SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

June 9, 2015

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Acosta, Andrias, Moskowitz, Kapnick, JJ.

14539 Luis Carrion, Index 18070/06
Plaintiff-Appellant,

-against-

John Faulkner, etc., et al.,
Defendants-Respondents.

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Arnold E. DiJoseph P.C., New York (Arnold E. DiJoseph, III of counsel), for appellant.

Gannon, Rosenfarb, & Drossman, New York (Lisa L. Gokhulsingh of counsel), for respondents.

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Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about March 20, 2013, which, in an action for personal injuries sustained when plaintiff allegedly slipped on a marble step tread as he descended the stairs in defendants' building, granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The worn marble edge of the step on which plaintiff allegedly slipped is not an actionable defect (*see DiPini v 381 E. 160 Equities LLC*, 121 AD3d 465 [1st Dept 2014]; *Richards v*

Kahn's Realty Corp., 114 AD3d 475 [1st Dept 2014]). Notably, plaintiff denied that any debris on the step caused his fall, and the photographs did not reveal any major defects (*see Cintron v New York City Tr. Auth.*, 77 AD3d 410, 411 [1st Dept 2010]).

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

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

ENTERED: JUNE 9, 2015

CLERK

Tom, J.P., Sweeny, Renwick, Kapnick, JJ.

14748 In re Richard F. Strasser, Index 500072/13
Petitioner.
- - - - -
Francine Strasser, et al.,
Petitioners-Appellants.

-against-

Jeffrey A. Asher,
Respondent-Respondent.

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Greenberg & Wilner, LLP, New York (Harvey L. Greenberg of counsel), for appellants.

Robinson Brog Leinwand Greene Genovese & Gluck P.C., New York (Philip T. Simpson of counsel), for respondent.

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Order, Supreme Court, New York County (Laura Visitación-Lewis, J.), entered on or about July 17, 2014, which, to the extent appealed from as limited by the briefs, disqualified Harvey L. Greenberg, Esq. from representing Francine Strasser and Ika Brakha, the co-guardians of Edward Strasser (Mr. Strasser) the alleged incapacitated person, and ordered that the co-guardians may not be jointly represented by counsel in this matter, affirmed, without costs.

In this guardianship proceeding, attorney Greenberg was initially appointed as counsel to Mr. Strasser, the alleged incapacitated person. After completion of his representation of

Mr. Strasser, who was judicially declared an incapacitated person, the co-guardians of Mr. Strasser's person, Francine Strasser and Ika Brakha - Mr. Strasser's wife and a close family friend - retained Greenberg as counsel to assist them in trying to remove Jeffrey A. Asher, Esq., who was appointed guardian of the property. The co-guardians argue that Asher lacks standing on this appeal because he was previously removed from his position as guardian. However, the motion court's July 17, 2014 order clearly indicates that "Jeffrey A. Asher, Esq., shall continue to serve as property guardian for a transition period pending the appointment of a successor property guardian [....]" The co-guardians neither assert nor submit evidence indicating that a successor property guardian has been appointed.

The motion court's disqualification of Greenberg from representing the co-guardians was proper. The matters involved in his prior representation of Mr. Strasser in this proceeding and his current representation of the co-guardians are substantially related and the interests of Mr. Strasser and the co-guardians are materially adverse (*see Tekni-Plex, Inc. v Meyner & Landis*, 89 NY2d 123, 130-131 [1996]; *cf. Becker v Perla*, 125 AD3d 575 [1st Dept 2015]).

The motion court helt that the co-guardians may not be jointly represented by any attorney due to the potential conflict of interest arising from their mutual financial dependence on Mr. Strasser and their related competing financial interests under the terms of a trust and as beneficiaries of Mr. Strasser's will. Our dissenting colleague finds that the present posture of this case does not require each of the co-guardians to retain separate counsel, as their interests in this article 81 proceeding are aligned with their ward. This misses the point.

It is well settled that an attorney "must avoid not only the fact, but even the appearance, of representing conflicting interests" (*Cardinale v Golinello*, 43 NY2d 288, 296 [1977]; *Flores v Willard J. Price Assoc.*, LLC, 20 AD3d 343, 344 [1st Dept 2005]). "[W]ith rare and conditional exceptions, the lawyer may not place himself in a position where a conflicting interest may, even inadvertently, affect, or give the appearance of affecting, the obligations of the professional relationship" (*Matter of Kelly*, 23 NY2d 368, 376 [1968]). Moreover, "doubts as to the existence of a conflict of interest must be resolved in favor of disqualification" (*Justinian Capital SPC v WestLB AG, N.Y. Branch*, 90 AD3d 585, 585 [1st Dept 2011] [internal quotation marks omitted]). Full disclosure and prior consent by the

parties may, on occasion, obviate the objection to conflicting representation (*Matter of Kelly*, 23 NY2d at 376).

Applying these principles to the facts of this case, we find that the motion court properly determined that joint representation of the co-guardians by a single counsel would be improper. While an actual conflict may not have arisen "at this time" and in this proceeding as the dissent posits, there is clearly a potential conflict of interest due to the co-guardians' mutual financial dependence on Mr. Strasser, their related competing financial interests under the terms of a certain trust, and their status as beneficiaries under Mr. Strasser's will.

Despite the co-guardians having provided written waivers for attorney Greenberg, who the dissent concedes should not represent the co-guardians, each co-guardian has a competing and conflicting interest in maximizing her proportional share of the trust created by Strasser for their benefit. Strasser created the trust for the support of his wife, co-guardian Francine Strasser. The trustee is his friend and other co-guardian, Ika Brakha. The trust residuary will pass to Ika Brakha on Francine's demise. The more assets spent during Francine's lifetime will of necessity mean less assets that will pass to Ika. Thus, representation by a single firm or attorney would

create the potential for a conflict, and impermissibly place that lawyer in a position which would give the appearance of representing conflicting interests (*Roddy v Nederlander Producing Co. of Am., Inc.*, 96 AD3d 509 [1st Dept 2012]; *see Flores v Willard J. Price Assoc.*, 20 AD3d at 344). They should therefore retain separate counsel in order to avoid the appearance of impropriety (*see Solow v Grace & Co.*, 83 NY2d 303, 309 [1994]; *Roddy* at 509-510), and to maintain the integrity of the guardianship.

All concur except Kapnick, J. who dissents in part in a memorandum as follows:

KAPNICK, J. (dissenting in part)

I agree that Greenberg must be disqualified from representing the co-guardians since, at the onset of his representation of Edward Strasser in this article 81 proceeding, Mr. Strasser did not wish to have a guardian appointed, thus creating "materially adverse" interests between the former client and the current clients (Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.9[a]). Moreover, Mr. Strasser was unable to give "informed consent" (*id.*) to Greenberg's subsequent representation of the co-guardians due to Mr. Strasser's cognitive impairment.

