640-
13640A X. Fan,
Plaintiff-Appellant-Respondent,

-against-

Andrew E. Sabin,
Defendant-Respondent-Appellant.

Index 158780/12

LeClairRyan, New York (Barry A. Cozier of counsel), for appellant-respondent.

Cohen Goldstein LLP, New York (Jeffrey R. Cohen of counsel), for respondent-appellant.

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered March 26, 2013, which, to the extent appealed from as limited by the briefs, upon converting defendant's motion for summary judgment dismissing the complaint to a motion to dismiss the complaint pursuant to CPLR 3211, granted the motion, and denied so much of plaintiff's counsel's motion to be relieved as sought a stay of proceedings, unanimously reversed, on the law, without costs, defendant's motion denied, and the stay granted. Order, same court and Justice, entered October 10, 2013, which denied plaintiff's motion to renew, and denied defendant's motion for sanctions, unanimously affirmed as to the denial of defendant's motion, and the appeal therefrom otherwise dismissed,

without costs, as academic.

Plaintiff Fan and defendant Sabin became acquainted in late 2009 and began a romantic relationship that would continue until October 2011. Shortly thereafter, Fan sued Sabin for negligence, fraudulent representation, and fraud by concealment. By order to show cause, Sabin moved for an order granting summary judgment pursuant to CPLR 3212, and sanctions in the amount of $10,000. Fan's counsel cross moved to be relieved as counsel and for an order staying the action for 30 days so that Fan could retain new counsel.

When the parties appeared for oral argument on March 20, 2013, the motion court began by stating, "I reviewed the papers in this case, and I find that the defendant has made [his] prima facie case of showing that this action has no merit, and so I grant the motion to dismiss the action." Fan's counsel argued that "to protect the record for myself and Ms. Fan," defendant's motion, made simultaneously with joinder of issue, was really a motion pursuant to CPLR 3211, and that the court would need to accept Fan's pleadings as true. In response, the court determined that, under its authority to correct mistakes and defects where they did not affect the substantial right of a party, it would convert the motion to one under CPLR 3211(a)(1)

and dismiss the action. Regarding any further substantive argument, the court stopped plaintiff's counsel, stating, "You did not put in opposition to this motion, so now you cannot stand up here, counsel, on the motion return date and start making an argument." The court agreed, however, to grant the cross motion to be relieved. By short form order signed on the date of oral argument, the court granted Sabin's motion "for dismissal of the summons and complaint" because he had "shown entitlement" to such relief. The court also granted the cross motion of Fan's counsel seeking to be relieved.

We now reverse. When the court granted plaintiff's counsel's motion for leave to withdraw, further proceedings against plaintiff were stayed, by operation of CPLR 321(c), until 30 days after notice to appoint another attorney had been served upon her (*Leonard Johnson & Sons Enters. v Brighton Commons Partnership*, 171 AD2d 1059 [4th Dept 1991], *lv dismissed* 77 NY2d 990 [1991]; *see Blondell v Malone*, 91 AD2d 1201, 1202 [4th Dept 1983]). While the stay was in effect, the court had no power to decide defendant's motion for summary judgment dismissing the complaint. To be sure, the court should not have entertained a CPLR 3212 summary judgment motion, sua sponte converted it to a CPLR 3211(a)(1) motion, and then prevented plaintiff's counsel

from making arguments in opposition, leaving plaintiff without counsel to fend for herself.

We reject defendant's argument that plaintiff was not entitled to the statutory stay because counsel's desire to withdraw was due to her disagreements with him over strategy and was therefore her fault. Fan's counsel's ill-advised publishing of his grievances with his client does not evidence the type of "fault" justifying a lack of a stay (*compare RDLF Fin. Servs., LLC v Bernstein*, 93 AD3d 421 [1st Dept 2012] [no automatic stay where the defendant attorney, representing himself and his firm, was disbarred]; *Sarlo-Pinzur v Pinzur*, 59 AD3d 607 [2d Dept 2009] [no automatic stay where husband failed to cooperate with his counsel]).

Furthermore, there is no evidence that Fan was voluntarily discharging or consenting to the discharge of her attorney (*compare Shurka v Shurka*, 100 AD3d 566 [1st Dept 2012] [no stay where there is a voluntary discharge]). Sabin's argument that Fan was never truly unrepresented is disingenuous at best, particularly since her outgoing counsel moved to be removed without filing any other papers, leaving Fan facing an unopposed dismissal motion.

