SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

**MARCH 7, 2017**

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Sweeny, J.P., Richter, Mazzarelli, Manzanet-Daniels, Feinman, JJ.

2576 Joseph Kleinplatz Index 108733/06
Plaintiff-Appellant,

-against-

Nathan L. Dembin & Associates, P.C., et al.,
Defendants-Respondents,

Tommy H. Brewer, Jr.,
Defendant.

_____

Jonathan M. Landsman, New York (Jonathan M. Landsman of counsel), for appellant.

Aaronson, Rappaport, Feinstein & Deutsch, LLP, New York (Robert S. Deutsch of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Shlomo Hagler, J.), entered June 10, 2015, dismissing the complaint pursuant to an order, same court and Justice, entered March 24, 2015, unanimously affirmed, on the ground of judicial estoppel.

Plaintiff's prolonged failure to disclose the instant lawsuit to the bankruptcy court renders him judicially estopped from pursuing the claim (*Koch v National Basketball Assn.*, 245

AD2d 230, 230-231 [1st Dept 1997]; *Becerril v City of N.Y. Dept. of Health & Mental Hygiene*, 110 AD3d 517, 519 [1st Dept 2013], *lv denied* 23 NY3d 905 [2014]). While the error initially may not have been intentional, as plaintiff had not commenced the legal malpractice claim when he filed his Chapter 13 petition, and was pro se at the time and may not have known that he was required to disclose such a suit, he failed to disclose the lawsuit to the bankruptcy court even after he commenced it, even after he retained bankruptcy counsel, and even after defendants cited the failure to disclose it in an unsuccessful summary judgment motion made years earlier, in June 2011. Thus, plaintiff's ongoing failure to correct the omission suggests it was not merely a good faith mistake or unintentional (*compare Murray*, 248 BR at 487; *United States v Hussein*, 178 F3d 125, 130 [2d Cir 1999]).

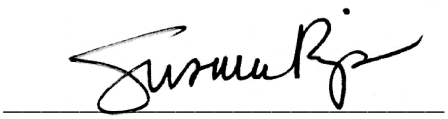
Because we determine that dismissal is appropriate on this ground, it is unnecessary to consider whether plaintiff otherwise had standing to pursue the claim.

The court providently exercised its discretion in granting leave to amend the answer (CPLR 3025[b]; *Cherebin v Empress Ambulance Serv., Inc.*, 43 AD3d 364, 365 [1st Dept 2007]). There was no significant prejudice to plaintiff from the delay to seek leave; plaintiff cannot claim surprise regarding his own failure

to disclose the instant lawsuit in the bankruptcy proceeding (*Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983]). As previously noted, plaintiff failed to disclose the instant lawsuit to the bankruptcy court for years, even after he was alerted to the issue of nondisclosure.

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

ENTERED: MARCH 7, 2017



CLERK

Sweeny, J.P., Renwick, Andrias, Kahn, Gesmer, JJ.

2852- Index 154131/15
2853-
2854 Margery Rubin as Trustee of the
Rubin Family Realty Trust, et al.,
Plaintiffs-Respondents,

-against-

Duncan, Fish & Vogel, L.L.P., et al.,
Defendants-Appellants.

_____

Lewis Brisbois Bisgaard & Smith LLP, New York (Jordan A. Ehrlich of counsel), for appellants.

Law Offices of Edward C. Kramer, P.C., New York (Edward C. Kramer of counsel), for respondents.

_____

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered October 19, 2015, which, to the extent appealed from, denied defendants' motion to dismiss the claims asserted by the individual plaintiffs, Margery Rubin and Robert Rubin, unanimously reversed, on the law, with costs, and the motion granted. Order, same court and Justice, entered March 20, 2016, which, upon reargument, conditionally granted defendants' motion to dismiss the individual plaintiffs' claims, unanimously modified, on the law, to grant the motion unconditionally, and, as so modified, affirmed, without costs. Order, same court and Justice, entered March 20, 2016, which, upon reargument, denied

defendants' motion to dismiss the claims asserted by plaintiff Rubin Family Irrevocable Marital Trust (the Marital Trust), unanimously modified, on the law, to grant the motion as to the claims of legal malpractice in connection with the settlement of the America's Cutting Edge Holdings, Inc. (ACE) litigation, except for the claim that defendants failed to obtain credit for plaintiffs of some $200,000 paid against the note and the claim based on deposition advice given to Margery Rubin, and to grant the motion as to the claim for punitive damages, and otherwise affirmed, without costs.

