SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 4, 2015

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

15319 The People of the State of New York, Ind. 4758/11
Respondent,

-against-

Rodney Dunbar,
Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (C. Scott McAbee of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Robert M. Stolz, J.), rendered April 24, 2013, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the third and fifth degrees, and sentencing him, as a second felony drug offender, to an aggregate term of 3½ years, unanimously affirmed.

Defendant has not preserved his challenge to the sufficiency of the evidence, or to the applicability of the automobile presumption (*see People v Caba*, 23 AD3d 291, 292 [1st Dept 2005], *lv denied* 6 NY3d 810 [2006]) and we decline to review these

claims in the interest of justice. As an alternative holding, we reject them on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. During a traffic stop of a vehicle in which defendant was a passenger, the police smelled a strong odor of PCP and recovered five vials containing a large quantity of pure PCP from a console, with an open lid, next to the passenger seat. The police also recovered large amounts of cash from defendant, from the codefendant driver, and from the car. Defendant was properly convicted both under the automobile presumption (Penal Law § 220.25[1]) and the theory of joint constructive possession. The jury could have reasonably concluded that "a person in possession of a large and valuable quantity of drugs would not permit another person to be in close proximity unless they were both part of the same criminal enterprise and were joint possessors" (*Caba*, 23 AD3d at 292; *see also People v Leyva*, 38 NY2d 160, 166-167 [1975]). In other words, the jury could have reasonably concluded that defendant was aware, and in joint control, of the PCP, not merely because it was noticeable, but because he was part of the drug-trafficking operation that caused the PCP to be in the car in the

first place.

Defendant did not preserve his claim that the driver's admission to the police that the vials contained PCP was relevant to his defense that the driver exclusively possessed the drugs (*see People v George*, 67 NY2d 817, 819 [1986]), or his constitutional claim (*see People v Lane*, 7 NY3d 888, 889 [2006]), and we decline to review them in the interest of justice. In offering this statement by the driver, a codefendant who had pleaded guilty before trial, defendant merely asserted that the statement was not offered for its truth, but to show the codefendant's state of mind. However, defendant never explained how the codefendant's state of mind was relevant. As an alternative holding, we reject defendant's arguments, including his constitutional claim, on the merits (*see Crane v Kentucky*, 476 US 683, 689-690 [1986]). The codefendant's state of mind was relevant to whether the codefendant was a possessor of the drugs,

but not to whether defendant was *also* a possessor. Unlike the situation in *People v Osorio* (75 NY2d 80, 86 [1989]), the codefendant's statement did not shift criminal liability away from defendant.

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

ENTERED: JUNE 4, 2015

CLERK

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

15320 In re Lahteek S.,

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

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Tamara A. Steckler, The Legal Aid Society, New York (Judith Stern of counsel), for appellant.

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

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Order, Family Court, New York County (Susan R. Larabee, J.), entered on or about August 12, 2014, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed an act that, if committed by an adult, would constitute the crime of possession or sale of a toy or imitation firearm, and placed him on probation for a period of 18 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The record supports the

court's credibility determination rejecting appellant's temporary innocent possession defense.

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

ENTERED: JUNE 4, 2015

CLERK

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

15325 Randi Sachar, Index 106847/10
Plaintiff-Respondent,

-against-

Columbia Pictures Industries, Inc., etc., et al.,
Defendants-Appellants,

AMC Entertainment Inc., sued here as Loews Theatre, et al.,
Defendants.

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Strongin Rothman & Abrams, LLP, New York (Howard F. Strongin of counsel), for Columbia Pictures Industries, Inc. and Sony Pictures Entertainment, Inc., appellants.

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

James T. Moriarty, New York, for respondent.

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Order, Supreme Court, New York County (Shlomo S. Hagler, J.), entered January 9, 2015, which granted plaintiff's motion to reargue and, upon reargument, denied the previously granted motions of defendants Regal Cinemas, Inc. (Regal), Sony Pictures Entertainment, Inc. (Sony) and Columbia Pictures Industries, Inc. (Columbia) for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Plaintiff alleges that she sustained injuries when she fell down a crowded staircase in a Regal movie theater, where she was

escorting a group of teenagers to see a free screening of a movie that was produced by Columbia and Sony, and shown at a Regal theater. She testified that her group was first directed to an upper level to find seats and then was told to turn around and go downstairs. As they were returning, there was a sudden stampede of people rushing from behind, and plaintiff felt a "pushing thud" behind her and she was hurled in the air. Regal's assistant manager confirmed that there appeared to have been a stampede, and Sony's employee testified that the event was overbooked to ensure the theater was filled to capacity.

The motion court providently exercised its discretion in granting plaintiff's motion for reargument on the basis that it had "overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision" (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992] [internal quotation marks omitted], *lv dismissed in part, denied in part* 80 NY2d 1005 [1992]; *see* CPLR 2221[d]). Although plaintiff neglected to attach all of the papers that had been submitted on the preceding motions, the court had discretion to consider the motion to reargue, and to excuse procedural deficiencies (*see HSBC Bank USA, N.A. v Halls*, 98 AD3d 718, 720-721 [2d Dept 2012]; CPLR 2001).

On the merits, the motion court properly concluded that defendants did not establish entitlement to judgment as a matter of law. It is well settled that landowners and permittees owe those "on their property a duty of reasonable care under the circumstances to maintain their property in a safe condition," and "to minimize foreseeable dangers on their property" (*Maheshwari v City of New York*, 2 NY3d 288, 294 [2004] [internal quotation marks omitted]). Under the circumstances presented, involving the deliberate overbooking of a theater for a free film screening, defendants were required to show that they took adequate crowd control measures to address the foreseeable risks to those attending in order to meet their prima facie burden of demonstrating entitlement to summary judgment (*see Marielisa R. v Wolman Rink Operations, LLC*, 94 AD3d 963 [2d Dept 2012]; *see also Marrero v City of New York*, 102 AD3d 409 [1st Dept 2013]*; Rotz v City of New York*, 143 AD2d 301 [1st Dept 1988]). Here, defendants knew that the screening was deliberately overbooked, and it was, therefore, foreseeable that overcrowding could be a problem (*see Vetrone v Ha Di Corp.*, 22 AD3d 835, 838-840 [2d Dept 2005]). Deposition testimony from both plaintiff and Regal's manager demonstrated that the staircase on which plaintiff fell was crowded, and that the crowd had formed a "stampede" after

being redirected downstairs to find available seats in the crowded theater. Since defendants failed to present evidence that adequate crowd control measures were in place, the motions for summary judgment were properly denied.

Furthermore, with respect to Sony and Columbia, the deposition testimony also creates an issue of fact as to their specific security duties, as sponsors of the event, at the screening (*see id.*; *Rotz v City*, 143 AD2d at 305-307).

The precedent relied upon by defendants, which apply a standard articulated in cases concerning a landowner's duty in the context of commuter crowds using public transportation, do not apply to the circumstances presented (*see e.g. Benanti v Port Auth. of N.Y. & N.J.*, 176 AD2d 549 [1st Dept 1991]; *Palermo v New York City Tr. Auth.*, 141 AD2d 809 [2d Dept 1988]). In any event, the record presents triable issues as to whether plaintiff was

"unable to find a place of safety" or her "free movement was restricted due to the alleged overcrowded conditions" (*Benanti* at 549).

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

ENTERED: JUNE 4, 2015

CLERK

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

15326 Unique Laundry Service, Inc., Index 111267/07
Plaintiff-Appellant-Respondent,

-against-

Hudson Park NY LLC, et al.,
Defendants-Respondents-Appellants,

Jesse D. Wolf, et al.,
Defendants-Respondents.

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Poltorak PC, Brooklyn (Elie C. Poltorak of counsel), for appellant-respondent.

Morrison Cohen LLP, New York (Y. David Scharf of counsel), for respondents-appellants.

Greenberg Traurig LLP, New York (Daniel R. Milstein of counsel), for respondents.

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Order and judgment (one paper), Supreme Court, New York County (Carol R. Edmead, J.), entered December 11, 2013, which, to the extent appealed from as limited by the briefs, granted defendants ground lessors' cross motion for summary judgment on their counterclaim for a declaratory judgment as to the validity of the laundry room contract, granted current ground lessees, defendants Hudson Park NY LLC and Joel S. Wiener (the Hudson defendants), cross motion for summary judgment dismissing the complaint as against them, denied plaintiff's motions for summary judgment on its claims against the Hudson defendants and to dismiss the ground lessors' counterclaim, and granted in part

plaintiff's motion for summary judgment dismissing the Hudson defendants' affirmative defenses, unanimously modified, on the law, to deny defendants' cross motions for summary judgment, to grant plaintiff summary judgment on its first and second causes of action against the Hudson defendants, to declare that the laundry room contract between plaintiff and the previous ground lessee is a valid lease, binding upon the Hudson defendants, to declare that the ground lessors lack standing to challenge the laundry room contract, and to grant plaintiff summary judgment dismissing all of the Hudson defendants' affirmative defenses except those related to plaintiff's tortious interference claim, and otherwise affirmed, without costs.

The upshot of the motion court's decision, as appealed, was that the ground lessors had standing to challenge the validity of the laundry room contract between plaintiff and a previous ground lessee; that although that contract constituted a lease, not a license, it was invalid and not binding on defendants as it violated the operative ground lease; and that plaintiff's tortious interference with contract claim against the Hudson defendants failed since the laundry room contract was not valid and binding.

However, on the prior appeal in this action (55 AD3d 382 [1st Dept 2008]), this Court determined that the Hudson

defendants lacked standing to argue that the contract between plaintiff and the prior ground lessee violated the ground lease, as there was no evidence that the ground lessors were threatening to terminate the lease with the Hudson defendants on the basis that the Hudson defendants were honoring the contract in violation of the ground lease. For the same reason, at this juncture, the ground lessors have no standing to seek to invalidate the laundry room contract solely because it violates the ground lease. Nor have the ground lessors demonstrated a present possessory interest in the building's laundry room or that they have an interest in the dispute between plaintiff and the Hudson defendants.

The Hudson defendants failed to raise an issue of fact as to whether plaintiff and the prior ground lessee intended the laundry room contract to be a license, rather than a lease (*see id.*). Thus, in light of the foregoing, the laundry room contract is a valid lease, binding upon the Hudson defendants.

Although the motion court dismissed plaintiff's tortious interference claim on the ground that the laundry room contract was *invalid*, plaintiff's tortious interference claim against the Hudson defendants should nevertheless be dismissed. Since the Hudson defendants acted on the basis of their economic self-interest in refusing to accept the assignment of the laundry room

contract, which included terms unfavorable to them such as below-market rent, they cannot be liable for tortious interference with plaintiff's contract (*see e.g. Collins v E-Magine*, 291 AD2d 350, 351 [1st Dept 2002], *lv denied* 98 NY2d 605 [2002].

