SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JULY 2, 2015

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Sweeny, Renwick, Saxe, Feinman, JJ.

15600 The People of the State of New York, Ind. 4335/12
Respondent,

-against-

Michael Algarin,
Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (David Crow of counsel), and Davis Polk & Wardwell LLP, New York (David J. Robles of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Cassandra M. Mullen, J.), rendered May 28, 2013, convicting defendant, after a jury trial, of criminal possession of a weapon in the third degree, assault in the third degree and criminal mischief in the fourth degree, and sentencing him, as a second felony offender, to an aggregate term of 2½ to 5 years, unanimously affirmed.

The court erred in its determination that defendant opened the door to a modification of its *Sandoval* ruling. Nonetheless the error was harmless in light of the remaining overwhelming

evidence of guilt.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility, and its mixed verdict does not warrant a different conclusion (*see People v Rayam*, 94 NY2d 557 [2000]).

Defendant's challenge to the court's jury charge is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we find no basis for reversal.

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

ENTERED: JULY 2, 2015

CLERK

Gonzalez, P.J., Sweeny, Renwick, Saxe, Feinman, JJ.

15601 Daniel S. Vogel, et al., Index 310447/11
Plaintiffs-Appellants,

-against-

Martos Development, LLC, et al.,
Defendants-Respondents.

_____

Pollack Pollack Isaac & DeCicco, LLP, New York (Beth S. Gereg of counsel), for appellants.

White Quinlan & Staley, LLP, Garden City (Michael W. Butler of counsel), for respondents.

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Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered April 9, 2014, which granted defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff Daniel Vogel fainted and struck his head against the "ledge" separating the shower stall from the rest of his bathroom, sustaining lacerations to his forehead, face and cornea. Defendants tiled the ledge during renovation work on plaintiff's apartment. Plaintiff, with his wife proceeding derivatively, commenced this action against defendants, alleging that they negligently constructed the shower ledge with a sharp edge.

An issue of fact exists as to whether defendants' negligence

was a proximate cause of plaintiff's injuries. A jury could find that plaintiff's fainting and cutting himself on the sharp edge of the ledge was a foreseeable, normal, and natural result of the risk created by defendants' negligence (*see Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 316 [1980]; *Clindinin v New York City Hous. Auth.*, 117 AD3d 628, 629 [1st Dept 2014]; *Pagan v Goldberger*, 51 AD2d 508, 512 [2d Dept 1976]).

Given the evidence of defendant Santiago Martos's participation in deciding whether a border was needed on the ledge, he may be held individually liable, regardless of whether he was acting solely in his capacity as an officer of defendant corporation (*see Peguero v 601 Realty Corp.*, 58 AD3d 556, 558 [1st Dept 2009]).

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

ENTERED: JULY 2, 2015

CLERK

Gonzalez, P.J., Sweeny, Renwick, Saxe, Feinman, JJ.

15602-
15603-
15604-
15605-
15606 In re Jalicia G.,

A Child Under the Age of
Eighteen Years, etc.,

Jacqueline G., etc.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

- - - - -

In re Jalicia G.,

A Child Under the Age of
Eighteen Years, etc.,

Randolph W,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Carol L. Kahn, New York, for Jacqueline G., appellant.

Law Office of Tennille Tatum-Evans, New York (Tennille M. Tatum-Evans of counsel), for Randolph W., appellant.

Zachary W. Carter, Corporation Counsel, New York (Susan P. Greenberg of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Amy Hausknecht of counsel), attorney for the child.

_____

Order, Family Court, Bronx County (Erik S. Pitchal, J.), entered on or about January 30, 2014, which, following a fact-finding hearing, determined that respondent mother Jacqueline G., had neglected the subject child, and order (same court and Judge), entered on or about September 12, 2013, which denied the mother's motion to disqualify the Legal Aid Society (LAS) from representing the child, unanimously affirmed, without costs. Appeal from order (same court and Judge), entered on or about July 8, 2013, which denied her application pursuant to Family Ct Act § 1028, unanimously dismissed, without costs, as moot. Order (same court, Kelly O'Neill Levy, J.), entered on or about November 26, 2013, finding, after a hearing, that respondent father Randolph W. neglected and derivatively neglected the child, unanimously affirmed, without costs.

Family Court's finding that there is no conflict in the Legal Aid Society's (LAS) continued representation of the subject child was proper, notwithstanding that its staff attorneys had represented the mother when she was a child who was the subject of a neglect proceeding. LAS demonstrated that, due to the size of its organization, and the safeguards and screening procedures in place, there was no risk that the LAS personnel representing the subject child in these proceedings had acquired or could

acquire any confidences and secrets she shared with other LAS personnel who previously represented her (*see Kassis v Teacher's Ins. & Annuity Assn.*, 93 NY2d 611, 616-618 [1999]; *People v Wilkins*, 28 NY2d 53, 56 [1971]; *Matter of T'Challa D.*, 3 AD3d 569 [2nd Dept 2004]).

A preponderance of the evidence supports the finding that the pattern of domestic violence between the parents, and the proximity of the child's bedroom to the physical and verbal fighting that occurred, placed the child at imminent risk of emotional and physical impairment (*see Matter of Angie G. [Jose D.G.]*, 111 AD3d 404, 404-405 [1st Dept 2013]; *Matter of Gianna C.-E. [Alonso E.]*, 77 AD3d 408 [1st Dept 2010]).

The evidence that the mother had been diagnosed with a mental illness for which she did not seek treatment, while not alone a basis for a finding of neglect, supported the finding of neglect since she displayed a lack of insight into the effect of her illness on her ability to care for the young child (see *Matter of Karma C. [Tenequa A.]*, 122 AD3d 415, 416 [1st Dept 2014]; *Matter of Jonathan S. [Ismelda S.]*, 79 AD3d 539 [1st Dept 2010]).

The record supports the finding of derivative neglect against the father. The father displayed a lack of insight into his parental duties, evidenced by his refusal to comply with services as directed by a Family Court dispositional order entered upon findings of sexual abuse of an older child and neglect of other children involving domestic violence and excessive corporal punishment (*see Matter of Cashmere S. [Rinell S.]*, 125 AD3d 543, 544-545 [1st Dept 2015]). Given the seriousness of the prior findings, which evince such a profoundly impaired level of parental judgment that any child in his care would be at a substantial risk of harm, the prior order, issued in 2010, was sufficiently proximate in time to the instant proceedings commenced in 2012 to support a finding of derivative neglect (*see Matter of Nyjaiah M. [Herbert M.]*, 72 AD3d 567 [1st Dept 2010]).

The mother's appeal from the order denying her application to return her child pursuant to Family Court Act § 1028 has been rendered moot by the determination of neglect (*see Matter of Jabez F. [Martha L.-Bernard F.]*, 92 AD3d 448 [1st Dept 2012]). Her appeal from the fact-finding order of neglect was not

affected by the subsequent entry of an order of disposition because the intermediate order is appealable as of right (Family Ct Act § 1112[a]; *see Matter of Christy C. (Roberto C.)*, 77 AD3d 563 [1st Dept 2010]).

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

ENTERED: JULY 2, 2015

CLERK

Gonzalez, P.J., Sweeny, Renwick, Saxe, Feinman, JJ.

15607 Zahira Valji, Index 311566/14
Plaintiff-Respondent,

-against-

Ali Valji,
Defendant-Appellant.

_____

Bressler, Amery & Ross, P.C., New York (David H. Pikus of counsel), for appellant.

Law Office of Anne E. Glatz, New York (Anne E. Glatz of counsel), for respondent.

_____

Order, Supreme Court, New York County (Ellen Gesmer, J.), entered on or about December 24, 2014, which, to the extent appealed from, denied defendant husband's motion to dismiss the action on the ground of forum non conveniens, unanimously affirmed, without costs.

In this action for divorce, the motion court did not err in sua sponte retaining jurisdiction over the parties' child custody and support issues even though the divorce action cannot be maintained due to a failure to satisfy the residency requirement (*see Venizelos v Venizelos*, 216 AD2d 206 [1st Dept 1995], *lv dismissed* 86 NY2d 861 [1995]). The record supports the court's finding that New York is the child's home state since she resided

here for more than six months prior to the commencement of the action (*see* Domestic Relations Law [DRL] § 76[a]).

Plaintiff wife's relocation to New York with the child in March 2014 without obtaining defendant's consent did not constitute "unjustifiable" conduct since there was no custody order preventing her from doing so (*see Matter of Sara Ashton McK. v Samuel Bode M.*, 111 AD3d 474, [1st Dept 2013]; *Matter of Schleger v Stebelsky*, 79 AD3d 1133, 1135 [2d Dept 2010]). We note that defendant, who communicated with the child daily via Skype and was aware of her precise location, did not take any legal action to secure the child's return prior to the commencement of this action. Accordingly, his challenge to plaintiff's assertion of jurisdiction based on the child's home state is unpersuasive (*see Sanjuan v Sanjuan*, 68 AD3d 1093, 1094-1095 [2d Dept 2009]).

Although the motion court did not explicitly consider all of the factors in DRL § 76-f(2), we may consider them based on the sufficiency of the record (*see Matter of Anthony B. v Priscilla B.*, 88 AD3d 590 [1st Dept 2011]). Our review of the relevant factors (*see* DRL § 76-f(2)[a]-[h]), supports the motion court's conclusion that New York is not an inconvenient forum. Travel between New York and Tanzania is at least 21 hours, and although

defendant argued that this significant distance and travel time would be burdensome for him, the burden that would be imposed on the parties' very young child is greater. For more than one year, the child has been residing in New York, and has attended school here. Evidence regarding her current care, well-being, and personal relationships, as well as all of the evidence pertaining to her education is located here.

Further, the child lived in Tanzania for approximately the first year of her life and even then she traveled to Dubai, her country of birth, for medical treatment. Thus, there is little material evidence in Tanzania, where defendant resides. Although defendant provided a list of potential witnesses in Tanzania who may have testimony relating to relevant issues, the motion court correctly observed that they may testify via video conferencing

(*see* DRL §§ 75-j, 75-k; *Matter of Blerim M.*, 41 AD3d 306, 311 [1st Dept 2007]).

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

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

ENTERED: JULY 2, 2015

CLERK

Gonzalez, P.J., Sweeny, Renwick, Saxe, Feinman, JJ.

15608 In re Kasheem Rhames, Index 308813/12
Petitioner-Respondent,

-against-

City of New York,
Respondent-Appellant.

_____

Zachary W. Carter, Corporation Counsel, New York (Benjamin C. Roth of counsel), for appellant.

Louis C. Fiabane, New York, for respondent.

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Order, Supreme Court, Bronx County (Julia Rodriguez, J.), entered April 17, 2014, which granted petitioner's motion to deny respondent City of New York's workers' compensation lien, unanimously reversed, on the law, without costs, and the motion denied.

Petitioner, an employee of the Department of Education, was injured when, while helping to unload a delivery of paper inside the school building where he worked, the skid that was carrying the paper fell on his foot. Under the circumstances presented, petitioner is not entitled to recover no-fault benefits (*see* Insurance Law § 5103[a][1]), since the delivery person's vehicle

was clearly not a proximate cause of petitioner's injuries (*see Walton v Lumbermens Mut. Cas. Co.*, 88 NY2d 211, 215 [1996]). Accordingly, the application to deny the workers' compensation lien should have been denied.

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

ENTERED: JULY 2, 2015

CLERK

Gonzalez, P.J., Sweeny, Renwick, Saxe, Feinman, JJ.

15609-
15610 Index 154651/12

Structure Tone, Inc., et al.,
Plaintiffs-Appellants-Respondents,

-against-

National Casualty Company,
Defendant-Respondent-Appellant,

Tower Insurance Group, et al.,
Defendants.

_____

Barry McTiernan & Moore, LLC, New York (Laurel A. Wedinger of counsel), for appellants-respondents.

Carroll McNulty & Kull L.L.C., New York (Ann Odelson of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Carol R. Edmead, J.), entered March 3, 2014, which granted defendant National Casualty's motion for summary judgment in part, and granted plaintiffs' cross motion for summary judgment in part, to the extent of declaring that National Casualty has no duty to indemnify plaintiffs, but must reimburse plaintiffs for the defense costs incurred in the underlying action from the time of its commencement until the date of the court's order, unanimously modified, on the law, to declare that National Casualty has no duty to reimburse plaintiffs for defense costs, and otherwise affirmed, without costs. Appeal from order, same court and

Justice, entered August 12, 2014, which, upon granting reargument and renewal, adhered to its prior determination, unanimously dismissed, without costs, as academic.

Because project owner 200 Fifth did not contract directly with electrical contractors Kleinknecht Electric Company, the named insured on National Casualty's policy, the motion court properly found that 200 Fifth did not qualify as an additional insured (*see Kel-Mar Designs, Inc. v Harleysville Ins. Co. of N.Y.*, 127 AD3d 662 [1st Dept 2015]). Further, any reliance on the certificate of insurance produced by plaintiffs' broker is unavailing, as it is undisputed that no agency agreement existed between National Casualty and the broker; accordingly, National Casualty is not bound by the representations made in the certificate of insurance (*see Tribeca Broadway Assoc. v Mount Vernon Fire Ins. Co.*, 5 AD3d 198, 200 [1st Dept 2004]). Hence, "[i]nsofar as the claim fell outside of the policy's coverage, the carrier was not required to disclaim as to coverage that did not exist" (*id.*).