The failure of the individual plaintiffs to schedule the instant claims as assets in their Chapter 11 bankruptcies bars their pursuit of those claims (*Dynamics Corp. of Am. v Marine Midland Bank-N.Y.*, 69 NY2d 191 [1987]). It is immaterial that the bankruptcy court had actual knowledge of the existence of the claims (s*ee Donaldson, Lufkin & Jenrette Sec. Corp. v Mathiasen*, 207 AD2d 280, 282 [1st Dept 1994]).

However, because the Marital Trust never filed for bankruptcy, it did not lose its claims. Further, contrary to defendants' contention, cognizable damages are pleaded by the Marital Trust's allegations that it incurred legal fees and that it lost any source of repayment for its loans to the other

plaintiffs by virtue of defendants' malpractice. Thus, the Marital Trust alone has standing to assert the claims in this action.

With regard to the merits, the complaint fails to state a cause of action for malpractice based on the settlement in the ACE litigation, with one exception. Plaintiffs do not allege that they received insufficient advice as to the potential risks of a settlement that did not release all plaintiffs. Even if the advice they received was insufficient, ACE had, on its own, declared that it would not accept such a release, and plaintiffs do not argue that the Rubin Family Irrevocable Stock Trust (the Stock Trust) would not have lost the underlying action in any event, which would have placed them in the same position, regardless of any action by defendants (*see Lindenman v Kreitzer*, 7 AD3d 30, 34 [1st Dept 2004]). The exception is plaintiffs' allegation that defendants failed to obtain credit in the settlement for $200,000 that the Stock Trust paid on the note.

The complaint fails to state a cause of action for malpractice based on the "recap" of accounts and balances provided in the Utah action. While defendants arguably should have found the error in the recap, the error did not cause plaintiffs any harm. It was irrelevant to the Utah proceeding.

In the judgment enforcement action in the U.S. District Court for the Southern District of New York, in which the transaction was expressly litigated, plaintiffs were represented by new counsel, and neither they nor counsel corrected the error.

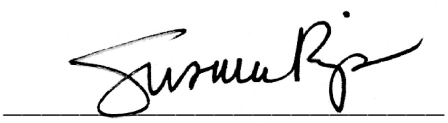
The complaint states a cause of action for malpractice based on the deposition advice given to Margery Rubin. The doctrine of judicial estoppel does not preclude plaintiffs from arguing against counsel that counsel's alleged advice as to giving perjurious testimony caused injury (*see D & L Holdings v Goldman Co.*, 287 AD2d 65, 71 [1st Dept 2001], *lv denied* 97 NY2d 611 [2002]). Margery Rubin did not prevail in the Utah action by virtue of her testimony. Moreover, the District Court for the Southern District of New York expressly relied on that testimony in finding certain transfers void and entering the turnover order.

The claim for punitive damages must be dismissed because the acts alleged by plaintiffs as a basis therefor are not part of

any cause of action and because plaintiffs do not allege that those acts caused them any harm.

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

ENTERED: MARCH 7, 2017



CLERK

Sweeny, J.P., Renwick, Andrias, Kahn, Gesmer, JJ.

2857 Atato Ducasse, et al., Index 20397/13E
Plaintiffs-Appellants,

-against-

New York City Health and Hospitals Corporation, et al.,
Defendants-Respondents.

_____

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

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

_____

Order, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered September 3, 2015, which, in this action alleging medical malpractice, granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

In this case, we are asked to decide whether defendants are entitled to summary judgment dismissing a claim of medical malpractice alleging that plaintiff Atato Ducasse (plaintiff patient) suffered injuries stemming from the use of chromic sutures rather than vicryl sutures during an episiotomy procedure. We find that defendants have made a prima facie showing sufficient to demonstrate their entitlement to summary judgment and that plaintiffs have failed to rebut that showing by

way of medical evidence of a departure from accepted medical practice and that such departure was a proximate cause of plaintiff patient's injuries (*Anyie B. v Bronx Lebanon Hosp.*, 128 AD3d 1, 3 [1st Dept 2015]).

