SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 23, 2015

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

14946N Leon Baer Borstein, Index 112421/10
Plaintiff-Respondent,

-against-

Virginia Marie Henneberry,
Defendant-Appellant.

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Capuder Fazio Giacoia LLP, New York (Douglas Capuder of counsel), for appellant.

Daniel A. Fried, Yonkers, for respondent.

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Order, Supreme Court, New York County (Donna M. Mills, J.), entered September 27, 2013, which, to the extent appealed from as limited by the briefs, denied defendant's motion for attorneys' fees and sanctions, unanimously modified, on the law and the facts, to impose sanctions on plaintiff in the amount of $5,000, payable to the Lawyers' Fund for Client Protection, pursuant to 22 NYCRR 130-1.2 and in accordance with 22 NYCRR 130-1.3, and to award defendant reasonable costs and attorneys' fees associated with the motion and this appeal, payable by plaintiff in an amount to be determined on remand, and otherwise affirmed, with

costs.

The parties were divorced pursuant to a judgment entered in December 2009. Plaintiff husband is an experienced matrimonial lawyer and he represented himself in the divorce proceeding. He was sanctioned twice during the course of that action. The first time he was ordered to pay $7,500 in attorneys' fees in connection with defendant wife's motion to enforce a pendente lite order against him. He was later directed to reimburse the wife $10,000 in connection with his violation of an order directing that a boat that was marital property be sold in an arm's length transaction, with the proceeds to be shared by the parties.

The divorce action culminated in a six-day trial. The parties submitted posttrial memoranda, and in a section entitled "Assets and Liabilities Claimed to be Marital," the husband claimed that he loaned the wife "$27,000 during the years after the filing for divorce" to allow her to finance a business venture. He also listed the loan as the sixth of nine credits totaling $1,184,500, and stated that he had "loaned to [the wife] about $27,000 after the filing for divorce and should receive a credit for the full $27,000." In addition, his Statement of Proposed Disposition, dated December 5, 2008, listed the loan in

a section titled, "Assets claimed to be marital property."

The court (Gische, J.), issued a 51-page decision after trial and an order, both dated April 17, 2009, which addressed distribution of the parties' marital assets. The court noted the statutory rule that, in general, "marital property" is all property acquired by either or both spouses during the marriage but before the commencement of a matrimonial action (Domestic Relations Law § 236B[1][c]). It rejected the husband's argument that most of the parties' assets should be classified as separate, even if acquired during marriage, because they led financially independent lives. The court reasoned that his argument was relevant to the ultimate distribution of marital assets, but not to their initial classification as marital or separate property.

In a section titled "Miscellaneous Adjustments and Credits," the court addressed certain of the credits that the husband sought, but it did not specifically address the $27,000 loan. However, in the concluding paragraph to the decision the court stated that "[a]ny arguments raised by the parties which have not been expressly addressed in this decision are rejected." The court concluded that each party was entitled to a 50% share of certain marital assets and marital debt. The judgment of

divorce, which incorporated the findings, listed certain credits but did not refer to or list a credit for the loan. The husband appealed the judgment, but he did not address the loan.[1]

The husband then commenced this action against the wife. The complaint sought recovery of the same $27,000 sought by the husband as a credit in the divorce action. It did not refer to the divorce proceeding or the fact that the husband had sought repayment of the loan in a proceeding that had ended in a final judgment. The wife's counsel sent the husband a letter asking him to discontinue the action voluntarily because the divorce action had determined his rights regarding the loan in light of the court's ruling on the husband's request for credits. The husband replied by letter asking, "Where is the statutory or case law that supports your position that separate property debts or assets are determined by a divorce decision[]? . . . If it were so obvious and 'frivolous' why have you not brought a summary judgment motion already?" The wife's counsel replied, "[T]he funds you promised and subsequently transferred to your

[1] On appeal, this Court modified the divorce judgment only to the extent that it reclassified as marital property certain debt adjudged by Supreme Court to be the wife's separate property, and increased the wife's share of appreciation on a farm owned by the parties (*Henneberry v Borstein*, 87 AD3d 451 [1st Dept 2011]).

then wife were marital property."

The wife did eventually move for summary judgment dismissing the complaint, arguing that the husband's claim was barred by res judicata principles because it had been fully litigated in the divorce action. She also argued that the loan was not enforceable because the funds that the husband transferred to her were marital property. The wife submitted excerpts from the husband's deposition testimony in the matrimonial action, in which he acknowledged that the loan funds were derived from compensation he received for an arbitration or mediation he completed while the parties were married. He also admitted that he had sought a credit for the loan in the divorce action.

Supreme Court (Mills, J.), granted the wife's motion and dismissed the complaint, concluding that the loan was "fully and actively litigated by [the husband]" in the divorce action. It rejected the husband's argument that the issue was never fully litigated because there was no formal finding that the source of the loan was marital property. The court noted that the husband sought specific relief for the loan in the divorce action in the form of a credit, which was denied, and that the husband sought to relitigate that same issue in the instant action. The court also noted that in the decision after trial, the court in the

divorce action stated that it rejected any argument raised by the parties that it had not expressly addressed. The court also rejected the husband's argument that he still had an independent cause of action because "the 'loan' w[as] never identified as a 'marital' asset and/or there was no specific discussion of offset of the 'loan' when marital assets were distributed." It cited his concessions in his filings in the divorce action that the source of funds for the loan was marital property.

The wife subsequently moved, pursuant to 22 NYCRR part 130 and Rules of Professional Conduct (22 NYCRR 1200.0) rule 3.1(a) and (b), for an order awarding her attorneys' fees, costs, disbursements, and sanctions due to the husband's "frivolous and improperly motivated" lawsuit. She argued that the husband's pursuit of the action required the wife's counsel to conduct discovery, depose the husband, defend the wife's deposition, make related discovery motions, and spend time trying, unsuccessfully, to persuade the husband to discontinue the action without the expense of a summary judgment motion. The court held that the husband's conduct in seeking repayment of the loan was not so frivolous as to warrant sanctions pursuant to 22 NYCRR part 130; however, as the court had dismissed the action in its entirety, it awarded the wife costs and disbursements in successfully

defending the action.

A court may, in its discretion, award to any party costs in the form of reimbursement for expenses reasonably incurred and reasonable attorneys' fees resulting from "frivolous conduct," which includes: (1) conduct completely without merit in law, which cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) conduct undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; and (3) the assertion of material factual statements that are false (22 NYCRR 130-1.1[a], [c][3]). The court may also award financial sanctions on the same grounds (22 NYCRR 130-1.1[b]).

In determining whether conduct is frivolous, the court shall consider "the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel" (22 NYCRR 130-1.1[c]).

Here, the husband made a claim in the divorce action for repayment of the $27,000 "loan," and Supreme Court rejected it. He then failed to challenge that finding on direct appeal. Any

argument that Supreme Court did not actually decide the issue of the "loan" because it did not specifically address it is rejected, since the court included the "catch-all" language that any claims not discussed were denied. In any event, the husband could have sought clarification from the court if he felt that the claim related to the "loan" had escaped the court's attention. Indeed, it would have behooved him to do so, as it is well settled that "res judicata bars a subsequent plenary action concerning an issue of marital property which could have been, but was not, raised in the prior matrimonial action" (*Boronow v Boronow*, 71 NY2d 284, 289 [1988]). Again, we are required to consider "the circumstances under which the conduct took place" when reviewing a sanctions motion (22 NYCRR 130-1.1[c]). Here, the circumstances are that the husband, an experienced divorce lawyer, ignored a long-standing principle of matrimonial jurisprudence. Thus, his decision to commence an action that he knew, or should have known, was futile from its inception, weighs heavily in favor of a finding that his conduct was intended solely to harass the wife.

We are mindful of the notion that a court must be careful not to confuse legal arguments that may appear at first blush to be frivolous with good faith efforts to modify existing law (*see*

W.J. Nolan & Co. v Daly, 170 AD2d 320, 321 [1st Dept 1991]). There is no cause for such concern here. The husband argues that an enforceable loan can be made from marital property, and that this Court has "strongly impl[ied]" this to be the case. However, the case he cites, *Popowich v Korman* (73 AD3d 515 [1st Dept 2010]), merely suggests that one spouse may enforce a loan to the other if the loan is pursuant to a written agreement signed by the parties and acknowledged, in accordance with Domestic Relations Law § 236(B)(3). Here, there is no question that no such agreement existed. Accordingly, the matrimonial court was unquestionably correct in hewing to the rule that property accumulated by the parties during the marriage but before commencement of a divorce action is marital property subject to equitable distribution.

In any event, the issue is not whether the husband should have prevailed on his claim in the matrimonial action, but whether he had any grounds for pursuing the matter after that action became final. It simply defies logic that, as the husband argues, the court in the matrimonial action would have implicitly ruled that the loan was separate property, when he conceded before it that the source of the funds was marital property. Further, the husband utterly fails to account for the court's

explicit statement that any arguments it did not address should be considered rejected.

Aside from the blatant lack of merit to the complaint, other factors justifying sanctions and attorneys' fees are present here. First, the wife expressly informed the husband that she considered the action barred by res judicata and urged him to discontinue it, but he pressed on, forcing her to expend unnecessary resources. Such unreasonable persistence in a position that has been demonstrated to be frivolous warrants the imposition of sanctions (*see Cattani v Marfuggi*, 74 AD3d 553 [1st Dept 2010] [plaintiff insisted on pursuing action against defendant that he had been advised was cloaked with absolute immunity from suit]). Further, we cannot ignore that this is not the first instance in which the husband has taken a position that is not legally tenable. He was ordered in the matrimonial action to pay the wife's legal fees in connection with his noncompliance with a temporary support order. While the court did not expressly opine that his conduct was frivolous, it can be presumed that he failed to present any good faith basis for his failure to abide by the order. Later in the action, however, the court explicitly stated that the husband had "frivolously" asked it to "re-write its decision" regarding the forced sale of a boat

so as to make his actions, which failed to comply with the decision, compliant nunc pro tunc. Coupled with these earlier incidents, the commencement of this action exhibits a "broad pattern . . . of delay, harassment and obfuscation" that warrants the imposition of sanctions and attorneys' fees (*Levy v Carol Mgt. Corp.*, 260 AD2d 27, 33 [1st Dept 1999]).

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

ENTERED: JUNE 23, 2015

CLERK

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

15135 Everton Nelson, Index 301887/10
Plaintiff-Appellant,

-against-

E&M 2710 Clarendon LLC, et al.,
Defendants-Respondents.

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Law Office of Nicole R. Kilburg, New York (Nicole R. Kilburg of counsel), for appellant.

Gannon, Rosenfarb & Drossman, New York (Lisa L. Gokhulsingh of counsel), for E&M 2710 Clarendon LLC, respondent.

Ahmuty, Demers & McManus, Albertson (Glenn A. Kaminska of counsel), for Ferhati, LLC, respondent.

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Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered December 19, 2013, which granted defendants' motions for summary judgment dismissing the complaint and cross claims against them, and denied plaintiff's cross motion to amend the complaint to assert a cause of action under Labor Law § 240(1), unanimously affirmed, without costs.

After a fire in a mixed-use building, defendant Ferhati, LLC was retained on behalf of the owner, defendant E&M 2710 Clarendon LLC (E&M), to perform clean-up services. E&M also agreed to let a salvager, whom its plumber had used to remove an item from the building during boiler repairs, and whom its principal recognized

from church, take certain items. The salvager was permitted to walk through the residential portion of the building and mark the items that he wanted. However, according to E&M, Ferhati was supposed to bring the items outside.

Plaintiff, an employee of a company hired to fix the building's roof, was asked by the salvager and his helper to help them move a refrigerator down a flight of stairs. Plaintiff agreed and held the back of the refrigerator as he walked backwards down the stairs. The helper held the front end and walked forwards.

When they reached a landing, the salvager and his helper argued over who would carry the refrigerator. After the salvager repeatedly told the helper to give him the refrigerator, the helper let go. The refrigerator slid down the stairs and plaintiff fell with it, injuring his ankle. After the accident, the salvager and the helper told plaintiff that they worked for Errol Morris, one of E&M's principals.

Ferhati and E&M established their prima facie entitlement to summary judgment dismissing plaintiff's claims. In opposition, plaintiff failed to raise a material issue of fact.

Ferhati established that there is no basis to hold it responsible for the actions of the salvager and/or his helper.

On the record before us, the contention that the salvager and/or his helper were independent contractors of, or otherwise working for Ferhati, is unsupported. Accordingly, Ferhati owed no duty to plaintiff.