Plaintiffs conceded that they were being provided coverage in the underlying action "pursuant to a contractor controlled insurance program," a policy issued by another carrier, and therefore, based on the plain language of the policy (*see J.P.*

Morgan Sec. Inc. v Vigilant Ins. Co., 126 AD3d 76, 83 [1st Dept 2015]), the Wrap-Up exclusionary language was triggered, precluding coverage for both plaintiffs. Under the timeline presented, National Casualty's assertion of the Wrap-Up Exclusion in the proposed amended answer constituted timely notice of disclaimer (*see American Mfrs. Mut. Ins. Co. v CMA Enters.*, 246 AD2d 373, 373 [1st Dept 1998]; *Mayo v Metropolitan Opera Assn., Inc.*, 108 AD3d 422, 425 [1st Dept 2013], *lv dismissed* 22 NY3d 1125 [2014]).

Because plaintiffs' claims were precluded by the Wrap-Up Exclusion, National Casualty was not obligated to reimburse either plaintiff for their defense costs (*Federal Ins. Co. v Kozlowski*, 18 AD3d 33, 38, 42 [1st Dept 2005]).

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

ENTERED: JULY 2, 2015

CLERK

Gonzalez, P.J., Sweeny, Renwick, Saxe, Feinman, JJ.

15611 The People of the State of New York, Respondent, Ind. 5137/11

-against-

Jonil Stewart-Hemphil, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered on or about June 11, 2013, unanimously affirmed.

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

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

service of a copy of this order.

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

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

ENTERED: JULY 2, 2015

CLERK

Gonzalez, P.J., Sweeny, Renwick, Saxe, Feinman, JJ.

15613 Michael A. Knopf, et al., Index 113227/09
Plaintiffs-Appellants, 15074/11

-against-

Michael Hayden Sanford, et al.,
Defendants-Respondents.

[And Another Action]

_____

Berry Law PLLC, New York (Eric W. Berry of counsel), for appellants.

Dorsey & Whitney LLP, New York (Nathaniel H. Akerman of counsel), for respondents.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered December 24, 2014, which granted that part of defendants' motion to cancel certain notices of pendency, and sub silentio denied that part of defendants' motion for costs and sanctions, unanimously affirmed, with costs.

Supreme Court had jurisdiction to cancel the notices of pendency. Although this Court previously extended the subject notices (110 AD3d 502 [1st Dept 2013]), this does not render them immune to subsequent motions to cancel pursuant to CPLR 6514 (*see e.g. Bowery Boy Realty, Inc. v H.S.N. Realty Corp.*, 55 AD3d 766 [2d Dept 2008], *lv denied* 11 NY3d 715 [2009]).

The notices of pendency were properly cancelled because

plaintiffs failed to show that money damages would be inadequate (*see Hoffmann Invs. Corp. v Yuval*, 33 AD3d 511 [1st Dept 2006]). Whether defendants are able to pay such damages is irrelevant to the determination of whether they are the appropriate remedy (*see American Cities Power & Light Corp. v Williams*, 189 Misc 829, 835-836 [Sup Ct, NY County 1947] ["The adequacy of the legal remedy for damages does not depend on the collectibility of the claim"]; *cf. Bertoni v Catucci*, 117 AD2d 892, 895 [3d Dept 1986]).

Furthermore, the cancellation of the notices of pendency was mandatory pursuant to CPLR 6514(a). CPLR 6514(a) provides, in relevant part, that "[t]he court, upon motion of any person aggrieved and upon such notice as it may require, shall direct any county clerk to cancel a notice of pendency, if service of a summons has not been completed within the time limited by section 6512." CPLR 6512 provides that a notice of pendency is only effective if a summons is served upon the defendant within 30 days after filing. Here, plaintiffs failed to serve defendant Pursuit Holdings, LLC within this 30-day period. "Nail-and-mail" substitute service was ineffective because that method of service is only appropriate for serving individuals, not corporate entities (*see Napic, N.V. v Fverfa Invs.*, 193 AD2d 549 [1st Dept

1993]; *Lakeside Concrete Corp. v Pine Hollow Bldg. Corp.*, 104 AD2d 551 [2d Dept 1984], *affd* 65 NY2d 865 [1985]).

Since defendants moved to cancel the notices of pendency pursuant to CPLR 6514, and not CPLR 6515, the posting of an undertaking was not required (*see Lessard Architectural Group, Inc., P.C. v X & Y Dev. Group, LLC*, 88 AD3d 768, 770 [2d Dept 2011]; *Reingold v Bowins*, 34 AD3d 667, 668 [2d Dept 2006]).

The court providently exercised its discretion in declining defendants' request for costs and sanctions pursuant to CPLR 6514(c) and 22 NYCRR 130-1.1, as there is no evidence of bad faith by plaintiffs.

We have considered the remaining arguments and find them unavailing.

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

ENTERED: JULY 2, 2015

CLERK

Gonzalez, P.J., Sweeny, Renwick, Saxe, Feinman, JJ.

15616 Mergent Services, Index 601777/07
Plaintiff,

John Bal,
Plaintiff-Appellant,

-against-

ITEX Corporation, et al.,
Defendants-Respondents,

New York Daily News,
Defendant.

_____

John Bal, appellant pro se.

Frankfurt Kurnit Klein & Selz, P.C., New York (Jeremy S. Goldman of counsel), for ITEX Corporation, respondent.

Law Office of Joseph B. Maira, Brooklyn (Soma S. Syed of counsel), for NYTO Trade, John Castoro, Izzy Garcia, Coral Homoki, Michael Marich and Jessica Taveras, respondents.

_____

Order, Supreme Court, New York County (Debra A. James, J.), entered February 27, 2014, which, to the extent appealed from, granted plaintiff pro se's motion to reargue an order entered April 1, 2013 and adhered to the original determination reinstating the dismissal of the action as against defendant Itex Corporation, unanimously affirmed, without costs.

Although plaintiff's reargument motion sought to bring up for review a January 2008 order, this Court had dismissed the appeal from that order as untimely and had denied plaintiff's motion to reinstate the appeal, and the time to appeal was not revived or extended by the subsequent vacatur and reinstatement of that order.

Plaintiff's argument that Itex had waived arbitration before its commencement by not timely proceeding within 30 days of issuance of a provisional remedy pursuant to CPLR 7502(c) was not proper reargument because the April 2013 order had addressed the different issue of whether plaintiff waived arbitration by not paying arbitral fees after commencement. In any event, the argument was without merit, as no provisional remedy had been issued. Plaintiff's contention that Itex, as an unauthorized foreign corporation doing business in this state, was not entitled to compel arbitration was properly rejected, because such a corporation may seek to compel arbitration defensively

(*see* Business Corporation Law § 1312[b]; *Ruti v Knapp*, 193 AD2d 662, 663 [2nd Dept 1993]).

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

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

ENTERED: JULY 2, 2015

CLERK

Gonzalez, P.J., Sweeny, Renwick, Saxe, Feinman, JJ.

15617 The People of the State of New York, Ind. 5715/10
Respondent,

-against-

Ernest Covington,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Lewis Bart Stone, J. at severance motions; Edward J. McLaughlin, J. at jury trial and sentencing), rendered January 15, 2013, convicting defendant of burglary in the third degree and grand larceny in the fourth degree, and sentencing him, as a second felony offender, to consecutive terms of 3½ to 7 years and 2 to 4 years, respectively, unanimously modified, on the law, to the extent of reducing the grand larceny conviction to petit larceny and remanding for resentencing on that conviction only, and otherwise affirmed.

The motion court properly exercised its discretion in denying defendant's severance motions. The counts relating to

the two incidents at issue were properly joined as sufficiently "similar in law" (CPL 200.20[2][c]) to satisfy the principles set forth in *People v Pierce* (14 NY3d 564, 573-574 [2010]), and defendant did not make a sufficient showing to warrant a discretionary severance (*see* CPL 200.20[3]; *People v Ford*, 11 NY3d 875, 879 [2008]). Defendant's argument about a variance in the proof of the two incidents is unavailing, particularly given defendant's reliable confessions to both crimes. We have considered and rejected defendant's remaining arguments on the joinder/severance issue.

We find that the charge as a whole conveyed the proper standards on witness credibility, inconsistencies in testimony, and the concept of reasonable doubt in the deliberative process, and that the isolated phrases challenged by defendant do not require reversal (*see People v Canty*, 60 NY2d 830, 831-832 [1983]). Although the trial court went beyond the Criminal Jury Instructions, when each of the phrases at issue is viewed in its proper context, we do not find that any of this language was prejudicial or constitutionally deficient.

As the People concede, the evidence was legally insufficient to establish the value element of fourth-degree grand larceny. We perceive no basis for reducing the sentence on the burglary conviction.

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

ENTERED: JULY 2, 2015

CLERK

Gonzalez, P.J., Sweeny, Renwick, Saxe, Feinman, JJ.

15619- Index 109955/09
15619A Yvonne Yannetti, et al.,
Plaintiffs-Appellants,

-against-

Hammerstein Ballroom, et al.,
Defendants-Respondents.

_____

Gruenberg Kelly Della, Ronkonkoma (Zachary M. Beriloff of counsel), for appellants.

Weg & Myers, P.C., New York (Joshua Mallin of counsel), for Hammerstein Ballroom, Manhattan Center Productions, Inc., and Manhattan Center Studios, Inc., respondents.

Hannum, Feretic, Prendergast & Merlino, LLC, New York (Michael J. White of counsel), for Live Nation, respondent.

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Orders, Supreme Court, New York County (Debra A. James, J.), entered April 18, 2014, which granted defendants' motions for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants established their prima facie entitlement to summary judgment by submitting photographic evidence, the injured plaintiff's deposition testimony and affidavits from witnesses establishing that plaintiff's fall as she descended the last of two broad steps outside of the ladies bathroom in the basement of the subject building was not caused by a code violation or

improper geometric configuration of the stairs (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Plaintiff testified that she saw the steps, as well as the markings on the nose of the steps, which, in photographs, clearly show the steps' drop-off points. Plaintiff also admittedly navigated the steps without incident several times during a two hour period, before taking the misstep that resulted in her injury. Plaintiff never specifically testified that she experienced optical confusion (a theory her expert put forth), and there is no evidence of any prior complaints or accidents involving the steps (*see Philips v Paco Lafayette LLC*, 106 AD3d 631 [1st Dept 2013]; *Serrano v New York City Hous. Auth.*, 268 AD2d 230 [1st Dept 2000]). While plaintiff testified that the area was dark, she acknowledged that there was recessed lighting, and defendants' expert obtained a meter reading showing that the area was illuminated within acceptable industry standards. More importantly, plaintiff never claimed that her fall was due to an inability to see (*see e.g. Carty v Port Auth. of N.Y. and N.J.*, 32 AD3d 732 [1st Dept 2006], *lv denied* 8 NY3d 814 [2007]).

In opposition, plaintiffs failed to raise a triable issue of fact as to whether her fall was caused by conditions that

presented a trap-like hazard due to optical confusion.

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: JULY 2, 2015

CLERK

Gonzalez, P.J., Sweeny, Renwick, Saxe, Feinman, JJ.

15620 The People of the State of New York, Ind. 2163/13
Respondent,

-against-

Craig Smith,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered February 6, 2014, convicting defendant, upon his plea of guilty, of burglary in the third degree, and sentencing him, as a second felony offender, to a term of three to six years, unanimously affirmed.

The court properly denied defendant's motion to withdraw his guilty plea (*see People v Frederick*, 45 NY2d 520 [1978]). Contrary to defendant's assertion, he received a full opportunity to advance, with the aid of counsel, any grounds he wished. Nevertheless, other than a request for further leniency, defendant's only identifiable ground for the motion was a conclusory claim of innocence that was refuted by his plea allocution. Defendant did not preserve his claim that the

voluntariness of his plea was impaired by the court's allegedly erroneous in limine ruling on the admissibility of uncharged crimes evidence, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. The record establishes that defendant's plea was knowing, intelligent and voluntary. Except for suppression rulings (*see* CPL 710.70[2]), evidentiary claims are forfeited by a guilty plea (*People v Hansen*, 95 NY2d 227, 230-231 [2000]; *People v Taylor*, 65 NY2d 1, 5 [1985]). A defendant should not be permitted to circumvent that rule by asserting on appeal that a ruling "impacted" the decision to plead guilty or left "no choice" but to do so.

Defendant made a valid waiver of his right to appeal, which forecloses review of his sentencing-related claims. Regardless of whether defendant validly waived his right to appeal, we perceive no basis for reducing the sentence.

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

ENTERED: JULY 2, 2015

CLERK

Gonzalez, P.J., Sweeny, Renwick, Saxe, Feinman, JJ.