On November 13, 2011, while plaintiff patient was at Lincoln Hospital giving birth to her baby, the infant's head was delivered but the shoulders were stuck. After attempting several unsuccessful maneuvers, the attending physician, defendant Dr. Patrina Phillip, performed an emergency episiotomy, making an incision in the perineum (the area between the vagina and the anus). The baby was safely delivered, but plaintiff patient suffered a fourth degree perineal laceration during the course of delivery, resulting in severe bleeding.

Dr. Phillip repaired the laceration, using vicryl (synthetic) sutures for the rectal mucosa (the membrane that lines the rectum) but using chromic (natural material) sutures for the internal and external anal sphincter (the muscles that control the opening and closing of the anus). On November 14, 2011, another doctor noted that plaintiff patient's blood loss had rendered her anemic. Plaintiff patient was discharged from the hospital on November 18, 2011.

On December 6, 2011, plaintiff patient was examined by a

certified nurse midwife at Morris Heights Health Center. In her report dated December 9, 2011, the nurse commented that while plaintiff patient's perineum was in various stages of healing, there were "fourth-degree perineal lac[eration] postpartum cond[itions and] compl[ications] (ICD-664.34)" (all capitalization omitted), including a "[s]mall open area" in the perineum, and that plaintiff patient's condition would be reassessed in two weeks. At plaintiff patient's follow-up visit on December 20, 2011, she was examined by the same nurse, who, in her report on that examination, commented that plaintiff patient was healing well, although she noted that there was a small area of tunneling in the perineum and also yellow discharge.

On January 12, 2012, plaintiff patient was diagnosed with a rectovaginal fistula (abnormal passage between the two organs). She underwent four surgical procedures at Montefiore Hospital to repair the fistula and restore colorectal control. The fistula eventually healed, but plaintiff patient continued to suffer from fecal incontinence. On January 31, 2013, plaintiff patient and her husband brought this medical malpractice action, claiming that Dr. Phillip was negligent in using chromic rather than vicryl sutures in some portions of the laceration repair and that defendants' negligent obstetrical care resulted in plaintiff

patient's fistula, fecal incontinence, and colorectal instability.

A defendant in a medical malpractice action demonstrates prima facie entitlement to summary judgment by showing either that he or she did not depart from good and accepted medical practice or that any departure did not proximately cause plaintiff's injuries (*Anyie B.*, 128 AD3d at 3). Once a defendant has established prima facie entitlement to summary judgment, the burden shifts to plaintiff to "rebut the prima facie showing via medical evidence attesting that the defendant departed from accepted medical practice and that such departure was a proximate cause of the injuries alleged" (*id.*).

Here, defendants established their prima facie entitlement to judgment as a matter of law. Defendants submitted evidence, including an expert's opinion, demonstrating that there was no departure from good and accepted medical practice and that, even if there was a departure, it was not a proximate cause of plaintiff's alleged injuries (*see Anyie B.*, 128 AD3d at 3; *cf. Pullman v Silverman*, 28 NY3d 1060, 1063 [2016] [holding that because the defendant physician's expert proffered conclusory statements unsupported by medical research, the defendant did not make a prima facie showing of lack of probable cause and

therefore was not entitled to summary judgment]).

In opposition, plaintiffs contended that an issue of fact existed as to whether there was a departure from the standard of care. Plaintiffs relied on their own expert, who opined that defendants' use of chromic rather than vicryl sutures to repair plaintiff patient's fourth degree perineal laceration, although generally acceptable, was a departure from accepted medical practice where, as here, the patient was anemic or suspected to be anemic.

Assuming, without deciding, that plaintiffs demonstrated the existence of an issue of fact as to whether there was a departure from the standard of care, they did not do so with respect to whether the departure was a proximate cause of plaintiff patient's injuries. Plaintiffs' expert opined that the use of chromic rather than vicryl sutures was a substantial factor in causing plaintiff patient's injuries because chromic sutures retain their tensile strength for a shorter period of time (14 days) than vicryl sutures (35 days), but did not offer any opinion as to precisely how much time elapsed between the laceration repair and the breakdown of the sutures. Rather, plaintiffs' expert merely opined that the breakdown started before December 20, 2011 and continued through January 10, 2012.