E&M established that even if it hired the salvager as an independent contractor, there is no basis to impose liability on it. "As a general rule, a principal is not liable for the acts of an independent contractor because, unlike the master-servant relationship, principals cannot control the manner in which independent contractors perform their work" (*Saini v Tonju Assoc.*, 299 AD2d 244, 245 [1st Dept 2002]; *see also Goodwin v Comcast Corp.*, 42 AD3d 322 [1st Dept 2007]). Although "liability will attach 'where the employer is negligent in selecting, instructing or supervising the contractor, where the contractor is employed to do work that is inherently dangerous or where the employer bears a specific nondelegable duty'" (*Leeds v D.B.D. Servs.*, 309 AD2d 666, 667 [1st Dept 2003][quoting *Tytell v Batter Beer Distrib.*, 202 AD2d 226-227 [1st Dept 1994]), these exceptions are inapplicable.

In opposition to the motions, plaintiff argues that pursuant to Multiple Dwelling Law § 78, E&M had a non-delegable duty to maintain the premises in a reasonably safe condition. However,

Multiple Dwelling Law § 78 does not apply because the accident occurred as a result of the means and methods of the work, not due to a condition of the premises (*see Lombardi v Stout*, 80 NY2d 290, 295 [1992]).

Nor can plaintiff avail himself of the inherently dangerous exception, which cannot be applied unless a risk inherent in the nature of the procedures is apparent or contemplated by the employer (*see Rosenberg v Equitable Life Assur. Socy. of the U.S.*, 79 NY2d 663, 669-670 [1992]). Here, the risk arose from the manner in which the work was performed and the accident was the result of ordinary negligence (*see Chainani v Board of Educ. of City of N.Y.*, 87 NY2d 370, 381 [1995]; *Goodman v 78 West 47th Street Corp.*, 253 AD2d 384, 387 [1998]).

Plaintiff's contention that issues of fact exist as to whether E&M or its principal were negligent in selecting the salvager, i.e. whether they failed to exercise reasonable care in ascertaining whether he was qualified to move a refrigerator down a flight of stairs, is also unavailing. "[A]n employer has the right to rely on the supposed qualifications and good character of the contractor, and is not bound to anticipate misconduct on the contractor's part...." (*Maristany v Patient Support Servs.*, 264 AD2d 302, 303 [1st Dept 1999]). Thus, an employer "is not

liable on the ground of his having employed an incompetent or otherwise unsuitable contractor unless it also appears that the employer either knew, or in the exercise of reasonable care might have ascertained, that the contractor was not properly qualified to undertake the work" (*id.*). "Cases finding employers liable for negligent hiring have done so only in very specific circumstances" (*id.*) not present here. There is no competent proof that E&M knew or should have known of any propensity on the part of the salvager or his helper to engage in the conduct that allegedly caused the accident (*see Schiffer v Sunrise Removal, Inc.*, 62 AD3d 776, 779 [2d Dept 2009]). Furthermore, plaintiff has not shown that E&M had any reason to question the qualifications of the salvager, who E&M knew had been used by its plumber on a prior occasion, to move a refrigerator (*see Liberty Mut. Fire Ins. Co. v Akindele*, 65 AD3d 673, 674 [2d Dept 2009]). Moreover, there was no reason for E&M to suspect that the salvager would enlist an employee of the roofing contractor to assist him.

The denial of the cross motion to amend the complaint to add a cause of action alleging a violation of Labor Law § 240(1) was not an improvident exercise of discretion. Labor Law § 240(1) does not apply because plaintiff was a volunteer, not an

"employee," when he was injured (*see Stringer v Muscacchia*, 11 NY3d 212, 213 [2008]). Notably, no one directed plaintiff to help move the refrigerator. Rather, the salvager and his helper asked plaintiff to help, and he agreed to do so of his own accord.

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

ENTERED: JUNE 23, 2015

CLERK

Mazzarelli, J.P., Acosta, Renwick, Manzanet-Daniels, Feinman, JJ.

15206 Candice Brown, Index 104524/11
Plaintiff-Appellant,

-against-

David Howson, et al.,
Defendants-Respondents.

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Vandamme Law Firm, P.C., New York (Hollis DeLeonardo Vandamme of counsel), for appellant.

Van Leer & Greenberg, New York (Evan Van Leer-Greenberg of counsel), for respondents.

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Order, Supreme Court, New York County (Shlomo S. Hagler, J.), entered October 25, 2013, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants established prima facie that they had no notice of the alleged defective ceiling in the apartment in which plaintiff resided, by submitting building owner defendant David Howson's testimony that he was never informed about cracks or any other defect in the ceiling and plaintiff's testimony that she never informed building management or Howson of any such cracks (*see Figueroa v Goetz*, 5 AD3d 164 [1st Dept 2004]). In opposition, plaintiff failed to raise an issue of fact. Her testimony that actual notice was given to defendants was

conclusory. Her argument, largely unpreserved for review, that violations issued by the Department of Housing and Preservation (HPD) based on unrepaired conditions constituted constructive notice is belied by HPD documents showing that, contrary to plaintiff's contention, HPD's reference to an apartment with ceiling problems on the third floor was not a mistaken reference to plaintiff's second-floor apartment.

The motion court erred in declining to consider the affidavits by plaintiff's domestic partner and a neighbor saying they had given defendants notice of the alleged ceiling cracks on the ground that these witnesses were not disclosed before discovery was complete, since plaintiff had made known their names and addresses at her deposition (*see Santana v 3410 Kingsbridge LLC*, 110 AD3d 435 [1st Dept 2013]). However, the court correctly found that in any event the affidavits were insufficiently specific and the alleged notice too far in the past to raise an issue of fact (*see Clark v New York City Hous. Auth.*, 7 AD3d 440 [1st Dept 2004]).

The doctrine of res ipsa loquitur is inapplicable to this case, since defendants did not have exclusive control over the ceiling during the tenancy of plaintiff's domestic partner, the tenant of record (*see Pintor v 122 Water Realty, LLC*, 90 AD3d 449, 451 [1st Dept 2011]).

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

ENTERED: JUNE 23, 2015

CLERK

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

15256 In re David Tucker, Index 100582/13
Petitioner,

-against-

New York City Housing Authority,
Respondent.

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David Tucker, petitioner pro se.

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

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Determination of respondent New York City Housing Authority (NYCHA), dated March 20, 2013, which, after a hearing, terminated petitioner's tenancy, unanimously modified, on the law, to the extent of vacating the penalty and remanding the matter to NYCHA for consideration of a new penalty in accordance with this order, and this proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Shlomo Hagler, J.], entered January 31, 2014), otherwise disposed of by confirming the remainder of the determination, without costs.

The penalty of terminating petitioner's tenancy, under the circumstances of this case, shocks our sense of fairness, and

should be vacated (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of the Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 237 [1974]). Notwithstanding that there was substantial evidence supporting the hearing officer's finding that petitioner violated a stipulation made over 17 years ago, in which he agreed to exclude Tanya Hall from the apartment, the remedy of terminating petitioner's tenancy failed to take into account substantially changed circumstances. These changed circumstances were set out in petitioner's pending application for relief from the condition of exclusion. Because petitioner's undecided application presented a strong basis for removing the exclusion against Ms. Hall, termination of his long term tenancy based on the violation of the exclusion provision, without considering the merits of whether the exclusion should still be in place, is manifestly unfair.

Petitioner is a resident of public housing for over 30 years. Tanya Hall is petitioner's long time girlfriend. Seventeen years ago she was staying with petitioner in the apartment, along with her then 16 year old son, Angel. At that time Angel vandalized several coin operated washers and dryers in the NYCHA building, resulting in NYCHA bringing charges to terminate petitioner's lease as a nondesirable tenant. In

resolution of those charges, petitioner signed a stipulation dated November 19, 1998, agreeing to permanently exclude Angel and Ms. Hall from visiting him at, or living in, his apartment. Although only Angel was claimed to have committed the undesirable acts, Ms. Hall, who was responsible for Angel's care and custody at that time, was also excluded. A further condition of the stipulation was that NYCHA investigators could make unannounced visits to his apartment to confirm petitioner's compliance with the conditions. Any refusal to allow such entry is, by the express terms of the stipulation, a violation. Petitioner was placed on probation for two years and agreed to downsize into a smaller apartment. The 1998 stipulation expressly provides that the permanent exclusion lasts beyond the probation period. The condition of unannounced visits, however, does not state whether it is only while petitioner is on probation, or nondurational. On January 29, 1999, NYCHA approved the stipulation.

There is simply no evidence, and no finding was ever made, that since the stipulation Angel ever again resided in or even visited the apartment. Now in his 30's, Angel has a family of his own, and he does not intend to ever return to the apartment. Following the 1998 stipulation, Ms. Hall moved immediately to Louisiana to live with her (now deceased) mother. It is,

however, undisputed that Ms. Hall and petitioner have maintained an intimate relationship over the years, during which she has intermittently stayed with him. It is also undisputed that in the intervening years Ms. Hall has grappled with serious medical issues and homelessness. During her periods of homelessness, she has left her personal belongings in petitioner's apartment. Ms. Hall, now in her 50's, is wheelchair-bound and frail, and suffers from a multitude of chronic, debilitating medical conditions. She depends on petitioner to help her with many basic needs, including making medical decisions for her.

In 2003, NYCHA investigators made an unannounced visit to petitioner's apartment and were let in by Ms. Hall. Charges were brought against petitioner and an administrative hearing was held. The hearing officer, noting Ms. Hall's frail health and mobility impairment, continued the permanent exclusion condition of the 1998 stipulation but did not order the sanction of eviction, allowing petitioner "a final opportunity to save his home in public housing."

In 2004, petitioner failed to allow NYCHA investigators into his apartment on two separate occasions. Charges were brought against him and after an administrative hearing at which petitioner testified that he had not been in contact with Angel

since 1998, the hearing officer continued the 1998 stipulation and imposed an additional one year of probation on him.

In 2006, petitioner was again charged with violating the 1998 stipulation and terms of his probationary period by refusing to let NYCHA investigators into the apartment. After yet another hearing, at which it was found that petitioner had violated the 1998 stipulation by failing to grant NYCHA investigators entry into his apartment, the hearing officer nonetheless observed that "no wrong-doing by Tanya Hall was ever alleged, and there is no evidence that Tanya uses the apartment for anything except storage." Petitioner was placed on another one-year probationary period.

Charges were filed against him in 2011 for the same reason and were resolved by stipulation dated January 12, 2012. Once again he was placed on probation for a one-year period. During the most recent probationary period, NYCHA claims its investigators were denied access to the apartment, resulting in the current charges.

The charges underlying this proceeding are that petitioner violated the terms of his probation by allowing "Tanya Hall and Angel [surname deleted] to take up residence in your Authority apartment since September 2012 without obtaining prior written

consent of your Development's Housing Manager, as required." These charges were set forth in NYCHA's October 23, 2012 notification of proposed termination of tenancy. After receiving the October 23, 2012 notification of charges, petitioner sent NYCHA a written request, dated November 11, 2012, seeking relief from the permanent exclusion requirement on the basis that Ms. Hall, who has been his girlfriend for 30 years, is ill, he has never been arrested, he has held stable employment throughout his tenancy, and immediately "barred [Angel] from the premises in 1999." Petitioner's written application only sought relief from the condition involving Ms. Hall's exclusion from his apartment.

A NYCHA tenant can seek relief from the condition of permanent exclusion by following the procedures set forth in paragraph 24 of NYCHA's termination of tenancy procedures:

> "The tenant found eligible [for continued tenancy], subject to permanent exclusion of one or more persons in the household may apply for removal of the condition at any time a substantial change has occurred bearing on the need for such condition for eligibility. The tenant's application shall be in writing, addressed to the Tenancy Administrator, who shall submit such application to the Hearing Officer. The Hearing Officer may in his/her discretion:
>
> (a) Continue the condition unchanged, or
>
> (b) Remove the condition of permanent

> exclusion of one or more persons in the household from the tenant's status of eligible."

The evidence before the hearing officer in this matter included petitioner's letter application seeking removal of the condition excluding Ms. Hall. There was also a letter from Angel stating that he had not resided with petitioner or his mother since 1999 because he "moved on," and a letter from Ms. Hall's doctor. Ms. Hall's physician describes her extremely poor health condition and opines that she "...has limited ambulatory abilities and requires stable housing and support from [petitioner] in order for her to attend all of her medical appointments." Petitioner and Ms. Hall were among the witnesses who testified.

The hearing officer sustained the charges, finding that Ms. Hall resided in the apartment in violation of the 1998 stipulation. No findings were made as to the remaining charges. In rendering her determination, the hearing officer observed that despite having "ample opportunity over the last thirteen years to seek [removal] of the condition of permanent exclusion against Tanya Hall" petitioner had not done so. Notwithstanding that the NYCHA rule provides that an application to remove a condition can be made "at any time," the hearing officer did not address the

merits of petitioner's application to remove the condition, despite his specific request that she do so.