15621 Andejo Corporation, doing business as Seaport Watch Company, et al., Plaintiffs,

Fulton Market Retail Fish Inc., doing business as Simply Seafood, Plaintiff-Appellant,

-against-

South Street Seaport Limited Partnership, et al., Defendants-Respondents.

Index 603707/04

_____

Hill Rivkin, LLP, New York (John L. O'Kelly of counsel), for appellant.

DLA Piper (US) LLP, New York (Christopher M. Strongosky of counsel), for respondents.

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Order and judgment (one paper), Supreme Court, New York County (Shlomo S. Hagler, J.), entered November 14, 2013, which, following a nonjury trial, awarded defendants landlords South Street Seaport Limited Partnership and Seaport Marketplace, L.L.C. full and exclusive use and possession of the subject premises, unanimously affirmed, without costs.

There is no basis upon which to disturb the factual findings of the trial court which rest largely on credibility determinations and are supported by evidence establishing that plaintiff tenant was in default of its lease based on its failure

to pay rent and utilities (*see Claridge Gardens v Menotti*, 160 AD2d 544 [1st 1990]). The lease provided that upon "the occurrence and continuance of an Event of default," defendants landlords, without notice, could elect to terminate the lease.

The trial court also properly found, based on evidence that plaintiff tenant deliberately and intentionally violated other lease provisions by failing to pay any utility charges for approximately a decade and misreporting gross sales, that equitable considerations do not warrant a finding that plaintiff should not forfeit the lease (*see First Natl. Stores v Yellowstone Shopping Ctr.*, 21 NY2d 630, 637 [1968]).

We have considered plaintiff tenant's remaining arguments, including that it was entitled to exercise an option to renew the lease, and find them unavailing.

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

ENTERED: JULY 2, 2015

CLERK

Gonzalez, P.J., Sweeny, Renwick, Saxe, Feinman, JJ.

15622 The People of the State of New York, Ind. 4140N/11
Respondent,

-against-

Marco Cuenea,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Sheila O'Shea of counsel), for respondent.

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Judgment, Supreme Court, New York County (Bruce Allen, J. at suppression hearing; Ruth Pickholz, J. at jury trial and sentencing), rendered April 16, 2013, as amended April 25 and July 12, 2013, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the first degree, three counts of criminal sale of a controlled substance in the third degree, and two counts of criminal possession of a controlled substance in the third degree, and sentencing him to an aggregate term of nine years, unanimously affirmed.

The court properly denied defendant's suppression motion. The warrantless seizure of an opaque package in defendant's workplace was proper under an intersection of the plain view and fellow officer doctrines. An undercover officer advised other

members of his team, who were lawfully present in premises open to the public, that certain drugs he had arranged to buy were in that particular bag. The undercover officer's conclusion about the contents of the bag was reasonable under the facts personally known to him, and it thus provided probable cause, thereby satisfying the "immediately apparent" element of the plain view doctrine (*see People v Batista*, 261 AD2d 218, 221-222 [1st Dept 1999], *lv denied* 94 NY2d 819 [1999]), and justifying the actions of the officers with whom he communicated (*see People v Ketcham*, 93 NY2d 416, 419-420 [1999]).

Under the circumstances of the case, the court's intentional inclusion, in a readback requested by the deliberating jury, of testimony that had been heard by the jury but stricken from the record does not warrant reversal. The court properly exercised its discretion when it revisited its ruling and permitted the jury to hear the stricken testimony, which was relevant and admissible information based on the witness's personal knowledge. Defendant was not prejudiced by the content of the initially stricken testimony, or by the fact that it had been stricken but nevertheless reinstated. In any event, any error in this regard was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

Defendant did not preserve his challenge to the court's own involvement in reading back the testimony, and we decline to

review it in the interest of justice. As an alternative holding, we find that the court's participation in the readback was inadvisable (*see People v Alcide*, 21 NY3d 687, 695 [2013]), but that it did not deprive defendant of a fair trial.

We perceive no basis for reducing the sentence.

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

ENTERED: JULY 2, 2015

CLERK

Gonzalez, P.J., Sweeny, Renwick, Saxe, Feinman, JJ.

15626 Glen Lau, MD, et al., Index 651648/13
Plaintiffs-Respondents,

-against-

Terry Lazar, et al.,
Defendants-Appellants.

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Steven G. Legum, Mineola, for appellants.

Advocates for Justice, Chartered Attorneys, New York (Richard Soto of counsel), for respondents.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered October 14, 2014, which, insofar as appealed from, denied defendants' motion to dismiss the first though nineteenth and the twenty-fourth through twenty-eighth causes of action, unanimously modified, on the law, to grant the motion as to the fourth, fifth, sixth, and seventeenth causes of action, and otherwise affirmed, without costs.

The fourth cause of action, which alleges tortious interference with the parties' letter of intent, should be dismissed because plaintiffs do not allege "the existence of a valid contract between [themselves] and a third party" (*see Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]). Nevertheless, the three remaining tortious interference claims

are properly pleaded because the complaint specifically alleges "that the acts of the defendant corporate officer[] which resulted in the tortious interference with contract ... were beyond the scope of [his] employment" (*Petkanas v Kooyman*, 303 AD2d 303, 305 [1st Dept 2003]) and were done for malicious and wrongful purposes (*see Bonanni v Straight Arrow Publs.*, 133 AD2d 585, 586-587 [1st Dept 1987]; *see also Algomod Tech. Corp. v Price*, 65 AD3d 974, 975 [1st Dept 2009], *lv denied* 14 NY3d 707 [2010]).

The fifth and sixth causes of action, which allege that the other member of the surgical center breached the operating agreement, should be dismissed because "[a] member of a limited liability company cannot be held liable for the company's obligations by virtue of his [or her] status as a member thereof" (*Matias v Mondo Props. LLC*, 43 AD3d 367, 367-368 [1st Dept 2007] [internal quotation marks omitted]; Limited Liability Company Law §§ 609; 610).

The unjust enrichment causes of action predicated on the informal loans made by plaintiffs to several of the defendants are adequately pleaded because "[w]here one party misappropriates property from another and uses that property to pay a debt to a third party, an action for unjust enrichment may lie against the

party who ultimately received the money" (*Trade Expo Inc. v Bancorp*, 2014 NY Slip Op 32408[U], *2 [Sup Ct, NY County 2014], citing *3105 Grand Corp v City of New York*, 288 NY 178 [1942]; *Carriafielio-Diehl & Assoc., Inc. v D&M Elec. Contr., Inc.*, 12 AD3d 478 [2d Dept 2004]).

The seventeenth cause of action, which alleges that the surgical center was unjustly enriched by capital improvements made by plaintiffs, should be dismissed because of the existence of an express agreement covering those capital improvements (*see Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 790-791 [2012]).

We have considered defendants' remaining arguments as to the sufficiency of the pleadings and find them unavailing.

We reject defendants' contention that the motion court demonstrated bias against them warranting assignment of the case to a different Justice.

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

ENTERED: JULY 2, 2015

CLERK

Gonzalez, P.J., Sweeny, Renwick, Saxe, Feinman, JJ.

15627N Soledad Domingez, et al., Index 116709/06
Plaintiffs-Respondents,

Elsia Vasquez,
Plaintiff-Appellant,

-against-

Ilan Zinnar, et al.,
Defendants,

Chase Group Alliance LLC, et al.,
Intervenors.

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Collins, Dobkin & Miller LLP, New York (Timothy L. Collins of counsel), for appellant.

Grimble & LoGuidice, LLC, New York (Robert Grimble of counsel), for respondents.

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Order, Supreme Court, New York County (Joan A. Madden, J.), entered on or about March 25, 2014, which, to the extent appealed from, granted plaintiffs-respondents' counsel's motion to confirm a referee's report setting a charging lien in favor of counsel, and denied plaintiff Vasquez's cross motion for renewal and reconsideration of counsel's prior motion for a charging lien, unanimously affirmed with respect to counsel's motion, and the appeal therefrom otherwise dismissed, without costs.

Vasquez's cross motion seeking renewal and reconsideration is deemed a motion to reargue, since Vasquez did not point to any

new fact that would change the prior determination (*see Pullman v Silverman*, 125 AD3d 562, 563 [1st Dept 2015]). Therefore, the denial of Vasquez's cross motion is not appealable (*id.*).

The motion court providently exercised its discretion in confirming the Referee's report, as the report is supported by the record (*Those Certain Underwriters at Lloyds, London v Occidental Gems, Inc.*, 11 NY3d 843, 845 [2008]).

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

ENTERED: JULY 2, 2015

CLERK

Acosta, J.P., Andrias, Saxe, DeGrasse, Richter, JJ.

14412-
14412A Overseas Shipholding Group, Inc., Index 650765/14
Plaintiff-Respondent,

-against-

Proskauer Rose, LLP, et al.,
Defendants-Appellants.

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Davis Polk & Wardwell LLP, New York (Paul Spagnoletti of counsel), for appellants.

Mullin Hoard & Brown, LLP, Amarillo, TX (Steven L. Hoard of the bar of the States of Texas and North Carolina, admitted pro hac vice, of counsel), for respondent.

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Orders, Supreme Court, New York County (Jeffrey K. Oing, J.), entered September 16 and September 25, 2014, which, to the extent appealed from, denied defendants' motion to dismiss the first cause of action alleging legal malpractice, affirmed, without costs.

The motion court correctly determined that the legal malpractice claim, based on allegedly deficient tax advice provided by defendants beginning in 2005 and continuing throughout the course of its ongoing representation of plaintiff, is not time-barred (*see Shumsky v Eisenstein*, 96 NY2d 164, 168 [2001]; *Ackerman v Price Waterhouse*, 252 AD2d 179, 205-206 [1st Dept 1998]; *see also Zwecker v Kulberg*, 209 AD2d 514, 515 [2d

Dept 1994]). Further, plaintiff sufficiently pleaded that defendants' advice was the proximate cause of its alleged damages.

Defendants argue that because the 2006 credit facility agreement was drafted by another law firm, it severed any causal chain between defendants' work in 2005 and plaintiff's increased tax liability. However, "[a]s a general rule, issues of proximate cause[, including superceding cause,] are for the trier of fact" (*Hahn v Tops Mkts., LLC*, 94 AD3d 1546, 1548 [4th Dept 2012] [alterations in original] [internal quotation marks omitted]) and defendants' contention is unavailing at this procedural juncture (*see Ableco Fin. LLC v Hilson*, 81 AD3d 416, 417 [1st Dept 2011]). Plaintiff alleges, inter alia, that it continually relied on defendants' advice for the purpose of shielding income from its off-shore subsidiary from federal income tax and that defendant improperly advised it to make the 2005 "check-the-box" election, which greatly enlarged the prospective pool of income on which plaintiff could be taxed. Plaintiff further alleges that the error in advising it to make the check-the-box election, which according to defendant could not be changed for the next five years, was compounded by the error of changing the language in the credit facility agreements

from several liability to joint and several liability, effectively transferring the entire pool of off-shore subsidiaries' income to plaintiff.

The motion court correctly determined that the complaint adequately pleads a valid claim of legal malpractice arising out of a 2011 memorandum. The documents submitted by defendants do not conclusively refute plaintiff's claim (*Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431, 433 [1st Dept 2014]).

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

All concur except Saxe and Richter, JJ. who concur in a separate memorandum by Richter, J. as follows:

RICHTER, J. (concurring)

The majority concludes that plaintiff's legal malpractice claim based on defendants' tax advice dating back to 2005 is not time-barred. Although I agree that the complaint should not be dismissed at this stage of the proceedings, I disagree with the majority's conclusion that the entire malpractice claim is timely as a matter of law. Instead, I believe that issues of fact exist with respect to the continuous representation doctrine and that discovery is needed to resolve the statute of limitations question.

Plaintiff Overseas Shipholding Group, Inc. (OSG) is in the business of transporting bulk crude oil and refined petroleum products throughout the world.[1] OSG's operations in the United States are conducted by its wholly-owned subsidiary OSG Bulk Ships, Inc. (OBS), and its foreign business is conducted by OSG International, Inc. (OIN), another wholly-owned subsidiary. Defendant Proskauer Rose, LLP is a nationally-recognized law firm that has provided a variety of legal services to OSG since the company's inception in 1969. Defendant Alan P. Parnes, a partner at Proskauer and the leader of its New York tax team, served as

[1] The facts set forth here are from OSG's complaint and are presumed to be true for purposes of this motion.

OSG's primary tax counsel. The remaining defendants are partners at Proskauer.

Proskauer, through Parnes, was OSG's principal tax advisor on issues related to the U.S. taxation of foreign shipping income earned by foreign subsidiaries of U.S. corporations, such as OIN. The tax treatment of such income has changed significantly over the years. As relevant here, since January 1, 2005, none of OIN's foreign shipping income has been subject to U.S. taxation unless it was either actually distributed to OSG in the form of a dividend, or deemed distributed under section 956 of the Internal Revenue Code (26 USC § 956). Section 956 provides, inter alia, that the earnings of a foreign subsidiary will be deemed to have been distributed to its U.S. parent under certain circumstances that are considered the functional equivalent of a dividend. These circumstances include when the assets of the foreign subsidiary are used to support the obligations of the U.S. parent, such as by way of a loan or guarantee.