Furthermore, although the first examination of plaintiff patient by the certified nurse midwife took place on December 6, 2011, 23 days after her November 13 laceration repair, by which time, according to plaintiffs' expert, chromic sutures would have broken down but vicryl sutures would not have, the nurse's report neither attributes the "[s]mall open area" to a breakdown of the sutures nor makes any mention of any such breakdown. And with respect to the nurse's report on the second examination of plaintiff on December 20, 2011, 37 days after the laceration repair, even assuming that the "small area of tunneling" noted by the nurse was attributable to a breakdown of the sutures, this examination took place more than 35 days after the laceration repair, by which time, according to plaintiffs' expert, both chromic and vicryl sutures would have broken down. Thus, this evidence is insufficient to raise an issue of fact as to whether the breakdown of the sutures had begun at any time at which the use of vicryl sutures instead of chromic sutures could have made any difference. Therefore, plaintiffs have failed to meet their burden of proffering any evidence sufficient to raise an issue of

fact as to whether the use of chromic sutures rather than vicryl sutures was a proximate cause of plaintiff patient's injuries (*see Anyie B.*, 128 AD3d at 3).

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

ENTERED: MARCH 7, 2017

CLERK

Acosta, J.P., Mazzarelli, Feinman, Webber, JJ.

2883N Laszlo R. Horvath, Index 310013/10
Plaintiff-Respondent,

-against-

Gumley Haft Kleier Inc.,
Defendant,

Eltech Industries, Inc.,
Defendant-Appellant.

_____

Chesney & Nicholas, LLP, Syosset (Cheryll L. Corigliano of counsel), for appellant.

Budin, Reisman, Kupferberg & Bernstein, LLP, New York (Gregory C. McMahon of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered December 4, 2014, which denied defendant Eltech Industries, Inc.'s motion to amend its answer to assert the affirmative defenses of lack of capacity to sue and judicial estoppel, and to dismiss the complaint based on those defenses, unanimously reversed, on the law, without costs, and the motion granted.

On October 26, 2009, plaintiff filed a Chapter 13 petition in the U.S. Bankruptcy Court for the District of New Jersey. Eleven months later, on September 15, 2010, plaintiff sustained an injury due to the alleged negligence of defendants. On

November 23, 2010, plaintiff initiated this action. On December 28, 2011, the Bankruptcy Court confirmed a plan. Three years later, on February 18, 2014, after appellant discovered that plaintiff had not disclosed this action to the Bankruptcy Court, plaintiff filed an amended schedule of assets and liabilities to include this action.

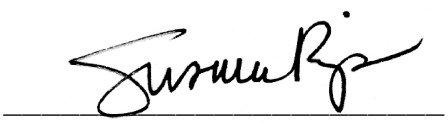
Plaintiff's prolonged failure to disclose this lawsuit to the Bankruptcy Court renders him judicially estopped from pursuing it (*Kleinplatz v Nathan*, __AD3d__ [1st Dept 2017] decided simultaneously herewith). Plaintiff took an inconsistent position in the bankruptcy proceeding - that he did not have any other legal claims than those listed on his schedule of assets and liabilities - and that position was adopted by the Bankruptcy Court when it confirmed the plan (*Goldson v Kral, Clerkin, Redmond, Ryan, Perry & Van Etten, LLP*, 2014 WL 3974584, *2, 2014 US Dist LEXIS 112291, *5 [SD NY, Aug. 13, 2014, No. 13 civ. 2747 (GBD)(FM)]).

Given that plaintiff is estopped from asserting his claim, it is unnecessary to consider whether he had standing to pursue it.

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: MARCH 7, 2017



CLERK

Andrias, J.P., Feinman, Gische, Gesmer, JJ.

3265N Elhadj Y. Diako, Index 309612/11
Plaintiff-Respondent,

-against-

Leonardo Dany Aguirre Yunga, et al.,
Defendants-Appellants.

_____

Amabile & Erman, P.C., Staten Island (Nicholas J. Loiacono of counsel), for appellants.

