SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 28, 2015

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Renwick, Andrias, Richter, Gische, JJ.

14301 CIFG Assurance North America, Inc., Index 653974/13
Plaintiff-Appellant,

-against-

Credit Suisse Securities (USA) LLC,
Defendant-Respondent.

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Quinn Emanuel Urquhart & Sullivan LLP, New York (Sean P. Baldwin of counsel), for appellant.

Orrick, Herrington & Sutcliffe LLP, New York (John Ansbro of counsel), for respondent.

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Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered on or about July 16, 2014, which granted defendant's motion to dismiss the complaint without prejudice, unanimously affirmed, without costs.

Plaintiff, a New York stock insurance company that provided financial guaranty insurance on a credit default swap, alleges that defendant, a registered broker-dealer, induced it to provide the insurance by representing that the collateral for the loans would be selected by a collateral manager, acting independently

and in good faith in the interests of long investors, and by further representing that the collateralized debt obligation's (CDO) notes had characteristics that merited their AAA/Aaa credit ratings. In September 2008, approximately two years after closing, an event of default occurred and plaintiff paid out $46 million under its guaranty. In November 2013, plaintiff commenced this action alleging causes of action for fraud and violation of Insurance Law § 3105. The motion court properly determined that these claims are time-barred.

As plaintiff concedes, because it filed its complaint more than six years after the CDO closed, the timeliness of its claims depends on whether it "discovered the fraud . . . or could with reasonable diligence have discovered it" more than two years before the filing of the complaint on November 15, 2013 (CPLR 213[8]; *see Sargiss v Magarelli*, 12 NY3d 527, 532 [2009]). "[W]here the circumstances are such as to suggest to a person of ordinary intelligence the probability that he has been defrauded, a duty of inquiry arises, and if he omits that inquiry when it would have developed the truth, and shuts his eyes to the facts which call for investigation, knowledge of the fraud will be imputed to him" (*Gutkin v Siegal*, 85 AD3d 687, 688 [1st Dept 2011] [internal quotation marks omitted]).

Plaintiff has failed to meet its burden of establishing that even with the exercise of reasonable diligence, it could not have discovered the basis for its claims prior to November 15, 2011. Plaintiff was put on notice of defendant's fraud and scienter as early as 2008, but certainly by 2010, based on certain reports, made public, indicating the alleged actions that form the basis of plaintiff's claims. In addition, plaintiff was put on notice of defendant's alleged fraudulent activities by other lawsuits commenced prior to November 2011. Because plaintiff possessed information suggesting the probability that it had been defrauded, and failed to conduct an inquiry at that time, knowledge of the fraud is imputed (*see Gutkin*, 85 AD3d at 688).

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

ENTERED: MAY 28, 2015

CLERK

Mazzarelli, J.P., Friedman, Sweeny, Gische, Kapnick, JJ.

14595 Sayda Villon, Index 107201/11
Plaintiff, 59075/11

-against-

Town Sports International LLC,
et al.,
Defendants.

- - - - -

Broadway-Hawthorne LLC,
Third-Party Plaintiff-Respondent,

-against-

Lawn Guard Inc., doing business
as Yorktown Landscaping,
Third-Party Defendant-Appellant.

_____

Gorton & Gorton LLP, Mineola (John T. Gorton of counsel), for appellant.

Mischel & Horn P.C., New York (Naomi M. Taub of counsel), for respondent.

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Order, Supreme Court, New York County (Donna M. Mills, J.), entered May 8, 2014, which, upon reargument, denied defendant/third-party defendant's (Lawn Guard) motion for summary judgment dismissing the cross claims and/or third-party claims for contractual and common-law indemnification, unanimously modified, on the law, to grant the motion as to the claim for contractual indemnification, and otherwise affirmed, without costs.

The contract between defendant/third-party plaintiff (Hawthorne) and Lawn Guard did not contain an indemnification provision. However, summary dismissal of Hawthorne's common-law indemnification claim against it is precluded by triable issues of fact whether Hawthorne or Lawn Guard was responsible for inspecting the property, whether Lawn Guard was contractually obligated to apply salt or sand to the parking lot area, and, if so, whether its negligent failure to do so was the sole cause of plaintiff's accident (*see Foster v Herbert Slepoy Corp.*, 76 AD3d 210, 216 [2d Dept 2010]; *Abramowitz v Home Depot USA, Inc.*, 79 AD3d 675, 677 [2d Dept 2010]).

We reject Lawn Guard's argument that it cannot be held responsible because plaintiff is bound by her judicial admissions that the cause of her accident was "old" ice, since issues of fact exist as to the scope and performance of Lawn Guard's contractual obligations in the period following the earlier snow storm.

We decline to consider Hawthorne's argument, improperly raised for the first time on appeal, that Lawn Guard's motion for summary judgment was procedurally defective.

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

ENTERED: MAY 28, 2015

CLERK

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

15094 In re Residents for Reasonable Development, etc., et al., Petitioners-Appellants, Index 101624/13

-against-

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

Albert K. Butzel Law Offices, New York (Albert K. Butzel of counsel), for appellants.

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

Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (Maria T. Vullo of counsel), for Memorial Hospital for Cancer and Allied Diseases, The City University of New York and City University Construction Fund, respondents.