As part of its representation of OSG, Proskauer negotiated and drafted a series of unsecured credit agreements for OSG and its subsidiaries, OIN and OBS. In agreements dated 1994 and 1997, OSG, OIN and OBS were "severally" liable only for the amounts each borrowed directly. In agreements dated 2000 and

2001, Proskauer changed the structure to provide that OSG, OIN and OBS were each borrowing on a "joint and several" basis. OSG alleges that this change in language had potentially dire tax consequences. According to OSG, the "joint and several" language was tantamount to a guarantee by OIN of OSG's borrowings under the credit agreements, rendering those borrowings a deemed dividend under section 956, and subjecting OSG to substantial U.S. income tax liability. OSG maintains that Proskauer never advised it that the new "joint and several" language could result in additional taxes for OSG, and that such failure fell below the standard of care owed by Proskauer to OSG.

OSG subsequently entered into a number of additional unsecured credit agreements from 2003 to 2006. Although Proskauer did not represent OSG in connection with these agreements, OSG alleges that it used the "joint and several" structure of the earlier Proskauer-drafted agreements as templates for the 2003-2006 agreements. According to OSG, Proskauer was aware of these credit agreements because copies were attached to certain filings with the Securities and Exchange Commission (SEC) for which Proskauer rendered legal advice. Further, during the time the agreements were negotiated, Proskauer continued to be OSG's principal tax advisor, including

with respect to ongoing issues related to foreign shipping income taxation under section 956.

Liability under section 956 arises only to the extent the foreign subsidiary has current or accumulated earnings that have not already been subject to U.S. taxation. Thus, the taxable amount of an actual or deemed distribution of foreign income from OIN to OSG is limited by the amount of OIN's current or past accumulated untaxed earnings and profits. Since 2000, OIN itself did not have significant earnings; rather, the vast majority of OIN's earnings was generated by its lower-tier subsidiaries. Thus, any potential section 956 tax liability for OSG due to OIN's "joint and several" liability under the credit agreements would have been limited to the untaxed earnings and profits at the OIN level. The substantial accumulated untaxed earnings and profits of OIN's lower-tier subsidiaries would not have been included in calculating OSG's section 956 tax liability.

According to OSG, that changed in early 2005, when Parnes advised OSG to make certain elections under the Internal Revenue Code known as "check-the-box" elections. One of the effects of these elections was to disregard OIN's lower-tier subsidiaries as separate entities for U.S. income tax purposes and to treat OIN and its subsidiaries as a single taxpayer. Thus, the substantial

accumulated untaxed earnings and profits of OIN's lower-tier subsidiaries would be considered, for tax purposes, as if they belonged to OIN. Because untaxed accumulated earnings and profits are the measure of the taxable amount of a section 956 deemed distribution, the result of the "check-the-box" elections was to dramatically increase OSG's potential tax liability due to the "joint and several" structure of the credit agreements. OSG alleges that Parnes neither reviewed the existing credit agreements to ensure that no negative tax consequences flowed from the elections, nor advised OSG to perform any such review itself. OSG followed Parnes's advice and made the recommended "check-the-box" elections. OSG alleges that this resulted in the addition of at least $1 billion of untaxed future earnings that subsequently became subject to section 956 tax liability due to the "joint and several" structure of the credit agreements.

In late 2010, OSG began working on a new unsecured credit agreement to replace the 2006 agreement, effective 2013. Proskauer represented OSG in negotiating and drafting this agreement, which used the same "joint and several" liability repayment structure that had existed in the previous post-1999 agreements. In April 2011, after reviewing a draft of the new agreement, Parnes told OSG that he was concerned that the "joint

and several" language created a potential section 956 tax problem. OSG alleges that after researching the matter, Parnes concluded that there was "no tax solution" to the problem, but did not tell this to OSG. Several days later, however, a different Proskauer partner told OSG that Proskauer had since determined that the language of the agreement would not trigger section 956 tax liability.

In June 2011, Proskauer wrote a memorandum to OSG in which it concluded that the "joint and several" language in the various credit agreements did not obligate OIN to repay OSG's borrowings and thus would not give rise to a deemed dividend under section 956. Proskauer advised OSG that it could continue to borrow under the existing 2006 credit agreement, and enter into the new agreement, without any adverse tax consequences. Proskauer's opinion rested on its conclusion that the language in the agreements was ambiguous, and that it was clear, from parol evidence, that the parties never intended OIN to guarantee OSG's borrowings. The memorandum, however, did not disclose that Parnes had concluded there was "no tax solution" to the problem, or advise OSG of any risk that the "joint and several" language would be determined to be unambiguous. In reliance on Proskauer's advice, OSG executed the new credit agreement with

the "joint and several" structure, and did not reexamine any of the draws it had previously taken under the earlier credit agreements.

In July 2012, OSG was contemplating a large drawdown on the existing 2006 credit agreement. In light of concerns voiced by the lenders, OSG asked Proskauer if it could still rely on the advice given in the June 2011 memorandum, and, according to OSG, Proskauer unequivocally told OSG that it could. Based on that representation, OSG proceeded with a $343 million drawdown, assuming that it could do so without section 956 tax exposure. OSG alleges that, subsequent to Proskauer's June 2011 memorandum and in reliance thereupon, OSG drew down a total of $659 million under the 2006 credit agreement.

In October 2012, OSG filed a form with the SEC withdrawing its financial statements for the previous three years, effectively repudiating Proskauer's tax advice on the section 956 matter. Several weeks later, OSG filed for Chapter 11 bankruptcy protection, and self-reported to the Internal Revenue Service (IRS) that some of its previous tax returns were incorrect. In February 2013, the IRS filed an amended claim in the OSG bankruptcy proceeding in the amount of several hundred million dollars, largely based on the section 956 issue.

In March 2014, OSG commenced this action asserting a cause of action for legal malpractice against Proskauer, Parnes, and three other Proskauer partners (hereinafter, collectively Proskauer).[2] OSG's malpractice claim has two branches. In the first branch, OSG maintains that Proskauer breached its duty of care by providing negligent section 956 tax advice. OSG alleges, inter alia, that Proskauer failed to identify the issue with the "joint and several" language contained in OSG's credit agreements, improperly advised OSG to make the "check-the-box" elections, and failed to disclose to OSG the tax consequences stemming from the credit agreements and the "check-the-box" elections.[3] The second branch of the malpractice claim centers around Proskauer's June 2011 memorandum, reaffirmed in 2012, advising OSG that there were no adverse section 956 tax issues with its credit agreements. OSG maintains that Proskauer's advice that the "joint and several" language in the agreements did not create a taxable deemed dividend under section 956 was

[2] The complaint also asserted a cause of action for breach of the duty of loyalty. That claim was dismissed as duplicative by the motion court and is not the subject of this appeal.

[3] Although OSG does not seek damages for Proskauer's alleged negligent advice concerning the 2000 and 2001 credit agreements, OSG maintains that such negligence is relevant to Proskauer's subsequent malpractice.

"dead wrong."

Proskauer sought dismissal of the legal malpractice claim, arguing that the first branch was barred by the statute of limitations, and that the second branch was barred by documentary evidence. Proskauer also argued that the claim as a whole does not state a cause of action due to lack of causation.[4] The motion court denied Proskauer's motion and this appeal followed.

On appeal, Proskauer contends that the branch of the malpractice claim related to the 2005 "check-the-box" advice (the 2005 claim) is time-barred.[5] In addressing a statute of limitations issue arising from a CPLR 3211 motion, the allegations of the complaint must be given a liberal construction and accepted as true (*Simcuski v Saeli*, 44 NY2d 442, 446-447 [1978]; *Johnson v Proskauer Rose LLP*, __ AD3d __, __, 2015 NY Slip Op 03626, *4 [1st Dept 2015]). Further, a plaintiff must be accorded the benefit of every possible favorable inference, and "[w]hether a plaintiff can ultimately establish its allegations

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[4] Proskauer makes no argument that the second branch, which relates to the June 2011 memorandum, is time-barred.

[5] Prosakuer also argues that OSG cannot establish causation with respect to either branch of the malpractice claim, and that documentary evidence bars the second branch. I agree with the majority's rejection of these arguments.

is not part of the calculus in determining a motion to dismiss" (*Johnson*, __ AD3d at __, 2015 NY Slip Op 03626, *4 [alteration in original] [internal quotation marks omitted]).

The statute of limitations for a legal malpractice claim is three years running from the date the alleged malpractice was committed (CPLR 214[6]; *Waggoner v Caruso*, 68 AD3d 1, 6 [1st Dept 2009], *affd* 14 NY3d 874 [2010]). OSG concedes that this action was brought more than three years after the 2005 advice was rendered, but argues that the limitations period should be tolled due to Proskauer's continuing representation of OSG. Under the continuous representation doctrine, the statute of limitations for legal malpractice is tolled while there is an "ongoing provision of professional services with respect to the contested matter or transaction" (*Matter of Lawrence*, 24 NY3d 320, 341 [2014]). The ongoing representation must relate "specifically to the matter in which the attorney committed the alleged malpractice" (*Shumsky v Eisenstein*, 96 NY2d 164, 168 [2001]). The doctrine, however, does not apply to a client's "continuing general relationship with a lawyer . . . involving only routine contact for miscellaneous legal representation . . . unrelated to the matter upon which the allegations of malpractice are predicated" (*id*.).

The continuous representation doctrine operates as a toll "only where there is a mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim" (*McCoy v Feinman*, 99 NY2d 295, 306 [2002]). The rationale underlying the doctrine is that a person seeking legal advice "has a right to repose confidence in the professional's ability and good faith, and realistically cannot be expected to question and assess the techniques employed or the manner in which the services are rendered" (*Shumsky*, 96 NY2d at 167 [internal quotation marks omitted]). Relatedly, a client cannot be expected to jeopardize his relationship with the attorney handling the matter while that same attorney continues to represent the client (*id.*). For these reasons, the limitations period is tolled until the ongoing representation is complete (*id.* at 167-168).

Here, Proskauer has met its prima facie burden of showing that this action was brought more than three years after the 2005 claim accrued. Thus, the burden shifted to OSG to "demonstrat[e] that the continuous representation doctrine applied, or at least that there was an issue of fact with respect thereto" (*CLP Leasing Co., LP v Nessen*, 12 AD3d 226, 227 [1st Dept 2004]). Although the majority would decide the limitations issue in OSG's

favor as a matter of law, I believe that issues of fact exist and that a conclusive determination cannot be made on this pre-answer pleading motion (*see Weiss v Manfredi*, 83 NY2d 974, 977 [1994] [rejecting time-bar defense where there was a question of fact as to whether the defendants continued to represent the plaintiff in connection with the matter]).

Because the statute of limitations period is tolled only where the ongoing legal representation is related to the "contested matter or transaction" (*Matter of Lawrence*, 24 NY3d at 341), it is essential to properly frame what that matter or transaction is. Proskauer narrowly defines the transaction as discrete, one-time tax advice concerning the "check-the-box" elections. Proskauer points out that the complaint does not allege that Proskauer gave OSG any further "check-the-box" advice after 2005. According to Proskauer, it could not have advised OSG any further on this matter because governing regulations prevented OSG from changing its "check-the-box" elections for a period of five years. Thus, Proskauer argues, its advice on the "check-the-box" elections came to an end when OSG made the elections, and no further representation continued on that matter.

In contrast to Proskauer's narrow framing of the matter, OSG

more broadly defines it as section 956 tax advice provided to ensure that its foreign shipping income remained exempt from U.S. taxation. OSG maintains that the "check-the-box" advice did not simply flow from a one-time engagement, but was part and parcel of Proskauer's continuing representation on how OSG could legally avoid foreign income taxation. In support, OSG points to allegations in the complaint that Proskauer was OSG's principal tax advisor with respect to these issues spanning from at least 2005 until 2012, and that OSG regularly consulted Proskauer for advice in this area.

I find that Proskauer's framing of the matter is too narrow. By defining the matter as simply "check-the-box" advice, Proskauer ignores the complaint's allegations that Proskauer negligently failed to advise OSG of the potential section 956 tax liability that could be triggered as a result of the "joint and several" structure of the credit agreements if the "check-the-box" elections were made. In other words, the alleged malpractice relates not simply to the discrete "check-the-box" advice, but more broadly to how that advice affected taxation of foreign income in light of the existing credit agreements. Indeed, in its June 2011 memorandum, Proskauer expressly states that it had advised OSG "over the years" that OIN could not

guarantee borrowings by OSG or any other domestic borrower.

On the other hand, I conclude that OSG's definition of the matter is too broad. By framing the matter as all tax advice concerning section 956, regardless of whether it was related to the "joint and several" structure of the credit agreements, OSG impermissibly seeks to expand the continuous representation doctrine to cover its "continuing general relationship" with Proskauer involving "routine contact for miscellaneous legal representation" (*Shumsky*, 96 NY2d at 168). OSG's sweeping analysis would mean that the statute of limitations was tolled as long as Proskauer continued to give them any type of section 956 advice and would blur the line between representation on a specific matter and serving as general tax counsel (*see Williamson v PricewaterhouseCoopers LLP*, 9 NY3d 1, 11 [2007] [no continuous representation where allegations show "failures within a continuing professional relationship, not a course of representation as to the particular problems (conditions) that gave rise to plaintiff's malpractice claims"]).