Macaluso & Fafinski, P.C., Bronx (Donna A. Fafinski of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Doris M. Gonzalez, J.), entered October 7, 2016, which granted plaintiff's motion to restore the case to the trial calendar and denied defendants' cross motion to compel plaintiff to comply with all outstanding discovery demands, affirmed, without costs.

The motion court providently exercised its discretion in granting plaintiff's motion and denying defendants' cross motion (*see Gumbs v Flushing Town Ctr. III, L.P.*, 114 AD3d 573, 574 [1st Dept 2014]). Plaintiff's waiver of his physician-patient privilege is limited to those conditions that he affirmatively placed in controversy (*id.*). Further, the hospital records defendants seek are not relevant, since plaintiff averred that he did not receive any medical care, treatment, or diagnostic

testing at the hospital before his accident for any injuries he sustained to his body in the accident (*Elmore v 2720 Concourse Assoc., L.P.*, 50 AD3d 493, 493 [1st Dept 2008]). The motion court also properly denied defendants' request for plaintiff's employment records from his previous employer, where he worked approximately 10 years before the accident, since such a request is "overbroad and unduly burdensome" (*Tomaino v 209 E. 84 St. Corp.*, 68 AD3d 527, 530 [1st Dept 2009]).

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

All concur except Gische, J. who concurs in a separate memorandum as follows:

GISCHE, J. (concurring)

While I concur, I do so solely on constraint of *Gumbs v Flushing Town Center III, L.P.* (114 AD3d 573 [1st Dept 2014]). I dissented in that case, and while it is my belief that "[p]laintiff's medical records [may] shed light on whether he suffered from other conditions, having nothing to do with this accident, which may have impacted upon his ability to enjoy life and/or life expectancy" (*Gumbs*, 114 AD3d at 577, Gische, J. dissenting), I will follow the prevailing precedent in this department and join in the decision of my colleagues.

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

ENTERED: MARCH 7, 2017

CLERK

Acosta, J.P., Richter, Manzanet-Daniels, Gische, Webber, JJ.

3325-
3325A Index 382373/09

Wells Fargo Bank, N.A., etc.,
Plaintiff-Appellant,

-against-

Iheanachor Njoku,
Defendant-Respondent,

New York City Environmental Control Board, et al.,
Defendants.

_____

Knuckles, Komosinski & Manfro LLP, Elmsford (Jordan J. Manfro of counsel), for appellant.

Michael Kennedy Karlson, New York, for respondent.

_____

Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered on or about July 13, 2015, which set down for a traverse hearing defendant Iheanachor Njoku's motion to vacate a default judgment of foreclosure and sale and to dismiss the complaint for lack of personal jurisdiction, unanimously reversed, on the law, without costs, and the motion denied. Appeal from order, same court and Justice, entered on or about March 28, 2016, which, following the traverse hearing, granted the motion, unanimously dismissed, without costs, as academic.

The affidavit of service constituted prima facie evidence of proper service, and defendant's conclusory denial of service was

insufficient to rebut plaintiff's prima facie showing (*see NYCTL 1998-1 Trust & Bank of N.Y. v Rabinowitz*, 7 AD3d 459, 460 [1st Dept 2004]). The alleged discrepancies noted by defendant were trivial (*Black v Pappalardo*, 132 AD2d 640, 641 [2d Dept 1987]).

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

ENTERED: MARCH 7, 2017

CLERK

Acosta, J.P., Richter, Manzanet-Daniels, Gische, Webber, JJ.

3327 Seth Martin, Claim No. 123068
Claimant-Respondent,

-against-

The State of New York,
Respondent-Appellant.

_____

Cartafalsa, Slattery, Turpin & Lenoff, New York (Michael Lenoff of counsel), for appellant.

Sacks and Sacks LLP, New York (Scott N. Singer of counsel), for respondent.

_____

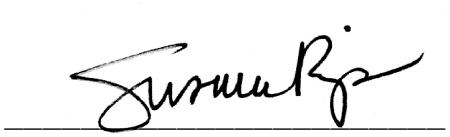
Order, Court of Claims of the State of New York (David A. Weinstein, J.), entered June 16, 2016, which, to the extent appealed from as limited by the briefs, denied the branch of respondent State of New York's motion for summary judgment that sought dismissal of claimant's Labor Law § 241(6) claims predicated on violations of Industrial Code (12 NYCRR) §§ 23-2.3(c), 23-8.2(c)(3) and 23-8.1(f)(2)(i), unanimously affirmed, without costs.