Order and judgment (one paper), Supreme Court, New York County (Alexander W. Hunter, Jr., J.), entered July 30, 2014, denying the petition to annul the City respondents' determination, dated December 18, 2013, which approved the proposed East 74th Street project for Memorial Hospital for Cancer and Allied Diseases (the clinical arm of Memorial Sloan-Kettering Cancer Center and hereinafter MSK) and the City University of New York (CUNY) (collectively, MSK-CUNY), and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Upon our review of the record, we find that the City respondents took the requisite "hard look" at the relevant areas of environmental concern, in particular the project's anticipated adverse environmental impacts, and provided a "reasoned elaboration" of the basis for their approval of the project. Their determination is not arbitrary and capricious and is supported by the evidence (*see Matter of Riverkeeper, Inc. v Planning Bd. of Town of Southeast*, 9 NY3d 219, 231–232 [2007]; *Akpan v Koch*, 75 NY2d 561, 570 [1990]).

Contrary to petitioners' contention, the Final Environmental Impact Statement (FEIS) was not required to consider the potential environmental impacts of the planned construction of a garage 50 blocks from the main project site and the FEIS detailed the factors considered commensurate with the circumstances and nature of the proposal. While the project and the garage exist by virtue of the same request for proposals and contract, they are two separate, independent projects that share no common purpose and are not part of a larger plan of development. Thus, the ongoing separate environmental review of the garage is proper (*compare Matter of Friends of Stanford Home v Town of Niskayuna*, 50 AD3d 1289 [3rd Dept 2008], *lv denied* 10 NY3d 716 [2008], *with Matter of Village of Westbury v Department of Transp. of State of*

N.Y., 75 NY2d 62, 69 [1989]).

Although City Environmental Quality Review [CEQR], as authorized by and in implementation of the State Environmental Quality Review Act (ECL art 8. [SEQRA]) requires that each FEIS include an analysis of a "No Action" alternative as though the project were not being constructed and existing conditions on the project would remain unchanged, the FEIS was not required to consider petitioners' preferred alternative scenario of residential development at the project site, because that scenario would not have met the objectives and capabilities of MSK-CUNY, the project sponsor (*see* 6 NYCRR 617.9[b][5][v]; *see also Matter of C/S 12th Ave. LLC v City of New York*, 32 AD3d 1, 5 [1st Dept 2006] ["Not every conceivable environmental impact, mitigating measure or alternative must be addressed"]).

The determination granting the zoning map and text amendments as well as the special permit applications is supported by substantial evidence sufficient to evince its rationality (*see Kettaneh v Board of Stds. & Appeals of the City of N.Y.*, 85 AD3d 620, 621 [1st Dept 2011], *lv dismissed in part, denied in part* 18 NY3d 919 [2012]). Contrary to petitioners' contention, the zoning map amendment does not constitute illegal spot zoning merely because it involves a single parcel only and

is not ad hoc zoning legislation affecting the land of a few without proper regard to the needs or design of the community as a whole (*see Matter of Town of Bedford v Village of Mount Kisco*, 33 NY2d 178, 187-188 [1973]). The record establishes that the zoning change is part of "a well considered and comprehensive plan to serve the general welfare of the community" (*see Collard v Incorporated Vil. of Flower Hill*, 52 NY2d 594, 600 [1981]).

The City's use of incentive zoning is well within its broad authority and is proper (*see Asian Ams. for Equality v Koch*, 72 NY2d 121, 129 [1988]). Nor is the payment for nearby parkland an illegal "quid pro quo" for specific floor area ratio; the funds are being paid directly to the Department of Parks so that it can perform the improvements (*compare Matter of Municipal Art Socy. of N.Y. v City of New York*, 37 Misc 2d 832 [Sup Ct, NY County 1987] [improper quid pro quo found where funds were to be paid into City's general operating account]).

The Manhattan Borough Board's approval of the project is properly the result of a vote by a majority of the board members present and entitled to vote (see City Charter §§ 85[c], [d]; 384[b][4]). While all 12 board members were present, one member

recused herself; 6 (of 11) votes (in favor) constitutes a majority. There is no basis in the record for finding the recusal improper or for deeming that the member abstained, rather than recused herself, from voting.

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

ENTERED: MAY 28, 2015

CLERK

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

15149 In re Elizabeth Rossi, Index 100562/13
Petitioner-Appellant,

-against-

New York City Department of
Health and Mental Hygiene,
Respondent-Respondent.

_____

Elizabeth A. Rossi, appellant pro se.

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

_____

Order, Supreme Court, New York County (Joan B. Lobis, J.), entered May 22, 2014, which denied petitioner's pro se application for declaratory and injunctive relief, including an order directing respondent, Department of Health and Mental Hygiene (DOHMH), to renew the restricted area permit allowing her to vend food from a mobile truck at a site-specific location, namely, directly in front of the Metropolitan Museum of Art's front steps, unanimously affirmed, without costs.