As to the remedy, the hearing officer observed that "petitioner cares deeply for Tanya Hall and wants her to continue residing with him im the subject apartment." Based upon this observation, the hearing officer concluded that the remedies of "[p]robation and permanent exclusion are no longer meaningful or effective deterrents . . ." She then granted NYCHA the right to terminate petitioner's tenancy.

As an initial matter we find that this matter was not properly transferred to this Court pursuant to CPLR 7804(g), as the petition does not raise an issue of substantial evidence. In the alternative, as a matter of judicial economy, we retain jurisdiction to dispose of all issues raised in the proceeding (*see* CPLR 7804[g]; *see also Matter of Trustees of Columbia Univ. v City of New York*, 110 AD3d 467, 467 [1st Dept 2013]). We reject petitioner's argument that he was not given a fair hearing based on NYCHA's late production of documents. We also find that there is adequate support for the hearing officer's conclusion that petitioner violated the 1998 stipulation by permitting Ms. Hall to stay with him in the apartment during the

most recent probationary period (*300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 179-180 [1978]).

We differ with the hearing officer only insofar as she imposed the remedy of eviction for this violation without considering the merits of petitioner's request to be relieved from the condition excluding Ms. Hall. Our review of the penalty is limited to whether it constitutes an abuse of discretion as a matter of law (*Matter of Kelly v Safir*, 96 NY2d 32, 38 [2001]). A penalty must be upheld unless it is "so disproportionate to the offense as to be shocking to one's sense of fairness" (*Matter of Pell*, 34 NY2d 222, 237 [1974]). While the standard of review of an administrative penalty is a formidable one, it is not insurmountable (*see Wise v Morales*, 85 AD3d 571 [1st Dept 2011], lv denied 18 NY3d 808 [2012]; *Matter of Vasquez v New York City Dept. of Hous. Preserv. & Dev.*, 58 AD3d 418 [1st Dept 2008] *Davis v DHPD*, 58 AD3d 418 [1st Dept 2009]; *Matter of Vasquez v New York City Hou. Auth.* [*Robert Fulton Houses*], 57 AD3d 360 [1st Dept 2008]). Were it otherwise, the right of review would be illusory.

We recognize that stipulations requiring the exclusion of an objectionable resident from public housing serve a salutary

purpose of protecting the community (*see Matter of Horne v New York City Hous. Auth.*, 113 AD3d 575 [1st Dept 2014]); *Matter of Gibbs v New York City Hous. Auth.*, 82 AD3d 412 [1st Dept 2011]). NYCHA's own rules, however, reflect that substantially changed circumstances may ameliorate the community's need for exclusion.

On this record it is undisputed that neither petitioner nor Ms. Hall have ever been accused of directly doing anything that would qualify them as undesirable. The stipulation excluding Ms. Hall was based upon the undesirable conduct of her teenage son, Angel, over 17 years ago. Petitioner has fully complied with that portion of the stipulation requiring him to exclude Angel from the apartment. Although Ms. Hall was responsible for Angel's care and custody when he was a minor at the time of the 1998 stipulation, she has had no such responsibility for him for many years. It is highly questionable whether the 1998 stipulation, to the extent it excludes Ms. Hall, still serves any practical purpose and the stipulation should not be blindly enforced without consideration of the pending application for relief from that condition of the stipulation (*see Matter of Perez v Rhea*, 20 NY3d 399, 405 [2013]).

We do not condone petitioner's decision to simply violate the stipulation and not seek relief from the condition of

exclusion sooner, and believe that his conduct warrants some degree of sanction. NYCHA's own rules, however, impose no time restriction on when to make an application for relief from an exclusion requirement of a stipulation. It is manifestly unjust and simply makes no sense to impose the most serious remedy of eviction upon petitioner for failing to exclude Ms. Hall from the apartment, if there is merit to his application that substantially changed circumstances no longer warrant her exclusion. We therefore remand this matter to respondent agency for reconsideration of the penalty.

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

ENTERED: JUNE 23, 2015

CLERK

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

15362 The People of the State of New York, Ind. 89/10
Respondent,

-against-

Jerome Perry,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Ruth Pickholz, J.), rendered November 20, 2012, as amended December 13, 2012, convicting defendant, after a jury trial, of robbery in the first and second degrees and assault in the second degree, and sentencing him, as a second felony offender, to an aggregate term of eight years, unanimously affirmed.

Defendant argues that he was deprived of the right to trial by a jury in whose selection he had a say when the court excused a juror during deliberations without consulting with defense counsel in advance (*see* CPL 270.35[2][b]). On October 29, 2012, during jury deliberations, Hurricane Sandy hit New York City and court was closed for several days. On November 5, 2012, the court called the jurors to confirm their availability to continue

to serve. The court excused one juror during an off-the-record telephone conversation, after the juror informed the court that he was leaving the country to be with a sick grandparent.

The trial resumed on November 7, 2012. The court noted on the record that the excused juror had informed the court that he had a flight scheduled for that day, and that the court had called the juror that morning but could not reach him. Defense counsel objected to the court's discharge of the juror without first consulting with counsel.[1] Counsel informed the court that, against her advice, defendant wanted deliberations to continue with the remaining 11 jurors. Defense counsel stated that she had told defendant "a number of times that I do not think we should go forward with 11," but defendant was "extremely insistent," was "tired of this process," and did "not want to retry the case." The court confirmed with defendant on the record that he wanted to continue with 11 jurors, and defendant executed a written waiver of a 12-person jury. Defense counsel also signed the written waiver.

Although the court should have given defense counsel an opportunity to be heard before it excused the juror (*see* CPL

1 The record indicates that there was an off-the-record discussion with defense counsel on November 5, 2012, but it is not clear if that happened after the juror was discharged.

270.35[2][b]), defendant entered a knowing, voluntary, and intelligent waiver of his right to a 12-person jury (*see People v Gajadjar*, 9 NY3d 438, 446-448 [2007]). Defense counsel stated that she had discussed with defendant the possibility of a retrial, and that defendant rejected that option (*see People v Washko*, 40 AD3d 277, 278 [1st Dept 2007], *lv denied* 9 NY3d 870 [2007]). The court questioned defendant on the record and confirmed that he had discussed his decision with counsel, and that he understood but rejected counsel's advice. As defense counsel stated, defendant was insistent that deliberations continue with an 11-person jury. Defendant "must accept the decision he knowingly, voluntarily and intelligently made" (*Gajadhar*, 9 NY3d at 448 [internal quotation marks omitted], quoting *People v Henriquez*, 3 NY3d 210, 216-217 [2004]). Further, there is no reason to doubt defendant's mental capacity to make such a waiver. Defendant had been found competent after CPL article 730 examinations, and the court confirmed on the record that he was taking his psychiatric medication and understood the proceedings.

Finally, 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. The evidence supports the conclusion that defendant used a knife or other sharp object in the commission of the robbery.

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

ENTERED: JUNE 23, 2015

CLERK

Tom, J.P., Renwick, Moskowitz, Manzanet-Daniels, Feinman, JJ.

15486 The People of the State of New York, Ind. 3802/99
Respondent,

-against-

Derrick Harris,
Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Kerry S. Jamieson of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Jeffrey A. Wojcik of counsel), for respondent.

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Order, Supreme Court, New York County (Renee A. White, J.), entered on or about August 8, 2012, which adjudicated defendant a level two sexually violent offender under the Sex Offender Registration Act (Correction Law art 6-c), unanimously affirmed, without costs.

The court properly exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). The mitigating factors cited by defendant were outweighed by the seriousness of the underlying sex crimes

committed against a child over a period of years, which raise valid concerns about a danger of recidivism, especially against children. We have considered and rejected defendant's remaining arguments.

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

ENTERED: JUNE 23, 2015

CLERK

Tom, J.P., Renwick, Moskowitz, Manzanet-Daniels, Feinman, JJ.

15487 Miguel Erosa, et al., Index 14247/05
Plaintiffs-Appellants,

-against-

Michael Coomaraswamy, M.D.,
Defendant-Respondent,

Alan Zeitlin, M.D., et al.,
Defendants.

_____

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

Shaub, Ahmuty, Citrin & Spratt, LLP, New York (Steven J. Ahmuty Jr. of counsel), for respondent.

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Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered April 8, 2014, which granted defendant-respondent's motion to set aside the jury's verdict to the extent of directing a new trial as to damages unless plaintiffs stipulate to reduce the award for past pain and suffering from $950,000 to $250,000, reduce the award for future pain and suffering from $250,000 to $25,000, reduce the award for past loss of consortium from $100,000 to $30,000, and reduce the award for future loss of consortium from $125,000 to $20,000, unanimously affirmed, without costs.

In this medical malpractice action, plaintiff Miguel Erosa required an open surgery to remove an appendiceal stump left behind in a prior laparoscopic appendectomy. The open surgery left plaintiff with a scar on his abdomen, but no physical limitations. The trial court found plaintiff's injury did not warrant the jury's awards for pain and suffering, and that they deviated materially from reasonable compensation under the circumstances to the extent indicated (*see* CPLR 5501[c]; *Padilla v Montefiore Med. Ctr.*, 119 AD3d 493, 494 [1st Dept 2014]; *cf. Rojas v Palese*, 94 AD3d 557 [1st Dept 2012] [award for future pain and suffering increased to $350,000 where the plaintiff was left with a large, raised scar across her abdomen that could worsen if she were to become pregnant and may require surgical repair in the future]). Giving the trial court's decision the appropriate weight, and considering the awards sustained by this court in similar cases, we find no basis to disturb the trial court's findings (see *Reed v City of New York*, 304 AD2d 1, 7 [1st

Dept], lv denied 100 NY3d 303 [2003] The court also properly reduced the awards for loss of consortium (*see Garcia v Spira*, 273 AD2d 57 [1st Dept 2000]).

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

ENTERED: JUNE 23, 2015

CLERK

Tom, J.P., Renwick, Moskowitz, Manzanet-Daniels, Feinman, JJ.

15488 In re Peter R.,
Petitioner-Appellant,

-against-

Samara B.,
Respondent-Respondent.

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Leslie S. Lowenstein, Woodmere, for appellant.

Law Offices of Randall S. Carmel, Syosset, (Randall S. Carmel of counsel), for respondent.

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Order, Family Court, Bronx County (Jennifer Burtt, Court Attorney-Referee), entered on or about January 31, 2014, which, after a hearing, denied petitioner father's petition for joint custody, and granted respondent mother's petition for sole custody and her request to relocate with the child to the State of Georgia, unanimously affirmed, without costs.

The court properly determined that awarding the mother sole custody and granting her request to relocate with the child to

Georgia was in the child's best interests, based on its consideration of the relevant factors (*Tropea v Tropea*, 87 NY2d 727, 740-741 [1996]).

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

ENTERED: JUNE 23, 2015

CLERK

Tom, J.P., Renwick, Moskowitz, Manzanet-Daniels, Feinman, JJ.

15489 Lisa Wolman, Index 306935/09
Plaintiff-Respondent-Appellant,

-against-

Eli Shouela,
Defendant-Appellant-Respondent.

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Larry M. Carlin, New York, for appellant-respondent.

Teitler & Teitler, LLP, New York (Jaime L. Weiss of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Laura Drager, J.), entered on or about September 2, 2014, which, to the extent appealed and cross-appealed from as limited by the briefs, denied defendant's motion to rescind portions of the parties' separation agreement, ordered a hearing on the issue of whether visitation should be modified, and granted plaintiff's cross motion for an award of attorney's fees, termination of further payments by plaintiff to defendant, and an order requiring defendant to pay for any forensic evaluation and all attorney's fees incurred at the visitation hearing, and for a hearing to recalculate defendant's child support obligations, unanimously affirmed, without costs.

The initial reason for supervised visits was defendant father's psychological issues, particularly his anxiety over the child's food allergies and health, which manifested negatively in the child. As the motion court noted, a forensic report from 2011 establishes that even when the parties entered into the separation agreement (Agreement) in November of that year, defendant's parenting skills and interactions with the child were improving. Comprehensive Family Services (CFS), the agency supervising the visits, wavered in its opinion on additional visitation, further suggesting that circumstances were changing and warrant exploration at a hearing.

The court was entitled to credit the affidavit from Dr. Hymowitz, defendant's therapist with whom he meets monthly, who opined that defendant now has a friendly and even temperament and no longer exhibits any negative traits that would harm the child. Dr. Hymowitz also spoke to CFS about defendant's progress. Furthermore, pursuant to the Agreement, defendant was required to seek Dr. Hymowitz's support for modification, and the parties agreed that the court would consider his opinion. Since the basis for supervision stemmed from defendant's psychological and parenting issues, and there is evidence that he has made progress during the past two years of therapy, and has continued to bond

with his son, the court properly concluded that there was a material change in circumstances warranting a hearing (*see Matter of King v King*, 266 AD2d 546 [1st Dept 1999]).