The Court of Claims correctly decided that an issue of fact exists concerning whether the State provided tag lines for

claimant's use in moving the steel I-beam across the Alexander Hamilton Bridge and whether the absence of tag lines was a proximate cause of claimant's injury (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 350 [1998]).

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

ENTERED: MARCH 7, 2017



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Acosta, J.P., Richter, Manzanet-Daniels, Gische, Webber, JJ.

3328 Confidence Beauty Salon Corp., Index 157777/15
Plaintiff-Appellant,

-against-

299 Third SA, LLC, et al.,
Defendants-Respondents.

_____

Goldberg, Scudieri & Lindenberg, P.C., New York (Michael Brian Cronk of counsel), for appellant.

Law Offices of Fred L. Seeman, New York (Fred L. Seeman of counsel), for respondents.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered on or about December 3, 2015, which denied plaintiff's application for a *Yellowstone* injunction, unanimously affirmed, without costs.

The denial of *Yellowstone* relief was a provident exercise of discretion because plaintiff failed to aver, let alone

demonstrate, that it had the ability to cure its alleged defaults (*see Artcorp Inc. v Citirich Realty Corp.*, 124 AD3d 545 [1st Dept 2015]).

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

ENTERED: MARCH 7, 2017

CLERK

Acosta, J.P., Richter, Manzanet-Daniels, Gische, Webber, JJ.

3329 The People of the State of New York, Ind. 982/12
Respondent,

-against-

José Victorino,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Peter D. Coddington of counsel), for respondent.

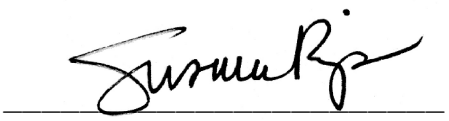
_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Judith Lieb, J.), rendered October 23, 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: MARCH 7, 2017



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

Acosta, J.P., Richter, Manzanet-Daniels, Gische, Webber, JJ.

3330 Risk Control Associates, Inc., et al., Index 155434/15
Plaintiffs-Appellants-Respondents,

-against-

Maloof, Lebowitz, Connahan &
Oleske, P.C., et al.,
Defendants-Respondents-Appellants.

_____

Behman Hambelton, LLP, New York (Kevin H. O'Neill of counsel), for appellants-respondents.

Schenck, Price, Smith & King, LLP, New York (John P. Campbell of counsel), for respondents-appellants.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered on or about February 11, 2016, which granted defendants' motion to dismiss the complaint, and denied defendants' application for sanctions, unanimously affirmed, without costs.

The factual allegations and the damages sought in the instant action are the same as the factual allegations underlying the legal malpractice claims and the damages sought in an earlier action brought against defendants by plaintiff Risk Control Associates, Inc., the claims administrator for plaintiff National Specialty Insurance Company (*Risk Control Assoc. Ins. Group v Maloof, Lebowitz, Connahan & Oleske, P.C.*, 127 AD3d 500 [1st Dept 2015]) (*see Voutsas v Hochberg*, 103 AD3d 445, 446 [1st Dept

2013], *lv denied* 22 NY3d 853 [2013]). The instant claims are also time-barred (*see* CPLR 214[6]).

Upon consideration of all the circumstances, we decline to impose sanctions against plaintiffs.

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

ENTERED: MARCH 7, 2017

CLERK

Acosta, J.P., Richter, Manzanet-Daniels, Gische, Webber, JJ.

3331 Egbebemwen A., an infant by his mother and natural guardian Benedicta A., et al., Plaintiffs-Appellants,

-against-

New York City Department of Education, et al., Defendants-Respondents. Index 108188/11

_____

Harnick & Harnick, P.C., New York (Jackie L. Gross of counsel), for appellants.