Last, it should be noted that although CPLR 321(c) provides that the action may continue with leave of court, the statutory provision for court leave was designed to allow an action to continue "in cases where the stay of proceedings would produce undue hardship to the opposing party, as where the time to take an appeal or other action would run or where a provisional remedy is sought and speed is essential," circumstances not present in this case (*Moray v Koven & Krause, Esqs.*, 15 NY3d 384, 390 [2010][internal quotation marks omitted]).

In light of the foregoing, there is no basis for sanctioning plaintiff.

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

ENTERED: FEBRUARY 17, 2015

CLERK

Acosta, J.P., Moskowitz, Richter, Feinman, Clark, JJ.

13866 Samuel Chaston, Index 302310/11
Plaintiff-Appellant,

-against-

Mamadou Doucoure, et al.,
Defendants-Respondents.

_____

Lozner & Mastropietro, Brooklyn (Elizabeth Mark Meyerson of counsel), for appellant.

Baker, McEvoy, Morrissey & Moskovits, P.C., Brooklyn (Robert D. Grace of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered April 24, 2013, which granted defendants' motion for summary judgment dismissing the complaint based on the failure to establish a serious injury within the meaning of Insurance Law § 5102(d), unanimously modified, on the law, to deny the motion as to plaintiff's claims of permanent consequential or significant limitation of use of plaintiff's right shoulder and right knee, and otherwise affirmed, without costs.

Defendants made a prima facie showing that plaintiff did not sustain permanent or significant injuries to his right shoulder, right knee, and lumbar and cervical spines as a result of the accident, by submitting the expert reports of an orthopedic surgeon and radiologist, who concluded that plaintiff's injuries

were degenerative in nature and not causally related to the accident (*see Paduani v Rodriguez*, 101 AD3d 470 [1st Dept 2012]). Defendant's radiologist opined that there was "mild" or "moderate" arthritis and the orthopedist opined that the tears found by plaintiff's surgeon were related to the arthritis, especially because there was no bone edema shown in the knee MRI.

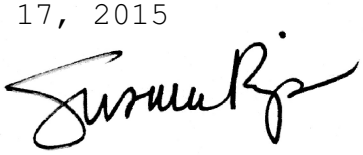
In opposition, plaintiff's surgeon opined, based on the history of the accident, his examination, and review of the MRI reports, that the tears in the right shoulder and right knee resulted from the accident. Plaintiff's MRI reports, presented by defendant's expert in his report, found a partial thickness tear in the shoulder with effusion, and the knee had a "sprain of the medial collateral ligament with an effusion," as well as "early degenerative changes in the medial joint line." The dispute between the parties' experts as to whether the tears were related to the arthritis or to the trauma of the accident raises issues of fact (*see e.g. Aviles v Villapando*, 112 AD3d 534 [1st Dept 2013]; *Thomas v NYLL Mgt. Ltd.*, 110 AD3d 613 [1st Dept 2013]).

The court properly dismissed plaintiff's 90/180 claim, as he failed to allege in his bill of particulars that he was

incapacitated for at least 90 of the first 180 days following the accident (*see Frias v Son Tien Liu*, 107 AD3d 589, 590 [1st Dept 2013]).

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

ENTERED: FEBRUARY 17, 2015



CLERK

Sweeny, J.P., Renwick, Moskowitz, Feinman, Kapnick, JJ.

14196 The People of the State of New York, Ind. 4026/08
Respondent,

-against-

Robert Harmon,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Richard Nahas 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 (Edward J. McLaughlin, J.), rendered on or about February 8, 2013,

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

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

ENTERED: FEBRUARY 17, 2015

CLERK

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

Mazzarelli, J.P., Acosta, Saxe, Clark, Kapnick, JJ.

13639 In re Annmarie Sheldon, Index 101210/12
Petitioner-Appellant,

-against-

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

_____

Jeffrey L. Goldberg, Port Washington, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Inga Van Eysden of counsel), for respondents.

_____

Order, Supreme Court, New York County (Paul Wooten, J.), entered March 11, 2013, reversed, on the law, without costs, the petition granted, the determination of respondent Board of Trustees of the New York City Police Department Pension Fund, Article II, annulled, and the matter remanded to respondent Board of Trustees for further proceedings consistent herewith.

Opinion by Acosta, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
Rolando T. Acosta
David B. Saxe
Darcel D. Clark
Barbara R. Kapnick, JJ.