DOHMH's interpretation of the parties' 2011 stipulation as not promising petitioner a site-specific vending permit is supported by a fair interpretation of the language therein and, as such, the challenged determination is rational and should not be disturbed (*see generally Matter of Matter of Uniformed*

Firefighters Assn. of Greater N.Y. v City of New York, 114 AD3d 510, 514 [1st Dept 2014], *lv denied* 990 NYS2d 161 [2014]; *Matter of First Coinvestors v Carr*, 159 AD2d 209 [1st Dept 1990]). Nor is there any evidence establishing that the renewal license petitioner received from DOHMH contains any fewer rights or is less valuable than the original vending license, which might trigger an obligation on the part of DOHMH to afford petitioner appropriate notice and an opportunity to be heard regarding any deficiencies in the renewal license she received (*see* Administrative Code of the City of New York § 17-317).

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

ENTERED: MAY 28, 2015

CLERK

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

15250 The People of the State of New York, Ind. 18/10
Respondent,

-against-

Angel Concepcion,
Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Anastasia Heeger of counsel), and Freshfields Bruckhaus Deringer US, New York (Aaron C. Lang of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Orrie A. Levy of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Barbara F. Newman, J.), rendered March 7, 2012, as amended April 6, 2012, convicting defendant, after a jury trial, of manslaughter in the first degree, and sentencing him to a term of 22 years, unanimously modified, on the law, to the extent of vacating the sentence and remanding for resentencing, and otherwise affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility and identification. Two eyewitnesses described the incident and the assailant, and both independently identified defendant in lineups. Discrepancies between their testimonies

were relatively minor given the rapid pace of the event, and those discrepancies largely related to the aftermath of the shooting, rather than the identity of the gunman.

The court properly denied defendant's motion to suppress identification testimony. The record supports the court's finding that the photo array was not unduly suggestive. Defendant and the other participants were reasonably similar in appearance, and there was no substantial likelihood that defendant would be singled out (*see People v Chipp*, 75 NY2d 327, 336 [1990], *cert denied* 498 US 833 [1990]). The fact that in the photo array defendant was wearing a gray sweatshirt, and the others were wearing darker clothing, did not render the array unduly suggestive, particularly since the description of the assailant included a dark sweatshirt, and defendant's clothing in the photo array matched this description less than that of the others (*see People v Drayton*, 70 AD3d 595 [1st Dept 2010], *lv denied* 15 NY3d 749 [2010]; (*People v Pelaez*, 3 AD3d 349, 350 [1st Dept 2004], *lv denied* 2 NY3d 744 [2004]). Moreover, the passage of two months between the photo array and the lineups sufficed to attenuate the taint from any unduly suggestive photo array procedure (*see e.g. People v Leibert*, 71 AD3d 513, 514 [1st Dept 2010], *lv denied* 15 NY3d 752 [2010]).

The court properly admitted brief, limited testimony that one of the eyewitnesses had identified defendant prior to the lineup, without permitting reference to the fact that a photo was used in the identification, to cure the misimpression created during defense counsel's cross-examination of the witness. Rather than complying with the court's earlier ruling that defense counsel first ask the witness whether the police had specifically asked about the assailant's hair, counsel focused on the description that the witness had given to the police, leaving the misimpression that the witness's ability to describe and identify the assailant was impaired because he had not mentioned that the assailant, like defendant, had a ponytail. The brief reference to the prior identification demonstrated that, prior to the lineup, the witness had confirmed that defendant's hair matched the assailant's (*see People v Garcia*, 56 AD3d 271 [1st Dept 2008], *lv denied* 12 NY3d 783 [2009]; *People v Givens*, 271 AD2d 372 [1st Dept 2000], *lv denied* 95 NY2d 865 [2000]).

The court properly exercised its discretion in precluding defendant from impeaching the other eyewitness with his failure to mention, during his testimony before the grand jury, an additional person who fled with the assailant after the incident, The witness did not testify before the grand jury in narrative

form, but in response to specific questions. His attention was not specifically called to this other person, and there was no apparent reason for him to focus on or otherwise volunteer that detail when the questions before the grand jury were focused on the assailant's actions (*see People v Bornholdt*, 33 NY2d 75, 88 [1973], *cert denied sub nom. Victory v New York*, 416 US 905 [1974]).

While a witness's reference to his loving relationship with the deceased, who was his brother, was immaterial to any issue at trial (*see People v Harris*, 98 NY2d 452, 490-491 [2002]), this brief and fleeting testimony was not so prejudicial as to warrant a new trial.

As the People concede, defendant is entitled to resentencing for an express youthful offender determination (*see People v Rudolph*, 21 NY3d 497 [2013]).

Defendant's remaining contentions are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal.

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

ENTERED: MAY 28, 2015

CLERK

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

15251 Dominick Vitolo, Index 305451/11
Plaintiff-Respondent,

Clare Vitolo,
Plaintiff,

-against-

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

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Cerrusi & Spring, White Plains (Joseph Porretto of counsel), for appellants.

Pellegrini and Associates, LLC, New York (Juan C. Restrepo-Rodriguez of counsel), for respondent.

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Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered September 23, 2014, which, insofar as appealed from, denied defendants' motion for summary judgment dismissing so much of plaintiff's Labor Law § 241(6) cause of action as is predicated on Industrial Code (12 NYCRR) § 23-5.1(h), unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

12 NYCRR 23-5.1(h) provides that "[e]very scaffold shall be erected and removed under the supervision of a designated person." "Designated person" is defined as "[a] person selected and directed by an employer or his authorized agent to perform a

specific task or duty" (12 NYCRR 23-1.4[b][17]).