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

_____

Order, Supreme Court, New York County (Margaret A. Chan, J.), entered June 5, 2015, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Infant plaintiff, a 15-year-old member of his school's basketball team, was injured when he tripped on a wrestling mat that he alleges was two to four steps from the baseline of an indoor basketball court, after he tried to dunk the basketball during a lay-up drill. The basketball court was located in a multi-purpose gym, and the wrestling mat, by all accounts, was open and obvious. Plaintiff assumed the risk of injury by

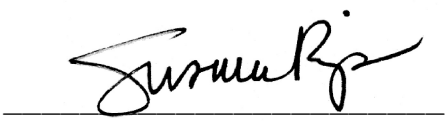
voluntarily choosing to participate in the drill, despite his awareness of the presence of the mat, and his knowledge that it posed a potential tripping hazard (*see Wallace v City of New York*, 138 AD3d 509 [1st Dept 2016], *lv denied* 27 NY3d 911 [2016]; *Latimer v City of New York*, 118 AD3d 420 [1st Dept 2014]; *Steward v Town of Clarkstown*, 224 AD2d 405 [2d Dept 1996], *lv denied* 88 NY2d 815 [1996]).

We note that dismissal as to the City was required in any event, because it is not a proper party (*see Perez v City of New York*, 41 AD3d 378 [1st Dept 2007], *lv dismissed* 10 NY3d 708 [2008]).

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: MARCH 7, 2017



CLERK

Acosta, J.P., Richter, Manzanet-Daniels, Gische, Webber, JJ.

3332 The People of the State of New York, Ind. 1766/15
Respondent,

-against-

Felix Nixon,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Jill Konviser, J.), rendered July 7, 2015, unanimously affirmed.

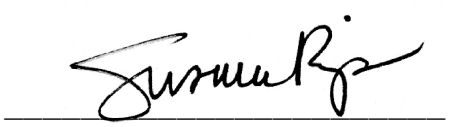
Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised 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: MARCH 7, 2017



CLERK

Acosta, J.P., Richter, Manzanet-Daniels, Gische, Webber, JJ.

3335 Sheryl R. Menkes, Index 111435/10
Plaintiff-Appellant,

-against-

Richard Delikat, etc., et al.,
Defendants-Respondents.

_____

Sheryl R. Menkes, appellant pro se.

Law Offices of Jonathan D. Shramko, New York (Jonathan D. Shramko of counsel), for respondents.

_____

Order, Supreme Court, New York County (Paul Wooten, J.), entered October 16, 2015, which, to the extent appealable, denied plaintiff's motion to renew, and thereupon vacate, a prior order granting defendants' motion to dismiss the complaint pursuant to CPLR 3126 based on plaintiff's failure to comply with discovery orders, unanimously affirmed, and the appeal therefrom otherwise dismissed, as taken from a nonappealable order, without costs.

No appeal lies from the portion of the order that denied reargument (*Jones v 170 E. 92nd St. Owners Corp.*, 69 AD3d 483 [1st Dept 2010]; *see* CPLR 5701[a][2][viii]). Thus, plaintiff's arguments that the motion court misapprehended the law or facts when it granted defendants' motion and denied her cross motion are not properly before this Court (*see Stratakis v Ryjov*, 66

AD3d 411 [1st Dept 2009]; CPLR 2221[d][2]).

As for the motion for leave to renew, plaintiff presented additional excuses and explanations for her delay in complying with outstanding discovery orders, but these facts were available at the time of the underlying motion and plaintiff did not explain why she did not offer them in opposition to the underlying motion (*see Rancho Santa Fe Assn. v Dolan-King*, 36 AD3d 460, 461 [1st Dept 2007]; CPLR 2221[e][2] and [3]).

Were we to reach the merits of the underlying order, we would find that the motion court providently exercised its discretion in determining that plaintiff's failure to respond to a simple demand for documentary discovery, as directed in five compliance conferences over the course of a year and one-half, was wilful and contumacious (*see Fish & Richardson, P.C. v Schindler*, 75 AD3d 219, 220 [1st Dept 2010]; *Brewster v FTM Servo, Corp.*, 44 AD3d 351, 352 [1st Dept 2007]; CPLR 3126). Plaintiff failed to tender a reasonable excuse to overcome defendants' showing of wilfulness (*see Reidel v Ryder TRS, Inc.*,

13 AD3d 170, 171 [1st Dept 2004]). Accordingly, plaintiff's belated disclosure did not outweigh the prejudice caused defendants in their preparation for trial (*see Brewster*, 44 AD3d at 352).