Although neither party's framing of the contested matter withstands scrutiny, the precise scope of the matter within these two extremes cannot be determined in the absence of further discovery. The complaint alleges that Proskauer continuously

served as OSG's tax counsel on section 956 matters, and sets forth an exhaustive list of numerous representations covered thereunder. Although some of these matters appear to have no connection to the matter from which the malpractice claim in this action arose, the record does not establish how all of these post-2005 section 956 matters relate to the problems that arose from Proskauer's alleged negligent advice concerning the "check-the-box" elections in the face of the "joint and several" structure of the credit agreements. Likewise, it cannot be determined whether all of these subsequent matters involve entirely separate transactions unrelated to the 2005 matter upon which the malpractice claim is predicated. Furthermore, OSG alleges that the 2006 credit agreement that continued the problematic "joint and several" liability language, although not drafted by Proskauer, was attached to SEC filings for which Proskauer rendered legal advice.

In determining whether the continuous representation tolling applies, it is essential to know whether "there is a mutual understanding of the need for further representation on the

specific subject matter underlying the malpractice claim" (*McCoy v Feinman*, 99 NY2d at 306). In the absence of further discovery as to the parties' mutual understanding, any determination on the continuous representation toll would be premature. Relatedly, there is insufficient evidence of the precise scope and parameters of OSG's engagement of Proskauer (*see Williamson v PricewaterhouseCoopers LLP*, 9 NY3d at 10 [nature and scope of the parties' engagement play a key role in determining whether continuous representation was contemplated by the parties]). Although the complaint alleges that the parties had only one engagement letter covering the entire period relevant to this case, the record does not contain a copy of that letter or any other details about the engagement.

Given the early stage of these proceedings, and in light of the disputed issues of fact on the continuous representation toll, I would affirm the decision of the motion court to deny Proskauer's motion to dismiss the 2005 claim as time-barred. Because a determination of the statute of limitations issue has the potential to dispose of a substantial part of OSG's

complaint, a prudent option for the motion court would be to order limited discovery on the continuous representation issue followed by further briefing and, if necessary, an immediate trial on that issue (*see* CPLR 3212[c]; *Deep v Boies*, 53 AD3d 948, 952 [3d Dept 2008]).

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

ENTERED: JULY 2, 2015

CLERK

Friedman, J.P., Renwick, Moskowitz, Clark, JJ.

14676 In re Martin Ephraim, as Fiduciary of the Deceased Executor for the Estate of Ronald D. Myers., Decedent.

- - - - -

Martin Ephraim, Petitioner-Appellant,

-against-

Anne O'Connor, Objectant-Respondent.

File 4109/06

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

Farrell Fritz, P.C., Uniondale (Eric W. Penzer of counsel), for respondent.

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Order, Surrogate's Court, New York County (Nora S. Anderson, S.), entered February 18, 2014, which, to the extent appealed from as limited by the briefs, denied petitioner's motion for summary judgment dismissing objectant's objections to an accounting of the Estate of Ronald D. Myers (decedent), and granted objectant's cross motion for summary judgment on her objections to the distribution of decedent's non-IBM stock to petitioner, unanimously affirmed, without costs.

Decedent's will, which apparently was prepared without the assistance of legal counsel, bequeathed "all monies" to his

mother, and "all [s]tocks of I.B.M." and "all personal property" to his life partner. Decedent's mother and his life partner, both now deceased, were named as coexecutors of decedent's estate, which included stock in companies other than IBM.

The court properly interpreted the will as intending to bequeath to decedent's mother the stock in companies other than IBM, in view of the limiting language of the bequest to his life partner and the broad language of the bequest to his mother (*see Matter of Cord*, 58 NY2d 539, 544 [1983]). If decedent viewed stock as "personal property," he would not have expressly noted the bequest of the IBM stock, since it would have been included in the more general bequest to his life partner.

The court properly relied on the language of the will in discerning decedent's intent (*see Matter of Cord*, 58 NY2d at 544). Since the will referred to decedent's life partner as a "close friend," the court's reference to decedent's life partner as a "friend" does not show that the court relied on a presumption in favor of relatives or that it marginalized or disregarded decedent's long-term relationship with his life

partner.

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: JULY 2, 2015

CLERK

Sweeny, J.P., Andrias, Manzanet-Daniels, Clark, JJ.

14924 In re 12-14 East 64th Owners Corp., Index 570432/11
Petitioner-Respondent,

-against-

Verina Hixon,
Respondent-Appellant.

_____

Wagner Berkow LLP, New York (Ian J. Brandt of counsel), for appellant.

Phillips Nizer LLP, New York (David A. Pellegrino of counsel), for respondent.

_____

Order of the Appellate Term of the Supreme Court, First Department, entered on or about February 1, 2013 which affirmed as modified, a judgment of Civil Court, New York County (Jean T. Schneider, J.), entered November 20, 2009, after a nonjury trial, in petitioner cooperative's favor, unanimously affirmed, without costs.

This appeal arises from a nonpayment proceeding to recover unpaid maintenance withheld by respondent following a flood in her apartment. The proceeding was tried jointly and substantively consolidated with a holdover proceeding brought by the cooperative against respondent in Civil Court, New York County (Jean T. Schneider, J.) (the Housing Court).

After a joint trial, the Housing Court issued an order, on

November 20, 2009, which granted withheld maintenance payments to the cooperative in the amount of $45,356.74, and denied respondent's counterclaims for rent abatement. In January 2013, the Appellate Term affirmed the Housing Court order, with the sole modification of reducing the cooperative's recovery of maintenance arrears from $45,356.74 to $34,300.02, and denied respondent's application for attorney's fees.

Under the warranty of habitability, the obligation of a tenant to pay rent (or maintenance) is dependent upon a landlord's satisfactory maintenance of the premises in a habitable condition (*Park W. Mgt. Corp. v Mitchell*, 47 NY2d 316, 327 [1979], *cert denied* 444 US 992 [1979]). The warranty provides that:

> "the occupants of such premises shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health or safety. When any such condition has been caused by the misconduct of the tenant or lessee or persons under his direction or control, it shall not constitute a breach of such covenants and warranties"

(RPL § 235-b(1)). It is undisputed that the apartment was in an uninhabitable condition at all relevant times after the flood.

The Appellate Term properly denied rent abatement to respondent for the period of May 2004 - November 2006, in light of her admitted misconduct, and subsequent delays, after the

flood. Once respondent advised the cooperative that she intended to make the repairs herself, in May 2004, the cooperative could not have overridden her instructions by making its own repairs. The warranty only applies to areas that are "within the landlord's control" (*Park W. Mgt. Corp.*, 47 NY2d at 327). This was a sufficient reason to deny rent abatement, at least until respondent changed her mind and demanded that the cooperative make the repairs in August 2005.

With respect to the remainder of the time period in question, respondent is again foreclosed from seeking a rent abatement in light of her own misconduct. Respondent admits that she commenced flood repairs without the proper application for doing so, and that she did not tender the $10,000 repair escrow amount until June 2005, thus delaying her compliance with a separate stipulation between the parties by some nine months. The cooperative credibly submits that, absent respondent's delays and misconduct, it would have restored her apartment to a habitable condition.

The Appellate Term also properly denied respondent's request for attorney's fees incurred in defending the holdover proceeding, in light of the mixed results of the joint

proceedings before the Housing Court (*see e.g. Berman v Dominion Mgt. Co.*, 50 AD3d 605, 605 [1st Dept 2008]).

We have considered the remaining contentions, and find them unavailing.

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

ENTERED: JULY 2, 2015

CLERK

Mazzarelli, J.P., Friedman, Richter, Manzanet-Daniels, Gische, JJ.

15578 The People of the State of New York, Ind. 1633/07
Respondent,

-against-

Brian Hawkins,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Sabrina Margret Bierer of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered November 14, 2007, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree, and sentencing him to a term of 3½ years, unanimously affirmed.

The court properly denied defendant's suppression motion. Defendant argued only that the pistol found in the trunk of his car should be suppressed as the fruit of an unlawful arrest, and that claim was without merit because he was at the very least lawfully arrested for driving with a suspended license. Defendant failed to argue, as he does on appeal, that the search of the car was not a lawful search incident to arrest or a lawful

search under the automobile exception (*see Arizona v Gant*, 556 US 332 [2009]). As a result, the People were never placed on notice of any need to develop the record as to these issues, or to otherwise establish the validity of the search, including by presenting evidence that defendant may have consented to the search (*see People v Martin*, 50 NY2d 1029 [1980]; *People v Tutt*, 38 NY2d 1011 [1976]; *People v Jiminez*, 109 AD3d 764 [1st Dept 2013].

While the prosecutor and court briefly alluded to the search of the car, the court specifically noted that defendant had focused on the issue of probable cause for the arrest, and that as a result, the record regarding the circumstances of the search had not been fully developed. Thus, the court did not "expressly decide[ ]" the issue "in response to a protest by a party" (CPL 470.05[2]; *see also Jiminez,* 109 AD3d at 764*; People v Perkins*, 68 AD3d 494, 495 [1st Dept 2009], *lv denied* 14 NY3d 891 [2010]). If anything, the court expressly declined to decide the issues defendant raises for the first time on appeal. Accordingly, we

find that defendant did not preserve his present claims, and given the limited record presented here, we decline to review them in the interest of justice.

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

ENTERED: JULY 2, 2015

CLERK

Mazzarelli, J.P., Friedman, Richter, Manzanet-Daniels, Gische, JJ.

15579 Mary Smith, etc., Index 6417/05
Plaintiff-Respondent,

-against-

New York City Housing Authority, et al.,
Defendants-Appellants,

I.B. Security Conscious, Inc.,
Defendant.

_____

Herzfeld & Rubin, P.C., New York (Linda M. Brown of counsel), for appellants.

Lynn Gartner Dunne & Covello, LLP, Mineola (Joseph Covello of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Barry Salman, J.), entered October 3, 2014, which denied the motion of defendants New York City Housing Authority and Grenadier Realty Corp. for summary judgment dismissing the complaint as against them, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

In this wrongful death action alleging negligent premises security, defendants met their prima facie burden by pointing to undisputed evidence that the assailant remains unknown, and it remains unknown whether he or she was an intruder, as opposed to another tenant or guest lawfully on the premises (*see New v New*

York State Urban Dev. Corp., 110 AD3d 531 [1st Dept 2013]). Thus, the burden shifted to plaintiff to "present evidence from which intruder status may reasonably be inferred" (*Burgos v Aqueduct Realty Corp.*, 92 NY2d 544, 551 [1998]), and in opposition, plaintiff failed to present such evidence.

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

ENTERED: JULY 2, 2015

CLERK

Mazzarelli, J.P., Friedman, Richter, Manzanet-Daniels, Gische, JJ.

15580 In re Jake M.,

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

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Tamara A. Steckler, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.

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

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Order of disposition, Family Court, Bronx County (Gayle P. Roberts, J.), entered on or about November 29, 2013, which adjudicated appellant a juvenile delinquent upon his admission that he committed the act of unlawful possession of a weapon by persons under 16, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court properly denied appellant's suppression motion. School officials received reliable first-hand information from numerous identified students that appellant had brought a firearm to school and exhibited it. Unlike anonymous or confidential informants, identified citizen witnesses, including minors, are presumed to be reliable (*see e.g. People v Walker*, 278 AD2d 852 [4th Dept 2000], *lv denied* 96 NY2d 869 [2001]). The patdown of

appellant's clothing amply met the standards for searches by school officials, "particularly in light of the urgency of interdicting weapons in schools" (*Matter of Steven A.*, 308 AD2d 359, 359 [1st Dept 2003]).

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

ENTERED: JULY 2, 2015

CLERK

Mazzarelli, J.P., Friedman, Richter, Manzanet-Daniels, Gische, JJ.

15581- Index 157640/12
15582 Renee Forbes,
Plaintiff-Appellant,

-against-

Paul J. Giacomo, Jr., etc., et al.,
Defendants-Respondents.

_____

Ruta Soulios & Stratis LLP, New York (Steven A. Soulios of counsel), for appellant.

Milber Makris Plousadis & Seiden, LLP, Woodbury (Lorin A. Donnelly of counsel), for respondents.

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Appeal from order, Supreme Court, New York County (Anil C. Singh, J.), entered on or about October 25, 2013, which granted defendants' motion to dismiss the complaint, unanimously dismissed, without costs, as untimely taken. Order, same court and Justice, entered on or about June 9, 2014, which denied plaintiff's motion for reargument, unanimously dismissed, without costs, as taken from a nonappealable paper.