However, I disagree that Mrs. Strasser and Ika Brakha, the two co-guardians of Mr. Strasser's person, must each retain their own separate counsel at this time. While the circumstances that the co-guardians have competing financial interests under a certain trust and are both beneficiaries under Mr. Strasser's will, which were cited by the motion court as to why there cannot be a joint representation, would prevent an attorney from jointly representing the co-guardians in a matter where these issues were specifically being litigated, these issues do not create a conflict in the instant article 81 proceeding, where both co-guardians are advocating for, and have a fiduciary duty to, Mr. Strasser. In any event, the co-guardians here are serving as

guardians of the *person*, not the *property*, further insuring that any potential conflicts the co-guardians may have under a certain trust or Mr. Strasser's will should not impede their choice to be jointly represented in this proceeding. To be clear, however, this is not to say that Mr. Strasser and the co-guardians may be jointly represented.

In addition, there is no indication that the joint representation here "involve[d] the lawyer in representing differing interests" (Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.7[a][1]), where the co-guardians were aligned in their request to remove the property guardian for nonfeasance and/or malfeasance as to his handling of Mr. Strasser's financial affairs. Even if the instant representation had raised any conflict, the co-guardians each gave their written consent to the representation and waived any potential conflict of interest in accordance with rule 1.7, and there is no contention that the disclosure or consents were inadequate.

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

ENTERED: JUNE 9, 2015

CLERK

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

14835 In re Bari A. Brower, 113843/10
Petitioner-Appellant, 100594/13

-against-

New York City Department
of Education,
Respondent-Respondent.

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Noah A. Kinigstein, New York, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Diana Lawless of counsel), for respondent.

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Judgment, Supreme Court, New York County (Manuel J. Mendez, J.), entered January 21, 2014, denying the petition to annul respondent's determination, dated December 20, 2012, which sustained the issuance of an unsatisfactory rating (U-rating) of petitioner's performance as a teacher for the 2006-2007 school year, and dismissing the proceeding, unanimously reversed, on the law, without costs, the petition granted, petitioner's U-rating for the 2006-2007 school year vacated, and the matter remanded to respondent for further proceedings consistent herewith.

Petitioner was certified by the State of New York as a public school teacher for grades 1 through 6 in September 2006. On August 31, 2006, she was appointed as a probationary kindergarten teacher with the Department of Education (DOE), and

was assigned to P.S. 1 in the Bronx. She received a satisfactory rating in her first formal observation, on November 21, 2006. However, she received an unsatisfactory rating after an "informal observation" on January 10, 2007.

Later in January 2007, the principal discovered that petitioner, who was only licensed to teach grades 1-6, was teaching out of license at the kindergarten level, and reassigned her to a first-grade class. Although respondent asserts that the transfer occurred in January, petitioner states that it occurred in March, seven months into the school year. In any event, it was a mid-year transfer into what petitioner describes as a "very difficult class." She alleges, inter alia, that five teachers had been assigned to the class in 2006-2007 and all had been reassigned or resigned; that many of the children in the class had severe behavior problems; and that the class was in effect "an unspecified 'special education' class."

On April 17, 2007, shortly after petitioner had been transferred to the new class, an assistant principal conducted a formal observation of petitioner's first-grade class, and rated petitioner unsatisfactory. The observation report found, inter alia, that during the lesson, two students were running around the room, and one ran out of the classroom; that petitioner did

not "address the needs" of two named students; and that petitioner "did not bring the lesson to summation" when the period ended.

A third and final formal observation for the 2006-2007 school year was scheduled for June 12, 2007, but never occurred. In a June 14, 2007 letter to petitioner, the principal related the relevant events and concluded that petitioner "impeded [the observation] process from taking place" by twice rescheduling and postponing the dates set for her pre-observation conference, as well as for the formal observation, claiming illness and failing to follow the proper procedure for absences.

On June 15, 2007, petitioner received and signed her annual review for the 2006-2007 school year, which rated her unsatisfactory in 17 of the 23 categories listed on the rating sheet. The review further showed that petitioner was absent from school 11 times during the school year.

By letter dated June 15, 2007, the Community Superintendent for District 7 informed petitioner that her file would be reviewed for a determination of whether her services as a probationary teacher would be discontinued and whether her teaching license would be terminated as of the close of business on July 15, 2007. The letter stated:

> "The consideration of your discontinuance is based on professional attitude and professional growth; attention to records and reports; unsatisfactory classroom performance; poor planning and preparation; skill in adapting instruction to the individual needs of the students; evidence of pupil growth in knowledge and skills."

This letter constituted the charging document that was the basis of the ensuing hearing. Notably missing from the charging document was any mention of excessive absences.

By letter dated July 16, 2007, the Community Superintendent for District 7 informed petitioner of the "reaffirm[ance of her] Discontinuance of Probationary Service and Termination." On November 20, 2007, an officially designated Chancellor's Committee, composed of three members, conducted a review of the decisions to issue petitioner a U-rating for the 2006-2007 school year, to discontinue her probationary service, and to revoke her New York City teaching certificate.

After considering the documents and testimony presented at the review, the majority of the Chancellor's Committee concurred as to the recommendation to discontinue petitioner's probationary service. However, "[r]ecognizing that [petitioner] is young and inexperienced and that she had to take over a new class, which may have been more of a challenge than she could handle," the Committee "reached unanimous[] non-concurrence on the

recommendation to terminate all license(s)/certificate(s) held by [petitioner]."

Approximately 2 ½ years later, by letter dated June 22, 2010, the Chancellor's designee informed petitioner that he had "reviewed the report of my Committee concerning the recommendation that all your teaching certificate(s)/licenses be terminated . . . and that your probationary service as a Teacher of Common Branches be discontinued," and had determined to sustain the recommendation. Accordingly, all of petitioner's licences/certificates to teach in New York City were terminated effective July 16, 2007. As petitioner notes, this determination was made notwithstanding the unanimous view of the Chancellor's Committee that the recommendation to terminate all her licenses/certificates held by petitioner should not be adopted.

This is petitioner's second CPLR article 78 proceeding. In the prior proceeding, the court concluded that the petition to review the termination of petitioner's probationary employment was time-barred, but granted the proceeding to the extent of annulling the unsatisfactory rating and revocation of petitioner's teaching license and remanding the matter for a new hearing on petitioner's unsatisfactory rating and the imposition of a penalty (*see Matter of Brower v New York City Dept. of*

Educ., 38 Misc 3d 291 [Sup Ct, NY County 2012]).

In the prior proceeding, the court also found, inter alia, that respondent failed to give petitioner adequate notice that absenteeism was a basis for its considering adverse action against her and thus that its reliance on petitioner's attendance record violated due process. Nevertheless, on remand, respondent again relied on evidence of absenteeism, as did the court in upholding petitioner's U-rating in the instant proceeding.

We find that respondent acted in a manner that was arbitrary and capricious. While the evidence of pedagogical deficiency – apart from the evidence of absenteeism – might, by itself, be sufficient to warrant the U-rating, that is for respondent to decide.