Regardless of whether or not plaintiff was the designated person, given his experience and qualifications in building scaffolds, any failure to so designate someone was not a proximate cause of plaintiff's accident (*see e.g. Atkinson v State of New York*, 49 AD3d 988 [3d Dept 2008]).

Plaintiff was injured when he attempted to drag the platform by himself while standing on the braces of the scaffold, rather than waiting for another worker to return. There is simply no basis to conclude that plaintiff's accident was in any way the result of someone failing to adequately supervise him.

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

ENTERED: MAY 28, 2015

CLERK

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

15252 In re Sirfire Joseph S.,

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

Nikienya Mercedes Teresa S., etc.,
Respondent-Appellant,

Jewish Child Care Association,
Petitioner-Respondent.

_____

Tennille M. Tatum-Evans, New York, for appellant.

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

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

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Order of fact-finding and disposition, Family Court, Bronx County (Erik K. Pitchal, J.), entered on or about July 31, 2014, which, upon a fact-finding determination based upon respondent mother's admission that she permanently neglected her child, terminated her parental rights and transferred custody and guardianship of the child to petitioners Jewish Child Care Association of New York and the Commissioner of Social Services, for the purpose of adoption, unanimously affirmed, without costs.

The court's determination that it was in the child's best interest to terminate respondent's parental rights, thus freeing

him for adoption by the foster family he has lived with predominantly since birth, was supported, at a minimum, by a preponderance of the evidence (*Matter of Adam Mike M. [Jeffrey M.]*, 104 AD3d 572, 573 [1st Dept 2013]). Respondent had threatened to kill him and his foster family and had no insight into why the child was placed in foster care to begin with (*Matter of Ebonee Annastasha F. [Crystal Arlene F.]*, 116 AD3d 576 [1st Dept 2014], *lv denied* 23 NY3d 906 [2014]). The circumstances presented do not warrant a suspended judgment (*Matter of Jayvon Nathaniel L. [Natasha A.]*, 70 AD3d 580 [1st Dept 2010]). Even if the mother were to continue on a path to mental recovery, there has not been a showing that it would be in the child's best interest to be returned to her care, where the child is presently well-cared for and eager to be adopted (*id.*; *Matter of Lorenda M.*, 2 AD3d 370, 371 [1st Dept 2003]).

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

ENTERED: MAY 28, 2015

CLERK

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

15254 John R. Coelho, Index 654404/13
Plaintiff-Respondent,

-against-

Grafe Auction Co., et al.,
Defendants-Appellants.

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Weinstein, Kaplan & Cohen, P.C., Garden City (Robert N. Cohen of counsel), for appellants.

Law Offices of Steven D. Isser, New York (Steven D. Isser of counsel), for respondent.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered on or about July 28, 2014, which denied defendants' motion to dismiss pursuant to CPLR 327, unanimously affirmed, with costs.

Contrary to defendants' contention, this is not "one of the relatively uncommon [cases] in which dismissal on forum non conveniens grounds is required as a matter of law" (*Mashreqbank PSC v Ahmed Hamad Al Gosaibi & Bros. Co.*, 23 NY3d 129, 138 [2014]). Rather, it is a standard case where "[t]he application of . . . *forum non conveniens* is a matter of discretion to be exercised by the trial court and the Appellate Division" (*Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 478 [1984], *cert denied* 469 US 1108 [1985]).

We agree with the motion court's denial of defendants' motion to dismiss. While some of the factors relevant to a determination of a motion to dismiss for forum non conveniens weigh in defendants' favor, the balance is not so strongly in their favor as to disturb plaintiff's choice of forum (*see Elmaliach v Bank of China Ltd.*, 110 AD3d 192, 208 [1st Dept 2013]). "[T]his is a multijurisdictional action with no single convenient forum amenable to all the parties" (*Lawati v Montague Morgan Slade Ltd.*, 102 AD3d 427, 429 [1st Dept 2013]).

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

ENTERED: MAY 28, 2015

CLERK

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

15255 The People of the State of New York, Ind. 4378/11
Respondent,

-against-

Shun Yoneyama,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Barbara Zolot of counsel), and DLA Piper (US), New York (Andrew J. Rodgers of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered August 21, 2012, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree and criminal possession of a controlled substance in the second degree, and sentencing him to concurrent terms of eight years, unanimously affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations. The totality of the circumstances established that defendant voluntarily consented to the search of his bedroom (*see People v Gonzalez*, 39 NY2d 122 [1976]).

Defendant, who had prior contacts with the criminal justice

system, provided his consent to search both orally and in writing, and he acknowledged that he had been notified of his right to refuse consent (*see People v Brunson*, 73 AD3d 432 [1st Dept 2010], *lv denied* 15 NY3d 772 [2010]). Although a large number of officers were present when defendant's car was stopped on the highway, and although defendant was initially handcuffed, the officers did not all remain with defendant throughout the encounter, and the handcuffs were removed at the time defendant consented to the search. Furthermore, defendant was very cooperative with the police, not merely in terms of lack of resistance, but in candidly disclosing the presence of drugs in his car and apartment (*see People v Quagliata*, 53 AD3d 670 [2d Dept 2008], *lv denied* 11 NY3d 834 [2008]; *see also People v Mercado*, 120 AD3d 441 [1st Dept 2014], *affd* 25 NY3d 936 [2015]).