Plaintiff did not file a notice of appeal from the October 24, 2013 order until months after she was served with the order and notice of entry, i.e. on July 8, 2014 (*see* CPLR 5513[a]). Contrary to her contention, "a motion to reargue may not be used

by a party to extend its time to appeal" (*Luming Café v Birman*, 125 AD2d 180, 180-181 [1st Dept 1986]).

No appeal lies from an order denying reargument (*see Cangro v Rosado*, 111 AD3d 422 [1st Dept 2013]). The motion court did not address the merits of the motion (*cf. Lipsky v Manhattan Plaza, Inc.*, 103 AD3d 418 [1st Dept 2013] [order purporting to deny motion for reargument but addressing merits is appealable as of right]).

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

ENTERED: JULY 2, 2015

CLERK

Mazzarelli, J.P., Friedman, Richter, Manzanet-Daniels, Gische, JJ.

15583-
15584 Justine Santiago,
Plaintiff-Appellant,

-against-

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

Index 103976/12

Law Office of Robert S. Powers, North Babylon (Robert S. Powers of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Fay Ng of counsel), for The New York City Department of Education and the City of New York, respondents.

Robin Roach, New York (Deena S. Mikhail of counsel), for District Council 37, respondent.

Orders, Supreme Court, New York County (Margaret A. Chan, J.), entered August 19, 2013, which granted defendants' motions to dismiss the complaint, unanimously affirmed, without costs.

The court correctly dismissed the complaint as against defendant New York City Department of Education (DOE), because plaintiff failed to exhaust the administrative remedies set forth in the collective bargaining agreement (*see Matter of Plummer v Klepak*, 48 NY2d 486, 489 [1979], *cert denied* 445 US 952 [1980]; *Matter of Ray v New York City Dept. of Correction*, 212 AD2d 387, 387 [1st Dept 1995], *lv denied* 85 NY2d 810 [1995]). Plaintiff

was not excused from this requirement by simply alleging that the union had mishandled her grievance, because she could have instituted the grievance procedure herself, yet she failed to do so. This is not a case where the union had sole, exclusive authority over the grievance process (*see Matter of Lewis v Klepak*, 65 AD2d 637, 638 [3d Dept 1978], *lv denied* 46 NY2d 711 [1979]).

Defendant the City of New York is not a proper party to this action, as it cannot be held liable for the DOE's alleged wrongdoings (*see Perez v City of New York*, 41 AD3d 378, 379 [1st Dept 2007], *lv denied* 10 NY3d 708 [2008]).

Plaintiff's claim against the union was not brought within the applicable four-month statute of limitations (*see* CPLR 217[2][a]). The statute of limitations was not tolled under CPLR 205(a), because the initial federal action, which was dismissed for lack of subject matter jurisdiction, was itself untimely. Moreover, plaintiff was not entitled to the 30-day toll created

by the application of Education Law § 3813(1) and CPLR 204(a), because the union is not an entity covered by Education Law § 3813(1).

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

ENTERED: JULY 2, 2015

CLERK

Mazzarelli, J.P., Friedman, Richter, Manzanet-Daniels, Gische, JJ.

15585 Shahram Kohan, Index 104185/11
Plaintiff-Respondent,

-against-

Behzad Nehmadi, etc., et al.,
Defendants-Appellants.

_____

Rivkin Radler LLP, New York (Evan R. Schieber of counsel), for appellants.

Claude Castro & Associates PLLC, New York (Claude Castro of counsel), for respondent.

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Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered November 21, 2014, which denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The court properly found that plaintiff's causes of action for an accounting and a constructive trust were not time barred. The statute of limitations for those claims are six years (CPLR 213[1]; *Knobel v Shaw*, 90 AD3d 493, 493 [1st Dept 2011]). A claim for an accounting accrues when there is an open repudiation of the fiduciary's obligation (*Evangelista v Mattone*, 44 AD3d 704, 705 [2d Dept 2007]), and for a constructive trust, "the cause of action accrues when the acts occur upon which the claim of constructive trust is predicated, the wrongful withholding"

(*Matter of Sakow*, 219 AD2d 479, 482 [1st Dept 1995] [internal quotation marks and citation omitted]).

Here, the causes of action accrued no earlier than 2006, when the property was divided and transferred, and when defendants allegedly breached their fiduciary duty, wrongfully withholding the property from plaintiff (*Knobel*, 90 AD3d at 496; *Maric Piping v Maric*, 271 AD2d 507, 508 [2d Dept 2000]). Plaintiff commenced this action in 2011. His claims are, therefore, timely.

The court properly concluded that there was an issue of fact as to whether plaintiff was entitled to the imposition of a constructive trust (*Sharp v Kosmalski*, 40 NY2d 119, 121 [1976]). Both plaintiff and defendant Behzad Nehmadi acknowledged that they were friends, and plaintiff claims that defendants promised him an interest in certain real property, that he had made payments and expended monies in reliance of that promise, that defendants were unjustly enriched at plaintiff's expense, given that certain conveyances transferred less property to him than what he claims he was promised. Given the close friendship between plaintiff and Behzad Nehmadi and defendants' alleged superior expertise and knowledge of real estate, the court properly concluded that if these factual claims were proved, they

could form the basis for the imposition of a constructive trust (*see Bankers Sec. Life Ins. Soc. v Shakerdge*, 49 NY2d 939 [1980] citing *Simonds v Simonds*, 45 NY2d 233, 241-242 [1978]).

The court also properly concluded that there is an issue of fact as to whether plaintiff is entitled to an accounting of all the income and expenses related to the subject property. Regardless of whether the property remained an unimproved tract of land, or generated an income or was profitable, expenses appear to have been paid and contributions made by the parties. If plaintiff proves there is a fiduciary relationship, he would be entitled to an accounting showing how these monies were expended (*see Roslyn Union Free School Dist. v Barkan*, 16 NY3d 643, 653 [2011]; *Kazi v Gen. Elec. Capital Bus. Asset Funding Corp. of Connecticut*, 116 AD3d 592 [1st Dept 2014]).

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

ENTERED: JULY 2, 2015

CLERK

Mazzarelli, J.P., Friedman, Richter, Manzanet-Daniels, Gische, JJ.

15586 The People of the State of New York, SCI 2903/13
Respondent,

-against-

Randall Rutledge, etc.,
Defendant-Appellant.

_____

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Anthony J. Ferrara, J.), rendered on or about September 12, 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: JULY 2, 2015

CLERK

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

Mazzarelli, J.P., Friedman, Richter, Manzanet-Daniels, Gische, JJ.

15587 Yoany Guzman, Index 305778/11
Plaintiff-Respondent,

-against-

Broadway 922 Enterprises, LLC,
Defendant,

21 Berry Deli, Inc.,
Defendant-Appellant.

_____

Law Offices of Michael E. Pressman, New York (Stuart B. Cholewa of counsel), for appellant.

Harris/Law, New York (Anna Kull of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered June 24, 2014, which denied defendant 21 Berry Deli, Inc.'s motion for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Defendant argues that it had no duty to remedy the alleged icy condition that caused plaintiff to slip and fall in front of its deli because there was a storm in progress at the time of the accident (*see* Administrative Code of NY § 16-123). However, the record demonstrates that the storm-in-progress doctrine has no application here. Plaintiff testified that the ice on which she slipped was covered by a thin layer of recently fallen, clean snow, that the ice, which she felt with her hand after she fell,

was dark, dirty, and very thick, and that there was built-up dirty snow in the area, as a result of "a really bad job at cleaning." Plaintiff's expert opined that the ice formed either because of "the improper clean-up of past storms" or from the melting of the snow piled up in the area and its refreezing, beginning after 2:00 a.m. on the night before plaintiff's accident, when the temperature fell to below freezing.

The court properly considered plaintiff's expert's report, despite the fact that there had been no CPLR 3101(d)(1) disclosure before plaintiff opposed defendant's motion, since there is no evidence of willfulness by plaintiff or prejudice to defendant (*see Baulieu v Ardsley Assoc., L.P.*, 85 AD3d 554 [1st Dept 2011]).

In any event, plaintiff's description of the ice as "dark" and "dirty," standing alone, is sufficient to raise an issue of fact whether the ice had been there long enough to be discovered and remedied by defendant (*see Tubens v New York City Hous. Auth.*, 248 AD2d 291 [1st Dept 1998]; *see also Wright v Emigrant Sav. Bank*, 112 AD3d 401, 401-402 [1st Dept 2013]). Moreover, plaintiff's testimony that she had seen four to five inches of dirty snow in the area the evening before her accident raises issues of fact whether the ice was caused by either defendant's

improper cleaning after past storms or from the melting and refreezing of snow in the early morning hours preceding the accident and whether defendant's earlier cleaning of the area caused or exacerbated the hazardous condition (*see De Los Santos v 4915 Broadway Realty LLC*, 58 AD3d 465 [1st Dept 2009]; *Olivieri v GM Realty Co., LLC*, 37 AD3d 569, 570 [2d Dept 2007]). These issues are not eliminated by defendant's testimony about its normal snow-clearing procedures, since defendant submitted no evidence as to when the sidewalk was last inspected or cleaned before plaintiff's accident (*see Mike v 91 Payson Owners Corp.*, 114 AD3d 420 [1st Dept 2014]).

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

ENTERED: JULY 2, 2015

CLERK

Mazzarelli, J.P., Friedman, Richter, Manzanet-Daniels, Gische, JJ.

15588 Phillip Oduro, et al., Index 300992/12
Plaintiffs-Respondents,

-against-

Bronxdale Outer, Inc.,
Defendant-Respondent-Appellant,

H&S Fitness, Inc. doing business
as Powerhouse Gym,
Defendant-Appellant-Respondent.

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Weiner, Millo, Morgan & Bonanno, LLC, New York (David Skochil of counsel), for appellant-respondent.

Morris Duffy Alonso & Faley, New York (Arjay G. Yao, Andrea M. Alonso and Athanasia Apostolakos of counsel), for respondent-appellant.

Wolf & Fuhrman, LLP, Bronx (Carole R. Moskowitz of counsel), for respondents.

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Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered June 13, 2014, which denied defendants' respective motions for summary judgment, unanimously modified, on the law, to the extent of dismissing defendant Bronxdale Outer, Inc.'s (Bronxdale) cross claim against defendant H&S Fitness, Inc. d/b/a Powerhouse Gym (H&S Fitness) for contractual indemnification, and otherwise affirmed, without costs.

Plaintiff Oduro alleges that he was injured after tripping and falling over an alleged defect on the ground immediately

outside the entranceway of a gym located on property owned by Bronxdale and leased by H&S Fitness.

Neither defendant is entitled to summary judgment dismissing the complaint. The photographs in the record showing the subject condition and its location less than a foot from the gym's entranceway, coupled with expert testimony as to the length, width and depth of the condition, raise an issue of fact as to whether the condition is actionable (*see King v City Bay Plaza, LLC*, 118 AD3d 476, 476 [1st Dept 2014]). Further, Bronxdale failed to make a prima facie showing that it lacked actual notice of the alleged defect. In addition, neither defendant is entitled to summary judgment in view of the triable issue arising from the record as to whether the defect was on the demised premises, for which H&S Fitness was responsible as tenant-in-possession and under the express terms of its lease, or on the adjoining public sidewalk, for which Bronxdale, as owner, was responsible under New York City Administrative Code § 7-210.

H&S Fitness is entitled to summary judgment dismissing Bronxdale's cross claim for contractual indemnification. The indemnification provision in the lease runs afoul of General Obligations Law § 5-321 because it purports to indemnify Bronxdale for its own negligence (*see Hakim v 65 Eighth Ave.*,

LLC, 42 AD3d 374, 374 [1st Dept 2007]). We reject Bronxdale's contention that the indemnification provision is enforceable because paragraph 22 of the lease required H&S Fitness to obtain insurance in favor of Bronxdale. Paragraph 22 of the lease required H&S Fitness to procure an insurance policy only for the property's plate glass windows, which are unrelated to the subject defect. Because the insurance provision does not require comprehensive liability coverage, the indemnification provision is void and unenforceable (*see Port Parties, Ltd. v Merchandise Mart Props. Inc.*, 102 AD3d 539, 541 [2013]).

Bronxdale does not refute H&S Fitness' contention that Bronxdale never asserted a cross claim alleging H&S Fitness' failure to procure insurance. In fact, Bronxdale concedes that H&S Fitness procured the required insurance.

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

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

ENTERED: JULY 2, 2015

CLERK

Mazzarelli, J.P., Friedman, Richter, Manzanet-Daniels, Gische, JJ.

15589 In re Arlene Williams, Index 100189/14
Petitioner,

-against-

New York City Housing
Authority, et al.,
Respondents.

_____

Arlene Williams, petitioner pro se.

David I. Farber, New York (Seth E. Kramer of counsel), for respondents.

_____

Determination of respondent New York City Housing Authority (NYCHA), dated October 15, 2013, which, after a hearing, denied petitioner's rent grievance, except to the extent that she is entitled to a $148 credit, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Michael D. Stallman, J.], entered May 14, 2014), dismissed, without costs.