If, on remand, respondent declines to sustain petitioner's unsatisfactory rating, respondent is free to reconsider the termination of her probationary employment (*see Matter of Brower v New York City Dept. of Educ.*, 38 Misc 3d 291). If, on the other hand, respondent sustains the unsatisfactory rating, it is precluded from imposing the penalty of revocation of her teaching license because the judgment in the first article 78 proceeding directed that the penalty, if any, should be something less than revocation of petitioner's license, and respondent did not appeal

from that judgment.

Petitioner here presents a much stronger case than that of the petitioner in *Matter of Brown v Board of Educ. Of the City School Dist. of the City of N.Y.* (89 AD3d 486 [1st Dept 2011]), which involved a single improperly considered document that ostensibly related to the same issue – i.e., pedagogical quality – the evidence of which we ultimately found adequate. Here, the disputed evidence relates to a different issue. Further, it is notable that both the post-hearing report of the ALJ on remand and the decision in the second article 78 proceeding paid considerable attention to the question of absenteeism. It is also noteworthy that, as the article 78 court in the first proceeding noted, the U-rating was based in large part on one formal evaluation during petitioner's short time as a first grade teacher. While there was certainly evidence supporting the U-rating, it should be noted that petitioner was transferred from the class that she had been teaching since the start of the school year to a new class sometime between January and March. Finally, it is significant that the wrongful admission of evidence in this case occurred after a specific direction from the court that evidence of absenteeism was not authorized, based on the charges.

Accordingly, we remand the matter to respondent for reconsideration of petitioner's performance rating for the 2006-2007 school year based solely on the evidence related to the charges of which petitioner received proper notice.

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

ENTERED: JUNE 9, 2015

CLERK

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

14981 Bryan Hockler, Index 190235/13
Plaintiff-Respondent,

-against-

The William Powell Company,
Defendant-Appellant.

_____

Clemente Mueller, PA, New York (William F. Mueller of counsel), for appellant.

Levy Konigsberg LLP, New York (Brendan Tully of counsel), for respondent.

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Order, Supreme Court, New York County (Sherry Klein Heitler, J.), entered October 23, 2014, which denied defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the motion granted, and the complaint dismissed. The Clerk is directed to enter judgment accordingly.

Plaintiff alleges that he developed peritoneal mesothelioma as a result of his exposure to asbestos in the course of work he did in the 1980s dismantling and salvaging scrap metal from, among other things, the steam systems in vacant buildings. Defendant, the William Powell Company (Powell), manufactured valves that contained asbestos in their packing and gaskets. Plaintiff alleges that these valves were among the metal

components that he recovered as scrap metal. Plaintiff's claims against Powell are based on theories of strict products liability and negligence in the defective design of the valves. We reverse because, even assuming Powell's valves were defectively designed, plaintiff's injuries did not result from their intended or unintended but reasonably foreseeable use (*see Hoover v New Holland N. Am., Inc.*, 23 NY3d 41, 53-54 [2014]).

When asked to explain how he was exposed to asbestos, plaintiff testified:

> "A lot of this stuff was very old stuff, covered in - what I know now is asbestos. We would rip it off, smash it off, cut it off. Any way we could get it off these valves and pumps, cut or smash, break any way we could get them out."

"A manufacturer who sells a product in a defective condition is liable for injury which results to another when the product is used for its intended purpose or for an unintended but reasonably foreseeable purpose" (*Lugo v LJN Toys*, 75 NY2d 850, 852 1990] [citations omitted]; *see also New Holland* at 53-54). The issue, which has not been squarely addressed by the courts of this State, is whether dismantling constitutes a reasonably foreseeable use of a product.

Although superseded in 1997 by Restatement (Third) of Products Liability, Restatement (Second) of Torts § 402A has

since been cited as authority by the Court of Appeals (*see e.g. Sprung v MTR Ravensburg*, 99 NY2d 468, 473 [2003]).[1]

We reference section 402A because it has been cited as authority by courts of other jurisdictions in determining whether salvaging and demolishing constitute foreseeable uses of a product. For example, *Wingett v Teledyne Indus., Inc.* (479 NE2d 51 [Ind 1985], *overruled on other grounds Douglass v Irvin*, 549 NE2d 368 [Ind 1990]) was an action brought by a demolition worker who fell and was injured when a segment of ductwork that he sat upon collapsed as he was cutting it (*id.* at 53). Citing section 402A, the Supreme Court of Indiana affirmed an order granting

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[1]Section 402A states as follows:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although:

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

summary judgment dismissing the demolition worker's strict products liability claim, finding that "the dismantling and demolition of the ductwork was not a reasonably foreseeable use of the product ... " (*id.* at 56). Applying the same reasoning, the Court also affirmed the dismissal of the negligence claim finding that, as a matter of law, the manufacturer of the ductwork owed no duty to the demolition worker (*id.*). Adopting the reasoning of the Court in *Wingett*, we find that plaintiff's salvage work was not a reasonably foreseeable use of the valves manufactured by Powell.

The plaintiff in *High v Westinghouse Elec. Corp.* (610 So 2d 1259 [Fl 1992]) was a scrap metal salvage worker who came into injurious contact with polychlorinated biphenyls (PCBs) while dismantling junked electrical transformers (*id.* at 1260-1261). Citing section 402A, the Supreme Court of Florida found no liability under the plaintiff's strict products liability claim holding that dismantling is not an intended use of a product (*id.* At 1262).[2] In *Kalik v Allis-Chalmers Corp.*(658 F Supp 631 [WD Pa

[2]The *High* Court did find a triable issue of fact as to whether a timely warning of the dangerous propensities of PCBs was given (*id.* at 1262-1263). Based on our own jurisprudence we, nonetheless, find no triable issue of fact regarding a duty to warn in this case because, as we note above, dismantling is not a foreseeable use of the valves manufactured by Powell. A

1987], the court also cited section 402A in holding that "the dismantling and processing of junk electrical components was not a reasonably foreseeable use of [General Electric Company's] products" (*id.* at 635]). We find these decisions persuasive. "To recover for injuries caused by a defective product, the defect must have been a substantial factor in causing the injury, and 'the product must have been used for the purpose and in the manner normally intended or in a manner reasonably foreseeable'" (*Hartnett v Chanel, Inc.*, 97 AD3d 416, 419 [1st Dept 2012], *lv denied* 19 NY3d 814 [2012][citation omitted]). As plaintiff did not use Powell's manufactured product in a reasonably foreseeable manner and his salvage work was not an intended use of the product, the complaint should have been dismissed.

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

ENTERED: JUNE 9, 2015

CLERK

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manufacturer has no duty to warn against latent dangers that do not result "from foreseeable uses of its products of which it knew or should have known" (*cf. Rastelli v Goodyear Tire & Rubber Co.*, 79 NY2d 289, 297 [1992]).