Defendant's consent was not invalidated by an investigator's advice to defendant that if he did not consent to the search, the police could get a warrant, and that the circumstances of the execution of the warrant could lead to the arrest of defendant's father, who also lived in the apartment. The investigator had valid legal and factual grounds for making these statements, which were not threats to arrest defendant's father, but warnings

of a possible, less favorable alternative scenario (*see People v LaDuke*, 206 AD2d 859, 860 [4th Dept 1994]).

We perceive no basis for reducing the sentence.

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

ENTERED: MAY 28, 2015

CLERK

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

15257 Trans-Packers Services Corp., Index 651711/10
Plaintiff-Appellant,

-against-

National Union Fire Insurance
Company of Pittsburgh, PA,
Defendant-Respondent,

Sterling & Sterling, Inc.,
Defendant-Appellant.

_____

Duane Morris, LLP, New York (Stephen Sussman of counsel), for appellant.

Mound Cotton Wollan & Greengrass LLP, New York (Sara F. Lilling and David A. Nelson of counsel), for respondent.

_____

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered August 12, 2014, to the extent it granted defendant National Union Fire Insurance Company's motion for summary judgment dismissing Trans-Packers' first cause of action, for breach of contract, and the second cause of action, for a declaratory judgment that Trans-Packers is entitled to coverage under the National Union policy, unanimously affirmed, without costs. Appeal by defendant Sterling & Sterling, Inc. from the aforesaid order unanimously withdrawn before argument, without costs, in accordance with the stipulation of the parties dated May 1, 2015.

By its terms, the release at issue extends to all claims that Trans-Packers, or its subsidiaries, successors, and assigns, "ever had, now have, or hereafter can, shall, or may have against National Union for, upon, or by reason of, arising out of or relating in any way to the Claim and all circumstances relating thereto," and therefore encompasses all costs arising out of the March 2008 and April 2008 contamination incidents, and resolves any and all causes of action in connection with the claim, i.e., losses arising from the salmonella contamination incidents in March and April 2008 (*see Allen v Riese Org., Inc.*, 106 AD3d 514, 516 [1st Dept 2013] [citations omitted]). We reject Trans-Packers' assertions of mutual or unilateral mistake in connection with the release.

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

ENTERED: MAY 28, 2015

CLERK

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

15258 In re Jocelyn Druyan, Index 400105/13
Petitioner-Appellant,

-against-

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

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Richard E. Casagrande, New York (Michael J. Del Piano of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Paul Wooten, J.), entered January 22, 2014, which denied the amended petition seeking to annul respondents' determination, dated on or about June 15, 2011, terminating petitioner from her position as a probationary teacher, and granted respondents' cross motion to dismiss the amended petition, unanimously affirmed, without costs.

The court providently exercised its discretion in denying petitioner's request, made under the interest of justice standard set forth in CPLR 306-b, for an extension of time to serve the petition and amended petition personally upon the respondents. Petitioner did not seek an extension of time until after the

expiration of the four-month statute of limitations (*see* CPLR 217[1]), and she failed to provide an excuse for the delay or for failing to timely serve respondents (*see Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 105-106 [2001]). Her pro se status is not a reasonable excuse (*see Matter of Ruine v Hines*, 57 AD3d 369, 370 [1st Dept 2008]). In addition, the petition lacks a meritorious claim (*see Leader*, 97 NY2d at 105; *Matter of Centeno v City of New York*, 115 AD3d 537, 537-538 [1st Dept 2014]). Petitioner failed to show that the termination of her probationary employment was made in bad faith or in violation of the law (*see Kahn v New York City Dept. of Educ.*, 18 NY3d 457, 471 [2012]). There is evidence in the record showing that petitioner received two unsatisfactory ratings following classroom observations in April and May 2011, despite mentoring and coaching throughout the school year and despite a post-observation conference in April 2011 advising her of her teaching

deficiencies (*see Matter of Brennan v City of New York*, 123 AD3d 607 [1st Dept 2014]).

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

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

ENTERED: MAY 28, 2015

CLERK

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

15260 In re Law Offices of Oliver Zhou, PLLC, et al.,
Petitioners,

-against-

New York State Division of Human Rights, etc., et al.,
Respondents.

Index 100035/14

_____

Oliver Zhou, New York, for petitioners.

Caroline J. Downey, Bronx (Michael K. Swirsky of counsel), for respondents.

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Determination of respondent New York State Division of Human Rights (DHR), dated November 26, 2013, which found that petitioners violated the State Human Rights Law by retaliating against the complainant who was engaging in a protected activity, and, directed petitioners to pay complainant back pay in the principal amount of $5,811 and compensatory damages for mental anguish in the principal amount of $10,000, and to pay a civil fine of $1,000, unanimously confirmed, the petition denied, and the proceeding (transferred to this Court by order of Supreme Court, New York County [Cynthia S. Kern, J.], entered February 18, 2014), dismissed, without costs.

Contrary to petitioners' contention, DHR had jurisdiction

over this matter as the record shows that petitioner employer had at least four employees (*see* Executive Law § 292[5]).