Substantial evidence supports NYCHA's determination that petitioner is not entitled to any further adjustment to her rent (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-181 [1978]). The calculations by respondent

Queensbridge North Houses, as modified in this proceeding to correct certain errors made at the administrative hearing that do not result in any credit owed petitioner, were explained in detail by Queensbridge's former property manager, whose testimony the hearing officer credited, and supported by documentary evidence. Petitioner's challenge to a $1,950 retroactive charge is based upon her misunderstanding of respondents' annual rent review time lines, which provided that, as a tenant assigned to the third quarter, she was required to submit her paperwork by July 1.

Petitioner's due process claims in connection with rent charges, credits, and procedural violations are unpreserved for judicial review (*see Moore v Rhea*, 111 AD3d 445 [1st Dept 2013]; *Rowe v Rhea*, 101 AD3d 420 [1st Dept 2012]). In any event, they are unsupported. Petitioner's administrative hearing comported with due process, and the hearing officer resolved the issue of

all of the charges and credits challenged therein.

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

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

ENTERED: JULY 2, 2015

CLERK

Mazzarelli, J.P., Friedman, Richter, Manzanet-Daniels, Gische, JJ.

15590 In re J. Ezra Merkin, Index 652415/12
Petitioner/Respondent-Respondent,

-against-

Joshua M. Berman, etc.,
Respondent/Petitioner-Appellant.

_____

Brickman Leonard & Bamberger, P.C., New York (David E. Bamberger of counsel), for appellant.

Dechert LLP, New York (Daphne T. Ha of counsel), for respondent.

_____

Order, Supreme Court, New York County (Richard B. Lowe III, J.), entered on or about July 9, 2014, which, to the extent appealed from, granted so much of the petition to confirm an arbitration award as seeks indemnification, unanimously reversed, on the law, without costs, the indemnification claim severed and continued as an action, and the matter remanded for further proceedings on the merits.

CPLR article 75 does not authorize a claim for contractual indemnification (*see* CPLR 103[b]). Therefore, the claim should be severed from the special proceeding and continued as a plenary

action (CPLR 407; *see City of New York v Candelario*, 223 AD2d 617 [2d Dept 1996]). The indemnification claim was not susceptible to summary resolution.

We need not reach respondent's remaining arguments.

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

ENTERED: JULY 2, 2015

CLERK

Mazzarelli, J.P., Friedman, Richter, Manzanet-Daniels, Gische, JJ.

15591 The People of the State of New York, Ind. 3094/11
Respondent,

-against-

Roberto Colon,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Svetlana M. Kornfeind of counsel), and Davis Polk & Wardwell LLP, New York (Vesna Cuk of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (David P. Stromes of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered February 15, 2012, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the third degree and petit larceny, and sentencing him, as a second felony drug offender, to an aggregate term of four years, unanimously affirmed.

The court properly denied defendant's suppression motion. The visual body cavity search in which police recovered 16 glassines of heroin was justified by a "specific, articulable factual basis supporting a reasonable suspicion to believe the arrestee secreted evidence inside a body cavity" (*People v Hall*, 10 NY3d 303, 311 [2008], *cert denied* 555 US 938 [2008]).

Defendant's overall pattern of behavior, which went far beyond mere fidgeting, strongly indicated that he had an object hidden in his buttocks, that he was trying to dispose of it before the police could find it, and that the object was some kind of contraband or evidence of a crime.

Defendant's argument that a police officer, qualified as an expert in street-level narcotics sales, improperly testified that he believed defendant was a drug dealer is unpreserved because no contemporaneous objection was made to the challenged testimony. During a colloquy earlier in the trial, the court agreed with defense counsel that the expert should not be permitted to state a conclusion that defendant was a drug dealer or was selling the drugs at issue. However, defendant did not alert the court to his present contention that the expert's actual testimony violated the court's favorable ruling (*see e.g. People v Sanchez*, 67 AD3d 491, 492 [1st Dept 2009]; *see also People v Whalen*, 59 NY2d 273, 280 [1983]), and we decline to review this unpreserved claim in the interest of justice. As an alternative holding, we reject it on the merits. Finally, any error was harmless in

light of the strong evidence that defendant possessed the 16 glassines with intent to sell (*see People v Crimmins*, 36 NY2d 230 [1975]).

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

ENTERED: JULY 2, 2015

CLERK

Mazzarelli, J.P., Friedman, Richter, Manzanet-Daniels, Gische, JJ.

15592 In re Eric Haubenstock, Index 651892/13
Petitioner-Respondent,

-against-

City of New York
Respondent,

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

_____

Zachary W. Carter, Corporation Counsel, New York (Janet L. Zaleon of counsel), for appellants.

Glass Krakower, LLP, New York (Bryan D. Glass of counsel), for respondent.

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Order, Supreme Court, New York County (Margaret A. Chan, J.), entered June 18, 2014, which, to the extent appealed from as limited by the briefs, following a hearing, granted the petition to vacate an arbitration award to the extent of vacating the penalty and remanding for determination of a lesser penalty, unanimously reversed, on the law, without costs, and the petition denied. The Clerk is directed to enter judgment confirming the award.

The penalty of termination does not shock our sense of fairness (*see Lackow v Department of Educ. [or "Board"] of City of N.Y.*, 51 AD3d 563, 560 [1st Dept 2008]). Petitioner committed

four separate acts of corporal punishment, in violation of Chancellor's Regulation A-420, which prohibits corporal punishment, defined as "any act of physical force upon a pupil for the purpose of punishing the pupil." Three of these acts occurred after petitioner had been formally warned that any recurrence of his misconduct would result in further disciplinary action and he had been referred to a mandatory training workshop on "appropriate behavior intervention strategies." We find petitioner's misconduct is highlighted by the fact that these pupils were non-verbal autistic children, incapable of protecting themselves or reporting what happened to them.

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

ENTERED: JULY 2, 2015

CLERK

Mazzarelli, J.P., Friedman, Richter, Manzanet-Daniels, Gische, JJ.

15594 The People of the State of New York, Ind. 4759/12
Respondent,

-against-

Sean Johnson,
Defendant-Appellant.

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Gregory Carro, J.), rendered on or about February 19, 2014,

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

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

ENTERED: JULY 2, 2015

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

Mazzarelli, J.P., Friedman, Richter, Manzanet-Daniels, Gische, JJ.

15596 Francis Rivera, Index 155874/12
Plaintiff-Appellant,

-against-

Victoria's Secret Stores, LLC,
Defendant-Respondent,

General Growth Properties, Inc.,
doing business as Staten Island Mall,
Defendant.

_____

Melcer Newman PLLC, New York (Jeffrey B. Melcer of counsel), for appellant.

Perez & Morris LLC, New City (Michael J. Glidden of counsel), for respondent.

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Order, Supreme Court, New York County (Joan M. Kenney, J.), entered June 12, 2014, which granted defendant Victoria's Secret Stores, LLC's (Victoria's Secret) motion for summary judgment dismissing plaintiff's complaint, unanimously affirmed, without costs.

Victoria's Secret established its entitlement to judgment as a matter of law, in this action where plaintiff alleges that she was injured when she tripped and fell over the white wooden base of a clothing rack. Victoria's Secret submitted photographic and testimonial evidence showing that the base was open and obvious, and not inherently dangerous, and that it did

not have prior notice of any dangerous condition regarding the rack or its base (*see Villanti v BJ's Wholesale Club, Inc.*, 106 AD3d 556, 556-557 [1st Dept 2013]).

In opposition, plaintiff failed to raise a triable issue of fact. The record shows that optical confusion did not cause plaintiff's accident, since she testified that she was looking straight ahead, and not at the ground, as she approached the rack (*see id.* at 432).

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

ENTERED: JULY 2, 2015

CLERK

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

15026 In re Senator Tony Avella, et al., Index 100161/14
Petitioners/Plaintiffs-Appellants,

-against-

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

_____

John R. Low-Beer, Brooklyn, for appellants.

Zachary W. Carter, Corporation Counsel, New York (Michael J. Pastor of counsel), for municipal respondents.

Skadden, Arps, Slate, Meagher & Flom LLP, New York (Jonathan L. Frank and Judith S. Kaye of counsel), for Queens Development Group, LLC and Queens Ballpark Company, L.L.C., respondents.

Fox Rothschild LLP, New York (Karen Binder of counsel), for Related Willets, LLC and Sterling Willets LLC, respondents.

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Judgment, Supreme Court, New York County (Manuel J. Mendez, J.), entered August 21, 2014, reversed, on the law, without costs, and the petition granted to the extent of declaring that construction of Willets West on City parkland without the authorization of the state legislature violates the public trust doctrine, and enjoining any further steps toward its construction.

Opinion by Mazzarelli, J.P. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
Dianne T. Renwick
Sallie Manzanet-Daniels
Darcel D. Clark, JJ.

15026
Index 100161/14

_____x

In re Senator Tony Avella, et al.,
Petitioners/Plaintiffs-Appellants,

-against-

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

_____x

Petitioners/plaintiffs appeal from the judgment of the Supreme Court, New York County (Manuel J. Mendez, J.), entered August 21, 2014, denying the petition for declaratory and injunctive relief in connection with the construction of Willets West, a retail entertainment center, in Flushing Meadows-Corona Park, and dismissing this hybrid CPLR article 78 and declaratory judgment proceeding.

John R. Low-Beer, Brooklyn, and Law Office of Lorna B. Goodman, New York (Lorna B. Goodman of counsel), for appellants.

Zachary W. Carter, Corporation Counsel, New York (Michael J. Pastor and Richard Dearing of counsel), for municipal respondents.

Skadden, Arps, Slate, Meagher & Flom LLP, New York (Jonathan L. Frank and Judith S. Kaye of counsel), for Queens Development Group, LLC and Queens Ballpark Company, L.L.C., respondents.

Fox Rothschild LLP, New York (Karen Binder and Jesse Masyr of counsel), for Related Willets, LLC and Sterling Willets LLC, respondents.

MAZZARELLI, J.P.

In 1961 legislation related to a stadium that was anticipated to be constructed in Flushing Meadow Park in Queens (the Park) was enacted. It was entitled "Renting of stadium in Flushing Meadow park; exemption from down payment requirements," and codified in Administrative Code of the City of New York § 18-118. The stadium that the legislation anticipated being constructed by the City in the Park was indeed built, and opened as Shea Stadium, the home of the New York Mets. In 2006, the owners of the Mets and the City agreed that the stadium would be demolished and replaced with a new stadium immediately to the east. That stadium, Citi Field, opened in 2009. The area where Shea Stadium once stood, and where Citi Field now stands, is bordered on its west by Willets Point. Willets Point is a 61-acre area that has long been considered by the City to be blighted. Indeed, Willets Point has no sewers, sidewalks or streetlights, is replete with potholed and rutted streets, and is prone to flooding. In 2008, the New York City Economic Development Corporation (EDC) embarked on its most recent attempt to develop Willets Point. It developed a plan that envisioned a mixed-use community including thousands of residential dwellings, 1.7 million square feet of retail space, 500,000 square feet of

office space, 400,000 square feet of convention center space, 700 hotel rooms, 150,000 square feet of community facility space, a school, thousands of parking spaces, and at least eight acres of publicly accessible open space. In addition, the plan contemplated raising the level of Willets Point to address recurrent flooding conditions, remediating environmental conditions caused by decades of contamination and adding new streets along with sanitary and storm-water improvements. In connection with the plan, in November 2008 the City Council approved a number of zoning and mapping actions pursuant to the City's Uniform Land Use Review Procedure (ULURP), which established a "Special Willets Point District."

While the City initially sought to develop the entirety of Willets Point in one phase, this turned out to not be feasible because the size of the project and the state of the economy would prevent any interested developer from securing the necessary financing. Instead, the City determined, implementation of the development plan would have to be done in phases, and in May 2011 EDC issued a Request for Proposals to private entities for a modified development plan. In May 2012, EDC accepted a development plan submitted by the "Queens Development Group" (QDG), a joint venture between entities

controlled by Sterling Equities Associates, the owner of the Mets, and The Related Companies, a real estate development firm. QDG proposed a two-phase project. Phase 1A, which was set to commence in 2015, would involve the construction of "Willets West," a retail mall and movie theater, on 30.7 acres of an existing parking lot adjacent to Citi Field, located outside the Willets Point Special District. Like the stadium, Willets West would be situated inside the Park. Phase 1A would also see the remediation of 23 acres of Willets Point, including installation of sewage systems, roads and ramps to access local highways, parking spaces, and the development of a 200-room hotel. Phase 1B, expected to commence in 2026, would involve the construction of mixed-income housing, a public school, and additional acres of open space. However, under the agreement between EDC and the joint venturers, the developers could avoid having to build Phase 1B by paying $35 million in liquidated damages.

In 2013, QDG and EDC jointly applied to the City Planning Commission (CPC), and submitted ULURP applications for a demapping of streets in Willets Point, a number of special permits, and a revision of the Special Willets Point District zoning. This was to allow "transitional" uses of the area, specifically interim parking lots and space for "active

recreation." The ULURP applications were reviewed by two local community boards, with one recommending approval and the other recommending disapproval. The Queens Borough President approved the application with certain conditions. CPC then conducted its review and held a public hearing. After receiving a final environmental impact statement, CPC approved the application. None of these approvals directly pertained to the Willets West property, and during the approval process, CPC stated that questions concerning the development of Willets West on mapped parkland were not subject to the commission's land use jurisdiction and were beyond the scope of the application. The development plan subsequently was approved by the Zoning and Franchises Subcommittee of the City Council, the Land Use Committee, the City Council and the Mayor.