13639
Index 101210/13

_____x

In re Annmarie Sheldon,
Petitioner-Appellant,

-against-

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

_____x

Petitioner appeals from an order of the Supreme Court, New York County (Paul Wooten, J.), entered March 11, 2013, which denied her petition to annul the determination of respondent Board of Trustees of the Police Pension Fund, Article II, dated October 13, 2011, denying her application for accidental disability retirement (ADR) benefits under Administrative Code of City of NY § 13-252.1, and dismissed the proceeding brought pursuant to CPLR article 78.

Jeffrey L. Goldberg, Port Washington, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Inga Van Eysden and Leonard Koerner of counsel), for respondents.

ACOSTA, J.

This appeal affords us the opportunity to address the World Trade Center (WTC) presumption (Administrative Code of City of NY § 13-252.1[1][a]), which places the burden on the police pension fund to show that a police officer's qualifying injury was not incurred in the line of duty, in the context of a diagnosis of fibromyalgia. Respondents argue that fibromyalgia is not a qualifying World Trade Center condition pursuant to Retirement and Social Security Law § 2(36)(c). We find that fibromyalgia qualifies as a "new onset disease" (*see id.*) and that respondents failed to rebut the WTC presumption. Petitioner is therefore entitled to ADR benefits as a matter of law.

Petitioner, a New York City police officer, was a first responder on September 11, 2001, and served over 300 hours at the World Trade Center site. On October 4, 2001, petitioner was assigned to a security post one block from Ground Zero. During her tour, she suffered shortness of breath, dizziness, nausea, and severe chest pains. An emergency care report from St. Vincent's Hospital on that date diagnosed "reaction to inhalation." In March 2002, petitioner was diagnosed with "fibromyalgia rhuumatic/myofascial pain syndrome."

In a letter dated February 20, 2008, Dr. Christopher J. Cimmino, a physician and surgeon board-certified in family

practice, stated that petitioner had been under his care since January 2002, and was currently diagnosed with fibromyalgia, due to body and muscle aches. Petitioner's fibromyalgia diagnosis was also confirmed by Dr. Milagros Hernandez, her treating rheumatologist, in a summary report dated June 5, 2008.

On March 6, 2008, petitioner applied for accidental disability retirement (ADR) benefits, stating that as a result of her WTC service, she suffered from headaches, chest pain, and shortness of breath, and had been diagnosed with fibromyalgia, pulmonary disease, heavy metal poisoning, hypothyroidism, alopecia areata, and body aches. An application for ordinary disability retirement benefits was filed by respondent police commissioner.

After three reviews of petitioner's application, the Medical Board of the pension fund concluded that petitioner was disabled from the performance of her duties by fibromyalgia and chronic fatigue syndrome. Without citing to any evidence, however, it concluded that those conditions were not caused by WTC exposure. The Medical Board also concluded that petitioner was not disabled by any other medical condition related to WTC exposure. The application was denied by the Board of Trustees of the pension fund as a result of a six-to-six vote, and petitioner retired with ordinary disability retirement benefits (ODR) in November

2009.

In February 2010, petitioner filed a second application for ADR. The Medical Board considered the application on five occasions. In the second Medical Board finding on the second application, the Board addressed petitioner's history of heavy metal poisoning, stating that it was "unclear" due to the discrepancy between Dr. Cimmino's testing, which showed elevated levels of cadmium, and the Police Department tests, which indicated that petitioner's lead, cadmium and mercury levels were normal or less than the detectable range. It went on to note that although petitioner's fibromyalgia and chronic fatigue syndrome started soon after her WTC exposure, there was no relationship between heavy metal poisoning and fibromyalgia. Petitioner subsequently submitted several articles purporting to show a link between heavy metal poisoning and fibromyalgia. The Medical Board ultimately reaffirmed its position that petitioner was disabled by fibromyalgia and chronic fatigue syndrome and not a WTC-related condition. By letter dated October 13, 2011, the Board of Trustees denied petitioner's application for ADR.

Petitioner commenced the instant CPLR article 78 petition on January 31, 2012. In denying the petition, Supreme Court noted, among other things, that the Medical Board had concluded that fibromyalgia and chronic fatigue syndrome were not qualifying

conditions under the WTC law. However, the court did not discuss the WTC presumption or analyze petitioner's claims pursuant to the presumption. It cited only one post 9/11 case (*Matter of Jefferson v Kelly*, 51 AD3d 536, 537 [1st Dept 2008]), in a string cite supporting the proposition that "the Medical Board's finding will be sustained unless it lacks a rational basis, or is arbitrary or capricious."