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

15343 The People of the State of New York Ind. 569/12
Respondent,

-against-

Christopher Banchs,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Cassandra Mullen, J.), rendered April 9, 2013, convicting defendant, after a jury trial, of robbery in the first degree, grand larceny in the fourth degree and criminal possession of a weapon in the third degree, and sentencing him, as a second felony offender, to an aggregate term of eight years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence supports the conclusion that at the time defendant took the victim's property (a baseball cap), defendant acted with the requisite intent to permanently deprive the victim of it (*see* Penal Law § 155.00[3]; *People v Kirnon*, 39 AD2d 666, 667 [1st Dept 1972], *affd* 31 NY2d 877

[1972]). Defendant's later abandonment of the baseball cap does not vitiate the evidence of defendant's intent; the video and audio recording of the crime showed him using a weapon to retain the cap when the victim initially followed him out of the subway car.

While some of the prosecutor's comments would have been better left unsaid, viewed as a whole, her summation did not deprive defendant of a fair trial (*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]). Just prior to summations, the court instructed the jury that if it sustained an objection to a "comment of a lawyer, the comment is stricken from the record and you must disregard it." The court then sustained defense counsel's objections to those of the prosecutor's comments that were inappropriate, including her final statement to the jury, "I am asking you to go back in that room and do what you swore to do, find the defendant guilty." The jury is presumed to have followed the court's earlier instruction to disregard comments to

which it sustained an objection. In any event, in light of the overwhelming evidence of defendant's guilt, any error was harmless.

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

ENTERED: JUNE 9, 2015

CLERK

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

15344 Keyona Vincent, Index 301938/11
Plaintiff-Respondent,

-against-

New York City Housing Authority,
Defendant-Appellant.

_____

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

Law Offices of Michael S. Lamonsoff, PLLC (Ryan Lawler of counsel), for respondent.

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Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered April 25, 2014, which, to the extent appealed from, denied defendant New York City Housing Authority's (NYCHA) motion for summary judgment dismissing plaintiff's mold claims based on her failure to file a timely notice of claim and, sua sponte, deemed the late notice of claim timely filed nunc pro tunc, unanimously reversed, on the law, without costs, and the motion granted.

Plaintiff alleges that she suffered exacerbation of her asthma as the result of exposure to mold in her apartment, which resulted from a leak that had been ongoing since May of 2010. She was required to file a notice of claim within 90 days after "the date of [her] discovery of the injury" or the date on which

"through the exercise of reasonable diligence the injury should have been discovered" (CPLR 214-c[3]; *see* General Municipal Law § 50-e[1][a]; *see also Galarza v New York City Hous. Auth.*, 99 AD3d 545 [1st Dept 2012]). NYCHA established that plaintiff's claim accrued no later than February 2011, by relying on plaintiff's testimony that her asthma symptoms worsened, resulting in more frequent attacks and hospital visits, starting in September or December of 2010, or January or February of 2011, when she was prescribed additional medications, as reflected in her hospital records. Thus, the notice of claim, filed over 90 days later in June 2011, without leave of court, was late and without effect (*see McGarty v City of New York*, 44 AD3d 447 [1st Dept 2007]).

Plaintiff argues that her claim did not accrue until March 2011, when a doctor noted a connection between her symptoms and the mold in her apartment. However, a "cause of action for damages resulting from exposure to toxic substances accrues when the plaintiff begins to suffer the manifestations and symptoms of his or her physical condition, i.e.[,] when the injury is apparent, not when the specific cause of the injury is identified" (*Searle v City of New Rochelle*, 293 AD2d 735, 736 [2d

Dept 2002]; *see also Martin v 159 W. 80 St. Corp.*, 3 AD3d 439, 439-440 [1st Dept 2004]).

The court lacked authority to deem the late notice of claim timely filed nunc pro tunc, since plaintiff never moved for such relief and the statutory time limitation for bringing the claim had already expired when NYCHA moved for summary judgment (*see* General Municipal Law § 50-e[5]; Public Housing Law § 157[2]; *Pierson v City of New York*, 56 NY2d 950, 954-956 [1982]; *Harper v City of New York*, 92 AD3d 505 [1st Dept 2012]).

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

ENTERED: JUNE 9, 2015

CLERK

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

15345 In re John W.,
Petitioner-Respondent,

-against-

Melissa G.,
Respondent-Appellant.

_____

Steven N. Feinman, White Plains, for appellant.

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

Larry S. Bachner, Jamaica, attorney for the child.

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Order, Family Court, New York County (Gloria Sosa-Lintner, J.), entered on or about January 27, 2014, which, to the extent appealed from as limited by the briefs, awarded petitioner father sole physical and legal custody of the child, unanimously affirmed, without costs.

In awarding sole physical and legal custody to the father, the court properly took into account the best interests of the

child based on its review of the totality of the circumstances (*Eschbach v Eschbach*, 56 NY2d 167, 172-174 [1982]).

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

ENTERED: JUNE 9, 2015

CLERK

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

15346-
15346A Index 652058/12

Antoine Khalife, et al.,
Plaintiffs-Appellants,

-against-

Audi Saradar Private Bank SAL,
Defendant-Respondent.

_____

Paul Batista, P.C., New York (Paul Batista of counsel), for appellants.

Dechert LLP, New York (Gary J. Mennitt of counsel), for respondent.

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Judgment, Supreme Court, New York County (Jeffrey K. Oing, J.), entered June 19, 2014, dismissing the complaint, unanimously affirmed, without costs. Order, same court and Justice, entered June 9, 2014, which granted defendant's motion to dismiss the complaint in its entirety for lack of personal jurisdiction, forum non conveniens, and failure to plead foreign law under CPLR 3016 (e), unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The court properly determined that it lacks personal jurisdiction over the defendant bank because there was no articulable nexus or substantial relationship between the securities transactions executed through defendant bank's omnibus

trading account with a US bank account and the freezing of plaintiffs' bank accounts in Lebanon by defendant bank and the Lebanese authorities. Further, none of the four causes of action alleged by plaintiffs contain any element relying upon the US securities transactions (*see Licci v Lebanese Can. Bank, SAL*, 20 NY3d 327, 340-341 [2012]). Instead, all four claims are based solely upon actions taken by defendant bank in Lebanon.

In light of the lack of personal jurisdiction, we need not determine whether the complaint was subject to dismissal on forum non conveniens or CPLR 3016(e) grounds (*see Ehrlich-Bober & Co. v University of Houston*, 49 NY2d 574, 579 [1980]).

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

ENTERED: JUNE 9, 2015

CLERK

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

15347 Blanca Soltero, Index 305833/09
Plaintiff-Respondent,

-against-

City of New York,
Defendant-Appellant.

_____

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

Law Offices of Lawrence P. Biondi, Garden City (Lisa M. Comeau of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered November 19, 2013, after a jury trial, to the extent appealed from as limited by the briefs, awarding plaintiff $246,000 for past loss of earnings, plus interest at the rate of 9% per year from the date of the verdict, unanimously modified, on the law, to vacate the award of interest, and remand the matter to calculate interest at the rate of 3% per year from the date of the verdict, and otherwise affirmed, without costs.

The jury's award for past loss of earnings was not speculative or excessive, as it was based on the evidence adduced at trial, including, among other things, plaintiff's testimony and income tax returns (*see Estate of Ferguson v City of New York*, 73 AD3d 649, 650 [1st Dept 2010]).