Petitioners, who are a State Senator, not-for-profit organizations, taxpayers, businesses, users of the Park, and other affected persons, brought this proceeding to enjoin the development of Willets West. In addition to injunctive relief, petitioners sought declarations that the City Council's approval of resolutions to facilitate construction of Willets West was arbitrary and capricious, that construction of the proposed shopping mall on unzoned property would violate section 11-13 of

the New York City Zoning Resolution, and that the failure to apply for zoning changes or submit a new lease for Willets West through ULURP (New York City Charter § 197-c and § 197-d) was improper. As their central claim, petitioners sought a declaration that the parking lot on which Willets West would be built, which is the site that previously housed Shea Stadium, remains subject to the public trust doctrine, because it remains mapped parkland. They contend that Administrative Code § 18-118 does not provide authorization for the project, as the legislation "was only for the stadium itself and ancillary public purposes for the benefit of the people of the City, not for a gigantic commercial development profiting private real estate developers and retailers."

Respondents sought dismissal of the petition, arguing that the City's leasing of the parking area in Willets West that is designated parkland does not violate the public trust doctrine. They interpret Administrative Code § 18-118 as authorization by the State to alienate the area where Citi Field now stands for any listed public purposes, including those to be promoted by the development of Willets West, such as amusement, entertainment and the improvement of trade and commerce. Respondents further argued that since the parkland where Willets West is being developed

remains under the control of the Commission of Parks and Recreation, there is no need for a zoning amendment designating a zoning district pursuant to Zoning Resolution § 11-13. They assert that since the lease for the mall is expressly authorized by statute, the statute overrides any other local law and the project thus does not require approval through the ULURP process. Finally, respondents argued that the challenged determinations approving the zoning actions were not arbitrary or capricious.

The court dismissed the proceeding. Its analysis of Administrative Code § 18-118 concluded that, rather than authorizing use of the property for a stadium alone, "the legislature took into consideration alternate uses of the property" and permitted approval of leases "for other uses to benefit the public." It further found that the legislative history of the 1961 statute establishes that "although the state legislature's initial intent for the parkland was Shea Stadium, other uses were acceptable" for public purposes for the benefit of the people of the City, including "improvement of trade or commerce." Finding that § 18-118 "applies to the use of the property for a shopping mall (that includes public programming space and a movie theater) will serve the public purpose of improving trade or commerce" and "will also serve the public

purpose of ultimately altering the blighted Willets Point into a mixed use community," the court held that the public trust doctrine was not violated. The court also noted that "improvement of trade or commerce resulting from leasing the parkland including use as a shopping mall, is part of the development plan for purposes of creating an entire 'special district' and community which ultimately will result in the public benefit of removal of urban blight from Willets Point," and that the City has already undertaken substantial efforts in obtaining possession of property and relocating business in Willets Point.

Having found that Administrative Code § 18-118 applies to the development of Willets West, the court concluded that this legislative authorization removes the need to apply ULURP and Zoning Resolution § 11-13, noting that they do not apply where there is state legislation governing a specific land use. Accordingly, the court found that "there is no need to address Petitioners' arguments concerning the requirements of ULURP and [] Zoning Resolution § 11-13." The court nevertheless concluded that ULURP does not apply to the development plans and review of the business terms for the disposition of the parkland formerly used for Shea Stadium, as these powers have devolved to the

Mayor, who has approved the development plan. Finally, the court found that the City's challenged determinations have a rational basis and are not arbitrary and capricious.

This dispute turns on whether the plain language of Administrative Code § 18-118 compels a narrow use of the parkland in question such that any additional construction on it must be directly related to a stadium, or whether any such construction on the parkland must only be related to one of the purposes delineated in § 18-118(b). The proper interpretation of the statute is critical in this case, because, under the public trust doctrine, dedicated park areas in New York are impressed with a public trust for the benefit of the people of the State, and their "use for other than park purposes, either for a period of years or permanently, requires the direct and specific approval of the State Legislature, plainly conferred" (*Friends of Van Cortlandt Park v City of New York*, 95 NY2d 623, 632 [2001] [internal quotation marks omitted]). Stated differently, parkland may be alienated or leased for non-park purposes as long as authorized by the legislature (*see Miller v City of New York*, 15 NY2d 34 [1964]), and the "legislative authority required to enable a municipality to sell its public parks must be plain" (*Aldrich v City of New York*, 208 Misc 930, 939 [Sup Ct, Queens

County 1955], *affd* 2 AD2d 760 [2d Dept 1956]).

We thus turn to the language of Administrative Code § 18-118. It provides, in pertinent part, as follows:

> "a. Notwithstanding any other provision of law, general, special or local, the city, acting by the commissioner, with the approval of the board of estimate, is hereby authorized and empowered from time to time to enter into contracts, leases or rental agreements with, or grant licenses, permits, concessions or other authorizations to, any person or persons, upon such terms and conditions, for such consideration, and for such term of duration as may be agreed upon by the city and such person or persons, whereby such person or persons are granted the right, for any purpose or purposes referred to in subdivision b of this section, to use, occupy or carry on activities in, the whole or any part of a stadium, with appurtenant grounds, parking areas and other facilities, to be constructed by the city on certain tracts of land described in subdivision c of this section . . ."

Section (b) of the statute, in turn, provides that

"b. Any contract, lease, rental agreement, license, permit, concession or other authorization referred to in subdivision a of this section may grant to the person or persons contracting with the city thereunder, the right to use, occupy or carry on activities in, the whole or any part of such stadium, grounds, parking areas and other facilities,

"(1) for any purpose or purposes which is of such a nature as to furnish to, or foster or promote among, or provide for the benefit of, the people of the city, recreation, entertainment, amusement, education, enlightenment, cultural development or betterment, and improvement of trade and commerce, including professional, amateur and scholastic sports and athletic events, theatrical, musical or other entertainment presentations, and meetings, assemblages, conventions and exhibitions for any purpose, including meetings, assemblages, conventions and exhibitions held for business or trade purposes, and other events of civic, community and general public interest, and/or

"(2) for any business or commercial purpose which aids in the financing of the construction and operation of such stadium, grounds, parking areas and facilities, and any additions, alterations or improvements thereto, or to the equipment thereof, and which does not interfere with the accomplishment of the purposes referred to in paragraph one of this subdivision. It is hereby declared that all of the purposes referred to in this subdivision are for the benefit of the people of the city and for the improvement of their health, welfare, recreation and prosperity, for the promotion of competitive sports for youth and

> the prevention of juvenile delinquency, and for the improvement of trade and commerce, and are hereby declared to be public purposes."

Respondents interpret the words "right ... to use, occupy or carry on activities in, the whole or any part of a stadium, with appurtenant grounds, parking areas and other facilities" in § 18-118(a) as authorizing the use of any part of the stadium, any part of the grounds, any part of the parking areas, or any part of any other facilities constructed on the site, so long as any such use is for one of the delineated purposes. They assert that because Willets West would "use" the parking areas, and because a shopping mall would satisfy § 18-118(b) by "improv[ing] . . . trade and commerce" for "the people of the city," it is authorized by the statute.

Petitioners counter that the term "use" is not broad enough to embrace a construction project of the type proposed by respondents. They argue that the language employed makes clear that, in enacting § 18-118, the legislature, contemplating the construction of a stadium in the Park, intended to provide only for how the stadium itself, and any necessary supporting facilities, such as parking lots, could be used. According to their contentions, the statute is concerned with trade and commerce that is conducted specifically with reference to the

stadium. Therefore, they assert, it does not matter that the Willets West project is an improvement of trade and commerce, even one crucial to the reclamation of Willets Point.

In determining which party's construction of the statute is correct, we must adhere to the traditional rules of statutory construction. The primary rule is that "courts are obliged to interpret a statute to effectuate the intent of the Legislature, and when the statutory language is clear and unambiguous, it should be construed so as to give effect to the plain meaning of the words used" (*People v Finnegan*, 85 NY2d 53, 58 [1995], *cert denied* 516 US 919 [1995] [internal quotation marks and brackets omitted]). Further, "[i]t is an accepted rule that all parts of a statute are intended to be given effect and that a statutory construction which renders one part meaningless should be avoided" (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 515 [1991]). Finally, we must be mindful of "the statutory context of the provision" (*New York State Psychiatric Assn., Inc. v New York State Dept. of Health*, 19 NY3d 17, 24 [2012] [internal quotation marks omitted]).

We find that the overriding context of Administrative Code § 18-118 concerns the stadium to be built in the portion of the Park delineated therein. Interpreting the language plainly, the

statute, boiled down to its simplest form, authorizes the City to permit "persons" to avail themselves of the stadium which the City plans to construct. Its focus is on the stadium, and the stadium only. There is simply no basis to interpret the statute as authorizing the construction of another structure that has no natural connection to a stadium.

This interpretation is confirmed by the use limitations laid out in subdivision (b). To be sure, the general purposes laid out in § 18-118(b)(1), considered in a vacuum, are not necessarily related to a stadium. Indeed, if one stopped reading after the words "improvement of trade and commerce," one might be led to believe that the uses contemplated by the legislature were without limitation. However, the general purposes are followed by specific examples, to wit: "professional, amateur and scholastic sports and athletic events, theatrical, musical or other entertainment presentations, and meetings, assemblages, conventions and exhibitions for any purpose, including meetings, assemblages, conventions and exhibitions held for business or trade purposes, and other events of civic, community and general public interest." Each of these examples is traditionally associated with a stadium. Obviously, Shea Stadium was used by the Mets for many years, and was also used to stage other

professional and non-professional sporting competitions. Similarly, we know that Shea Stadium was used for musical presentations, such as the famous performance there by the Beatles. No actual examples of "meetings, assemblages, conventions and exhibitions" come to mind that took place at Shea Stadium, but one could envision such events being suitable for a large stadium. Indeed, Yankee Stadium has been known to host religious services. One could also imagine a large trade show, such as a car or boat exhibition, being staged at a stadium.

The fact that the examples given by the legislature as types of uses that improve trade and commerce all naturally relate to uses of a large stadium is significant to our analysis. That is because the canon of statutory construction known as ejusdem generis "requires the court to limit general language of a statute by specific phrases which have preceded[1] the general language" (McKinney's Cons Laws of NY, Book 1, Statutes § 239). Stated differently, the general phrase becomes "known by the company it keeps" (*People v Illardo*, 48 NY2d 408, 416 [1979]). Here, the purposes for which the "stadium, grounds, parking areas

[1] Here the limiting terminology follows the general, but that distinction is immaterial.

and other facilities" may be used are unquestionably wide, but only to the degree that they fit within the specific examples provided by the limiting language. To look past the specific examples, as respondents urge, would be to purposely ignore the clear intent of the legislature to curtail the use of this portion of the Park to a stadium. Accordingly, we are not permitted to construe the statute as authorizing uses merely related to the improvement of trade and commerce. We must interpret it as requiring any proposed use to be associated with the stadium and the necessary and natural appurtenances to it.

Section 18-118(b)(2) is also not supportive of respondents' position, because its use authorization is even narrower than subdivision (b)(1). Any use of the Park permitted by that subsection must be related to the financing of the construction and improvement of the stadium, and, according to the section, must "not interfere with the accomplishment of the purposes referred to in" subdivision (b)(1). Accordingly, pursuant to our construction of the statute, the uses described in subdivision (b)(1) must still relate to the stadium itself and the naturally expected uses of a stadium as listed in subdivision (b)(1).

We take no issue with the notion that Willets West is a

potential driver of trade and commerce, and that it is a worthy first step in the City's long-stated desire to breathe new life into a neighborhood that is in dire need of improvement. However, the public trust doctrine is clear that any alienation of parkland must be explicitly authorized by the legislature. No reasonable reading of Administrative Code section 18-118 allows for the conclusion that the legislature in 1961 contemplated, much less gave permission for, a shopping mall, unrelated to the anticipated stadium, to be constructed in the Park. Further, it is simply not in our power to set the doctrine aside, no matter how worthy a proposed use of parkland may be. Here, while there is a legislative mandate for the use of the Park, that mandate does not encompass the use proposed by respondents. Thus, the Willets West project must be enjoined.

Accordingly, the judgment of the Supreme Court, New York County (Manuel J. Mendez, J.), entered August 21, 2014, denying the petition for declaratory and injunctive relief in connection with the construction of Willets West, a retail entertainment center, in Flushing Meadows-Corona Park, and dismissing this hybrid CPLR article 78 and declaratory judgment proceeding, should be reversed, on the law, without costs, and the petition granted to the extent of declaring that construction of Willets

West on City parkland without the authorization of the state legislature violates the public trust doctrine, and enjoining any further steps toward its construction.

All concur.

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

ENTERED: JULY 2, 2015

CLERK