Administrative Code § 13-252.1 provides that "any condition or impairment of health ... caused by a qualifying World Trade Center condition" as defined in the Retirement and Social Security Law "shall be presumptive evidence that it was incurred in the performance and discharge of duty and the natural and proximate result of an accident ... unless the contrary be proved by competent evidence" (§ 13-252.1[1][a]; *see Matter of Samadjopoulos v New York City Employees' Retirement Sys.*, 104 AD3d 551 [1st Dept 2013]). "Qualifying World Trade Center condition" is defined to include, among other conditions, "[n]ew onset diseases resulting from exposure as such diseases occur in the future including cancer, asbestos-related disease, heavy metal poisoning, and *musculoskeletal disease*" (§ 2 [36][c][v] [emphasis added]).

In determining whether a particular illness or condition is covered under the statute, the Medical Board should avoid

employing narrow definitions. Thus, this Court rejected a narrow reading of the statute in *Matter of Dement v Kelly* (97 AD3d 223, 231-232 [1st Dept 2012]), finding that it

> "would defeat the avowed purpose of the statute, i.e., to protect 9/11 workers as a result of their heroic efforts. Indeed, the full extent of the health challenges faced by these workers, arising from chronic, acute exposures to a toxic brew of substances at the site, may not be known for years. The statutory language 'an impairment of health caused by a qualifying [WTC] condition' must be interpreted in a manner consistent with the underlying purposes of the statute."

Consistent with the Legislature's intent, the statute refers to "diseases" in the most general terms to include, syndromes and disorders (*see e.g.* Retirement and Social Security Law § 2[36][c][ii] ["diseases of the lower respiratory tract, including but not limited to . . . reactive airway dysfunction *syndrome*"] [emphasis added]; *see also* § 2[36][d][I] [diseases of the psychological axis, including post-traumatic stress disorder, anxiety, depression, or any combination of such conditions]).

Fibromyalgia is defined as "a syndrome that causes chronic, widespread musculoskeletal pain" (Lisa R. Sammaritano, M.D., *An In-Depth Overview of Fibromyalgia*, Hospital for Special Surgery, http://www.hss.edu/conditions_in-depth-overview-fibromyalgia.asp, September 8, 2003, reviewed and updated December 30, 2009; *see also Mosby's Dictionary of Medicine, Nursing & Health Professions*, 695 [9th ed. 2013] [Fibromyalgia is "a form of

nonarticular[1] rheumatism characterized by musculoskeletal pain, spasms, stiffness, fatigue, and severe sleep disturbance"]). Therefore, under an expansive reading of the statute, fibromyalgia falls within the broad parameters of a musculoskeletal disease.

Here, the evidence shows that petitioner did not have fibromyalgia before September 11, 2001, and that she developed disabling fibromyalgia and chronic fatigue syndrome in the wake of her WTC exposure.

Because it was "caused by a qualifying [WTC] condition," petitioner's fibromyalgia is presumed to have been "incurred in the performance and discharge of duty and the natural and proximate result of an accident not caused by [her] own willful negligence, unless the contrary be proved by competent evidence" (Administrative Code § 13-252.1[1][a]). Respondents bear the burden of showing that petitioner's qualifying injury was not incurred in the line of duty (*Matter of Bitchatchi v Board of Trustees of the N.Y. City Police Dept. Pension Fund, Art. II*, 20 NY3d 268, 276 [2012]; *Samadjopoulos*, 104 AD3d at 552). The Board of Trustees' determination must be supported by credible evidence

[1]Nonarticular is defined as "affecting or involving soft tissues (as muscles and connective tissues) rather than joints" (Merriam-Webster on-line dictionary, www.merriam-webster.com).

in the record (*Bitchatchi*, 20 NY3d at 281).

The significance of the presumption is that, "unlike ordinary ADR claimants, first responders need not submit any evidence — credible or otherwise — of causation to obtain the enhanced benefits" (*id.* ["The legislature created the WTC presumption to benefit first responders because of the evidentiary difficulty in establishing that non-trauma conditions ... could be traced to exposure to the toxins present at the WTC site in the aftermath of the destruction"]). Thus, the Board "cannot deny ADR benefits by relying solely on the absence of evidence tying the disability to the exposure" (*id.* at 282).