Pursuant to Public Authorities Law § 1212(6), the rate of interest on the judgment may be no more than 3% per year. Although the judgment is against the City, and not the New York City Transit Authority, which is not a party to this action, the Transit Authority is the real party in interest, as it is bound to indemnify the City pursuant to a lease, and will ultimately pay the judgment (*see Ebert v New York City Health & Hosps. Corp.*, 82 NY2d 863, 866-867 [1993]; *see also Williams v City of New York*, 111 AD3d 420 [1st Dept 2013]). Therefore, the interest rate set forth in Public Authorities Law § 1212(6) applies to the judgment (*Williams*, 111 AD3d at 420). Although the City did not object to the interest rate when the judgment was proposed for settlement, the 3% interest rate is mandated by statute, and the error should be corrected (*see id.*).

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

ENTERED: JUNE 9, 2015

CLERK

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

15348 Phyllis Auliano, et al., Index 114265/11
Plaintiffs-Respondents,

-against-

145 East 15th Street Tenants Corp., et al.,
Defendants-Appellants,

Master Renovation, Inc.,
Defendant-Respondent.

_____

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

Ginsberg & Wolf, P.C., New York (Martin Wolf of counsel), for Phyllis Auliano and John Auliano, respondents.

Jacobson & Schartz, LLP, Jericho (Paul Goodovitch of counsel), for Master Renovation, Inc., respondent.

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Order, Supreme Court, New York County (Joan M. Kenney, J.), entered November 5, 2014, which, among other things, denied defendants 145 East 15th Street Tenants Corp. and Orsid Realty Corp.'s (collectively 145 East) motion for summary judgment dismissing the complaint against them or, in the alternative, for summary judgment on their cross claim for contractual indemnification against defendant Master Renovation, Inc., unanimously modified, on the law, to grant 145 East conditional summary judgment on the contractual indemnification claim, and

otherwise affirmed, without costs.

The court correctly denied 145's motion, and Master's cross motion, for summary judgment dismissing the complaint. Issues of fact exist as to whether the condition that allegedly caused plaintiff Phyllis Auliano's fall was open and obvious, given, among other things, plaintiff's testimony that the area was "dim," the colored photographs of the area showing that a window was covered with heavy latticework, and the lack of any handrails or guardrails, which may have alerted plaintiff to a potentially dangerous condition (*see Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69, 70-72 [1st Dept 2004]; *see also Thornhill v Toys "R" Us NYTEX*, 183 AD2d 1071, 1073 [3d Dept 1992]). The evidence also raises issues of fact as to whether defendants breached their common-law duty to maintain the area in a reasonably safe condition by failing to provide adequate lighting, barriers, warnings, handrails or guardrails (*see Westbrook*, 5 AD3d at 72-75). Further, there are issues of fact as to whether defendants violated Administrative Code of the City of New York § 27-381 (requiring adequate illumination), and whether Master violated former Administrative Code § 27-1009[a]) (amended and renumbered as § 3301.2 [eff July 1, 2008]) (requiring contractors to provide and maintain safety measures).

145 East is entitled to conditional summary judgment on its cross claim for contractual indemnification against Master, given the broad indemnification clause in the contract between the parties, which does not purport to indemnify 145 East for its own negligence, and given that issues of fact exist as to 145 East's negligence (*see Johnson v Chelsea Grand E., LLC*, 124 AD3d 542 [1st Dept 2015]; *DeSimone v City of New York*, 121 AD3d 420, 422-423 [1st Dept 2014]).

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

ENTERED: JUNE 9, 2015

CLERK

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

15349 The People of the State of New York, Ind. 2942/12
Respondent,

-against-

Sherod Andrews,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Allen J. Vickey of counsel), for respondent.

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Judgment, Supreme Court, New York County (Renee A. White, J.), rendered March 5, 2013, convicting defendant, upon his plea of guilty, of attempted robbery in the second degree, and sentencing him to a term of 2 years, unanimously modified, on the law, to the extent of vacating the sentence and remanding for resentencing, and otherwise affirmed.

As the People concede, defendant is entitled to resentencing for an express youthful offender determination (*see People v*

Rudolph, 21 NY3d 497 [2013]). Accordingly, we need not address defendant's remaining arguments regarding his sentence.

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

ENTERED: JUNE 9, 2015

CLERK

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

15350 Jozef Serowik, et al., Index 309306/10
Plaintiffs-Respondents, 83704/11

-against-

Leardon Boiler Works Inc., et al.,
Defendants-Appellants-Respondents.

- - - - -

Leardon Boiler Works Inc., et al.,
Third-Party Plaintiffs-
Appellants-Respondents,

-against-

GDT Associates, Inc.,
Third-Party Defendant-
Respondent-Appellant.

_____

French & Casey, LLP, New York (Joseph A. French of counsel), for appellants-respondents.

Nicoletti Gonson Spinner LLP, New York (Kevin S. Locke of counsel), for respondent-appellant.

Saftler & Bacher, PLLC, New York (Lawrence B. Saftler of counsel), for respondents.

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Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered August 23, 2013, which granted plaintiff Jozef Serowik's motion for partial summary judgment on liability on his claim pursuant to Labor Law § 240(1), denied defendants/third-party plaintiffs' motion for summary judgment dismissing the complaint, and on their third-party claims for common law indemnification and

contribution, and denied third-party defendant GDT Associates, Inc.'s (GDT) motion for summary judgment dismissing plaintiff's Labor Law § 240(1) and 241(6) claims, unanimously modified, on the law, defendants/third-party plaintiffs' motion granted to the extent of dismissing the common law negligence and Labor Law § 200 claims and awarding them conditional summary judgment on their third-party claim for common law indemnification, and otherwise affirmed, without costs.

Plaintiff, an employee of GDT, was injured while helping to lower a tank weighing at least four to five hundred pounds down a flight of stairs. The tank was attached to one end of the rope, and plaintiff and four others held the rope near the other end, to act as counterweights slowing the tank's descent. However, when the tank was pushed over the edge of the top step, plaintiff was pulled forward into a pipe around which the rope was wrapped, resulting in the rope severing his index finger and part of his middle finger, a grave injury pursuant to Workers' Compensation Law § 11.

Plaintiff's injury was due to the application of gravity to the tank, and the elevation differential was not de minimis given the weight of the tank, which generated sufficient force to pull plaintiff into the pipe and cause injury (*Runner v New York Stock*

Exch., Inc., 13 NY3d 599, 605 [2009]). Even if he had wrapped the rope around his arm, such action was not the sole proximate cause of his accident, as plaintiff was not provided with adequate safety devices. In addition, plaintiff's work was a necessary step in the installation of the tank in the building, constituting alterations or other activities protected by Labor Law § 240(1) (*see Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 882-883 [2003]). Accordingly, the motion court correctly granted plaintiff summary judgment as to liability on his claim under section 240(1).