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

ENTERED: JUNE 4, 2015

CLERK

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

15327 The People of the State of New York, Ind. 1382/13
Respondent,

-against-

Andrea Jones,
Defendant-Appellant.

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Thomas A. Farber, J.), rendered on or about July 16, 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: JUNE 4, 2015

CLERK

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

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

15330-
15331 Index 152150/12
590660/12

Nancy J. Melito, etc.,
Plaintiff-Respondent,

-against-

ABS Partners Real Estate, LLC, et al.,
Defendants-Appellants-Respondents,

3738 LLC,
Defendant.

- - - - -

ABS Partners Real Estate, LLC, et al.,
Third-Party Plaintiffs-Appellants-Respondents,

-against-

Transel Elevator and Electric, Inc.,
Third-Party Defendant-Respondent-Appellant.

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Mauro Lilling Naparty LLP, Woodbury (Gregory A. Cascino of counsel), for appellants-respondents.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Patrick J. Lawless of counsel), for respondent-appellant.

Sullivan Papain Block McGrath & Cannavo, P.C., New York (Stephen C. Glasser of counsel), for respondent.

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Order, Supreme Court, New York County (Joan M. Kenney, J.), entered November 20, 2014, which, to the extent appealed from as limited by the briefs, denied the motion of defendants ABS Partners Real Estate, LLC, 3738 West LLC, JLJ LLC and 3738 West

Company Limited Partnership (collectively ABS) for summary judgment dismissing plaintiff's Labor Law § 240(1) claim and summary judgment against third-party defendant Transel Elevator and Electric, Inc. (Transel) on their third-party claims for common-law and contractual indemnity, granted Transel's motion for summary judgment dismissing the claim for common-law indemnification against it, and denied Transel's motion for summary judgment dismissing plaintiff's claim pursuant to Labor Law § 240(1), unanimously modified, on the law, to grant ABS's motion for summary judgment on its contractual indemnity and common-law indemnity claims as against Transel, and otherwise affirmed, without costs.

This action, which involves decedent elevator mechanic falling to his death down an unguarded elevator shaftway, is covered by the protections of Labor Law 240(1) (*see Magee v 438 E. 117th St. LLC*, 56 AD3d 376 [1st Dept 2008]; *Barwicki v Friars 50th St. Garage*, 288 AD2d 14 [1st Dept 2001]). Nor can defendants rely upon the defense of sole proximate cause, since they failed to provide adequate safety devices in the first instance (*see Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]; *see also Cuentas v Sephora USA, Inc.*, 102 AD3d 504 [1st Dept 2013]).

The court erred, however, in denying ABS's motion for

common-law and contractual indemnity from Transel. There is no evidence that ABS was negligent; its liability is purely statutory (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348-349 [1998]; *Picchione v Sweet Constr. Corp.*, 60 AD3d 510 [1st Dept 2009]). Plaintiff did not oppose the motion of ABS seeking dismissal of all common law and Labor Law § 200 claims against them, and those claims were dismissed.

With respect to contractual indemnity, the insurance agreement between Transel and ABS provided that Transel would indemnify ABS for claims caused by, inter alia, the negligent acts or omissions of Transel in connection with its operations. This accident arose from Transel allowing decedent to work near the unguarded shaftway without any safety devices to protect him (*see Guzman v 170 W. End Ave. Assoc.*, 115 AD3d 462 [1st Dept 2014]). Transel is incorrect in asserting that the grease and oil contract between the parties would not include the work being performed by decedent, as that contract provided that emergency

work would also be "provided under the terms of this contract." However, ABS is incorrect in stating that the grease and oil contract, in contrast with the insurance agreement, contained an explicit indemnity provision.

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

ENTERED: JUNE 4, 2015

CLERK

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

15332 City National Bank, Index 158388/14
Plaintiff-Appellant,

-against-

Morelli Ratner, P.C., et al.,
Defendants-Respondents.

_____

Gibson, Dunn & Crutcher LLP, New York (Robert L. Weigel of counsel), for appellant.

Kasowitz, Benson, Torres & Friedman LLP, New York (Marc E. Kasowitz of counsel), for respondents.

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Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered December 8, 2014, which, insofar as appealed from, denied plaintiff's motion for summary judgment in lieu of complaint, unanimously affirmed, with costs.

Plaintiff's motion pursuant to CPLR 3213 was properly denied in this action where plaintiff seeks payment due under a note, letter of credit and guaranty. The record presents triable issues of fact as to whether the parties had entered into an oral agreement to modify the loan documents, and whether defendants' payment of $250,000 constituted partial performance of the purported oral agreement and was "unequivocally referable to the modification," rather than to the note (*Rose v Spa Realty Assoc.*, 42 NY2d 338, 341 [1977]; *compare Citibank, N.A. v Silverman*, 85 AD3d 463, 465 [1st Dept 2011] ["defendant's payments were not

unequivocally referable to the alleged oral agreement to forbear"]).

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

M-1399 - ***City National Bank v Ratner***

Motion to strike reply brief denied.

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

ENTERED: JUNE 4, 2015

CLERK

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

15333 The People of the State of New York, Ind. 561N/13
Respondent,

-against-

Kendel Brown,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Nicole Coviello 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 (Melissa C. Jackson, J.), rendered on or about June 18, 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: JUNE 4, 2015

CLERK

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

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

15334 In re Christopher S.,

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

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Neal D. Futerfas, White Plains, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Amanda Sue Nichols of counsel), for presentment agency.

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Order of disposition, Family Court, Bronx County (Peter J. Passidomo, J.), entered on or about March 25, 2014, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed an act that, if committed by an adult, would constitute the crime of criminal possession of stolen property in the fifth degree, and placed him with the Close to Home program for a period of 12 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's credibility determinations. The evidence established appellant aided his brother in knowingly and intentionally possessing the victim's phone and impeding the

victim from recovering it (*see* Penal Law § 20.00). Appellant's accessorial liability did not depend on whether, or for how long, he personally held or touched the phone.

The evidence established that the incident occurred "on or about" a designated date, as alleged in the petition. Appellant has not established that he was prejudiced in any way by the victim's uncertainty as to whether the incident occurred on the designated date, or possibly on the day before.

We have considered and rejected appellant's challenge to the presentment agency's summation (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]).

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

ENTERED: JUNE 4, 2015

CLERK

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

15335 American Casualty Company of Reading, P.A., et al., Plaintiffs-Appellants, -against- Morris Gelb, et al., Defendants-Respondents. Index 653280/11

DLA Piper (US) LLP, New York (Joseph G. Finnerty III of counsel), for appellants.

Dickstein Shapiro LLP, New York (James R. Murray of counsel), for respondents.

Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered June 23, 2014, which denied plaintiffs' motion for summary judgment declaring that they have no duty to defend defendants in an adversary proceeding in a bankruptcy action, and granted defendants' cross motion for the contrary declaration, unanimously modified, on the law, to declare that plaintiffs have a duty to defend defendants in the adversary proceeding, and otherwise affirmed, without costs.

Defendants are former directors and officers of Lyondell Chemical Company who seek insurance coverage for their defense of an adversary proceeding commenced by the creditors committee in Lyondell's bankruptcy proceeding. The bankruptcy proceeding was commenced in 2009 by Lyondell, a company with which it had merged

in 2007, and about 90 of their subsidiaries. Before the merger was consummated, a shareholder brought a putative class action challenging the merger price and alleging that Lyondell's directors and officers had failed to get the best price possible for the company. Plaintiffs provided a defense for the directors and officers in that action, which eventually was dismissed (*Lyondell Chem. Co. v Ryan,* 970 A2d 235 [Del 2009]). For the purpose of prosecuting the adversary proceeding, the creditors committee's claims were assigned to a litigation trust, which alleged in its complaint that the merger price set by the directors resulted in a windfall to them, that the price was derived from misleading financial data, and that the financing arranged to consummate the merger was over-leveraged, leading to the bankruptcy.

Defendants seek coverage for the adversary proceeding under excess directors and officers liability policies issued by plaintiffs to Lyondell in various layers over the course of two separate policy periods running from 2006 to 2007 and from 2007 to 2013. This excess coverage was to follow form to Lyondell's primary coverage. The primary insurer provided a defense for the directors and officers in the adversary proceeding. However, after the primary policies were exhausted and the defense was tendered to plaintiffs, plaintiffs commenced this action for a

declaration that they have no obligation to defend defendants in that proceeding.

Plaintiffs argue that both the merger litigation commenced in 2007 and the adversary proceeding commenced in July 2009 arose out of the merger transaction and therefore must be treated as a single, unified claim that came into existence when the merger litigation was commenced, and that since that claim came into existence during the 2006-2007 policy period, it is subject to the exclusion in the 2006-2007 policies for claims brought by or on behalf of Lyondell against any of its own directors or officers (the "insured versus insured" [IVI] exclusion). In April 2009, the IVI exclusion was narrowed, as announced by the primary insurer as part of its "Select Form," so that it no longer excluded claims brought or maintained by, inter alia, a bankruptcy creditors committee.

We reject plaintiffs' argument that the merger litigation and the adversary proceeding constitute one continuous claim. The two proceedings, while arising from the merger, are wholly different, with different parties, different allegations, and different causes of action. In essence, the merger litigation was premised on the allegation that the price per share set by Lyondell's directors and officers was too low, while the adversary proceeding is premised on the allegation that the price

was in a sense too high, supported by unsustainable revenue projections and requiring excessive leverage by Lyondell to finance and consummate the transaction. Thus, the adversary proceeding claim came into existence in July 2009, after the Select Form had been announced, and is not subject to the IVI exclusion.

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

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

ENTERED: JUNE 4, 2015

CLERK

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

15336 Narvisa Marine, Index 20622/14E
Plaintiff-Appellant,

-against-

Montefiore Health Systems, Inc.,
doing business as Marble Hill
Family Practice, et al.,
Defendants,

Command Security Corporation,
Defendant-Respondent.

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Shayne, Dachs, Sauer & Dachs, LLP, Mineola (Jonathan A. Dachs of counsel), for appellant.

Gallo Vitucci Klar, LLP, New York (Cheryl I. Chan of counsel), for respondent.

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Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered on or about September 8, 2014, which denied plaintiff's motion for a default judgment against defendant Command Security Corporation (Command), and granted Command's cross motion to compel plaintiff to accept its answer, unanimously affirmed, without costs.

The court properly denied plaintiff's motion for a default judgment and directed plaintiff to accept defendant Command's answer. Command offered a reasonable excuse for its delay in answering -- confusion and inadvertence -- which, although not particularly compelling, is sufficient under the circumstances of

this case. Moreover, the delay was relatively short, plaintiff suffered no prejudice, there is no evidence of willfulness and there is a strong public policy in favor of resolving cases on the merits (*see Chevalier v 368 E. 148th St. Assoc., LLC*, 80 AD3d 411, 413 [1st Dept 2011]); *Lamar v City of New York*, 68 AD3d 449 [1st Dept 2009]).