The court correctly denied defendant's motion to rescind portions of the Agreement allocating certain expenses to him as a result of his motion to modify visitation. Defendant acknowledged under oath that he had the assistance of counsel in negotiating the Agreement, understood its terms, and entered into it voluntarily (*see Klauer v Abeliovich*, 120 AD3d 1114, 1115 [1st Dept 2014]). The court also correctly rejected defendant's claim that the Agreement was manifestly unfair or against public policy because it denied him a level playing field. Plaintiff has already paid defendant more than $800,000 in lump sum payments and attorney's fees under the terms of the Agreement and he has failed to document his claim of financial hardship. Moreover, defendant accepted those payments without questioning the fairness of the Agreement (*see Mahan v Mahan*, 29 AD3d 471, 472 [1st Dept 2006]; *see also Beutel v Beutel*, 55 NY2d 957 [1982]).

Accordingly, the court correctly required defendant to comply with the Agreement's terms requiring him to pay his own attorney's fees and reasonable attorney's fees of $50,000 to plaintiff, notwithstanding its prior award to plaintiff of

$25,000, for her total fees of $83,151.75. In addition, we find the Agreement's additional penalties for defendant's motion practice enforceable. They were freely negotiated between the parties and do not reflect any overreaching or manifest unfairness, nor does defendant argue that they are unconscionable or were procured by duress, fraud, or mistake (*see Mahan*, 29 AD3d at 72).

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

ENTERED: JUNE 23, 2015

CLERK

Tom, J.P., Renwick, Moskowitz, Manzanet-Daniels, Feinman, JJ.

15490 Ambar R. Moreno, et al., 306542/13
Plaintiffs-Appellants,

-against-

Golden Touch Transportation, et al.,
Defendants-Respondents.

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

Lewis Brisbois Bisgaard & Smith LLP, New York (Nicholas Hurzeler of counsel), for Golden Touch Transportation and Hector L. Montoya, respondents.

Kelly, Rode & Kelly, LLP, Mineola (Susan Ulrich of counsel), for Melissa M. Ruiz and Sandra Almanzar, respondents.

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Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered August 21, 2014, which, to the extent appealed from, denied plaintiff's motion for summary judgment on the issue of defendants' liability, unanimously affirmed, without costs.

Plaintiffs were passengers in a vehicle owned by defendant Almanzar and driven by defendant Ruiz (collectively the Almanzar defendants). In their verified bill of particulars, plaintiffs alleged that a vehicle owned by defendant Golden Touch Transportation and driven by defendant Montoya (collectively the Golden Touch defendants) negligently changed lanes and sideswiped the Almanzar defendants' vehicle. However, in support of their

motion for summary judgment, plaintiffs submitted the affidavit of plaintiff Moreno, who averred that the Almanzar defendants' vehicle was slowing down when it was suddenly struck in the rear by the Golden Touch defendants' vehicle. Plaintiffs' conflicting accounts of the accident, coupled with the police report showing that the Almanzar defendants' vehicle was switching lanes when it sideswiped the Golden Touch defendants' vehicle, create issues of fact as to which vehicle is responsible for the accident (*see Evans v Fox Trucking*, 309 AD2d 618, 618 [1st Dept 2003]; *Mangual v Pleas*, 2004 WL 736817, *3, 2004 US Dist LEXIS 5749, *7-9 [SD NY, April 6, 2004, No. 02-Civ-8311(CBM)]).

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

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

ENTERED: JUNE 23, 2015

CLERK

Tom, J.P., Renwick, Moskowitz, Manzanet-Daniels, Feinman, JJ.

15491 Marshall Maor, etc., Index 161623/13
Plaintiff-Respondent,

-against-

Glorious Food Inc., et al.,
Defendants-Appellants.

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Gordon & Rees, LLP, New York (Mark A. Beckman of counsel), for appellants.

Virginia & Ambinder, LLP, New York (James Emmet Murphy of counsel), for respondent.

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Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered November 3, 2014, which, to the extent appealed from, denied defendants' motion to dismiss the Labor Law § 196-d cause of action, unanimously affirmed, with costs.

Plaintiff alleges that defendants imposed a mandatory charge on all contracts for catered events and provided customers with documents "convey[ing]" those charges without disclaiming that they were gratuities, and that defendants' customers believed that the mandatory charges were to be paid to the service staff as a gratuity. Construing the complaint liberally and accepting the allegations as true, we find that the complaint adequately alleges that defendants "represented or allowed their customers to believe that the charges were in fact gratuities for their

employees," in violation of Labor Law § 196-d (*Samiento v World Yacht Inc.*, 10 NY3d 70, 81 [2008]).

The documents submitted by defendants do not "conclusively dispose[]" of this claim (*see Fortis Fin. Servs. v Fimat Futures USA*, 290 AD2d 383 [1st Dept 2002]). The majority of the invoices submitted include a 24% charge for "Benefits and Payroll Taxes," while others provide for a "Prix Fixe," with a notation that the Prix Fixe "includes food and labor." A customer might reasonably conclude that some portion of these charges was meant to be paid to the service staff as a gratuity.

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

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

ENTERED: JUNE 23, 2015

CLERK

Tom, J.P., Renwick, Moskowitz, Manzanet-Daniels, Feinman, JJ.

15492-
15493 The People of the State of New York,
Respondent,

-against-

Francisco Medina,
Defendant-Appellant.

Ind. 10623/90

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

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

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Order, Supreme Court, New York County (Ruth Pickholz, J.), entered on or about June 20, 2012, which denied defendant's CPL 440.10 motion to vacate a judgment of conviction rendered February 22, 1991, unanimously affirmed.

The court properly denied defendant's CPL 440.10 motion without holding a hearing (*see People v Samandarov*, 13 NY3d 433, 439-440 [2009]). *Padilla v Kentucky* (559 US 356 [2010]), requiring counsel to advise a defendant of the immigration consequences of entering a guilty plea, is not accorded retroactive effect (*People v Baret*, 23 NY3d 777 [2014]). To the extent that defendant's moving papers may be read to assert that he was given misleading advice, his failure to specify the

allegedly erroneous advice, by setting forth sufficient factual allegations to support his claim is fatal to his application (CPL 440.30[1][a]; *see People v Simpson*, 120 AD3d 412 [1st Dept 2014], *lv denied* 24 NY3d 1046 [2014]).

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

ENTERED: JUNE 23, 2015

CLERK

Tom, J.P., Renwick, Moskowitz, Manzanet-Daniels, Feinman, JJ.

15494 In re Noel Goddard, Index 100885/13
Petitioner-Appellant,

-against-

City University of New York
(CUNY), Hunter College,
Respondent-Respondent.

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Law Office of Ronald B. Weisenberg P.C., New York (Ronald B. Weisenberg of counsel), for appellant.

Eric T. Schneiderman, Attorney General, New York (David Lawrence III of counsel), for respondent.

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Judgment, Supreme Court, New York County (Alexander W. Hunter, Jr., J.), entered December 19, 2013, denying the petition to annul respondent's determination, dated February 18, 2013, not to reappoint petitioner as an assistant professor, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The collective bargaining agreement governing petitioner's employment provides for a three-step grievance and arbitration procedure; petitioner's failure to avail herself of this procedure precludes her from seeking relief under article 78 (CPLR 7801[1]; *see e.g. Matter of Plummer v Klepak*, 48 NY2d 486 [1979], *cert denied* 445 US 952 [1980]). Petitioner failed to

establish that arbitration, which could result in referral to a three-member committee of faculty members drawn from a panel jointly chosen by the Chancellor and the union, would be futile (*see Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52 [1978]). Contrary to petitioner's contention, the Chancellor's academic judgment as to petitioner's scholarly record and failure to secure meaningful funding does not constitute an agency policy that would render resort to administrative remedies futile (*cf. Lehigh Portland Cement Co. v New York State Dept. of Envtl. Conservation*, 87 NY2d 136, 141 [1995] [resort to administrative remedies futile where agency's longstanding position that Uniform Procedures Act (UPA) was not applicable to program pursuant to which petitions were brought meant petitions could not be deemed approved pursuant to UPA]; *G. Heileman Brewing Co. v New York State Liq. Auth.*, 237 AD2d 203 [1st Dept 1997] ["in view of

defendant's firm statement of policy, it is evident that resort to administrative remedies . . . would have been futile, and therefore was not required"]).

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

ENTERED: JUNE 23, 2015

CLERK

Tom, J.P., Renwick, Moskowitz, Manzanet-Daniels, Feinman, JJ.

15495 Bremond Houses, Inc, etc., et al., Index 161966/13
Plaintiffs-Respondents,

-against-

Lemle & Wolfe, Inc.,
Defendant-Appellant.

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

Tumelty & Spier, LLP, New York (John Tumelty of counsel), for respondents.

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Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered on or about August 19, 2014, which, insofar as appealed from, denied the motion of defendant, Lemle & Wolfe, Inc. (Lemle), to dismiss the causes of action for an accounting and breach of contract, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint.

Nonparty Bremond Houses Associates, L.P. (Bremond LP) is a limited partnership, with plaintiff Bremond Houses, Inc. (Bremond Inc.) being its general partner, and another entity being its limited partner. As alleged, Bremond LP owns certain properties, and Lemle had been retained to serve as the managing agent of those properties, pursuant to a Management Agreement Contract

(Management Agreement) which was entered into by Lemle and Bremond LP. Claiming that Lemle had misappropriated funds that it collected in connection with its management of the properties, Bremond Inc. commenced this action "Individually and as General Partner of Bremond Houses Associates, L.P." seeking, inter alia, an accounting and damages for breach of contract.

The claims brought by Bremond Inc. in its individual capacity should have been dismissed. The Management Agreement, from which the claims for an accounting and breach of contract arose, was between only Bremond LP and Lemle. Thus, Bremond Inc. failed to allege a relationship, let alone a fiduciary relationship, between itself and Lemle that would support a claim for an accounting (*see e.g. Kazi v General Elec. Capital Bus. Asset Funding Corp. of Conn.*, 116 AD3d 592 [1st Dept 2014]; *Zyskind v Facecake Mktg. Tech., Inc.*, 110 AD3d 444, 446 [1st Dept 2013]). Not being a party to the Management Agreement, Bremond Inc. also has no standing to sue for breach of that contract (*see Bullock v Alhadeff*, AD3d , 2015 NY Slip Op 03940 [1st Dept 2015]; *2470 Cadillac Resources, Inc. v DHL Express [USA], Inc.*, 84 AD3d 697, 698 [1st Dept 2011], *lv dismissed* 18 NY3d 921 [2012]).

Nevertheless, as the general partner, Bremond Inc. may bring the claims on Bremond LP's behalf (*see* Partnership Law § 115; *Shea v Hambro Am.*, 200 AD2d 371, 371-372 [1st Dept 1994]; *Kirschbaum v Merchants Bank of N.Y.*, 272 App Div 336 [1st Dept 1947]). Further, the allegations and the Management Agreement showing that Lemle was entrusted with the handling of the finances of the properties, among other things, establishes a fiduciary relationship sufficient to support a claim for an accounting (*see Fitzpatrick House III, LLC v Neighborhood Youth & Family Servs*, 55 AD3d 664 [2d Dept 2008]; *Caprer v Nussbaum*, 36 AD3d 176, 192-193 [2d Dept 2006]). The record also sufficiently shows that the partnership has a viable breach of contract claim based on Lemle's alleged breach of the Management Agreement.

However, under the circumstances presented, including the parties' dispute as to whether Bremond Inc. may properly bring this action, and the fact that Bremond Inc. was removed as the general partner during the pendency of the action, we dismiss the

claims brought on behalf the limited partnership without prejudice to the partnership re-serving a complaint reflecting a proper title.

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

ENTERED: JUNE 23, 2015

CLERK

Tom, J.P., Renwick, Moskowitz, Manzanet-Daniels, Feinman, JJ.

15496 Connie Perdomo, et al., Index 310058/11
Plaintiffs,

Naixsha M., an Infant by Her Mother
and Natural Guardian, Wendy D.,
Plaintiff-Appellant,

-against-

City of New York, et al.,
Defendants.

Rafael Contin, et al.,
Defendants-Respondents.

_____

Okun, Oddo & Babat, P.C., New York (Darren Seilback of counsel), for appellant.

Marjorie E. Bornes, Brooklyn, for respondents.

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Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered May 6, 2014, which, to the extent appealed from as limited by the briefs, granted the motion of Rafael Contin and Mari Mora-Martinez for summary judgment dismissing infant plaintiff Naixsha M.'s claims against all defendants due to her inability to demonstrate a serious injury to her right knee or cervical spine within the meaning of Insurance Law § 5102(d), unanimously modified, on the law, to deny the motion as to plaintiff's claim of "significant" limitations of use of her right knee, and otherwise affirmed, without costs.