DHR's findings are supported by substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-181 [1978]). The evidence establishes that the complainant was terminated immediately after she showed her employer a sexual harassment complaint that she filed with DHR, and that, while petitioners claimed there were various nondiscriminatory reasons for the termination, the complainant showed that the reasons were merely a pretext for illegal retaliation (*see Matter of Board of Educ. of New Paltz Cent. School Dist. v Donaldson*, 41 AD3d 1138 [3d Dept 2007], *lv denied* 10 NY3d 706 [2008]).

The awards of back pay and compensatory damages, and the assessment of the civil fine are proper (see Executive Law § 297 [4][c]; *Matter of New York City Tr. Auth. v State Div. of Human Rights*, 78 NY2d 207 [1991]).

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

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

ENTERED: MAY 28, 2015

CLERK

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

15261 The People of the State of New York, Ind. 1159/13
Respondent,

-against-

Edward Chapman,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Manu K. Balachandran 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 (Robert M. Stolz, J.), rendered on or about January 29, 2014,

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

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

ENTERED: MAY 28, 2015

CLERK

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

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

15262 Lynn Lucka Bergman, Index 350257/02
Plaintiff-Respondent,

-against-

Franklin Bergman,
Defendant-Appellant.

_____

Gunilla Perez-Faringer, White Plains, for appellant.

David J. Aronstam, New York, for respondent.

_____

Order, Supreme Court, New York County (Laura E. Drager, J.), entered on or about November 8, 2013, which, to the extent appealed from as limited by the briefs, granted plaintiff wife's motion for confirmation of the referee's report, dated April 11, 2013, to the extent it denied defendant husband's motion for a downward modification of his maintenance obligations, unanimously affirmed, without costs.

Supreme Court properly granted plaintiff's motion to confirm the referee's report, since defendant failed to establish that he had suffered a substantial change in circumstances to warrant downward modification of his support obligation (*see Nordhauser v Nordhauser*, 130 AD2d 561, 562 [2d Dept 1987]). Although the referee's findings of fact tracked the language of the arguments and assertions in plaintiff's memorandum of law, the relevant

issue was whether the referee's findings were substantially supported by the record (*see Barr v Barr*, 232 AD2d 316 [1st Dept 1996]; *Freedman v Freedman*, 211 AD2d 580 [1st Dept 1995]), which they were.

Defendant's expenses exceeded his stated income, and the record established that a number of his personal expenses were paid for by his wholly-owned company, which had generated $1.5 million in 2011, the year prior to the hearing. We reject defendant's challenges to the referee's credibility findings. "It is the function of a referee to determine the issues presented, as well as to resolve conflicting testimony and matters of credibility" (*Poster v Poster*, 4 AD3d 145, 145 [1st Dept 2004], *lv denied* 3 NY3d 605 [2004]). The referee determined that defendant's witnesses were not credible to the extent they testified that his wholly-owned company was insolvent, since the testimony of insolvency was contrary to defendant's sworn statement that the combined operations of two of his entities resulted in a profit of $45,000 over a two and one-half year period, and no valuation of the goodwill of the company's 32-year old trade name had occurred, even though the name had generated $1.5 million in sales for defendant's company.

We note that plaintiff was not required to offer testimony

at the hearing, since the burden was on defendant to establish that he had suffered a substantial change in circumstances to warrant a downward modification of his maintenance obligations (*see Nordhauser*, 130 AD2d at 562).

The record shows that there was no actual bias or prejudice in the special referee's treatment of the parties (*see Poster*, 4 AD3d at 145-146; *see also Herman v Gill*, 61 AD3d 433 [1st Dept 2009]).

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

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

ENTERED: MAY 28, 2015

CLERK

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

15263- Index 652367/10
15264-
15265-
15266-
15267-
15268

AQ Asset Management LLC (as successor to Artist House Holdings Inc.), et al.,
Plaintiffs-Respondents,

-against-

Michael Levine,
Defendant-Respondent,

Habsburg Holdings Ltd., et al.,
Defendants-Appellants.

- - - - -

Kerry Gotlib,
Nonparty Appellant.

_____

Law Offices of Michael A. Haskel, Mineola (Michael A. Haskel of counsel), for appellants.

Reitler Kailas & Rosenblatt, New York (Edward P. Grosz of counsel), for AQ Asset Management, LLC, Antiquorum, S.A., Antiquorum USA, Inc. and Evan Zimmermann, respondents.

Levine & Associates, Scarsdale (Michael Levine of counsel), for Michael Levine, respondent.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered February 5, 2014, which denied defendants Habsburg Holdings Ltd. and Osvaldo Patrizzi's motion for partial summary judgment on their eighth counterclaim and for preclusion of plaintiffs' defenses thereto, unanimously affirmed, with