Contrary to defendants/third-party plaintiffs' argument that defendant Leardon Boiler Works, Inc. (Leardon) was not a general contractor that may be liable under the Labor Law, Leardon contracted with defendant owner 125 East 84th Street Corporation to install a new boiler system at the premises, and may be held liable under the Labor Law as the agent of the owner for injuries arising from work within the scope of its contract *(Russin v Louis N. Picciano & Sons*, 54 NY2d 311, 318 [1981]).

To the extent the motion court denied defendants/third party plaintiffs' cross motion for failure to annex copies of the pleadings, it erred since the moving papers were "sufficiently complete" inasmuch as copies of the pleadings had been submitted

by plaintiff and GDT (*Washington Realty Owners, LLC v 260 Wash. St., LLC*, 105 AD3d 675 [1st Dept 2013][internal quotation marks omitted]). Because defendants/third-party plaintiffs did not supervise or control plaintiff's work, they are entitled to dismissal of plaintiff's Labor Law § 200 and common law negligence claims (*Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 AD3d 446, 449 [1st Dept 2013]). They are also entitled to common law indemnification on their third-party claims for the same reason.

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

ENTERED: JUNE 9, 2015

CLERK

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

15351-
15352 Professional Staff Congress/CUNY, etc., et al.,
Plaintiffs-Appellants,

-against-

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

- - - - -

In re Professional Staff Congress/CUNY, etc., et al.,
Petitioners-Appellants,

-against-

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

Queensborough Community College, et al.,
Respondents.

Index 151021/12
103414/12

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Meyer, Suozzi, English & Klein, P.C., New York (Hanan B. Kolko of counsel), for appellants.

Eric T. Schneiderman, Attorney General, New York (Andrew W. Amend of counsel), for respondents.

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Order, Supreme Court, New York County (Anil C. Singh, J.), entered February 24, 2014, which granted defendants' motion to dismiss the complaint, unanimously affirmed, without costs. Judgment, same court and Justice, entered February 28, 2014, denying the petition for, among other things, an order declaring that respondents violated the Open Meetings Law, and dismissing

the proceeding, unanimously affirmed, without costs.

Contrary to plaintiffs' argument, the settlement agreement that defendants are alleged to have breached does not extend to the faculty the exclusive power to formulate university-wide academic admissions and accreditation policies such as the "Pathways to Degree Completion Initiative" approved by respondent Board of Trustees in the June 27, 2011 resolution. The settlement agreement attached a resolution reaffirming Board bylaws stating that the "faculty shall be responsible" for the formulation of academic policy relating to curriculum, credits and granting of degrees (current Board Bylaws § 8.5); referencing the University Faculty Senate's responsibility for formulating policy relating to university-level educational and instructional matters; and setting forth the Board's resolution that "such policies will then be considered by the Board ... in making policy decisions relating to educational matters."

Petitioners failed to assert a viable claim of violation of the Open Meetings Law (Public Officers Law § 100). They allege that respondents improperly charged the college presidents, who are not public bodies whose actions are subject to the Open Meetings Law (Public Officers Law § 103[a]), rather than the college faculty senates, which are public bodies subject to the

Open Meetings Law, with formulating plans to implement the "Pathways to Degree Completion Initiative" (*see Matter of Perez v City Univ. of N.Y.*, 5 NY3d 522 [2005]). This is a claim that respondents violated Board of Trustees bylaws or college governance plans so as to sidestep the Open Meetings Law; it does not state a direct claim under the Open Meetings Law.

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

ENTERED: JUNE 9, 2015

CLERK

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

15353 Mark A. Smith, Index 570657/10
Plaintiff-Appellant,

-against-

The Girls Club of New York,
Defendant-Respondent.

_____

Mark A. Smith, appellant pro se.

McGaw, Alventosa & Zajac, Jericho (James K. O'Sullivan of counsel), for respondent.

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Order of the Appellate Term of the Supreme Court, First Department, entered December 13, 2012, which affirmed two orders, Civil Court, Bronx County (Irving Rosen, J.H.O.), entered June 16, 2009 and May 19, 2010, respectively, denying plaintiff's motion for partial summary judgment on his Labor Law § 240(1) claim and, upon renewal, adhering to that determination, unanimously affirmed, without costs.

The record shows that plaintiff was injured while voluntarily participating in a community service program in lieu of incarceration. Accordingly, the court correctly denied plaintiff's motion for partial summary judgment, since he failed to establish that he was an "employee" entitled to the

protections of Labor Law § 240(1) (*see Stringer v Musacchia*, 11 NY3d 212 [2008]; *Whelen v Warwick Val. Civil & Social Club*, 47 NY2d 970, 971 [1979]; *Pigott v State of New York*, 199 AD2d 734 [3d Dept 1993]). The evidence does not support plaintiff's assertion that he was employed by an agent of defendant, and his reliance on the Workers' Compensation Law is unavailing. Nor does the alleged new evidence submitted by plaintiff in support of his motion to renew warrant a different result (*see Gal-Ed v 153rd St. Assoc., LLC*, 73 AD3d 438, 439 [1st Dept 2010]).

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

ENTERED: JUNE 9, 2015

CLERK

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

15354 The People of the State of New York, Ind. 6528/10
Respondent,

-against-

Jesus Vega,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (John T. Hughes of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered March 6, 2012, convicting defendant, after a jury trial, of criminal contempt in the first degree, and sentencing him, as a second felony offender, to a term of 1¾ to 3½ years, unanimously affirmed.

The evidence was legally sufficient to establish each of the elements of criminal contempt in the first degree (Penal Law § 215.51[b][iv]). To the extent defendant argues that the evidence was legally insufficient to establish his intent to harass, annoy, threaten or alarm the victim, it is not fully preserved, as this argument was never made to the trial court. Defendant's only claim before the trial court was that there was insufficient proof that he did not act with a legitimate purpose. Even if

defendant's present claim could be deemed to be adequately preserved, we would reject it. When viewed in the context of defendant's abusive relationship with the victim, and the orders of protection against defendant, the evidence supports the conclusion that defendant called the victim with the requisite intent to harass, annoy, threaten or alarm her and with no legitimate purpose (*see People v Tomasky*, 36 AD3d 1025, 1026 [3d Dept 2007], *lv denied* 8 NY3d 927 [2007]. The evidence also sufficiently established the element of identity, and the requirement that the calls be made repeatedly.

We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 9, 2015

CLERK

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

15355-
15356 Index 150244/12

Rachel H. Peterman,
Plaintiff-Appellant,

-against-

New York College of Traditional Chinese Medicine, et al.,
Defendants-Respondents,

John Does 1-10,
Defendants.

_____

Sanford Hausler, New York, for appellant.

Kaufman Dolowich & Voluck, LLP, New York (George Meierhofer of counsel), for respondents.

_____

Order, Supreme Court, New York County (Ellen M. Coin, J.), entered March 8, 2013, which, to the extent appealed from as limited by the briefs, granted defendant's motion to dismiss the cause of action for negligence, and order, same court and Justice, entered on or about July 25, 2013, which, upon renewal and reargument, adhered to the determination on the original motion, unanimously affirmed, without costs.