Given that no default judgment had been entered, defendant was not required to demonstrate a meritorious defense (*see Lamar*, 68 AD3d at 449; *Nason v Fisher*, 309 AD2d 526 [1st Dept 2003]; CPLR 3012[d]).

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

ENTERED: JUNE 4, 2015

CLERK

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

15337 The People of the State of New York, Ind. 4389/09
Respondent,

-against-

Raymond Medina,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Katherine A. Gregory of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Dominic R. Massaro, J.), rendered June 16, 2011, convicting defendant, upon his guilty plea, of attempted assault in the first degree and sentencing him, as a second violent felony offender, to a term of seven years, unanimously affirmed.

Defendant failed to preserve his claim that his Florida conviction does not qualify as a predicate New York violent felony, his claim does not fall within the "narrow exception to the preservation rule permitting appellate review when a sentence's illegality is readily discernible from the . . . record" (*People v Santiago*, 22 NY3d 900, 903 [2013]; *see also People v Samms*, 95 NY2d 52, 57 [2000]), and we decline to review it in the interest of justice. As an alternative holding, we find that defendant was properly adjudicated a second violent

felony offender.

Florida's aggravated battery statute consists of two subdivisions. The first encompasses conduct that would constitute the equivalent of assault in the second degree in New York (Fla Stat § 784.045[1][a][1]; Penal Law § 120.05[1]). While it refers to "knowing" as well as intentional conduct, Florida courts have held that "[a]ggravated battery is a specific intent crime" (*State v Horvatch*, 413 So 2d 469, 470 [Fla 4th DCA 1982]), and thus "a defendant who does not intend the injuries received by the victim does not commit aggravated battery" (*Beard v State*, 842 So 2d 174, 176 [Fla 2d DCA 2003]). Therefore, this statute does not, as defendant argues, encompass mental states broader than that required for the equivalent felony under New York law.

Furthermore, subdivision (1) of the Florida statute does not encompass injuries that would not support a felony conviction under New York law. The Florida statute requires infliction of "great bodily harm, permanent disability, or permanent disfigurement" (Fla Stat. § 784.045[1][a][1]), which is analogous to New York's requirement of "serious physical injury," defined as "physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment

of the function of any bodily organ" (Penal Law § 10.00[1]; *see also McCormick v City of Fort Lauderdale*, 333 F3d 1234, 1239 n 5 [11th Cir 2003]).

We find, however, that a conviction under subdivision (2) of the Florida statute, which requires commission of misdemeanor battery with "a deadly weapon," would not constitute a predicate violent felony in New York because, unlike a conviction for second-degree assault in New York, there is no requirement under the Florida statute that the victim sustain physical injury (*see People v Scott*, 111 AD2d 45 [1st Dept 1985]; *see also Johnson v United States*, 559 US 133, 137 [2010]). As a result, review of the accusatory instrument is required, as the "foreign statute criminalizes discrete acts" (*People v Diaz*, 115 AD3d 483, 484 [1st Dept 2014], *lv denied* 23 NY3d 1036 [2014]). Although the Florida accusatory instrument was not originally before the sentencing court, the record on appeal has been expanded to include this document, which establishes a conviction under subdivision (1) of the Florida statute, and is thus equivalent to a conviction of assault in the second degree.

For the same reasons, we find no ineffective assistance of counsel for failure to challenge the predicate felony, as defense counsel cannot be faulted for the failure to raise an argument that lacks merit (*see People v Caban*, 5 NY3d 143, 152 [2005]).

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

ENTERED: JUNE 4, 2015

CLERK

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

15338 Tower Insurance Company of New York, Index 101064/11
Plaintiff-Appellant,

-against-

Sanita Construction Co., Inc.,
Defendant,

Ciampa Estates, LLC,
Defendant-Respondent.

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Law Office of Max W. Gershweir, New York (Joshua L. Seltzer of counsel), for appellant.

Carroll McNulty & Kull LLC, New York (Ann Odelson of counsel), for respondent.

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Order, Supreme Court, New York County (Milton A. Tingling, J.), entered July 26, 2013, which, to the extent appealed from, denied plaintiff's motion for summary judgment declaring that it had no duty to defend and indemnify defendant Sanita Construction Co. in the underlying personal injury action, unanimously reversed, on the law, without costs, the motion granted and it is declared that plaintiff, Tower Insurance Company of New York, had no duty to defend or indemnify Sanita in the underlying action. The Clerk is directed to enter judgment accordingly.

Defendant Ciampa Estates, LLC served a judgment on November 21, 2014 on Sanita in connection with its award for contractual indemnification and defense costs, which remains unsatisfied.

Accordingly, pursuant to Insurance Law § 3420(a)(2), Ciampa "steps into the shoes" of Sanita and has standing to contest Tower's disclaimer of coverage. However, Ciampa forfeited any right to coverage based on its untimely notice (*see Ciampa Estates, LLC v Tower Ins. Co. of N.Y.*, 84 AD3d 511, 512 [1st Dept 2011], *lv denied* 17 NY3d 709 [2011]); thus, its attempt, as a judgment creditor of Sanita, to attack the disclaimer on the doctrine of equitable estoppel, is unavailing, as Sanita has failed to establish prejudice and reliance (*see River Seafoods, Inc. v JPMorgan Chase Bank*, 19 AD3d 120, 122 [1st Dept 2005]).

Ciampa's primary argument is that Tower failed to advise Sanita of its right to independent counsel at Tower's expense. Yet, the right to independent counsel does not establish an affirmative duty on defendant's part to advise its insured of that right (*compare Sumo Container Sta. v Evans, Orr, Pacelli, Norton & Laffan*, 278 AD2d 169, 170 [1st Dept 2000] *with Elacqua v Physicians' Reciprocal Insurers*, 52 AD3d 886, 888-889 [3d Dept 2008] *and Wilner v Allstate Ins. Co.*, 71 AD3d 155, 161 [2d Dept 2010]). Moreover, Tower's August 17, 2006 disclaimer, which should have alerted Sanita of a potential conflict of interests, in addition to the letter from Sanita's "personal, general counsel," which informed assigned defense counsel that it would "protect [Sanita's] interest in respect to this matter," fails to

establish Sanita's reliance on Tower's defense strategy (*Sumo*, 278 AD2d at 171).

It was also incumbent on Ciampa to show that the settlement of the underlying action was improvident and that it would not have sustained the claimed damages "but for" defendant attorneys' alleged misconduct leading to the settlement" (*id.*). Ciampa has not challenged the reasonableness of the settlement - it simply challenges the failure to appeal the contractual indemnification order in its attempt to avoid the disclaimer of coverage. Nor has Ciampa (or Sanita) ever challenged the exclusions on which Tower relied. Thus, even if Tower's counsel had breached some duty of care to Sanita/Ciampa, such breach, combined with Ciampa's noncompliance with policy notification requirements, was not the proximate cause of any alleged harm (*id.*).

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

ENTERED: JUNE 4, 2015

CLERK

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

15340 In re Isaiah Jenkins, et al. Index 401039/13
Petitioners,

-against-

New York City Housing Authority,
Amsterdam Houses,
Respondent.

_____

Isaiah Jenkins, petitioner pro se.

David I. Farber, New York (Andrew M. Lupin of counsel), for respondent.

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Determination of respondent, dated March 6, 2013, after a hearing, denying petitioner Edward Jenkins's remaining family member claim, filed by petitioner Isaiah Jenkins on Edward's behalf as his legal guardian, to succession rights to an apartment formerly leased to Edward's grandmother, Rosa Jenkins, 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 [Alice Schlesinger, J.], entered April 16, 2014), dismissed, without costs.

Substantial evidence supports respondent's determination that Edward is not entitled to succession rights as a remaining family member because he failed to meet the requirement of continuous occupancy for at least one year preceding the death of

the tenant of record (*see Matter of Fermin v New York City Hous. Auth.*, 67 AD3d 433 [1st Dept 2009]). Isaiah obtained custody of Edward, his nephew, in April 2003. Edward had previously lived with Rosa, the tenant of record, who died in January 2004. The evidence abundantly shows that petitioners generally lived in New Jersey while Edward, then a minor, was attending school there, apparently beginning almost nine months before Rosa's death. Moreover, Edward did not obtain the requisite written permission to rejoin the household after moving in with Isaiah in New Jersey in April 2003, less than one year before Rosa's death (*see Ortiz v Rhea*, __ AD3d __, 2015 NY Slip Op 03609 [1st Dept 2015]).

Petitioners' contention that they were deprived of due process by the preclusion of a witness at the hearing is unpreserved since it was not raised at the administrative level (*see Green v New York City Police Dept.*, 34 AD3d 262 [1st Dept 2006]). Moreover, this claim was improperly raised for the first time in a memorandum of law submitted after respondent filed its answer.

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

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

ENTERED: JUNE 4, 2015

CLERK

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

15341N In re Maxine Todd, Index 100518/14
Petitioner-Appellant,

-against-

New York City Health and
Hospitals Corporation Office
of Legal Affairs, Claims Division,
Respondent-Respondent.

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Maxine Todd, appellant pro se.

Zachary W. Carter, Corporation Counsel, New York (Antonella Karlin of counsel), for respondent.

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Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered August 20, 2014, which denied the petition for leave to file a late notice of claim, unanimously affirmed, without costs.

Supreme Court considered the relevant statutory factors and exercised its discretion in a provident manner in denying the petition (*see generally Williams v Nassau County Med. Ctr.*, 6 NY3d 531, 535 [2006]; General Municipal Law § 50-e[5]). The record shows that petitioner failed to provide a reasonable excuse for her failure to file a timely notice of claim, as ignorance of the law is not a valid excuse (*see Rodriguez v New York City Health & Hosps. Corp. [Jacobi Med. Ctr.]*, 78 AD3d 538 [1st Dept 2010], *lv denied* 17 NY3d 718 [2011]). Petitioner also failed to show that respondent acquired actual knowledge that a

wrong was committed in that the hospital records do not on their face indicate that the hospital deviated from good and accepted medical practice (*see Basualdo v Guzman*, 110 AD3d 610 [1st Dept 2013]). Furthermore, the court properly found that the delay between the events at issue and the filing of the petition were likely to have prejudiced respondent in its investigation (*see Brown v New York City Health & Hosps. Corp. [N. Cent. Bronx Hosp.]*, 116 AD3d 514 [1s Dept 2014], *lv denied* 24 NY3d 908 [2014]).

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

ENTERED: JUNE 4, 2015

CLERK

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

15342 In re Alex Ortiz, Index 22/15
[M-1357] Petitioner, Ind. 5320/13

-against-

Hon. Patricia Nuñez, etc., et al.,
Respondents.

Hughes Hubbard & Reed LLP, New York (David B. Shanies of counsel), for petitioner.

Eric T. Schneiderman, Attorney General, New York (Michelle R. Lambert of counsel), for Hon. Patricia Nuñez, respondent.