costs. Order, same court and Justice, entered May 1, 2014, which sua sponte sanctioned defendants Hapsburg Holdings Ltd. and Osvaldo Patrizzi for bringing the motion for partial summary judgment, unanimously affirmed, without costs. Order, same court and Justice, entered June 24, 2014, which denied said defendants' motion to renew defendant Michael Levine's motion to dismiss their legal malpractice cross claims, to find plaintiffs in contempt of court, for sanctions against attorneys Levine and plaintiff Zimmerman for their conduct in a nonparty deposition, and for an anti-suit injunction barring Levine and Zimmerman from the Swiss litigation, unanimously affirmed, without costs. Order, same court and Justice, entered November 13, 2014, which, to the extent appealed from as limited by the briefs, denied defendants Hapsburg Holdings Ltd. and Osvaldo Patrizzi's motion to amend their answer to include a counterclaim for a constructive trust against plaintiffs Antiquorum S.A. and Zimmerman, unanimously reversed, on the law, without costs, and the motion granted. Order, same court and Justice, entered April 28, 2014, which sua sponte imposed a $5,000 sanction on defense counsel nonparty appellant Kerry Gotlib for improperly filing documents under seal, unanimously affirmed, without costs. Order, same court and Justice, entered May 23, 2014, which, inter

alia, denied defendants Hapsburg Holdings Ltd. and Osvaldo Patrizzi's motion for recusal, unanimously affirmed, without costs.

Defendants Hapsburg Holdings Ltd. and Patrizzi's (defendants) motion for partial summary judgment depended on defendants' ability to establish precisely the inventory that had been on hand before the parties entered into the stock purchase agreement (SPA). Defendants offered only an unsworn email list, which none of their affiants authenticated or stated was accurate, and which was therefore inadmissable hearsay (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Nor did plaintiffs' references to the document in opposition to various motions constitute an admission of its accuracy. The claims for a constructive trust and money had and received were barred by the SPA, an express contract covering the same subject matter (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]). Further, the motion was filed before plaintiffs' response to the amended answer and counterclaims and thus was untimely (*City of Rochester v Chiarella*, 65 NY2d 92, 101 [1985]).

Given the absence of any admissible evidence to support the motion, the motion court properly sanctioned defendants for bringing a frivolous motion.

The court properly refused to preclude plaintiffs from defending against the eighth counterclaim for failure to produce certain inventory records. The court was managing discovery closely, and plaintiffs were making a rolling production at the time of the motion to preclude (*see generally Auerbach v Klein*, 30 AD3d 451, 452 [2nd Dept 2006]).

The court correctly denied renewal of Levine's motion to dismiss the legal malpractice claims. Levine's newly discovered acts were taken in his role as escrow agent; he clearly was not defendants' attorney at the time. Further, defendants had already suffered injury with regard to the funds at issue, when Levine transferred them from the escrow account for defendants to the escrow account he held for the third party. The subsequent disbursement of the funds from the third-party's escrow account did not cause any additional injury to defendants and thus cannot extend the time for bringing their malpractice claim.

The court correctly declined to hold plaintiffs in contempt of an order of this Court for not "segregating" proceeds from inventory sales. Our order required plaintiffs and Levine to freeze the $2 million in proceeds from inventory sales believed held by Levine at that time. It did not bar subsequent sales of inventory, nor did it purport to identify which inventory items

were subject to the escrow (*see Matter of Department of Envtl. Protection of City of N.Y. v Department of Envtl. Conservation of State of N.Y.*, 70 NY2d 233, 240 [1987]).

The court properly declined to sanction Zimmerman and Levine in connection with the Bonnano deposition. Defendants did not show the use or disclosure there of any confidential or privileged documents. Moreover, counsel was entitled to use even privileged information in defense of claims asserted against them by their former clients, defendants (*see Orco Bank v Proteinas Del Pacifico*, 179 AD2d 390 [1st Dept 1992]). Nor did defendants establish that the Swiss litigation was brought in bad faith or as a fraud, or otherwise satisfy the strict standard for an anti-suit injunction (*see Sebastian Holdings, Inc. v Deutsche Bank AG*, 78 AD3d 446 [1st Dept 2010]).

This Court having reinstated the counterclaim seeking imposition of a constructive trust against Antiquorum S.A. and Zimmerman (119 AD3d 457 [1st Dept 2014]), defendants' motion to amend the answer to include the counterclaim at this stage of the litigation should have been granted.

The court correctly imposed sanctions on nonparty appellant defense counsel Gotlib, as he admitted violating the rules for the electronic filing of material under seal.

Defendants cite no statutory basis for recusal of the motion court, and their sole basis for alleging "bias" is inadequate, i.e. the court's adjudicatory actions (*see People v Moreno*, 70 NY2d 403 [1987]).

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

ENTERED: MAY 28, 2015

CLERK

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

15269 Shulan Zhao, Index 101323/12
Plaintiff-Appellant,

-against-

Brookfield Office Properties, Inc., et al.,
Defendants-Respondents.

Ross, Legan, Rosenberg, Zelen & Flaks, LLP, New York (Richard H. Rosenberg of counsel), for appellant.

Law Office of James J. Toomey, New York (Evy L. Kazansky of counsel), for respondents.

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered June 17, 2014, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants established entitlement to judgment as a matter of law in this action where plaintiff was injured when she allegedly lost her balance and fell when stepping off a low concrete platform onto a cobblestone-covered surface. Defendants demonstrated that the cobblestone-covered area was an open and obvious condition and was not inherently dangerous (*see e.g. Abraido v 2001 Marcus Ave. LLC*, 126 AD3d 571 [1st Dept 2015]). Defendants referred to evidence that plaintiff traversed the

cobblestone-covered area before the accident and submitted photographs of the area showing its open and obvious nature, demonstrating that it was "readily observable by anyone employing the reasonable use of their senses" (*Wachspress v Central Parking Sys. of N.Y., Inc.*, 111 AD3d 499, 499 [1st Dept 2013]).