Plaintiff alleges that defendants were negligent in their preparation, provision and grading of a written final examination required for her to obtain a degree upon the completion of all course work. These allegations go to the core of defendants'

substantive evaluation of plaintiff's academic performance and are therefore beyond judicial review (*Matter of Susan M. v New York Law School*, 76 NY2d 241 [1990]). Judicial review of the decisions of academic institutions as to their students' academic performance is limited, pursuant to CPLR article 78, to whether the decision was arbitrary and capricious, irrational or in bad faith (*id.* at 246; *Keles v Trustees of Columbia Univ. in City of N.Y.*, 74 AD3d 435 [1st Dept 2010], *lv denied* 16 NY3d 890 [2011], cert denied ___ US ___, 132 S Ct 255 [2011]).

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

ENTERED: JUNE 9, 2015

CLERK

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

15357 Joseph Yasgur, et al., Index 603650/09
Plaintiffs-Appellants,

-against-

17 Battery Associates LLC, et al.,
Defendants-Respondents,

17 Diamond Corp., et al.,
Defendants.

_____

Meister Seelig & Fein LLP, New York (Stephen B. Meister of counsel), for appellants.

McDermott Will & Emery LLP, New York (Robert A. Weiner of counsel), for respondents.

_____

Order and judgment (one paper), Supreme Court, New York County (Barbara R. Kapnick, J.), entered May 30, 2014, dismissing the remaining causes of action in the complaint, specifically, the first cause of action against defendant 17 Battery Associates LLC for breach of contract, the fourteenth cause of action against defendant 17 Battery Associates LLC for an accounting, and the seventeenth and eighteenth causes of action against defendants Allen Gross and Edith Gross for fees and costs, as premature, unanimously affirmed, without costs.

In this action involving the interpretation of a "nominee agreement" entered into by plaintiffs and defendant 17 Battery in

December 1999, the key issue on appeal is the construction of paragraph 4 of the Agreement which provides that plaintiffs were to be paid $250,000 on January 10, 2000 "plus 20% of the net profits in excess of $13,500,000 from the sale of the condominium units as, if and when such net profits are distributed." After the testimony of four witnesses over the course of the two-day bench trial, the court correctly determined that net profits could not be calculated until all the units were sold, and there is no basis upon which to disturb this determination (*see Watts v State of New York*, 25 AD3d 324, 324 [1st Dept 2006]). Extrinisic evidence, including deposition testimony and additional provisions of the contract contradict plaintiffs' assertion that the costs and expenses are calculated at the time of each individual sale, at which time "net profits" in excess of $13,500,000 should be distributed to them (*see Foot Locker, Inc. v Omni Funding Corp. of Am.*, 78 AD3d 513, 515 [1st Dept 2010]).

With respect to paragraph 9 of the Nominee Agreement which provides that "the obligation to make payments to [plaintiffs] pursuant to Paragraph 4 and Paragraph 11 hereof shall survive the termination of this Agreement until paid in full," the motion court properly determined that paragraph 4 refers to both the payment of $250,000 (which has already been paid to plaintiffs),

as well as "net profits," and paragraph 11 refers to any payments made under the indemnity provision, as opposed to multiple payments of "net profits," as asserted by plaintiffs. Contrary to plaintiffs' contention, the pre-execution drafts do not change this result, as they do not include any negotiation of or change to the seminal phrase "in the aggregate," or the phrase "all of the units." The plain, ordinary meaning of these terms supports the court's construction (*see Seaport Park Condominium v Greater N.Y. Mut. Ins. Co.*, 39 AD3d 51, 54 [1st Dept 2007]).

Nor did the court's construction produce a commercially unreasonable result, because plaintiffs were paid $250,000 up front for agreeing to purchase the subject units as nominees, undertook no risk, and defendants were responsible for all costs and expenses incurred in connection with the units until they are sold. Paying plaintiffs profits prior to the payment of all costs and expenses in carrying all units could result in a windfall to plaintiffs (*see Matter of Lipper Holdings v Trident Holdings*, 1 AD3d 170, 171 [1st Dept 2003]).

Plaintiffs did not plead causes of action for frustration of purpose and the implied covenant of good faith and fair dealing.

As stated by the court, nothing in its decision impairs plaintiffs' ability to commence new litigation after all units are sold. Until then, plaintiffs' claims are premature.

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

ENTERED: JUNE 9, 2015

CLERK

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

15358 In re The People of the State of New York, etc.,
Petitioner-Respondent,

-against-

Edwin Rivera, doing business as Inmigracion Hoy, etc.,
Respondent-Appellant,

Inmigration Hoy News Today, et al.,
Respondents.

Index 1576/04

_____

Edwin Rivera, appellant pro se.

Eric T. Schneiderman, Attorney General, New York (Karen W. Lin of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered August 27, 2013, which denied respondent Rivera's motion to dismiss the petition, unanimously affirmed, without costs.

As the court noted in an order entered March 4, 2013, and in the order on appeal, the petition that Rivera seeks to have dismissed was decided by order entered May 23, 2005. Although Rivera appealed from the May 2005 order, the appeal was never perfected. Thus, this appeal is an improper attempt to relitigate the May 2005 order, and the time to seek reargument of that order has long since passed (*see Servais v Silk Nail Corp.*, 96 AD3d 546, 547 [1st Dept 2012]). Moreover, respondent never

raised the issue of lack of personal jurisdiction prior to the May 2005 determination. Thus, he waived his arguments regarding a lack of proper service (*see International Bus. Machs. Corp. v Murphy & O'Connell*, 172 AD2d 157, 158 [1st Dept 1991], *appeal dismissed* 78 NY2d 908 [1991]).

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

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

ENTERED: JUNE 9, 2015

CLERK

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

15359 The People of the State of New York, Ind. 3100/12
Respondent,

-against-

Felicia Williams,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Alan S. Axelrod of counsel), for appellant.

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Rena K. Uviller, J.), rendered on or about February 20, 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 9, 2015

CLERK

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

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

15360 The People of the State of New York, Ind. 1189/12
Respondent,

-against-

Donnie Jones,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Rena K. Uviller, J.), rendered August 13, 2013, convicting defendant, after a jury trial, of assault in the second degree, and sentencing him, as a second violent felony offender, to a term of seven years, unanimously affirmed.

The court properly exercised its discretion in precluding evidence that defendant's friend allegedly told witnesses that he, rather than defendant, assaulted the victim. This hearsay evidence did not satisfy the reliability requirement for admissibility under the exception for declarations against penal interest (*see People v Settles*, 46 NY2d 154, 167-170 [1978]), or under a due process theory (*see Chambers v Mississippi*, 410 US

284, 298-302 [1973]). Defendant's friend told defense counsel that he neither committed the assault nor made the alleged statements, the statements were contradicted by trial witnesses who testified that the friend was nearby but did not participate in the assault, the statements were allegedly made to persons closely aligned with defendant, and recorded phone calls raised suspicion that defendant had made efforts to manufacture exculpatory evidence. All these factors undermined any reliability this hearsay evidence may have had (*see e.g. People v Than Giap*, 273 AD2d 54, 55 [1st Dept 2000], *lv denied* 95 NY2d 872 [2000]), and it was far removed from the trustworthy third-party confessions at issue in *Chambers*.