In June 2011, plaintiff, an unrestrained passenger in a taxi owned by defendant Contin and operated by defendant Mora-Martinez, was injured when the taxi struck a New York City Police Department vehicle responding to an emergency.

The moving defendants met their initial burden by showing, through the affirmed report of their expert, that plaintiff had full range of motion in her neck and right knee. The expert further concluded that these injuries were not the result of trauma, as there were no objective neurological findings (*see Malupa v Oppong*, 106 AD3d 538, 539 [1st Dept 2013]), and no edema in plaintiff's right knee (*see Arroyo v Morris*, 32 Misc 3d 1240[A], *4 [Sup Ct, Bronx County 2010], *affd* 85 AD3d 679 [1st Dept 2011]; *and see Chaston v Doucoure*, 125 AD3d 500 [1st Dept 2015]).

In opposition, plaintiff raised an issue of fact as to whether, as a result of the accident, she sustained a serious injury to her right knee involving significant, but not permanent, limitations in use. Her orthopedic surgeon opined that it was necessary to perform arthroscopic surgery on plaintiff's knee about two months after the accident because she continued to be symptomatic despite conservative treatment. During surgery, he found a meniscal tear. In addition, plaintiff

underwent therapy for her knee both before and after her August 2011 surgery (*see Mejia v Ramos*, 124 AD3d 449 [1st Dept 2015]). The surgeon attributed plaintiff's injuries to the accident, and not degeneration, since plaintiff was 16 years old when she was injured, and was previously asymptomatic (*see Vera v Islam*, 70 AD3d 525 [1st Dept 2010]; *June v Akhtar*, 62 AD3d 427 [1st Dept 2009]).

However, the medical records submitted by plaintiff show that her surgeon found full range of motion in her knee one month after the surgery. While he found a deficit in range of motion upon examination three years later, the surgeon failed to reconcile his earlier normal findings with that later finding (*see Colon v Torres*, 106 AD3d 458 [1st Dept 2013]). This failure entitles defendants to summary judgment on any claim of a serious injury based on the "permanent consequential limitation of use" category (*see Sutliff v Qadar*, 122 AD3d 452, 453 [1st Dept 2014]).

Plaintiff also failed to submit medical evidence sufficient to raise an issue of fact as to whether she suffered either "significant" or "permanent consequential" limitation of use of her cervical spine as a result of the accident, since her physicians found only relatively minor limitations (*see Sone v*

Qamar, 68 AD3d 566 [1st Dept 2009]).

We note that if plaintiff establishes a serious injury, she is entitled to recover damages for all injuries incurred as a result of an accident, even those that do not meet the serious injury threshold (*see Rubin v SMS Taxi Corp.*, 71 AD3d 548, 549-550 [1st Dept 2010]).

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

ENTERED: JUNE 23, 2015

CLERK

Tom, J.P., Renwick, Moskowitz, Manzanet-Daniels, Feinman, JJ.

15499- Index 653412/11
15500 Courtney Dupree,
Plaintiff,

Rodney Watts,
Plaintiff-Appellant,

-against-

Scottsdale Insurance Company,
Defendant-Respondent.

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Thompson & Knight LLP, New York (Marion Bachrach of counsel), and Ronald E. DePetris, Southhampton, for appellant.

Skarzynski Black LLC, New York (Alexis J. Rogoski of counsel), for respondent.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered September 10, 2014, which, inter alia, granted defendant's motion to vacate the court's prior order entered June 28, 2012, declared that defendant was no longer required to pay for plaintiff Rodney Watt's defense in the criminal action and directed Watts to reimburse defendant for the monies it expended in his defense in accordance with the terms of the policy, and denied Watt's motion to compel defendant to pay for his incurred legal fees retroactively, unanimously affirmed, with costs.

Plaintiff Watts was the chief investment officer of GDC Acquistions, LLC. Defendant Scottsdale Insurance Company issued GDC a directors & officers policy that covered Watts. On August 13, 2010, Watts was indicted for conspiracy to commit bank fraud, bank fraud, and making false statements (*U.S. v Courtney Dupree, Thomas Foley and Rodney Watts*, Case No. 1:10-CR-627 [KAM] [ED NY]). On June 28, 2012, the IAS court issued a preliminary injunction directing defendant to pay for Watt's defense in the criminal action. Following Watt's conviction and sentencing, defendant sought to be relieved of its obligation to pay for his continued defense, particularly, the appeal from his conviction that he was already pursuing. Defendant argued that the policy contained an exclusion for coverage of acts of fraud that became operable upon a "final judgment against its insured." The IAS court agreed with defendant, and vacated the preliminary injunction. We affirm.

In the context of a criminal prosecution, it is well settled that the imposition of the sentence constitutes the final judgment against the accused (*see e.g.* Criminal Procedure Law § 1.20[15]). While the appeal may, at some point, relieve Watts of that judgment, the finality of it is not changed by the pendency

of the appeal (see *Matter of Bailey [Bush Term. Co.]*, 265 AD 758 [1st Dept 1943], *affd* 291 NY 534 [1943]).

The language of the exclusion here is clear. Once the final judgment for fraud was entered against Watts, defendants' obligation to defend him from those claims ceased (*see e.g. 30W. 15th St. Owners Corp. v Travelers Ins. Co.*, 165 AD2d 731, 733 [1st Dept 1990]).

The court also correctly concluded that, at the time of its order, its finding that plaintiff was excluded from receiving further coverage for his defense under the policy and was then obligated to reimburse defendant for the monies it had expended would also entitle it to an offset on plaintiff's claim for past legal fees.

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

ENTERED: JUNE 23, 2015

CLERK

Tom, J.P., Renwick, Moskowitz, Manzanet-Daniels, Feinman, JJ.

15501 In re Evelyn Green, Index 402345/12
Petitioner-Appellant,

-against-

Manhattan Community Board 10,
et al.,
Respondents-Respondents.

_____

Evelyn Green, appellant pro se.

Zachary W. Carter, Corporation Counsel, New York (Michael S. Legge of counsel), for respondents.

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Order and judgment (one paper), Supreme Court, New York County (Doris Ling-Cohan, J.), entered July 18, 2013, which denied the petition seeking to vacate an arbitration award, dated June 14, 2012, which upheld an administrative determination made after a hearing conducted pursuant to a collective bargaining agreement between petitioner's union and respondent New York City, terminating petitioner from her position as a Community Associate at Community Board 10, and confirmed the arbitration award, unanimously affirmed, without costs.

Supreme Court properly held this special proceeding, commenced pursuant to CPLR Article 78, is in the nature of a CPLR article 75 proceeding challenging the award rendered by the arbitrator pursuant to the grievance procedures set forth in the

collective bargaining agreement with petitioner's union (*see Matter of Rosa v City Univ. of N.Y.*, 13 AD3d 162 [1st Dept 2004], *lv denied* 5 NY3d 705 [2005]; *Rodriguez v New York City Tr. Auth.*, 280 AD2d 272 [1st Dept 2001]). As so considered, the court properly dismissed the petition, filed November 20, 2012, on the ground that it was untimely filed pursuant to the applicable 90-day statute of limitations (*see* CPLR 7511[a]), based on petitioner's admission that she received formal notice of the arbitration award on July 6, 2012. Petitioner's pro se status is not a basis to reach the merits of her claim. Because the proceeding is time-barred, we do not have discretion to hear it (*see Matter of Henry v New York City Hous. Auth.*, 122 AD3d 448 [1st Dept 2014]).

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

ENTERED: JUNE 23, 2015

CLERK

Tom, J.P., Renwick, Moskowitz, Manzanet-Daniels, Feinman, JJ.

15502 In re Van Wagner Communications, LLC, Index 100418/13
Petitioner-Appellant,

-against-

Board of Standards and Appeals of the City of New York,
Respondent-Respondent.

_____

Akerman LLP, New York (Richard G. Leland of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Deborah A. Brenner of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Donna M. Mills, J.), entered February 19, 2014, denying the petition seeking annulment of a resolution by respondent, Board of Standards and Appeals of the City of New York, dated February 5, 2013, which affirmed the New York City Department of Buildings' denial of petitioner's applications to register two commercial advertising signs, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Pursuant to New York City Zoning Resolution § 52-61, petitioner's discontinuance of its legal nonconforming use of two advertising signs for more than 15 years following the 1973 collapse of the West Side Highway, extinguished its rights to the

nonconforming use. Petitioner has failed to demonstrate that it falls into the limited exception applicable when discontinuance "is directly caused by . . . the construction of a duly authorized improvement project by a governmental body or a public utility company (NY City Zoning Resolution § 52-61; *cf. Matter of 149 Fifth Ave. Corp. v Chin*, 305 AD2d 194 [1st Dept 2003] [nonconforming use was not discontinued within the meaning of the Zoning Resolution where sign was removed to permit legally mandated building facade inspections and repairs]).

We have considered petitioner's remaining contentions, including its constitutional argument, and find them unavailing.

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

ENTERED: JUNE 23, 2015

CLERK

Tom, J.P., Renwick, Moskowitz, Manzanet-Daniels, Feinman, JJ.

15503 The People of the State of New York, Ind. 3117/13
Respondent,

-against-

Christopher Nieves,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Lauren Springer 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 (Richard D. Carruthers, J.), rendered on or about October 23, 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 23, 2015

CLERK

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

Tom, J.P., Renwick, Moskowitz, Manzanet-Daniels, Feinman, JJ.

15504 Enchantments Inc., Index 650073/14
Plaintiff-Appellant,

-against-

424 East 9th LLC,
Defendant-Respondent.

_____

Law Firm of Daniel O'Hara, PLLC, New York (Daniel O'Hara of counsel), for appellant.

The Law Offices Of Jamie Lathrop, PC, Brooklyn (Jamie Lathrop of counsel), for respondent.

_____

Order, Supreme Court, New York County (Anil C. Singh, J.), entered on or about September 16, 2014, which, to the extent appealed from as limited by the briefs, denied plaintiff's summary judgment motion for a declaration that it has no real estate tax liability resulting from any increase in assessed value due to improvements that solely benefit defendant landlord, and granted defendant landlord's motion for summary judgment and declared that plaintiff was obligated to pay 40% of the increase in real estate taxes over the 2009 base year, unanimously reversed, on the law, with costs, defendant's motion denied, plaintiff's motion granted to declare that plaintiff's tax liability does not include increases based on the increased valuation of the building due to improvements solely benefitting

the landlord, and the matter remanded for a determination as to the extent, if any, the improvements caused the tax increases and whether, or to what extent, such improvements solely benefit the landlord.

The Court of Appeals has made clear that "[i]t is not the aim of . . . a [tax escalation] clause . . . to impose upon the tenant responsibility for increases in real estate taxes resulting from improvements on the property redounding solely to the benefit of the landlord" (*Credit Exch. v 461 Eighth Ave. Assoc.*, 69 NY2d 994, 997 [1987]; *see also 223 W. Corp. v B & D Leistner Props.*, 21 AD3d 810 [1st Dept 2005] ["a tax escalation clause such as the one at issue will not be read to impose responsibility on a tenant for 'increases in real estate taxes resulting from improvements on the property redounding solely to the benefit of the landlord'"]).

The motion court incorrectly found that this principle was limited to circumstances where the improvement involved a vertical or horizontal enlargement of the building. That both *Credit Exchange* and *223 W. Corp.* included expansions of the number of floors in the respective buildings does not limit the application of the principle to those facts. Indeed, in *223 W. Corp.*, part of the improvement which fell under this rubric was

the "conversion of the building to a residential condominium." The improvement at issue is a renovation solely of the residential aspects of the building. Plaintiff is a commercial tenant. Our declaration here simply states the well settled principle regarding tax escalation clauses.

We have examined defendant's remaining arguments and find them unavailing.

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

ENTERED: JUNE 23, 2015

CLERK

Tom, J.P., Renwick, Moskowitz, Manzanet-Daniels, Feinman, JJ.

15505 The People of the State of New York, Ind. 2431/13
Respondent,

-against-

Carrie Greene,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Richard Carruthers, J.), rendered on or about October 2, 2013, unanimously affirmed.

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

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

service of a copy of this order.

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

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

ENTERED: JUNE 23, 2015

CLERK

Tom, J.P., Renwick, Moskowitz, Manzanet-Daniels, Feinman, JJ.

15506N H. Patrick Barclay, Index 402340/10
Plaintiff-Appellant,

-against-

Odell H. Etim, et al.,
Defendants-Respondents.

_____

H. Patrick Barclay, appellant pro se.

_____

Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered December 3, 2013, which denied plaintiff's motion to vacate the dismissal of the action for failure to appear at a scheduled conference, unanimously affirmed, without costs.