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

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

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

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

ENTERED: JUNE 4, 2015

CLERK

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

14728 Brigitta Joachim, Index 101417/12
Plaintiff-Respondent,

-against-

AMC Multi-Cinema, Inc., et al.,
Defendants-Appellants.

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Carroll McNulty & Kull LLC, New York (Robert Seigal of counsel), for appellants.

Leav & Steinberg, LLP, New York (Edward A. Steinberg of counsel), for respondent.

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Order, Supreme Court, New York County (Paul Wooten, J.), entered July 8, 2014, which, inter alia, denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff seeks to recover for injuries sustained when she allegedly tripped and fell in one of the auditoriums in defendants' movie theater. Contrary to defendants' contention, plaintiff sufficiently identified the cause of her accident. She testified that as she exited the row, her foot became caught on a misleveled metal light strip running between the concrete floor and the carpeted staircase. The parties' conflicting deposition testimony as to whether the strip was metal or rubber, and whether it contained lighting, are issues of fact for a jury. Although plaintiff could not recall exactly where in the

auditorium she fell, her companion identified the specific row where the accident occurred.

Defendants failed to meet their prima facie burden of showing that they lacked constructive notice. The facilities manager of the theater testified that near the time of the incident, he would walk through the theater auditoriums "about once a week" "usually on a Monday" to check for damages, but kept no written log of these inspections. This vague testimony is insufficient to show the absence of constructive notice because it fails to establish "specifically that the dangerous condition did not exist when the area was last inspected . . . before plaintiff fell" (*Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421 [1st Dept 2011]).

It also cannot be stated at this juncture whether the auditorium was adequately lit, much less whether inadequate lighting was a proximate cause of plaintiff's fall (*see Dickert v City of New York*, 268 AD2d 343 [1st Dept 2000]). Although the facilities manager averred in his affidavit that annexed photographs reflected the lighting conditions in the auditorium on the date of plaintiff's accident, at his deposition, one year

earlier, he testified that he was not present at the theater at the time of the accident and had no independent recollection of the accident.

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

ENTERED: JUNE 4, 2015

CLERK

Tom, J.P., Friedman, Renwick, Moskowitz, DeGrasse, JJ.

14868 In re Nicholas Koutros, Index 104279/12
Petitioner-Appellant,

-against-

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

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Law Offices of Stewart Lee Karlin, P.C., New York (Stewart Lee Karlin of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Paul Wooten, J.), entered December 3, 2013, to the extent appealed from, denying the petition seeking to annul respondent the Department of Education of the City of New York's (DOE) determination, dated July 2012, which terminated petitioner's employment, effective July 1, 2012, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The determination to terminate petitioner's employment based on his lack of a proper teaching certificate was not arbitrary and capricious (*see Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 NY2d 753, 757-758 [1991]). Petitioner failed to show that, in July 2012, when DOE terminated his

employment, he had been retroactively certified (*see Matter of Smith v Board of Educ. of Wallkill Cent. School Dist.*, 65 NY2d 797 [1985]). Because petitioner's employment was terminated for failing to maintain minimum qualifications, and not for disciplinary reasons, he was not entitled to a hearing pursuant to Education Law § 3020-a (*see Matter of New York State Off. of Children & Family Servs. v Lanterman*, 14 NY3d 275, 282 [2010]).

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

ENTERED: JUNE 4, 2015

CLERK

Sweeny, J.P., Renwick, Andrias, Moskowitz, Gische, JJ.

15143- Index 101692/13
15144 In re Tanvir Ahmed, et al., 101762/13
Petitioners-Respondents-Appellants,

-against-

The City of New York, et al.,
Respondents-Appellants-Respondents.

- - - - -

New York Taxi Workers Alliance,
Amicus Curiae.

- - - - -

In re Adelso Raul Delorbe, et al.,
Petitioners-Respondents-Appellants,

-against-

The City of New York, et al.,
Respondents-Appellants-Respondents.

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New York Taxi Workers Alliance,
Amicus Curiae.

_____

Zachary W. Carter, Corporation Counsel, New York (Scott Shorr of counsel), for appellants-respondents.

Cuti Hecker Wang LLP, New York (Eric J. Hecker of counsel), for Tanvir Ahmed, Charbel Sfeir, Guy Vieux, respondents-appellants.

Fox Rothschild, LLP, New York (James L. Lemonedes of counsel), for Adelso Raul Delorbe, Pedro Sierra and Samson Zerai, respondents-appellants.

Meyer, Suozzo, English & Klein P.C., New York (Edward Pichardo of counsel), for amicus curiae.

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Order, Supreme Court, New York County (Margaret A. Chan, J.), entered April 11, 2014, which granted the petitions to the

extent of annulling certain "Health Care Rules" promulgated by respondent New York City Taxi and Limousine Commission (TLC), and denied petitioners' request for restitution of funds deducted pursuant to those rules, unanimously modified, on the law, to grant petitioners' request for restitution of deducted funds, and otherwise affirmed, without costs.

In 1971, the New York City Council created the New York City Taxi and Limousine Commission (the TLC) for the stated purposes of "continuance, further development and improvement of taxi and limousine service" in New York City (New York City Charter § 2300). The TLC is empowered "to adopt and establish an overall public transportation policy governing taxi, coach, [and] limousine . . . services as it relates to the overall public transportation network of the city" and "to establish certain rates, standards of service, standards of insurance and minimum coverage; standards for driver safety."

The New York City Charter expressly provides that the TLC's "regulation and supervision shall extend to" matters including "issuance, revocation [and] suspension of licenses for drivers, chauffeurs, owners or operators of vehicles," as well as "the establishment of qualifying standards required for such licensees" (New York City Charter § 2303[b][5]). The Charter further authorizes the TLC to "prescribe, revise and otherwise

regulate reasonable rates of fare which may be charged and collected" for taxi services (New York City Charter § 2304[b]). Finally, the City Council authorized the TLC to promulgate "rules and regulations reasonably designed to carry out" its purposes (New York City Charter § 2303[b][11]; *see* Administrative Code of City of NY § 19-503[a] [same]).

Taxi drivers are compensated according to the rules set forth in Title 35, chapter 58 of the Rules of the City of New York. Most taxi drivers lease medallion cabs from the medallion owners and make an average of $30,000 to $40,000 per year. The TLC sets maximum lease rates that owners may charge drivers – for example, $115 for any 12-hour day shift (*see* Rules of City of New York Taxi, and Limousine Commission [35 RCNY] § 58-21[c]). Taxi passengers pay fares using cash, credit or debit cards, and taxi drivers retain fares and tips paid in cash (*see* 35 RCNY §§ 54-17[c], [e][1][I]). Medallion taxis use a computerized "Taxicab Technology System" (abbreviated as "TPEP") to handle credit and debit card payments. Each day (or under certain circumstances, each week), medallion owners pay drivers the total amount of all card payments made during the drivers' shifts, minus various surcharges (*see* 35 RCNY §§ 58-21[f][1]-[2], 58-26[h][1]).

As to the drivers themselves, the City Council prescribes standards governing their licensure. To that end, the Code

specifies that taxi driver license applicants must be "of sound physical condition with good eyesight and no epilepsy, vertigo, heart trouble or any other infirmity of body or mind which might render him or her unfit for the safe operation of a licensed vehicle" (Administrative Code § 19-505[b][3]). Applicants must be "examined as to [their] physical condition by a duly licensed physician designated by the [TLC]" (Administrative Code § 19-505[d]); applicants whose physical exams are "unsatisfactory" "shall be refused a license" (*id.*). The TLC may make renewal licenses "subject to the same standards and tests as are applicable for original applications" (Administrative Code § 19-505[h]). Upon notice and an opportunity for a hearing, the TLC may suspend or revoke the license of any driver who fails to comply with any applicable Code provision (*see* Administrative Code § 19-505[l]) or who poses a "direct and substantial threat to the public health or safety" (Administrative Code § 19-512.1[a]).

Most taxi drivers work as independent contractors, leasing medallion cabs from the owners; as independent contractors, drivers generally lack access to employer-funded health insurance. Additionally, until February 2013, the TLC erroneously believed that taxi drivers who were not entitled to health insurance from medallion owners were also not entitled to

disability insurance. However, the New York State Workers' Compensation Board advised the TLC that medallion owners who are legally required to provide workers' compensation benefits must also provide them with disability benefits. This disability coverage provides 50% of a driver's weekly earnings, up to a maximum benefit of $170 per week. Therefore, a driver earning a typical sum of $35,000 per year, or about $700 per week, and covered only by standard disability benefits, would receive less than 25% of that amount ($170) if disabled.

On July 12, 2012, after a public hearing, the TLC voted to approve amendments to its rules governing taxi fares. The amendments increased the fares by 17%; authorized TPEP providers to deduct six cents per fare to be "dedicated for the purpose of providing healthcare services and disability coverage for drivers"; and authorized medallion owners to offset the six-cent charges from credit card payments that passengers made to drivers. According to the amendments, a portion of the proposed 17% fare increase would flow into a fund for driver health care services; the fund would be managed by an outside entity that would help drivers seeking health insurance to navigate the New York State health exchange. The fund would also provide drivers with a "minimum level of disability insurance." The TLC was also to select a health care assistance entity to provide driver

health care and disability coverage.

On September 11, 2013, the TLC issued an Industry Notice that the new rules (the health care rules or the rules) would be effective beginning on October 1, 2013. As promulgated and effective, the health care rules authorized and directed TPEP providers to collect the six-cent per trip fee from medallion owners; required the fee to be dedicated to "providing healthcare services and disability coverage for drivers"; directed medallion owners to offset the six-cent charges from drivers' credit card receipts; and directed owners to remit the charges to their TPEP providers (*see* 35 RCNY §§ 58-21[c][5][viii]; [f][1], [2], [5]; 75-25[q][2]).

Meanwhile, on February 6, 2013, the TLC issued a request for proposals (the RFP) from entities for provision of the services contemplated under the Health Care Rules. The RFP stated that the selected contractor would use a projected $10 million in annual fees to, among other things, evaluate health insurance plans offered through the New York State Health Care Exchange, help taxi drivers navigate the Exchange and enroll in a health insurance plan, and obtain subsidies available under the federal Patient Protection and Affordable Care Act (the ACA, commonly known as Obamacare). The RFP noted that the navigation services would be in addition to navigation services already provided by

New York State under the ACA, and were to be "specifically tailored to the needs of the taxi driver population."

An addendum to the RFP further provided that the selected contractor was to negotiate for and buy short-term disability insurance coverage for some 30,000 full-time drivers, with benefits of at least $300 per week for up to 26 weeks. Those disability benefits were to be in addition to disability benefits provided by owners under the Workers' Compensation Law. On September 25, 2013, the TLC awarded the healthcare services contract to the New York Taxi Workers Alliance (NYTWA), an advocacy group for taxi drivers.