In opposition, plaintiff failed to raise a triable issue of fact. Her argument that the cobblestones were obscured from view is unpreserved, as it is raised for the first time on appeal, and, in any event, is refuted by the photographic evidence.

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

ENTERED: MAY 28, 2015

CLERK

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

15271 The People of the State of New York, Ind. 961/11
Respondent,

-against-

Darin Spencer,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (William Terrell, III of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Patricia DiMango, 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: MAY 28, 2015

CLERK

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

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

15272 The People of the State of New York, Ind. 1094/13
Respondent,

-against-

Delvin Moronta Alvarez,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Edward J. McLaughlin, J.), rendered on or about June 11, 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: MAY 28, 2015

CLERK

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

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

15273N In re Dmitry Gorelik, Index 101027/13
Petitioner-Appellant,

-against-

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

_____

Gregory T. Chillino, New York, for appellant.

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

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Order and judgment (one paper), Supreme Court, New York County (Michael D. Stallman, J.), entered May 21, 2014, which denied the petition to annul respondent Department of Buildings's (DOB) determination, dated March 19, 2013, denying petitioner's application for a New York City master fire suppression piping contractor's license, dismissed the proceeding brought pursuant to CPLR article 78, and denied petitioner's motion for sanctions, unanimously affirmed, without costs.

DOB's denial of petitioner's application for a master fire suppression piping contractor's (MFSPC) license has a rational basis in the record and is not arbitrary and capricious (*see Flacke v Onondaga Landfill Sys.*, 69 NY2d 355, 363 [1987]). The finding that petitioner lacked the requisite "good moral

character" (*see* former Administrative Code of City of NY § 26-133) is supported by his 2000 conviction for "giving unlawful gratuities," in violation of Penal Law § 200.30. DOB rationally concluded that the conviction, which arose in connection with petitioner's admitted paying of a public servant $2,000 to "take care" of questions concerning whether certain water meters had been installed in compliance with regulations, bears a "direct relationship" to the MFSPC license (Corrections Law § 752 [1]), pursuant to which petitioner's work would have to comply with the Building Code and would be subject to inspection by various agencies, and that the issuance of the license "would involve an unreasonable risk . . . to the safety or welfare of . . . the general public" (Corrections Law § 752[2]), which the fire suppression systems are intended to safeguard in the event of a fire. Unlike the cases relied upon by petitioner, here, the subject offense arose from work performed in the industry in which petitioner seeks licensure, the application was for a new license, not a renewal, and DOB did not change the position it took upon earlier applications as to the effect of the conviction on the petitioner's qualifications (*see e.g. Matter of Bovich v LiMandri*, 116 AD3d 489 [1st Dept 2014]; *Matter of Gil v New York City Dept. of Bldgs.*, 107 AD3d 632 [1st Dept 2013], *lv denied* 22

NY3d 852 [2013]).

DOB properly considered the factors enumerated in article 23-A of the Correction Law (*see Matter of Arrocha v Board of Educ. of City of N.Y.*, 93 NY2d 361, 364-365 [1999]; *Matter of Persaud v New York State Off. of Children & Family Servs.*, 114 AD3d 492 [1st Dept 2014]). That it afforded greater weight to factors unfavorable to petitioner than to factors favorable to him does not warrant the conclusion that it did not consider the favorable factors (*Arrocha*, 93 NY2d at 366-367). Moreover, the certificate of relief from disabilities "shall create a presumption of rehabilitation" (Correction Law § 753[2]); "it does not create a prima facie entitlement to the license" (*Matter of Dempsey v New York City Dept. of Educ.*, 108 AD3d 454, 455 [1st Dept 2013]). DOB satisfied its statutory duty by considering the certificate.

We agree with the court that sanctions are not warranted; the complained-of conduct does not constitute "frivolous conduct" within the meaning of 22 NYCRR 130-1.1.

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

ENTERED: MAY 28, 2015

CLERK

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

15274N New GPC Inc., Index 155301/12
Plaintiff-Appellant,

-against-

Kaieteur Newspaper Inc.,
Defendant-Respondent.

_____

Ray Beckerman, P.C., Forest Hills (Ray Beckerman of counsel), for appellant.

Law Offices of James F. Sullivan, P.C., New York (James F. Sullivan of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered January 22, 2015, which denied plaintiff's motion for leave to file a second amended complaint, without prejudice to renew at the time of trial by conforming the pleadings to the proof presented at trial, unanimously reversed, on the law, without costs, and the motion granted.

Since defendant stipulated to the filing of plaintiff's second amended complaint, and in the absence of any opposition, either to the motion below or on this appeal, it cannot be said that the amendment is "palpably insufficient or patently devoid

of merit," or that it surprised or prejudiced defendant (*Goodwin v Empire City Subway Co., Ltd.*, 124 AD3d 559, 559 [1st Dept 2015] [internal quotation marks omitted]).

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

ENTERED: MAY 28, 2015

CLERK