Supreme Court properly exercised its discretion in denying plaintiff's motion to vacate his default in this action alleging fraud and seeking to recover ownership of a parcel of real property. Plaintiff failed to submit with his moving papers an

affidavit from someone with personal knowledge that addresses the merit of his claims (*see Biton v Turco*, 88 AD3d 519 [1st Dept 2011]; *Bollino v Hitzig*, 34 AD3d 711 [2d Dept 2006]).

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

ENTERED: JUNE 23, 2015

CLERK

Tom, J.P., Renwick, Moskowitz, Manzanet-Daniels, Feinman, JJ.

15507N Cory Farrington, Index 305063/13
Plaintiff-Respondent,

-against-

Fordham Associates, LLC, et al.,
Defendants-Appellants,

JJ Operating Inc., et al.,
Defendants.

_____

Thomas M. Bona, P.C., White Plains (Thomas M. Bona of counsel), for appellants.

Louis C. Fiabane, New York, for respondent.

_____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about October 21, 2014, which denied defendants Fordham Associates, LLC, Bally Total Fitness Corporation, Bally Total Fitness of Greater New York, Inc., and Fine Line Restoration, LLC's motion to change venue of the action to Nassau County, unanimously affirmed, without costs.

Plaintiff commenced this Labor Law action in Bronx County, designating venue on the basis of his residence there. However, at his deposition, plaintiff testified that he had been living in Kings County, in a shelter facility, for about 15 months. About three months later, after giving plaintiff time to sign the deposition transcript (CPLR 3116[a]) and serving a demand for

change of venue, defendants moved for change of venue, since plaintiff's testimony indicated that he had been living in Kings County at the time he commenced the action.

Under these circumstances, defendants were excused from complying with the time requirements of CPLR 511 for a motion to change venue, but they were required to move "promptly," i.e. within a "reasonable time" after they obtained knowledge of the facts supporting their request (*Moracho v Open Door Family Med. Ctr., Inc.*, 79 AD3d 581, 581 [1st Dept 2010]). The motion court denied their motion on the ground that their three-month delay in moving was unreasonable. We find that change of venue is not warranted in any event. The shelter could be considered a residence for venue purposes, given plaintiff's prolonged stay there (*see Leetom v Bell*, 68 AD3d 532 [1st Dept 2009]). However, a person may have two residences for venue purposes (CPLR 503[a]). In opposition to the motion, plaintiff demonstrated through his affidavit and supporting documentary evidence that his residence at the Brooklyn facility was temporary and that he never "intended to abandon or surrender" his residence with his mother in Bronx County, which he viewed as his permanent home (*see Clarke v Ahern Prod. Servs.*, 181 AD2d 514 [1st Dept 1992]).

Among other things, plaintiff still kept personal belongings there, spent time and stayed there, received all mail there, and used that address on his State identification card.

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

ENTERED: JUNE 23, 2015

CLERK

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

15508 The People of the State of New York, Ind. 3376/10
Respondent,

-against-

Paris Jones,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (David A. Crow of counsel), and Kramer Levin Naftalis & Frankel LLP, New York (Scott Ruskay-Kidd of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Eric C. Washer of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Michael A. Gross, J.), rendered March 9, 2012, as amended April 6, 2012, convicting defendant, after a jury trial, of robbery in the third degree, and sentencing him, as a second felony offender, to a term of 3½ to 7 years, unanimously affirmed.

The court properly submitted, over defendant's objection, the count of the indictment charging third-degree robbery, because there was a reasonable view of the evidence that defendant committed that crime without committing first-degree robbery (*see generally People v Negron*, 91 NY2d 788, 792 [1998]). The first-degree charge was based on the victim's claim that after defendant "violently" seized the victim's property and a

chase ensued, defendant drew a knife and charged at the victim in order to deter him from making further efforts to recover his property. The jury, which acquitted defendant of first-degree robbery, could have rejected the victim's vigorously contested testimony that defendant had a knife, but still found that defendant used force, including the implied threat of harm, in the initial taking of the property, its retention, or both. Even with the aid of an interpreter, the victim had difficulty articulating exactly what happened, and his testimony was subject to competing reasonable interpretations, creating issues to be resolved by the jury.

The court properly exercised its discretion in precluding defendant from introducing evidence relating to what was apparently a child protective proceeding brought against his girlfriend by the Administration for Children's Services, because defendant did not establish the relevance of this evidence. On appeal, defendant asserts that his presence in his girlfriend's apartment would have adversely affected her interests in the child protective proceeding, and that such a circumstance would have tended to explain why he hid from the police when they entered the apartment, thereby undermining the inference of consciousness of guilt. However, despite extensive argument

about this evidence at various points in the trial, defendant never alerted the court to this particular theory of admissibility. Accordingly, his claim is unpreserved (*see People v George*, 67 NY2d 817, 819 [1986]), and we decline to review it in the interest of justice. As an alternative holding, we find that the precluded evidence had little or no probative value in explaining why defendant hid from the police. The issue is not whether defendant was entitled to offer an innocent explanation for consciousness-of-guilt evidence, but whether the proposed evidence was relevant to such an explanation. Even on appeal, defendant has not made a convincing connection between his girlfriend's situation and his efforts to hide. In any event, defendant was able to explain to the jury that he was hiding because he was on parole.

After an appropriate inquiry, the court properly discharged a sworn juror over defendant's objection. During voir dire, the juror, who became the foreperson, did not indicate any acquaintance with defendant. However, in a recorded prison phone call, defendant told his sister that he knew the juror from his neighborhood, that the juror had been "making eye contact" with him in the courtroom, and that defendant hoped to benefit from this situation. The court conducted a careful inquiry, in which

it simply informed the juror that defendant "believe[d]" that he was acquainted with the juror "in some way" from the neighborhood where the juror lived. When the juror stated unequivocally that this information would prevent him from rendering a fair and impartial verdict, the court properly discharged him as "grossly unqualified" (*see* CPL 270.35[1]; *People v Buford*, 69 NY2d 290, 298 [1987]). Defendant argues that, by revealing that defendant believed he knew the juror, the court rendered the juror unqualified. However, the court properly exercised its discretion when it confronted the juror with defendant's statement, in a sanitized form, in order to ensure a candid and credible response, especially given the potential implications of defendant's claim that the juror had been making particular eye contact with him.

Defendant's challenges to the prosecutor's summation and the court's charge are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find no

basis for reversal. We have considered and rejected defendant's related ineffective assistance of counsel claim, and his assertion that he actually preserved his present argument regarding the court's charge.

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

ENTERED: JUNE 23, 2015

CLERK

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

15509 Roberto Wagner, Index 401491/11
Plaintiff-Respondent,

-against-

Acme American Repairs, Inc.,
Defendant-Appellant.

_____

Marshall Dennehey Warner Colemen & Goggin, P.C., New York (John K. McElligott of counsel), for appellant.

Andrew L. Weitz & Associates, P.C., Mineola (James M. Lane of counsel), for respondent.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered April 18, 2014, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff, a dishwasher at a restaurant, slipped on a wet floor of the restaurant's dishwashing room and alleges that his accident was caused by defendant contractor's failure to properly maintain the dishwasher, causing it to leak.

Issues of fact exist as to whether the service contract between defendant and plaintiff's employer entirely displaced the

employer's duty to maintain the kitchen equipment in a safe condition, since the contract prohibited anyone other than defendant's employees from working on the equipment, including the dishwasher (*see Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579, 589 [1994]).

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

ENTERED: JUNE 23, 2015

CLERK

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

15510 In re Ramona R.,
Petitioner-Appellant,

-against-

Morris G. C.,
Respondent-Respondent.

_____

Leslie S. Lowenstein, Woodmere, for appellant.

Law Office of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), for respondent.

_____

Order, Family Court, New York County (Susan K. Knipps, J.), entered on or about June 12, 2014, which, after a fact-finding hearing, dismissed the petition seeking an order of protection, unanimously affirmed, without costs.

Petitioner failed to establish by a fair preponderance of the evidence that respondent committed acts amounting to harassment in the second degree (*see Matter of Gloria C. v Josephine I.*, 106 AD3d 630 [1st Dept 2013]; Penal Law § 240.26). The court's finding that the father touched the mother only to

separate her from their child, who was upset by her refusal to stop bathing him, is supported by the evidence, and there is no basis to disturb the court's credibility determinations (*Matter of Everett C. v Oneida P.*, 61 AD3d 489 [1st Dept 2009]).

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

ENTERED: JUNE 23, 2015

CLERK

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

15511 Ivon Anaya, Index 310783/11
Plaintiff-Appellant,

-against-

Vacca Bros. Contractors, Inc., et al.,
Defendants-Respondents.

_____

Ephrem J. Wertenteil, New York, for appellant.

Kenney Shelton Liptak Nowak LLP, White Plains (Deborah A. Summers of counsel), for Vacca Bros. Contractors, Inc., respondent.

D'Amato & Lynch, LLP, New York (Arturo M. Boutin of counsel), for Premier Carting of New York, respondent.

_____

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered April 3, 2014, which granted defendants' motions for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Summary judgment was properly granted in this action where plaintiff was injured when, while attempting to walk under the horizontal metal post of a sidewalk bridge, her head struck the post. The record does not present a triable issue of fact as to whether the placement of the dumpster created a dangerous condition.

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 23, 2015

CLERK

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

15512 Delores Person, Index 21171/12E
Plaintiff-Respondent,

-against-

New York City Housing Authority,
Defendant-Appellant.

_____

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

Frekhtman & Associates, Brooklyn (Arkady Frekhtman of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Lizbeth Gonzalez, J.), entered August 19, 2014, which, inter alia, granted plaintiff's motion to renew and reargue and, upon renewal and reargument, denied defendants's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The court exercised its discretion in a provident manner in granting renewal. Although the motion was based on information that was available to plaintiff earlier, "courts have discretion to consider such evidence in the interest of justice" (*Laourdakis v Torres*, 98 AD3d 892, 893 [1st Dept 2012]; *see Cruz v Bronx Lebanon Hosp. Ctr.*, 73 AD3d 597 [1st Dept 2010]; *Segall v Heyer*, 161 AD2d 471, 473 [1st Dept 1990]).

Defendant moved for summary judgment on the ground that plaintiff's notice of claim was not served within the 90-day period set forth in General Municipal Law § 50-e, and plaintiff had not timely moved for an extension of time to serve. Plaintiff contended that she qualified under either or both prongs of the "savings provision" under General Municipal Law § 50-e(3)(c), which provides that "[i]f the notice is served within the period specified by this section, but in a manner not in compliance with the provisions of this subdivision, the service shall be valid if the public corporation against which the claim is made demands that the claimant. . .be examined in regard to it, or if the notice is actually received by a proper person within the time specified by this section, and the public corporation fails to return the notice, specifying the defect in the manner of service, within thirty days after the notice is received."

Moreover, "[t]he purpose of a notice of claim is to allow the municipal defendant to make a prompt investigation of the facts and preserve the relevant evidence. The applicable statute should be applies flexibly so as to balance two countervailing interests: on the hand, protecting municipal defendants from stale or frivolous claims, and on the other hand, ensuring that a

meritorious case is not dismissed for a ministerial error. General Municipal Law § 50-e was not meant as a sword to cut down honest claims, but merely as a shield to protect municipalities against spurious ones" (*Lomax v New York City Health and Hospitals Corp.*, 262 AD2d, 4 [1999]) (internal citations omitted).

Here, the record shows that plaintiff served a notice of claim on defendant on December 8, 2011 via regular mail, which did not comply with the requirement that service be completed in person or via registered or certified mail. However, defendant subsequently demanded that plaintiff appear for examinations pursuant to General Municipal Law § 50-h with regard to her claim. Under such circumstances, plaintiff's service of the notice of claim is valid under the first prong of General Municipal Law § 50-e(3)(c).

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

ENTERED: JUNE 23, 2015

CLERK

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

15514 Laurita Figueroa, et al., Index 22473/12
Plaintiffs-Appellants,

-against-

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

_____

Mitchell Dranow, Sea Cliff, for appellants.

Zachary W. Carter, Corporation Counsel, New York (Deborah A. Brenner of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered March 13, 2015, which denied plaintiffs' motion to strike defendants' answer for failing to comply with discovery orders, unanimously affirmed, without costs.

The court providently exercised its discretion in denying the motion to strike and warning defendants that failure to appear at depositions could result in additional sanctions (*see Palmenta v Columbia Univ.*, 266 AD2d 90, 91 [1st Dept 1999]). While it is true that defendants failed to comply with three discovery orders and to submit to depositions on multiple occasions, the court did not abuse its discretion in choosing not to exercise the "drastic remedy" of striking the answer (*McGilvery v New York City Tr. Auth.*, 213 AD2d 322, 324 [1st Dept

1995]), and instead providing defendants with one additional opportunity to submit to depositions. Moreover, while the "frail health" of plaintiff Figueroa is unfortunate, since plaintiffs have asserted that he is "ready, willing, and able to submit to a deposition," there does not appear to be any actual prejudice at this time.