Petitioners[1] commenced this hybrid article 78 and declaratory judgment proceeding against respondents City of New York, TLC, and TLC Commissioner David Yasky, seeking a declaration that the health care rules were ultra vires and violated the separation of powers doctrine or, in the alternative, a declaration that the rules were arbitrary and

[1] This appeal comprises two proceedings, the first by petitioners Tanvir Ahmed, Charbel Sfeir, and Guy Vieux (collectively, Ahmed) and the second by petitioners Adelso Raul Delorbe, Pedro Sierra, and Samson Zerai (collectively, Delorbe). Ahmed and Delorbe commenced their proceedings separately and the IAS court consolidated the two proceedings for decision. The court also dismissed a third petition, *Friendly Group, Ltd., et al. v City of New York, et al.* (Index No. 100019/14). No appeal has been taken from the dismissal of that petition.

capricious. Petitioners further sought a declaration that the award of the healthcare services contract to NYTWA violated the law and was arbitrary and capricious. In their prayer for relief, petitioners sought an order annulling the health care rules, as well as restitution of monies deducted from drivers' receipts under the health care rules.

In their answer to the petition, respondents provided an affidavit from a TLC Deputy Commissioner, who explained that the six-cent per-trip deduction was calculated to generate about $10 million per year. That $10 million sum, in turn, was estimated to cover the "cost of enriched disability coverage" of "approximately $3 million" per year, and "provide enough funds to give drivers an appropriate level of healthcare support." The deputy commissioner did not, however, provide any detail as to how the TLC planned to spend the remaining $7 million (after the $3 million cost of supplemented disability insurance) of the annual $10 million.

The IAS court annulled the health care rules, finding that they were arbitrary and capricious. In its ruling on the consolidated petitions, the court declared that in promulgating the health care rules, the TLC exceeded the authority that the City Council delegated to it, violating the separation of powers doctrine.

Tracking the four factors set forth in *Boreali v Axelrod* (71 NY2d 1 [1987]), the court found that the TLC had "engaged in its own cost-benefit analysis," which was properly a function for the legislature. The court also found that there was "no nexus between the requirements for a taxi driver license" as set forth in Administrative Code § 19-505(b)(3) (relied upon by TLC as legislative authority for the Rules), on the one hand, and "assisting taxi drivers with the [ACA] and supplemental disability coverage," on the other. The court, accordingly, found that the TLC had not had the "benefit of legislative guidance," the second *Boreali* factor.

In addition, the IAS court held that, because the ACA makes express provision for health insurance navigation services and disability insurance coverage, "the legislative branch has spoken" on these issues, militating towards a finding of excess of authority under the third *Boreali* factor. Finally, as to the fourth *Boreali* factor, the "special expertise" employed by the agency in promulgating the regulation, the court found, in effect, that the TLC did not have any special expertise in the field of taxi driver health care issues.

The court also rejected the TLC's assertion that the health care rules were rational because they were "promulgated for the benefit of the taxi drivers who are independent contractors

without employer supported health insurance or disability coverage." In so doing, the court found that the TLC had "provided no basis, rational or otherwise, for the six cents deduction." The court added that the TLC had provided no "clear defined information on what the six cents are for besides paying for an outside contractor . . . to assist taxi drivers [to] navigate the [ACA] — assistance which States provide free of charge to applicants."

Likewise, the court rejected the argument that the award of the contract to the NYTWA was arbitrary and capricious, finding the argument academic in light of its holding that the rules themselves were arbitrary and capricious. The court added that, in any event, the challenge to the awarding of the contract was untimely as it was not initiated within the requisite 10 days "from obtaining knowledge of the facts on which the challenge[] [was] based."

Notwithstanding its annulment of the rules, the court denied petitioners' request for damages, i.e., restitution of the six-cent charges withheld under the Rules. In so doing, the court held that the "doctrine of governmental immunity shields respondents" from monetary liability, because the promulgation of the Rules, which precipitated the claim for monetary damages, "is an official action that involves the exercise of discretion or

expert judgment in policy matter, and is not exclusively ministerial."

TLC's "expansive mandate to develop and improve taxi and limousine service" notwithstanding (*Greater N.Y. Taxi Assn. v New York City Taxi & Limousine Commn.*, 121 AD3d 21, 28 [1st Dept 2014], *stay granted* 25 NY3d 957 [2015]), we find that TLC exceeded its authority in promulgating the Health Care Rules (*see Boreali v Axelrod*, 71 NY2d 1, 9-10 [1987]).

First, the record demonstrates that, in its attempt to establish a cost-effective structure for promoting driver health, TLC, motivated by broad "economic and social concerns," was making policy, and therefore was "operating outside of its proper sphere of authority" (*Boreali*, 72 NY2d at 12). Second, TLC manufactured a "comprehensive set of rules without benefit of legislative guidance" (*id.* at 13). TLC has certain delineated powers to ensure that drivers are capable of driving safely (*see* New York City Charter § 2300; Administrative Code of City of NY §§ 19-505[b][3], [d], [h], [l]; 19-512.1[a]). However, nothing in the Charter or the enabling Code provisions contemplates the establishment and outsourcing of a miniature health insurance navigation and disability insurance department. Third, no expertise in the field of health care services or disability insurance was involved in the development of the rule (indeed,

this is not TLC's area of expertise), a fact highlighted by the lack of technical discussion at the hearings on the proposed rule amendments (*see Boreali*, 71 NY2d at 13-14; *Matter of New York Statewide Coalition of Hispanic Chambers of Commerce v New York City Dept. of Health & Mental Hygiene*, 23 NY3d 681, 701 [2014]).

The Health Care Rules also lack a rational foundation and are arbitrary and capricious (*see New York State Assn. of Counties v Axelrod*, 78 NY2d 158, 166 [1991]). The record demonstrates that the 6¢-per-trip charge was carefully calibrated to generate a projected $10 million per year for use in providing drivers with healthcare navigation services and supplemental disability insurance. However, the record fails to show how the $10 million figure was determined or how the money is to be spent. This is the essence of arbitrariness in rate-setting regulation (*see New York State Assn.*, 78 NY2d at 167-168; *see also Matter of Catholic Med. Ctr. of Brooklyn & Queens v Department of Health of State of N.Y.*, 48 NY2d 967 [1979]).

The municipal respondents concede that if the rules are invalidated, petitioners are entitled to a refund of monies

collected thereunder (*see* CPLR 7806; *Metropolitan Taxicab Bd. of Trade v New York City Taxi & Limousine Commn.*, 115 AD3d 521 [1st Dept 2014], *lv denied* 24 NY3d 911 [2014]; *Matter of Adams v Welch*, 272 AD2d 642, 644 [3d Dept 2000]).

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

ENTERED: JUNE 4, 2015

CLERK

Andrias, J.P., Moskowitz, DeGrasse, Gische, Kapnick, JJ.

15253 Ana Jocelyn Pena, Index 303202/11
Plaintiff-Appellant,

-against-

Penny Lane Realty Inc.,
Defendant-Respondent.

_____

Peña & Kahn, PLLC, Bronx (Diane Welch Bando of counsel), for appellant.

Lester Schwab Katz & Dwyer, LLP, New York (Harry Steinberg of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered March 7, 2014, which granted defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff, a resident in defendant's building, claimed that she was robbed at gunpoint and assaulted in the lobby as she was leaving for work. She alleged that the assailant gained access to the premises as a result of a malfunctioning lock on one of the entryway doors.

In its motion for summary judgment, defendant prima facie established that it "discharged its common-law duty to take minimal security precautions against reasonably foreseeable criminal acts by third parties" (*James v Jamie Towers Hous. Co.*, 99 NY2d 639, 641 [2003]) through the testimony of its live-in

superintendent who stated that the lock on the entrance door to the building was functional both before and after the subject incident. Plaintiff, however, raised a triable issue of fact as to whether defendant had actual or constructive notice of the allegedly defective lock on the interior vestibule door *(Picaso v 345 E. 73 Owners Corp.*, 101 AD3d 511 [1st Dept 2012]). At her deposition, plaintiff testified that she did not need to use her key to open the door for the entire week leading up to the incident and that her husband had verbally complained to the building superintendent within that time period about the lock being inoperable. Viewing the evidence in a light most favorable to the non-moving party (*Johnson v Goldberger*, 286 AD2d 604 [1st Dept 2001]), a trier of fact could rationally conclude that the superintendent, who claimed to have inspected the lock daily, had sufficient time to discover and remedy the purported faulty condition. We note that the hearsay evidence about the husband's statement may be relied upon to defeat summary judgment because it is not the only evidence submitted in opposition (*Fountain v Ferrara*, 118 AD3d 416 [1st Dept 2014]). Any issues of credibility raised by defendant concerning plaintiff's position are for the jury to resolve (*Ocean v Hossain*, 127 AD3d 402 [1st Dept 2015]).

There is also sufficient evidence to raise issues of fact

regarding whether plaintiff's attack was foreseeable. The evidence included a police complaint documenting a homicide that occurred directly in front of the building a few weeks prior to the incident and a police detective's deposition testimony that the immediate vicinity of defendant's building was identified by the NYPD as having a "robbery pattern" (*see Romero v Twin Parks Southeast Houses, Inc.*, 70 AD3d 484, 485 [1st Dept 2010]; *Jacqueline S. v City of New York*, 81 NY2d 288, 294 [1993]). Additionally, if the assault occurred in the manner presented by plaintiff, a jury could find proximate cause on the ground that the assailant would have gained access to the premises through a negligently maintained entrance (*see Romero*, 70 AD3d at 486).

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

ENTERED: JUNE 4, 2015

CLERK

Tom, J.P., Sweeny, Moskowitz, DeGrasse, Richter, JJ.

15296 The People of the State of New York, Ind. 937/11
Respondent,

-against-

Eddy Coello,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Karen Swiger of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Ralph A. Fabrizio, J.), rendered November 14, 2012, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 25 years to life, unanimously affirmed.

The court properly denied defendant's request for a jury charge on the affirmative defense of extreme emotional disturbance. There was no reasonable view of the evidence, viewed most favorably to defendant, that he had established, by a preponderance of the evidence, either the subjective element of the defense, that he "acted under the influence of an extreme emotional disturbance," or the objective element, "that there was a reasonable explanation or excuse for that disturbance" (*People v Roche*, 98 NY2d 70, 76 [2002]).

More than a month before the incident, defendant told the

victim, his wife, that he could kill her and no one would care, indicating premeditation (*see People v Moronta*, 96 AD3d 418, 420 [1st Dept 2012], *lv denied* 20 NY3d 987 [2012]). Earlier on the night of the incident, the victim sent a number of text messages telling defendant, in rude language, that she was leaving him. However, the theory that defendant was extremely disturbed by those messages was negated by the text messages defendant sent in reply asking about dinner, as well as witnesses' observation of defendant's demeanor and conduct after receiving the messages. Even if defendant became angry or jealous upon seeing the messages, such emotions alone "are not equivalent to the loss of self-control generally associated with [the] defense" (*People v Walker*, 64 NY2d 741, 743 [1984]). We also note that defendant made methodical efforts at concealing his crime, likewise undermining his claim of loss of control (*see People v Acevedo*, 56 AD3d 341 [1st Dept 2008], *lv denied* 12 NY3d 813 [2009]).