The court properly denied defendant's application for a material witness order since he failed to establish "reasonable cause to believe" that the proposed witness possessed

"information material to the determination" of the case (CPL 620.20[1][a]; *see People v Parsons*, 18 AD3d 317 [1st Dept 2005], *lv denied* 5 NY3d 792 [2005]).

We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 9, 2015

CLERK

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

15361 Carlos Bazan, et al., Index 23367/12
Plaintiffs-Appellants,

-against-

Manuel Concepcion, et al.,
Defendants-Respondents.

_____

Michael J. Noonan, Bronx, for appellants.

Ruta Soulios & Stratis LLP, New York (Joseph A. Ruta of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (John A. Barone, J.), entered February 6, 2014, which, inter alia, granted defendants' motion for summary judgment dismissing the complaint and denied plaintiffs' cross motion to amend the complaint, unanimously affirmed, without costs.

The court properly determined that res judicata and collateral estoppel barred the relitigation of claims arising from defendants' determination to cede authority to the New York District of the Assemblies of God, after a dispute between members of the congregation arising from the revocation of the credentials of the church's long-time pastor. Although this Court's review of the prior action arising from this controversy was primarily based upon the prior motion court's finding of

mootness, we specifically found that that court's legal and factual conclusions concerning the appropriateness of defendants' actions were correct. Moreover, plaintiffs here are in privity with petitioners in the prior proceeding in that their interests were represented by petitioners, who had a full and fair opportunity to litigate in that proceeding (*see Buechel v Bain*, 97 NY2d 295, 303-304 [2001], *cert denied* 535 US 1096 [2002]).

The issue of whether plaintiffs' church membership was properly revoked for "unbiblical conduct" is not a dispute subject to resolution by civil courts (*see Serbian E. Orthodox Diocese v Milivojevich*, 426 US 696, 709-710 [1976]).

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 9, 2015

CLERK

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

15363N Valerie Reuling, Index 117414/08
Plaintiff-Appellant,

-against-

Consolidated Edison Company
of New York, Inc., et al.,
Defendants.

- - - - -

Consolidated Edison Company of
New York, Inc.,
Third-Party Plaintiff,

-against-

Tully Construction Company,
Third-Party Defendant-Respondent.

_____

The Flomenhaft Law Firm, PLLC, New York (Benedene Cannata of counsel), for appellant.

Cartafalsa, Slattery, Turpin & Lenoff, New York (Louis A. Carotenuto of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered January 21, 2015, which, inter alia, denied plaintiff's motion for leave to supplement and amend her bill of particulars, unanimously affirmed, without costs.

The decision to permit an amendment to a pleading or bill of particulars, especially on the eve of trial, is committed to the sound discretion of the IAS court (*Lissak v Cerabona*, 10 AD3d 308 [1st Dept 2004]). Here, we find the IAS court did not abuse its

discretion in denying plaintiff leave to amend to add claims of injuries to her other foot. While plaintiff was aware of the injury to her left foot for more than three years, she inexplicably delayed in seeking her expert's opinion on the issue of causation and then further delayed in filing the instant motion. We note that the evidence ultimately relied upon by plaintiff's expert was developed in 2009 (the MRI) and 2011 (Dr. Fishman's report), well before the plaintiff filed her note of issue in 2012. In short, the motion was untimely.

We have considered the remaining arguments and find them unavailing.

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

ENTERED: JUNE 9, 2015

CLERK

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

15364N Joan Banach, Index 600918/09
Plaintiff/Petitioner-
Respondent-Appellant,

-against-

The Dedalus Foundation, Inc.,
Defendant/Respondent-
Appellant-Respondent.
- - - - -
Bantle & Levy LLP,
Nonparty Respondent.
- - - - -
National Employment Lawyers
Association/New York,
Amicus Curiae.

_____

Pryor Cashman LLP, New York (Benjamin K. Semel of counsel), for appellant-respondent.

Bantle & Levy LLP, New York (Lee F. Bantle of counsel), for respondent-appellant.

Emery Celli Brinckerhoff & Abady LLP, New York (Jonathan S. Abady of counsel), for respondent-appellant and respondent.

Giskan Solotaroff Anderson & Stewart, LLP, New York (Darnley D. Stewart of counsel), for amicus curiae.

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Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered October 28, 2014, which, to the extent appealed from, denied defendant's motion to, among other things, reinstate and compel compliance with a subpoena ad testificandum and duces tecum served upon plaintiff's counsel Bantle & Levy, and denied

plaintiff's motion for discovery sanctions and to compel disclosure of certain documents and information, unanimously modified, on the law and the facts, to grant plaintiff's motion to compel disclosure, and otherwise affirmed, without costs.

The court properly refused to reinstate a subpoena that it had previously quashed, since the subpoena sought documents and testimony protected by the attorney-client privilege (*Bohn v 176 W. 87th St. Owners Corp.*, 106 AD3d 598, 600 [1st Dept 2013], *lv dismissed in part and denied in part* 22 NY3d 909 [2013]). The record shows that the subpoena sought information from plaintiff's counsel for the improper purpose of impeaching plaintiff (*see Melcher v Apollo Med. Fund Mgt. L.L.C.*, 52 AD3d 244, 245 [1st Dept 2008]). Moreover, defendant failed to show a sufficient basis for applying the crime-fraud exception to the attorney-client privilege (*see Matter of Grand Jury Subpoena*, 1 AD3d 172, 173 [1st Dept 2003]).

The court should have compelled disclosure of all materials and information requested by plaintiff, as the requested discovery is relevant to her defense of defendant's counterclaims (*see* CPLR 3101[a]). Defendant waived its attorney-client privilege regarding the requested minutes of a board meeting, by using portions of those minutes during a deposition and by

placing the contents of the minutes at issue (*see Drizin v Sprint Corp.*, 3 AD3d 388, 389-390 [1st Dept 2004]; *Orco Bank v Proteinas Del Pacifico*, 179 AD2d 390, 390 [1st Dept 1992]).

Discovery sanctions against defendant are not warranted, as there was no prior order directing the exchange of the items sought, and no evidence of willful or contumacious conduct (*see Ayala v Lincoln Med. & Mental Health Ctr.*, 92 AD3d 542 [1st Dept 2012]).

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

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

ENTERED: JUNE 9, 2015

CLERK

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

15364 In re Carol Noe, Ind. 310660/12
[M-6245] Petitioner,

-against-

Hon. Ellen Gesmer, etc., et al.,
Respondent.

_____

Carol Noe, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Michael J. Siudzinski of counsel), for Hon. Ellen Gesmer, respondent.

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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.

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

ENTERED: JUNE 9, 2015

CLERK

MOTION INDEX

Orders Released on June 9, 2015