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

ENTERED: JUNE 23, 2015

CLERK

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

15517 The People of the State of New York Ind. 444/11
Respondent,

-against-

Angel Colon,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered January 4, 2012, convicting defendant, after a jury trial, of robbery in the third degree, burglary in the third degree, and auto stripping in the second degree, and sentencing him, as a second felony offender, to an aggregate term of three to six years,, unanimously affirmed.

Defendant's legal sufficiency claim regarding his robbery conviction is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence amply supported the jury's conclusion that defendant used or threatened the immediate use of

physical force for the purpose of retaining stolen property (*see People v Gordon*, 23 NY3d 643, 649-651 [2014]). The victim clearly testified that defendant did not drop the stolen property until after he "swung" at the victim. This violent act satisfied the element of force, and defendant's arguments to the contrary are without merit.

The court's *Sandoval* ruling was an improvident exercise of discretion only to the extent that it permitted inquiry into a criminal mischief conviction's underlying facts, which were extremely similar to the facts of the present case. However, we find the error to be harmless (*see People v Grant*, 7 NY3d 421 [2006]).

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

ENTERED: JUNE 23, 2015

CLERK

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

15518 Park Avenue Realty, LLC, Index 21191/13E
Plaintiff-Respondent,

-against-

Schindler Elevator Corporation, et al.,
Defendants,

New York Marine and General
Insurance Company, et el.,
Defendants-Appellants.

_____

Speyer & Perlberg, LLP, Melville (James M. O'Hara of counsel), for appellants.

Doyle Broumand, LLP, Bronx (Michael B. Doyle of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (John A. Barone, J.), entered March 26, 2014, which, to the extent appealed from, denied defendants-appellants' cross motion to dismiss plaintiff's third cause of action, for bad faith in violation of General Business Law § 349, in addition to plaintiff's request for attorneys' fees and punitive damages, with leave to renew upon the completion of discovery, unanimously reversed, on the law, without costs, and defendants' cross motion for summary judgment dismissing the third cause of action granted.

"The discovery rules are designed to support a properly pleaded cause of action and to prepare defenses to charges made

not to discover whether a claim exists" (*American Communications Assn., Local 10, I.B.T. v Retirement Plan for Empl. of RCA*, 488 F Supp 479, 484 [SD NY 1980], *affd* 646 F2d 559 [2d Cir 1980]). Here, plaintiff has insufficiently pled the third cause of action, for "bad faith" based on General Business Law § 349, as the allegations contained within the complaint do not encompass consumer-oriented conduct (*Cusack v Greenberg Traurig, LLP*, 109 AD3d 747, 748 [1st Dept 2013]; *see Fekete v GA Ins. Co. of N.Y.*, 279 AD2d 300, 300 [1st Dept 2001]). Even if a plaintiff meets the threshold of alleging consumer-oriented conduct, it must then establish that defendant engaged in an act or practice that was deceptive in a material way and that plaintiff was injured by it (*Gomez-Jimenez v New York Law Sch.*, 103 AD3d 13, 16 [1st Dept 2012], *lv denied* 20 NY3d 1093 [2013]). Plaintiff's possession of the actual insurance policies that contained the exclusionary language upon which the denial of coverage later was based negates any finding of deceptive acts on the part of the insurers.

Accordingly, discovery cannot cure plaintiff's pleading defects, and the third cause of action, including plaintiff's request for attorneys' fees and punitive damages, should be dismissed without waiting for the completion of discovery (*see Fekete*, 279 AD2d at 300).

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

ENTERED: JUNE 23, 2015

CLERK

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

15519-
15519A DD 11th Avenue, LLC, et al.,
Plaintiffs-Respondents,

-against-

Harleysville Insurance Company
of New York,
Defendant-Appellant,

S.J. Electric, Inc.,
Defendants.

Index 103362/11

_____

Gallo Vitucci Klar LLP, New York (Daniel P. Mevorach of counsel), for appellant.

Cornell Grace, P.C., New York (Laura M. Maletta of counsel), for respondents.

_____

Order, Supreme Court, New York County (Richard F. Braun, J.), entered June 17, 2014, which, to the extent appealed from, granted plaintiffs' motion for summary judgment to the extent of declaring that the policy issued by defendant insurance company provides primary and not excess coverage to plaintiffs, unanimously affirmed, with costs. Appeal from order (same court and Justice), entered November 1, 2013, unanimously dismissed, without costs, as subsumed in the appeal from the order entered June 17, 2014.

Defendant insurance company issued a policy for liability coverage to defendant, S.J. Electric, Inc. Plaintiffs, the owner of the premises as well as the construction and development managers, who were listed as additional insureds on the policy, sought coverage for an underlying personal injury claim brought by an employee of S.J. Electric. Defendant insurance company declined to provide coverage, arguing, among other things, that its coverage obligations are excess to plaintiffs' own coverage through a Contractor Controlled Insurance Program (CCIP).

The motion court correctly determined that the plain language of the policy provides primary coverage to plaintiffs in the underlying action. The terms of the CCIP endorsement cannot pertain to plaintiffs as additional insureds; by its plain language, it only pertains to the named insured, S.J. Electric. In addition, the additional insured endorsement specifically provides that "any coverage ... to an additional insured shall be excess ... unless the 'written contract' specifically requires that this insurance be primary ..." and S.J. Electric expressly

contracted to provide plaintiffs primary coverage (*see Bovis Lend Lease LMB Inc. v Great Am. Ins. Co.*, 53 AD3d 140, 145-146 [1st Dept 2008]).

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

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

ENTERED: JUNE 23, 2015

CLERK

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

15520 In re Gunther Powers, Index 103347/12
Petitioner,

-against-

Robert Doar, etc.,
Respondent.

_____

Gunther Powers, petitioner pro se.

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

_____

Determination of respondent, dated March 21, 2012, which sustained three charges of misconduct against petitioner and terminated his employment, 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 [Kathryn Freed, J.], entered January 24, 2013), dismissed, without costs.

Substantial evidence supports the determination that petitioner committed the charged acts of misconduct (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-181 [1978]). The record shows that petitioner

engaged in a pattern of aggressive and inappropriate workplace conduct, and there exists no basis to disturb the credibility determinations made by the Administrative Law Judge (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]).

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

ENTERED: JUNE 23, 2015

CLERK

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

15521 The People of the State of New York, Ind. 64/10
Respondent,

-against-

Ignacio Pena,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Julia L. Chariott of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Alvin Yearwood, J.), rendered March 16, 2012, convicting defendant, after a jury trial, of assault in the second and third degrees, reckless endangerment in the second degree, unlawful fleeing a police officer in a motor vehicle in the third degree, and operating a motor vehicle while under the influence of alcohol, and sentencing him, as a second violent felony offender, to an aggregate term of six 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]). While an officer was lawfully attempting to remove defendant from a car, defendant drove forward rapidly, with the officer still hanging on to defendant,

causing the officer to be dragged and injured. The totality of defendant's conduct throughout the incident supports the conclusion that defendant acted with intent to prevent the officer from performing a lawful duty (*see* Penal Law § 120.05[3]; *People v Bueno*, 18 NY3d 160, 168-169 [2011]), and that defendant was not so intoxicated as to be unable to form the requisite intent (*see* Penal Law § 15.25; *People v Stillwagon*, 101 AD3d 1629 [4th Dept 2012], *lv denied* 21 NY3d 1020 [2013]).

Defendant's excessive sentence claim appears to be moot because he has completed his prison term and, as a result of having been deported, he is not serving postrelease supervision. In any event, we perceive no basis for reducing the sentence.

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

ENTERED: JUNE 23, 2015

CLERK

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

15522 The People of the State of New York, Ind. 86/13
Respondent,

-against-

Negro Rivera,
Defendant-Appellant.

_____

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 (Hope Korenstein of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Michael Obus, J.), rendered on or about October 17, 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 23, 2015

CLERK

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

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

15523 Gladys Estaba, Index 250731/11
Plaintiff-Respondent,

-against-

Peter Estaba, et al.,
Defendants,

Mortgage Electronic Registration
Systems, Inc., etc.,
Defendant-Appellant.

_____

DelBello Donnellan Weingarten Wise & Weiderkehr, LLP, White Plains (Eric J. Mandell of counsel), for appellant.

Joseph A. Altman, P.C., Bronx (Joseph A. Altman of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered December 1, 2014, which denied the motion of defendant Mortgage Electronic Registration Systems, Inc. (MERS) for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The court properly determined that the action is not time-barred. A claim against a forged deed is not subject to a statute of limitations defense (*see Faison v Lewis*, __ NY3d __, 2015 NY Slip Op 04026, **5 [May 12, 2015]). In any event, CPLR 212(a) would not bar plaintiff from bringing this action, as she sufficiently alleged her ownership and possession of the property

within the time required (*see Matter of Marini*, 119 AD3d 584, 586 [2d Dept 2014]).

The court properly determined that there remain unresolved issues of fact concerning the execution of the deed precluding summary judgment. Although the notarization of a signature raises a presumption that the signature is genuine (*see* CPLR 4538), the presumption is rebuttable (*see Seaboard Sur. Co. v Earthline Corp.*, 262 AD2d 253 [1st Dept 1999]). Plaintiff's affidavit averring that her signature on the 1966 deed is a forgery, along with the supporting documents attached thereto, were sufficient to raise an issue of fact as to the authenticity of that signature, warranting denial of MERS' summary judgment motion. Plaintiff's opposition was also sufficient to rebut the prima facie evidence of the contents of the deed, which had been recorded and on file in the Office of the City Register, Bronx County, for more than ten years (*see* CPLR 4522).

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

ENTERED: JUNE 23, 2015

CLERK

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

15528 The People of the State of New York, Ind. 5209/12
Respondent,

-against-

Charles Paterson,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Rena K. Uviller, J.), rendered on or about May 8, 2013, as amended May 10, 2013, unanimously affirmed.

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

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

service of a copy of this order.

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

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

ENTERED: JUNE 23, 2015

CLERK

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

15529N Stephanie Bonadio, Index 100792/12
Plaintiff-Appellant,

-against-

New York University,
Defendant,

James Stuckey,
Defendant-Respondent.

_____

Outten & Golden LLP, New York (Gregory S. Chiarello of counsel), for appellant.

Zukerman Gore Brandeis & Crossman, LLP, New York (John K. Crossman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Paul Wooten, J.), entered October 30, 2014, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion to compel discovery of information related to claims of sexual misconduct made against defendant Stuckey when he was employed by Forest City Ratner (FCR), except insofar as such information was provided to or otherwise known by defendant New York University or, in the alternative, to renew plaintiff's prior motion to compel or reargue Stuckey's prior motion to quash, unanimously reversed, on the law and the facts, without costs, and the motion to compel granted.

Plaintiff claims that she was subjected to unlawful conduct in the form of unwanted touching by defendant Stuckey; Stuckey denies that his intent was to harass plaintiff or that his conduct was unwanted. He claims that he took plaintiff's hand and placed it on his upper leg, innocently and with her consent, in an effort to console her. As Stuckey's intent is at issue and "no particular intent can be inferred from the nature of the act [he] committed," plaintiff is entitled to disclosure of evidence that bears on his intent, e.g. "other similar acts" (*see Matter of Brandon*, 55 NY2d 206, 211-212 [1982]). Thus, she is entitled to information related to claims of sexual misconduct made against Stuckey while he was employed at FCR (*see e.g. Pecile v Titan Capital Group, LLC*, 119 AD3d 446 [1st Dept 2014]).

We have considered all other claims and find them unavailing.

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

ENTERED: JUNE 23, 2015

CLERK

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

15154 In re BarFreeBedford, et al., Index 100217/14
Petitioners-Appellants,

-against-

The New York State Liquor Authority,
et al.,
Respondents-Respondents.

_____

Mallin & Cha, P.C., New York (Barry Mallin of counsel), for appellants.

Jacqueline P. Flug, Albany (Mark D. Frering of counsel), for New York State Liquor Authority, respondent.

Law Offices of William M. Poppe, PLLC, New York (William M. Poppe of counsel), for Chumley's 86 LLC, respondent.

_____

Judgment, Supreme Court, New York County (Barbara Jaffe, J.), entered August 26, 2014, affirmed, without costs.

Opinion by Acosta, J. All concur

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
Rolando T. Acosta
David B. Saxe
Sallie Manzanet-Daniels
Darcel D. Clark, JJ.

15154
Index 100217/14

_____x

In re BarFreeBedford, et al.,
Petitioners-Appellants,

-against-

The New York State Liquor Authority,
et al.,
Respondents-Respondents.

_____x

Petitioners appeal from a judgment of the Supreme Court, New York County (Barbara Jaffe, J.), entered August 26, 2014, denying the petition to annul respondent New York State Liquor Authority's October 24, 2013 conditional approval of a liquor license to respondent Chumley's 86 LLC, doing business as "Chumley's," and dismissing the proceeding brought pursuant to CPLR article 78.