Like the defendant in *People v McKenzie* (19 NY3d 463 [2012]), where the Court of Appeals held that the defense should have been submitted, defendant told others that he had "snapped" and "blacked out." However, in *McKenzie* there was far more evidence to support the defense. In any event, even if a reasonable jury could find that the subjective element was established by such statements and the surrounding circumstances,

there was still no reasonable view to support the objective element. There was no evidence showing that defendant, who was amply shown to have been physically and psychologically abusive toward his wife, had a reasonable excuse for any extreme emotional disturbance.

Because defendant based his extreme emotional disturbance defense entirely on the People's evidence, he was not required to give CPL 250.10 notice (*see People v Gonzalez*, 22 NY3d 539 [2014]). However, the record does not support defendant's assertion that lack of notice was a basis for the court's denial of the charge request.

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

ENTERED: JUNE 4, 2015

CLERK

Tom, J.P., Sweeny, Moskowitz, DeGrasse, Richter, JJ.

15297 Manzoor Ahmad, Index 150871/13
Plaintiff-Appellant,

-against-

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

_____

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

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

_____

Order, Supreme Court, New York County (Frank P. Nervo, J.), entered November 20, 2014, which, inter alia, denied plaintiff's motion for partial summary judgment on the issue of liability on his claim alleging false arrest, without prejudice to renewal following discovery, unanimously affirmed, without costs.

Plaintiff's motion, based on his testimony given at a hearing pursuant to General Municipal Law § 50-h, was properly denied because he failed to make a prima facie showing that the defense of probable cause pleaded by defendants in their answer "has no merit" (CPLR 3212[b]; *see Davis v City of New York*, 100 AD3d 822 [2d Dept 2012]). Although the fact that the arrest was made without a warrant raises a presumption of a lack of probable cause (*see Broughton v State of New York*, 37 NY2d 451, 458 [1975], *cert denied* 423 US 929 [1975]), plaintiff admitted in his

testimony that, prior to being stopped and arrested by defendant police officer, he had made an illegal turn, thus presenting a factual issue as to whether the officer had probable cause to believe an offense had been committed (*see People v Bigelow*, 66 NY2d 417, 423 [1985]). Since "[s]ummary judgment should be denied where there is any doubt, at least any significant doubt, whether there is a material, triable issue of fact" (*Phillips v Kantor & Co.*, 31 NY2d 307, 311 [1972]), the court properly denied plaintiff's motion, without prejudice to renew following discovery, including depositions of the officers involved in the arrest.

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

ENTERED: JUNE 4, 2015

CLERK

Tom, J.P., Sweeny, Moskowitz, DeGrasse, Richter, JJ.

15298-
15299 In re Naqi T., and Another,

Children Under the Age
of Eighteen Years, etc.,

Marlena S.,
Respondent-Appellant,

Administration for Children's
Services, et al.,
Petitioners-Respondents,

Shaka T., etc., et al.,
Nonparty Respondents.

_____

Andrew J. Baer, New York, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Victoria Scalzo of counsel), for Administration for Children's Services, respondent.

Larry S. Bachner, Jamaica, for Shaka T., respondent.

Bruce A. Young, New York, for Wadner N., respondent.

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

_____

Orders, Family Court, New York County (Stewart H. Weinstein, J.), entered on or about January 23, 2014, which, upon a fact-finding determination that respondent mother neglected the subject children, granted custody of the children to their respective fathers, unanimously affirmed, without costs.

The finding of neglect is supported by a preponderance of

the evidence, which demonstrates that respondent's alcohol abuse impaired the children's physical, mental or emotional condition or placed the children at imminent risk of impairment (*see Matter of Nasiim W. [Keala M.]*, 88 AD3d 452 [1st Dept 2011]; Family Court Act §§ 1012[f][i][B]; 1046[b][i]). The children wore tattered, dirty clothing and gave off an odor; Naqi's classmates refused to sit near him (*see Matter of China C. [Alexis C.]*, 116 AD3d 953, 954 [2d Dept 2014], *lv dismissed* 23 NY3d 1047 [2014]; *Matter of David II.*, 49 AD3d 1093 [3rd Dept 2008]). Naqi, who is autistic and attends a small, specialized class, also missed an excessive number of days of school to his detriment (*see Matter of Jaquan F. [Alexis F.]*, 120 AD3d 1113 [1st Dept 2014]).

The record establishes that it is in the best interests of the children to be in the custody of their respective fathers (*see Eschbach v Eschbach*, 56 NY2d 167, 171 [1982]). While continuing to live with siblings is often in a child's best

interest, this is "not an absolute" (*id.* at 173); both fathers have expressed a willingness to ensure that each sibling enjoys frequent contact with the other (*see Matter of Shayna R.*, 57 AD3d 262, 263 [1st Dept 2008]).

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

ENTERED: JUNE 4, 2015

CLERK

Tom, J.P., Sweeny, Moskowitz, DeGrasse, Richter, JJ.

15300 Alison Dorian, Index 103817/12
Plaintiff-Appellant,

-against-

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

_____

Alison Dorian, appellant pro se.

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

_____

Order, Supreme Court, New York County (Kathryn E. Freed, J.), entered September 18, 2013, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for renewal (denominated a motion for reargument) of a prior order, same court and Justice, entered June 6, 2013, granting defendants' motion to dismiss, pursuant to CPLR 3212 (a)(7), plaintiff's causes of action for punitive damages, federal civil rights violations, abuse of process, and intentional infliction of emotional distress, and granting defendants' motion for a change of venue as to her causes of action for assault and excessive force, unanimously affirmed, without costs.

Plaintiff presented additional facts in her papers on her "reargument" motion and, accordingly, we treat the motion as one

for renewal, the denial of which is appealable (*see Mejia v Nanni*, 307 AD2d 870, 871 [1st Dept 2003]; *Sementilli v Ruscigno*, 286 AD2d 242, 243 [1st Dept 2001]).

The court, however, properly denied plaintiff's motion. Plaintiff failed to state facts constituting valid causes of action for abuse of process (*Curiano v Suozzi*, 63 NY2d 113, 116 [1984]); intentional infliction of emotional distress (*LoPresti v Florio*, 71 AD3d 574, 574-575 [1st Dept 2010]); or a violation of her federal civil rights (*Monell v Department of Social Servs. of City of N.Y.*, 436 US 658, 694 [1978]). Moreover, even assuming that plaintiff's punitive damages claim was meant to be part of her intentional tort claims (*Rocanova v Equitable Life Assur. Socy. of U.S.*, 83 NY2d 603, 616 [1994]), and not a separate claim (*see Rivera v City of New York*, 40 AD3d 334, 344 [1st Dept 2007], *lv dismissed* 16 NY3d 782 [2011]), punitive damages are not recoverable against a state or its political subdivisions, which includes a municipality (*Sharapata v Town of Islip*, 56 NY2d 332, 334, 338-339 [1982]).

The court properly granted defendants' motion for a change of venue to Richmond County pursuant to CPLR 504(3).

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

ENTERED: JUNE 4, 2015

CLERK

Tom, J.P., Sweeny, Moskowitz, DeGrasse, Richter, JJ.

15301-
15301A-
15301B

Index 100822/13

In re Aracelly Y. Hernandez,
Petitioner-Respondent,

-against-

New York City Housing Authority,
Respondent-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Joan B. Lobis, J.), entered October 8, 2014, annulling respondent's (NYCHA) determination, dated November 17, 2010, which terminated petitioner's public housing tenancy, unanimously reversed, on the law, without costs, the petition denied, and the proceeding brought pursuant to CPLR article 78 dismissed. Appeal from orders, same court and Justice, entered August 21, 2013, and October 24, 2013, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The court denied respondent's cross motion to dismiss the petition because the computer "screenshot" attached as an exhibit to a supporting affidavit by a NYCHA employee responsible for mailing Determinations of Status to tenants created ambiguity as to whether the determination in this case was mailed to

petitioner. Assuming, without deciding, that the court correctly denied the initial motion, it erred in denying the motion to renew, which dispelled any confusion. Because the new facts submitted on the motion to renew "addressed an issue raised sua sponte by the court in the original decision," respondent had a reasonable excuse for failing to offer them on the prior motion, and it was error for the court to refuse to consider those facts (*Scannell v Mt. Sinai Med. Ctr.*, 256 AD2d 214, 214 [1st Dept 1998]; *see also Matter of Bevona [Superior Maintenance Co.]*, 204 AD2d 136, 138-139 [1st Dept 1994]; CPLR 2221[e]). Considered in light of the new facts, the affidavits by NYCHA personnel constituted proof of proper mailing, which gave rise to a rebuttable presumption that the determination was received by petitioner in November 2010, and petitioner's denial of receipt, standing alone, did not overcome the presumption (*see Badio v Liberty Mut. Fire Ins. Co.*, 12 AD3d 229, 230 [1st Dept 2004]).

Thus, the petition was time-barred, since it was filed more than two years after the mailing of the final determination (*see* CPLR 217).

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

ENTERED: JUNE 4, 2015

CLERK

Tom, J.P., Sweeny, Moskowitz, DeGrasse, Richter, JJ.

15302-
15303 The People of the State of New York,
Respondent,

-against-

Kenneth J. Lynch, also known as
John Lynch,
Defendant-Appellant.

Ind. 6021/09
6033/11

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

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

Appeals having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Marcy L. Kahn, J.), rendered on or about June 5, 2012,

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

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

ENTERED: JUNE 4, 2015

CLERK

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

Tom, J.P., Sweeny, Moskowitz, DeGrasse, Richter, JJ.

15304 Adwoa Gyabaah, Index 307081/10
Plaintiff-Respondent,

-against-

Rivlab Transportation Corp.,
et al.,
Defendants-Appellants.

_____

Perry, Van Etten, Rozanski & Primavera, LLP, Melville (Elizabeth Gelfand Kastner of counsel), for appellants.

Law Offices of Kenneth A. Wilhelm, New York (Barry Liebman of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered July 31, 2014, which granted plaintiff's motion for summary judgment on the issue of liability, unanimously affirmed, without costs.

Plaintiff made a prima facie showing of her entitlement to judgment as a matter of law on the issue of liability by submitting her affidavit stating that the yellow school bus owned by defendant Rivlab Transportation Corp. struck her and ran over her foot, as she was crossing within a crosswalk, with the pedestrian light in her favor, and after she had looked for oncoming traffic (*see Garzon-Victoria v Okolo*, 116 AD3d 558, 558 [1st Dept 2014]). Defendants' contention that plaintiff did not provide evidence to establish that defendant Littlejohn was the

driver of the bus is raised for the first time on appeal and therefore is not preserved for our review (*see Diarrassouba v Consolidated Edison Co. of N.Y. Inc.*, 123 AD3d 525 [1st Dept 2014]).