A review of *Bitchatchi*, *Macri* and *Maldonado* (decided together) is instructive on the issue of causation. In *Bitchatchi*, approximately one year after WTC exposure, the petitioner discovered a cyst near her rectum, and a biopsy revealed that she had rectal cancer. The Medical Board recommended disapproval of ADR benefits because the "causal factor" of the cancer was not WTC exposure, but ulcerative colitis, a condition that had been surgically addressed about 20 years earlier (*id.* at 277). The Board cited a 2009 medical journal article and referenced "clinical data" on the growth rates of tumors, and found it "highly likely" that the mass discovered in October 2002 was present before September 11, 2001

(*id.* at 278). The Court held that the Board failed to present credible evidence to rebut the WTC presumption, observing that the medical journal article stated that "the long-term fate . . . in the surgical management of ulcerative colitis has yet to be determined" (*id.* at 282 [internal quotation marks omitted]), and that the Board "failed to include the actual [clinical] data in the record, effectively precluding us from assessing whether its finding of no-causation was supported by credible evidence" (*id.* at 282). "Because the Medical Board bore the burden on the issue of causation," the Court concluded, "this deficiency in proof is fatal" (*id.*).

In *Macri*, the petitioner was a first responder who in August 2002 was diagnosed with lung cancer, which had metastasized to his sacrum. An x-ray taken on 9/11 revealed no evidence of lung cancer. The Medical Board recommended disapproval of ADR benefits, stating "with a high degree of certainty" that the lung cancer existed before 9/11, "noting that there was substantial literature quantitating the doubling times of primary pulmonary lung cancers" (20 NY2d at 279 [internal quotation marks omitted]). The Court held that the Board failed to rebut the presumption, stating that, as in *Bitchatchi*, "the Board failed to identify or include the specific literature or data upon which it relied" (*id. at* 283).

Petitioner Maldonado had been diagnosed with cancer before 9/11; het argued that WTC exposure aggravated his condition. The Board of Trustees asserted that the burden of proof remained with petitioner to demonstrate that his exposure aggravated or exacerbated the preexisting cancer. However, this argument had not been preserved, so the Court of Appeals simply applied the presumption to the petitioner's claim that his cancer was aggravated by the exposure. The Court noted that the Board focused on the equivocal nature of the petitioner's evidence, in particular, describing the opinion of the petitioner's doctor as speculative and conjectural. The Court held that the Board failed to rebut the presumption since "petitioner carried no burden to offer any evidence of causation. Simply put, the Board could not rely on petitioner's deficiencies to fill its own gap in proof" (*id.* at 284).

Similarly, respondents have failed to rebut the presumption that petitioner's qualifying condition, fibromyalgia, was caused by hazards encountered at the WTC site. Indeed, while in *Bitchatchi* and *Macri* the Board cited to articles and data but failed to include the evidence in the record, in the present case, the Board did not even purport to cite to any specific evidence. In fact, without citing to any credible evidence, the Board simply stated that "there is no evidence that [petitioner's

fibromyalgia and chronic fatigue syndrome] is in any way related to her World Trade Center exposure." That the articles petitioner submitted on the correlation between heavy metal poisoning and fibromyalgia may have been speculative at best is of no moment. There is no evidence that the Board relied on the articles, and, in any event, it "could not rely on petitioner's deficiencies to fill its own gap in proof" (*Bitchatchi,* 20 NY3d at 284). Furthermore, as in *Samadjopoulos* (104 AD3d at 552-553), respondents "do not even purport to offer an alternative cause for petitioner's debilitating conditions." Indeed, the record contains no proof whatsoever that petitioner's disabling conditions were attributable to any other cause. Petitioner is therefore entitled to ADR benefits as a matter of law (*Bitchatchi*, 20 NY3d at 283).

Accordingly, the order of the Supreme Court, New York County (Paul Wooten, J.), entered March 11, 2013, which denied the petition to annul the determination of respondent Board of Trustees of the New York City Police Pension Fund, Article II, dated October 13, 2011, denying petitioner's application for accidental disability retirement benefits under Administrative Code of City of NY § 13-252.1, and dismissed the proceeding brought pursuant to CPLR article 78, should be reversed, on the law, without costs, the petition granted, the determination

annulled, and the matter remanded to respondent Board of Trustees for further proceedings in accordance herewith.

All concur.

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

ENTERED: FEBRUARY 17, 2015

CLERK