Mallin & Cha, P.C., New York (Barry Mallin of counsel), for appellants.

Jacqueline P. Flug, Albany (Mark D. Frering and Courtney E. Denette of counsel), for New York State Liquor Authority, respondent.

Law Offices of William M. Poppe, PLLC, New York (William M. Poppe of counsel), for Chumley's 86 LLC, respondent.

ACOSTA, J.

At issue in this appeal is whether Supreme Court properly denied the CPLR article 78 petition to annul the State Liquor Authority's conditional grant of a liquor license to Chumley's 86 LLC. Chumley's is located at 86 Bedford Street in the West Village of Manhattan. Petitioners are BarFreeBedford, a community association of residents who live near 86 Bedford Street, and 47 individual residents of the area. We affirm the denial of the petition since the record demonstrates that the State Liquor Authority's determination has a rational basis and is not arbitrary and capricious.

Respondent Chumley's, a bar and restaurant in the West Village, has a storied history. "The place on Bedford," as it was known then, first opened as one of Manhattan's original speakeasies in the 1920's. Simone de Beauvoir, one of the many literary luminaries who frequented Chumley's, wrote, "[I]t has that rare thing in America: an atmosphere" (Jeff Klein, *The History and Stories of the Best Bars of New York* [2006]. It was housed in an obscure location befitting the age of the roaring, prohibition-period 20's, and just getting into Chumley's, with its multiple front, side, back, and trap doors, was an adventure.

The roster of regulars reads like the syllabus of a course on Great American Literature: Hemingway, O'Neill, Fitzgerald,

Faulkner, Steinbeck, and Salinger. So prominent were the brilliant wordsmiths of the day at Chumley's that in a 1930's review, restaurant critic Rian James wrote, "[I]t is quite definitely the headquarters of New York's choosier literati" (Rian James, *Dining in New York* 203 [1930]). As a tribute to past patrons, Chumley's walls were decorated with old book jackets. In 2000, the venerable watering hole was added to the National List of Literary Landmarks by the Friends of Libraries USA.

More recently, Chumley's has become a home to firefighters from FDNY Ladder Company 5 and Engine Company 24, a firehouse that lost 11 men on 9/11. The firehouse is just a few blocks away from Chumley's, and many of the firefighters work there part-time. In recent years, memorials for fallen firefighters have been held there. Laddermen have come from as far away as Oklahoma and Toronto to pay homage and carve their names in the restaurant's treasured wooden tables. In a memo to the owner of Chumley's dated October 1, 2008, the local Bedford Barrow Commerce Block Association recognized that the bar has become "[a] community memorial to our own heroic fallen firefighters."

In 2007, Chumley's closed temporarily for the repair of structural defects in the landmark-designated building. On May 10, 2012, Chumley's notified Community Board 2 (the Board) of its

intention to apply for a liquor license for the reopened premises. On June 21, 2012, Chumley's appeared at a full Board meeting and presented its application for a license to operate, in a mixed-use building, a 2,000-square-foot restaurant with 58 table seats, a standing bar (no bar seats), and a maximum legal capacity of 74 people. There would be no sidewalk café or backyard garden, and it would play only recorded music at "background levels." Chumley's also submitted a petition, signed by roughly 250 neighboring residents, that states that granting the license would be in the public's best interest.

The Board and Chumley's then negotiated certain stipulations regarding operation of the establishment. On the same date, June 21, 2012, the 39-member Board unanimously adopted a resolution recommending denial of Chumley's application unless the stipulations were incorporated into its "Method of Operation" on the license. Specifically, Chumley's agreed to close at 1:00 a.m. Sunday through Wednesday, and 2:00 a.m. Thursday through Saturday, and to obtain all required certificates, permits and related documents, including a revised and approved certificate of occupancy upon completion of its renovations. Chumley's also agreed to keep the windows and doors closed at all times, to keep the kitchen open until one hour before closing, and to maintain security in front of the premises and a doorman inside. The

Board notified the State Liquor Authority of its resolution.

On or about January 3, 2013, Chumley's filed its application with the Authority. Chumley's acknowledged that 86 Bedford Street is within 500 feet of at least three other establishments that serve liquor. Although, in such cases, the applicant must provide a written statement explaining why issuance of the license would be in the public interest, Chumley's did not provide such a statement at that time.

When the 500-foot rule is implicated, the Authority must hold a hearing to determine whether issuance of the license is in the public interest (*see* Alcoholic Beverage Control Law [ABCL] § 64[7][f]). The Authority scheduled a hearing for January 24, 2013. By letter dated January 4, 2013, the Authority notified the Board of the hearing, and advised the Board that it could testify through an officer, or submit a written statement of its position, if desired.

At the January 24, 2013 hearing, Chumley's submitted an affidavit by its manager, James Miller, who stated that granting the liquor license "promotes public convenience and advantage and is in the public interest" because: "the neighborhood is not saturated with liquor licenses," Chumley's would have all of its necessary permits and licenses, there would be no noticeable effect on traffic or parking in the area, existing noise levels

would not increase, and there was no history of violations of the liquor law or reported crime on the premises." In a separate affidavit, Miller reaffirmed that he would adopt the previously described stipulations.

No one appeared on the Board's behalf, and no opposition to the application was raised at the hearing. By letter dated October 24, 2013, the Authority informed Chumley's that its application was conditionally approved, i.e., that it would be approved upon Chumley's compliance with the stipulations, inter alia.

By petition dated February 21, 2014, petitioners commenced the instant proceeding to annul the Authority's conditional approval of the license. They alleged that there were at least 21 other licensed establishments within 500 feet of the premises and that the relevant statute recognizes that even three bars within 500 feet is over-saturation. Petitioners further noted that the other bars were on more commercial neighboring streets, such as Seventh Avenue South, but there were no bars on Bedford Street itself, and that the five restaurants on Bedford Street closed by 11 p.m. during the week and midnight on weekends. Thus, they alleged, if Chumley's stayed open later, it would undermine the peace and quiet on the block. In addition, they alleged that before Chumley's closed, it was a "major destination

for tourists, undergraduates and barhopping bridge-and-tunnel partygoers," resulting in "unruly, drunk and extremely loud" crowds on the street.

Petitioners alleged that the Authority violated the ABCL by issuing the license without finding that it would further the public interest, and by failing to state and file the reasons for its determination. Thus, they argued, the determination was the result of an error of law, and was arbitrary and capricious and an abuse of discretion.

In its answer, the Authority admitted that it failed to state and file the reasons for its determination before issuing the conditional approval. Accordingly, in addition to the previously described correspondence, it annexed a memorandum, dated March 5, 2014, that provided its reasons and stated that the application had been approved. In concluding that issuance of the license would serve the public interest, the Authority noted that the Board unanimously recommended issuance of the license, subject to compliance with the stipulations. It further noted that Chumley's would renovate a physically collapsed building, that it had previously had a liquor license, that it would create jobs, that there was no history of criminal activity when it was licensed, and that there was substantial community support. Regarding the article 78 petitioners' concerns, the

Authority noted that Chumley's had agreed that the business would close two to three hours before the regular city-wide closing time, would keep its windows and doors closed at all times, and would have security in front of the building.

The Authority argued that its submission of the memorandum mooted the proceeding, and that the reasons had not been required, since it had not issued a license but had only conditionally approved it, subject to resolution of certain issues with the City Department of Buildings (DOB).

Chumley's argued that the stipulation addressed petitioners' concerns, as the Board recognized when it recommended granting the application. Citing the Authority's memorandum, Chumley's also asserted mootness as an affirmative defense.

In reply, petitioners claimed that they were not notified of Chumley's application, and that the Authority should not have relied on the Board's resolution or Miller's representations regarding the public interest without performing an independent inquiry.

At oral argument, petitioners advised that they were

> "not against Chumley's per se, if they want to operate in the same way that the other restaurants in the block operate; they close at midnight during the week – midnight on the weekends, 11:00 P.M. during the week. There would be no problem with Chumley's reopening under those kinds of stipulations."

The court denied the petition, reasoning that the Authority's initial failure to state and file its reasons for the conditional approval was not fatal because the license had not yet issued at that time, since approval was contingent on Chumley's obtaining all necessary DOB approvals and permits. The court noted that in any case the Authority had since stated its reasons, which were consistent with the relevant statutory criteria. The court noted that the Authority had considered the Board's unanimous resolution, subject to the stipulations, Miller's sworn assurances that Chumley's would abide by those stipulations, that there would be no noticeable effect on traffic, parking, or noise, and that there was no history of criminal activity at the location. The court also noted that in light of the lack of any opposition at the hearing, the Authority properly credited Chumley's representations at the hearing. We now affirm.

Ordinarily, applications for licenses to sell liquor for consumption on premises "shall be issued to all applicants except for good cause shown" (ABCL § 64[1]); however, no such license shall be granted for any premises within 500 feet of three or more existing licensed and operating premises, unless the Authority "determines that granting such license would be in the public interest" (ABCL § 64[7][b], [f]). In determining whether

the granting of a license will promote the public interest, the Authority may consider:

> "(a) The number, classes and character of licenses in proximity to the location and in the particular municipality or subdivision thereof.
>
> "(b) Evidence that all necessary licenses and permits have been obtained from the state and all other governing bodies.
>
> "(c) Effect of the grant of the license on vehicular traffic and parking in proximity to the location.
>
> "(d) The existing noise level at the location and any increase in noise level that would be generated by the proposed premises.
>
> "(e) The history of liquor violations and reported criminal activity at the proposed premises.
>
> "(f) Any other factors specified by law or regulation that are relevant to determine the public convenience and advantage and public interest of the community" (ABCL §64[6-a]).

These factors are intended to guide the Authority "in assuring that appropriate factors are taken into consideration which relate to the business and the impact it has . . . [and] to assure that quality of life impacts are fully incorporated into the responsible state decision-making apparatus" (*Cleveland Place Neighborhood Assn. v New York State Liq. Auth.*, 268 AD2d 6, 10 [1st Dept 2006] [internal quotation marks omitted]).

In cases implicating this 500-foot rule, "[b]efore it may issue any such license, the [A]uthority shall conduct a hearing, upon notice to the applicant and the municipality or community

board, and shall state and file in its office its reasons therefor" (ABCL § 64[7][f]).

"A reviewing court is not entitled to interfere in the exercise of discretion by an administrative agency unless there is no rational basis for the exercise, or the action complained of is arbitrary and capricious" (*Matter of Soho Alliance v New York State Liq. Auth.*, 32 AD3d 363, 363 [1st Dept 2006]). Courts look to whether the determination "is without sound basis in reason and is generally without regard to the facts" (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]).

Regarding the substance of the reasons stated by the Authority, this Court has held that something more than a "perfunctory recitation" is needed to comply with the requirement that the Authority state its reasons for concluding that issuance of a license would be in the public interest (*Matter of Waldman v New York State Liq. Auth.*, 281 AD2d 286 [1st Dept 2001]).

Here, the Authority's written statement sets forth detailed, concrete reasons for its determination, made after a hearing, that issuance of a liquor license to Chumley's would be in the public interest (ABCL § 64[7][b], [f]). To the extent petitioner challenges the timing of the Authority's issuance of written

reasons, we note that at that juncture, the Authority had only conditionally granted the license, in its October 24, 2013 letter, and subsequently stated its reasons in a memorandum dated March 5, 2014. The Authority also noted, among other things, that the reopening of Chumley's would renovate a previously vacant and physically collapsed building and would create employment opportunities, and that there was substantial community support for the reopening.

The Authority was entitled to rely on representations made in affidavits submitted by Chumley's at the hearing, since the statute does not require oral testimony, and neither petitioners nor the community board raised any reason to reject the representations in the affidavits. Moreover, in conditionally granting Chumley's application for a license, the Authority addressed petitioners' main, if not sole, concern: the potential for after-midnight noise stemming from late-night visitors to the bar on Bedford Street, a predominantly residential street. The Authority required Chumley's to abide by its agreement with the community board, which supported the application, to reduce the likelihood of outside street noise by such measures as keeping windows and doors closed, maintaining security on the premises, and closing by 2:00 a.m. Moreover, the bar/restaurant would not have any outdoor space, live music, or dancing, as noted in the

Authority's written reasons.

Accordingly, the judgment of the Supreme Court, New York County (Barbara Jaffe, J.), entered August 26, 2014, denying the petition to annul respondent New York State Liquor Authority's October 24, 2013 conditional approval of a liquor license to respondent Chumley's 86 LLC, d/b/a "Chumley's," and dismissing the proceeding brought pursuant to CPLR article 78, should be affirmed, without costs.

All concur.

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

ENTERED: JUNE 23, 2015

CLERK