In opposition, defendants failed to raise a triable issue of fact, since they submitted only an affirmation from an attorney without personal knowledge of the facts (*see Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]). Nor was defendants' answer, verified by an attorney without personal knowledge of the facts, sufficient to raise an issue of fact (*see JPMorgan Chase Bank, N.A. v Clancy*, 117 AD3d 472 [1st Dept 2014]). Defendants' speculation that plaintiff may have been comparatively negligent does not raise a triable issue of fact (*see Coutu v Santo Domingo*, 123 AD3d 410, 410 [1st Dept 2014], *lv dismissed* 24 NY3d 1214 [2015]). Although plaintiff's motion was filed before discovery, defendants failed to explain what discovery was needed to oppose the motion (*see Santana v Danco Inc.*, 115 AD3d 560 [1st Dept 2014]; *see also* CPLR 3212[f]), and they did not serve

discovery demands during the years the action was pending (*see* *Patino v Drexler*, 116 AD3d 534, 534 [1st Dept 2014]).

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

ENTERED: JUNE 4, 2015

CLERK

Tom, J.P., Sweeny, Moskowitz, DeGrasse, Richter, JJ.

15305-
15306 Index 652445/11

Northern Stamping, Inc.,
Plaintiff-Appellant,

-against-

Monomoy Capital Partners, L.P.,
et al.,
Defendants-Respondents.

_____

Levin & Associates Co., LPA, Cleveland, OH (Aparesh Paul of the bar of the State of Ohio, admitted pro hac vice, of counsel), for appellant.

Crowell & Moring LLP, New York (Jack Thomas of counsel), for respondents.

_____

Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered April 11, 2014, which granted defendants' motion for summary judgment dismissing the sole remaining cause of action, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered December 12, 2013, which granted defendants' motion to strike plaintiff's expert disclosure, unanimously dismissed, without costs, as academic in light of the foregoing.

Plaintiff contends that defendants breached the January 6, 2011 agreement between it and defendant Monomoy Capital Management, L.L.C. by using "Confidential Information" for a purpose other than providing equity financing for plaintiff's and defendants' proposed joint acquisition of nonparties Steel Parts

Holdings, Inc. and Steel Parts Manufacturing, Inc. (together, Steel Parts). The provision at issue says, "[Y]ou [Monomoy Capital Management] will not use the Confidential Information for any purpose other than in respect of your defined role on the transaction."

"Confidential Information" is not defined in the confidentiality agreement. However, "Northern Stamping Confidential Information" is defined, and the provision on which plaintiff relies is in the section of the confidentiality agreement that addresses Northern Stamping Confidential Information, not the section that addresses "Target [Steel Parts] Confidential Information." Thus, we read "Confidential Information" to mean "Northern Stamping Confidential Material." However, defendants would not have needed information about *plaintiff* to acquire *Steel Parts*; they needed information about Steel Parts, and Monomoy Capital Management had a direct right to that information under a confidentiality agreement it entered into with nonparty Quarton Partners (Steel Parts' investment banker) on February 22, 2011. It did not need to depend on the confidential information about Steel Parts that plaintiff had given defendants pursuant to the January 6, 2011 confidentiality agreement (*see generally Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435, 436 [1st Dept 1988]).

Plaintiff contends that a letter that defendant Monomoy Capital Partners, L.P. sent to it on January 28, 2011 and that it countersigned on February 2, 2011 was a "Type II" agreement under federal case law, requiring defendants to exercise good faith to pursue a transaction jointly with plaintiff to acquire Steel Parts. Our Court of Appeals has rejected "the rigid classifications into 'Types'" in favor of asking "whether the agreement contemplated the negotiation of later agreements and if the consummation of those agreements was a precondition to a party's performance" (*IDT Corp. v Tyco Group, S.A.R.L.*, 13 NY3d 209, 213 n 2 [2009]). The January 28/February 2 letter agreement said that, except for certain sections not relevant on this appeal, "[a]ll other terms of this Letter constitute statements of present intention adopted to facilitate the negotiation of definitive agreements, do not constitute a contract or agreement and are not to be enforceable against Monomoy" (*see e.g. Amcan Holdings, Inc. v Canadian Imperial Bank of Commerce*, 70 AD3d 423, 427 [1st Dept 2010], *lv denied* 15 NY3d 704 [2010]).

In light of the foregoing, we need not reach plaintiff's remaining arguments.

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

ENTERED: JUNE 4, 2015

CLERK

Tom, J.P., Sweeny, Moskowitz, DeGrasse, Richter, JJ.

15307-
15307A Index 450047/13

Centennial Elevator Industries, Inc.,
Plaintiff-Appellant,

-against-

New York City Housing Authority,
Defendant-Respondent.

_____

Babchik & Young, LLP, White Plains (Erin M. Ferrone of counsel), for appellant.

David I. Farber, New York (Gil Nahmias of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Joan A. Madden, J.), entered April 25, 2014, dismissing the complaint, unanimously affirmed, without costs. Appeal from underlying order, same court and Justice, entered February 4, 2014, which granted defendant's motion to dismiss the complaint, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff and defendant NYCHA entered into a contract (the Contract) under which plaintiff was to perform elevator work at a NYCHA housing development. NYCHA directed plaintiff to store its equipment and materials at certain NYCHA-controlled locations, which subsequently experienced multiple sewage back ups, causing damage to plaintiff's equipment and materials. Plaintiff now

seeks to recover money for work it was required to perform to clean and maintain the equipment and material that got damaged by sewage back ups.

Plaintiff contends that, notwithstanding Section 24 of the Contract, under which it assumed the risk of "loss or damage to any materials or equipment" stored in any location made available by NYCHA, NYCHA is liable for damage caused by its own negligence or willful negligence. However, regardless of whether the clause effectively exculpates NYCHA, plaintiff is precluded from bringing any negligence claim because it failed to serve NYCHA with a notice of intention to commence a negligence action within 90 days after the claim arose (*see* Public Housing Law § 157[2]; General Municipal Law § 50-e[1][a]).

Plaintiff's claims are also barred by the release it signed, in which it indicated that there were no "outstanding and unsettled items . . . due and owing by NYCHA." It did not sufficiently plead or show through additional evidentiary submissions that NYCHA engaged in a course of conduct that could constitute a waiver of the release of the cleaning costs (*cf. Global Precast, Inc. v Stonewall Contr. Corp.*, 78 AD3d 432 [1st Dept 2010]; *E-J Elec. Installation Co. v Brooklyn Historical Socy.*, 43 AD3d 642 [1st Dept 2007])

In addition, plaintiff failed to provide NYCHA with timely

written notice of its claims within 20 days, as required by Section 23 of the Contract (*see Everest Gen. Contrs. v New York City Hous. Auth.*, 99 AD3d 479 [1st Dept 2012]; *4-A Gen. Contr. Corp. v New York City Hous. Auth.*, 28 AD3d 261 [1st Dept 2006]). Its contention that certain communications and actions by NYCHA's employees estopped NYCHA from relying on the notice provision is unavailing, as the alleged improper conduct either occurred after the notice period had passed (*S.J. Fuel Co., Inc. v New York City Hous. Auth.*, 73 AD3d 413, 414 [1st Dept 2010]; *cf. Conquest Cleaning Corp. v New York City School Constr. Auth.*, 279 AD2d 546 [2d Dept 2001]), or is insufficient to give rise to estoppel. In any event, the claim would be barred by the contract's no estoppel clause (*see Master Painting & Roofing Corp. v New York City Hous. Auth.*, 28 Misc3d 1235[A] [Sup Ct, New York County 2010]).

Plaintiff may not recover in quantum meruit or unjust enrichment given that the contract governs the subject matter (*Cox v NAP Constr. Co., Inc.*, 10 NY3d 592, 607 [2008]; *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388-389 [1987]).

Plaintiff also has not sufficiently pleaded fraud as a means of avoiding the release (*see* CPLR 3016[b]; *Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486 [2008]), or set forth the

elements of fraud (*see Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]). Nor has it alleged a special relationship sufficient to support a claim for negligent misrepresentation (*see Kimmell v Schaefer*, 89 NY2d 257, 263 [1996]; *Parisi v Metroflag Polo, LLC*, 51 AD3d 424 [1st Dept 2008]; *United Safety of Am. v Consolidated Edison Co. of N.Y.*, 213 AD2d 283, 285-286 [1st Dept 1995]).

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

ENTERED: JUNE 4, 2015

CLERK

Tom, J.P., Sweeny, Moskowitz, DeGrasse, Richter, JJ.

15308 Casa Wales Housing Development Fund Corp., et al., Plaintiffs-Appellants, Index 14277/06

-against-

The City of New York, Defendant-Respondent.

_____

Kaufman Dolowich & Voluck, LLP, Woodbury (Matthew J. Minero of counsel), for appellants.

Zachary W. Carter, Corporation Counsel, New York (Julie Steiner of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (John A. Barone, J.), entered February 19, 2013, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Supreme Court properly found that because the contract at issue never met the requirements of the Procurement Policy Board and Chapter 13 of the New York City Charter, it was not a final and legally binding contract, and thus both plaintiffs' contractual, and noncontractual-based causes of actions, including the claim of promissory estoppel, should be dismissed.

It is well settled that "where there is a lack of authority on the part of agents of a municipal corporation to create a liability, except by compliance with well-established

regulations, no liability can result unless the prescribed procedure is complied with and followed" (*Lutzken v City of Rochester*, 7 AD2d 498, 501 [4th Dept 1959]). Consequently, those dealing with municipal agents must ascertain the extent of the agents' authority, or else proceed at their own risk (*see Emerman v City of New York*, 34 AD2d 901 [1st Dept 1970]).

The courts of this state have long held that "no implied contract to pay for benefits furnished by a person under an agreement which is invalid because it fails to comply with statutory restrictions and inhibitions can create an obligation or liability of the city" (*Seif v City of Long Beach*, 286 NY 382, 387 [1941]; *see also Henry Modell & Co. v City of New York,* 159 AD2d 354 [1st Dept 1990], *appeal dismissed* 76 NY2d 845 [1990]).

Estoppel can be invoked against a municipality or municipal agency only in "the rarest cases" (*see Matter of Parkview Assoc. v City of New York*, 71 NY2d 274, 282 [1988], *cert denied* 488 US 801 [1988]) and this is not one of those cases. Plaintiffs were well aware of the requirements for a binding contract with the City, and these statutory requirements was expressly set forth in the proposed contract. Accordingly, they proceeded with certain expenditures at their own risk.

We have considered plaintiff's remaining claims and find them unavailing.

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

ENTERED: JUNE 4, 2015

CLERK

Tom, J.P., Sweeny, Moskowitz, DeGrasse, Richter, JJ.

15309-
15309A In re Gabriel Anthony McC.,
and Another,

Children Under the Age
of Eighteen Years, etc.,

Marianne Theresa McC., also
known as Marianne Theresa T.,
Respondent-Appellant,

Leake and Watts Services, Inc.,
Petitioner-Respondent.

_____

Kenneth M. Tuccillo, Hastings on Hudson, for appellant.

James M. Abramson, PLLC, New York (Dawn M. Orsatti of counsel), for respondent.

Law Office of Thomas R. Villecco, P.C., Jericho (Thomas R. Villecco of counsel), attorney for the children.

_____

Orders of disposition, Family Court, Bronx County (Monica Drinane, J.), entered on or about April 7, 2014, to the extent they bring up for review a fact-finding order, same court and Judge, entered on or about March 6, 2014, which found that respondent mother had permanently neglected the subject children, unanimously affirmed, without costs.

The finding of permanent neglect is supported by clear and convincing evidence of the mother's failure to plan for the future of the subject children, despite petitioner agency's

diligent efforts to strengthen the parental relationship (*see* Social Services Law § 384-b[7]). The record shows that the agency assigned a housing specialist to the mother, assisted her in her search for appropriate housing for the family, and scheduled regular visitation (*see Matter of Precious W. [Carol R.]*, 70 AD3d 486, 486-487 [1st Dept 2010]). Although the mother periodically visited the children, she failed to obtain suitable housing, which was the only requirement left before she could assume custodial parenting responsibilities (*see Matter of Jonathan Jose T.*, 44 AD3d 508, 509 [1st Dept 2007]).

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

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

ENTERED: JUNE 4, 2015

CLERK

Tom, J.P., Sweeny, Moskowitz, DeGrasse, Richter, JJ.

15311 In re Bessie Kennedy, etc., Index 101097/13
Petitioner,

-against-

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

_____

Martin Druyan and Associates, New York (Martin Druyan of counsel), for petitioner.

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

_____

Determination of respondent Police Commissioner, dated July 3, 2013, which terminated petitioner's employment as a Police Administrative Aide with the New York City Police Department, 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 [Donna M. Mills, J.], entered December 26, 2013), dismissed, without costs.

Substantial evidence supports the determination that petitioner engaged in numerous acts of misconduct, including discourteousness to coworkers and supervisors, refusal to follow the directives of her supervisors, and failure to accept appropriate work assignments. Although petitioner contends that the uniformed police personnel were hostile to her because of her union activities, she admitted making some of the charged

statements and refusing to accept work assignments. The record reflects that testimony of a civilian employee also supported some the allegations of misconduct. There exists no basis to disturb the credibility determinations of the Hearing Officer (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]).

The penalty of termination does not shock our sense of fairness in view of the number of incidents involved, and given petitioner's prior disciplinary record (*see Matter of Safir v Kelly*, 96 NY2d 32, 38-39 [2001]; *Matter of Martinez v City of New York*, 281 AD2d 187 [1st Dept 2001]).

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

ENTERED: JUNE 4, 2015

CLERK

Tom, J.P., Sweeny, Moskowitz, DeGrasse, Richter, JJ.

15313 The People of the State of New York, Ind. 2638/12
Respondent,

-against-

Nancy Garcia,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Patricia Nunez, J.), rendered January 16, 2014, convicting defendant, upon her plea of guilty, of criminal sale of a controlled substance in the third degree, and sentencing her, as a second felony drug offender, to a term of four years, unanimously affirmed.

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

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

ENTERED: JUNE 4, 2015

CLERK

Tom, J.P., Sweeny, Moskowitz, DeGrasse, Richter, JJ.

15314 Miguel A. De Los Santos, Index 307557/13
Plaintiff-Appellant,

-against-

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

_____

Subin Associates LLP, New York (Robert J. Eisen of counsel), for appellant.

Lawrence Heisler, Brooklyn, for respondents.

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Order, Supreme Court, Bronx County (Barry Salman, J.), entered October 3, 2014, which granted defendants' motion to vacate a prior order granting plaintiff's motion for summary judgment on the issue of liability upon defendants' default, and, upon vacating the prior order, denied plaintiff's motion for summary judgment, unanimously affirmed, without costs.

Defendants provided a reasonable excuse for their failure to timely oppose plaintiff's summary judgment motion. Defendants submitted, inter alia, their attorney's affirmation explaining that she was trying another case during a three-week period when defendants' opposition to plaintiff's motion was due, and that defendant Ciprian, the driver of defendant Transit Authority's bus which collided with plaintiff's vehicle, was out on medical

leave and unavailable to execute an affidavit in opposition (*see Xiao Jia Lin v Engleton*, 121 AD3d 483 [1st Dept 2014]).

Ciprian's affidavit, in which he averred that the collision occurred when plaintiff's vehicle "came into [Ciprian's] lane of travel and struck the right passenger's side of the bus," even though Ciprian "turned the steering wheel in an effort to avoid contact," adequately set forth a meritorious defense on the issue of fault in causation of the accident. The affidavit also sufficed to raise questions of fact warranting denial of plaintiff's pre-discovery motion for partial summary judgment on the issue of liability (*see Belziti v Langford*, 105 AD3d 649 [1st Dept 2013]).

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

ENTERED: JUNE 4, 2015

CLERK

Tom, J.P., Sweeny, Moskowitz, DeGrasse, Richter, JJ.

15315-
15316 John Roberts, et al., Index 116543/07
590138/08
Plaintiffs-Respondents-Appellants,

-against-

Lower Manhattan Development
Corp., et al.,
Defendants-Appellants-Respondents.

- - - - -

Lower Manhattan Development
Corporation, et al.,
Third-Party Plaintiffs-Respondents,

-against-

Regional Scaffolding/Safeway
Environmental, NY Joint Venture, LLC,
Third-Party Defendant-Appellant.

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French & Casey, LLP, New York (Susan A. Romano of counsel), for appellant.

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

Parker Waichman, LLP, Port Washington (Jay L.T. Breakstone of counsel), for respondents-appellants.

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Order, Supreme Court, New York County (Shlomo Hagler, J.), entered January 9, 2014, as amended by order entered June 27, 2014, which, to the extent appealed from as limited by the briefs, denied plaintiffs' motion for summary judgment on the issue of liability on their Labor Law § 240(1) claim and defendants' motion for summary judgment dismissing the complaint

as against defendant Lower Manhattan Development Corp. (LMDC), with leave to renew based on medical testimony regarding the injured plaintiff's hospital records, and denied third-party defendant Regional Scaffolding/Safeway Environmental, NY Joint Venture, LLC's motion for summary judgment dismissing the third-party complaint, unanimously affirmed, without costs.

On this record, it cannot be determined whether the release executed by plaintiff bars this action as against defendant LMDC or should be set aside as based on a mutual mistake of fact (*see Mangini v McClurg*, 24 NY2d 556 [1969]). Plaintiff signed the release three weeks after his fall from a scaffold, at which time he and one of third-party defendant's principals believed, according to their testimony, that his injuries were limited to fractured ribs. Less than three months after the accident, plaintiff was diagnosed with herniated discs. Defendants contend that the disc herniations were a consequence of the known injury, and that, based on that injury, plaintiff could have known of the herniated discs before signing the release if he had sought to obtain the required test. The record does not allow us to conclusively determine this question.

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

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

ENTERED: JUNE 4, 2015

CLERK

Tom, J.P., Sweeny, Moskowitz, DeGrasse, Richter, JJ.

15317 Stephane Cosman Connery, et al., Index 401336/05
Plaintiffs-Respondents,

-against-

Burton S. Sultan,
Defendant-Appellant.

_____

Burton S. Sultan, appellant pro se.

Jacobs & Burleigh LLP, New York (Zeynel M. Karcioglu of counsel), for respondents.

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Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered April 28, 2014, which denied defendant's motion seeking vacatur of a judgment (same court and Justice), entered December 3, 2012, pursuant to CPLR 5015(a)(3) and (4); dismissal of the complaint pursuant to CPLR 3211(a)(1), (2), (3) and (7); leave to amend the answer pursuant to CPLR 3025(b) to assert an affirmative defense of lack of standing or capacity to sue; and sanctions pursuant to CPLR 8303-a and 22 NYCRR § 130-1.1(a), unanimously affirmed, without costs.

Contrary to defendant's argument, a trustee may maintain an action against another "as he could maintain if he held the trust property free of trust" (Restatement [Second] of Trusts § 280). "It is unnecessary for the trustee in the pleadings or other proceedings to describe himself as trustee. He can proceed in

the action as though he were the owner of the claim which he is enforcing. If he does describe himself as trustee the description is treated as mere surplusage" (*id.*, Comment h; *see Gerel Corp. v Prime Eastside Holdings, LLC*, 12 AD3d 86, 95 n3 [1st Dept 2004]; *Haag v Turney*, 240 AD 149, 150-151 [1st Dept 1934]).

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

ENTERED: JUNE 4, 2015

CLERK

Tom, J.P., Sweeny, Moskowitz, DeGrasse, Richter, JJ.

15318N Jeverson Cruz, etc., Index 308028/08
Plaintiff-Appellant,

-against-

Lynwood Brown, et al.,
Defendants-Respondents.

_____

Levine & Slavit, PLLC, New York (Ira S. Slavit of counsel), for appellant.

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

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Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered August 14, 2014, which denied plaintiff's motion for leave to amend the complaint to assert a cause of action for wrongful death, unanimously affirmed, without costs.

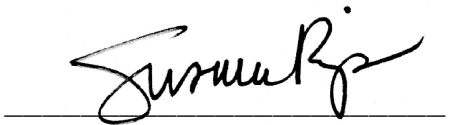
In denying leave to amend the complaint, Supreme Court erred by holding that plaintiff was required to make an evidentiary showing as to the merits of the proposed amendment, and by considering the underlying merits of the proposed wrongful death claim. "On a motion for leave to amend a pleading, movant need not establish the merit of the proposed new allegations, but must simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit" (*Miller v Cohen*, 93 AD3d 424, 425 [1st Dept 2012] [internal quotation marks omitted]).

Applying the appropriate standard, we conclude that leave to

amend was nonetheless properly denied, as plaintiff's proposed amendment is palpably insufficient. "A motion seeking leave to amend a personal injury complaint to assert a cause of action for wrongful death must be supported by competent medical proof of the causal connection between the alleged [negligence] and the death of the original plaintiff" (*McGuire v Small*, 129 AD2d 429, 429 [1st Dept 1987]). Here, the proposed claim alleges that plaintiff's decedent's 2012 death from an accidental overdose was due to the effect of injuries sustained in a 2008 automobile accident. In seeking to establish the requisite causal connection, plaintiff relies solely upon the affirmation of a medical expert, who sets forth an alleged causal link only in conclusory terms and without indicating what medical records were reviewed (see *Griffin v New York City Tr. Auth.*, 1 AD3d 141 [1st Dept 2003]).

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

ENTERED: JUNE 4, 2015



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