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

ENTERED: MARCH 7, 2017

CLERK

Acosta, J.P., Richter, Manzanet-Daniels, Gische, Webber, JJ.

3336 In re Milciades Pepin, Index 100727/14
Petitioner-Appellant,

-against-

New York City Department of Education,
Respondent-Respondent.

_____

Milciades Pepin, appellant pro se.

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

_____

Order and judgment (one paper), Supreme Court, New York County (Lucy Billings, J.), entered December 17, 2015, to the extent appealed from, denying so much of the petition as sought to annul the "problem code" assigned to petitioner's employment file, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

In April 2011, petitioner commenced an article 78 proceeding to challenge the discontinuance of his probation as an assistant principal, the unsatisfactory rating (U-rating) he received, and the placement of a "problem code" in his employment file after findings of misconduct were made against him. The court granted the petition to the extent of annulling the U-rating and prohibiting the assignment of a problem code insofar as it was

supported by the annulled U-rating or unsubstantiated conduct, and otherwise denied the petition and dismissed the proceeding. Petitioner did not appeal.

Petitioner commenced the instant proceeding in 2014, again challenging the problem code that was placed in his file in 2011 and respondent's alleged constructive termination of his license as a result of the problem code and its impact on his applications for a Certificate of Eligibility for employment in a supervisory capacity.

To the extent petitioner is again challenging the assigned problem code, since he neither alleged nor demonstrated that the problem code was based on impermissible grounds, the claim is barred by the statute of limitations and res judicata (*see e.g. Beth Rifka, Inc. v State of New York*, 114 AD2d 560, 562 [3d Dept 1985]). In any event, petitioner's allegation that his inability to obtain a certificate of eligibility has constructively terminated his license fails to state a claim. As the court observed, respondent is not prohibited from considering the past discontinuance of petitioner's probation in assessing his eligibility for employment. Assuming that the sole basis for respondent's not issuing petitioner a certificate of eligibility is the problem code, and not a failure to satisfy any other

applicable requirements, petitioner has not been deprived of the right to seek employment without due process. Even if his job prospects are more limited, petitioner is not prohibited from seeking a position that does not require a certificate of eligibility, i.e., a non-supervisory position; nor is he prohibited from applying to employers outside respondent's authority.

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

ENTERED: MARCH 7, 2017

CLERK

Acosta, J.P., Richter, Manzanet-Daniels, Gische, JJ.

3337 The People of the State of New York, Ind. 900/10
Respondent,

-against-

Timothy Johnson,
Defendant-Appellant.

_____

Massena Law P.C., New York (Alain V. Massena of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Shannon Henderson of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Troy K. Webber, J.), rendered August 2, 2014, convicting defendant, after a jury trial, of manslaughter in the first degree and two counts of criminal possession of a weapon in the second degree, and sentencing him, as a second violent felony offender, to an aggregate term of 20 years, unanimously affirmed.

The verdict was supported by legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348–349 [2007]). Although the principal witness's testimony was undisputedly self-contradictory, the jury had a rational basis upon which to credit the version of the events provided on direct examination while discrediting the version provided on cross- and redirect examination (*see People v*

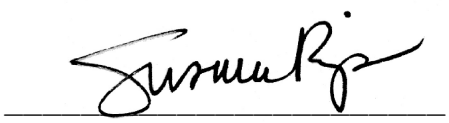
*Fratello*, 92 NY2d 565, 573-575 [1998], *cert denied* 526 US 1068 [1999]). The fact that the jury acquitted defendant of murder does not warrant a different conclusion (*see People v Rayam*, 94 NY2d 557 [2000]).

The court providently permitted the People to impeach the witness with his grand jury testimony, because his trial testimony on cross- and redirect examination was not merely unhelpful or limited to inability to recall, but was affirmatively damaging to the People's case (*see* CPL 60.35[1]; *People v Winchell*, 98 AD2d 838, 841 [1983], *affd* 64 NY2d 826 [1985]). Furthermore, when viewed in context, the prosecutor's summation comments did not treat the grand jury testimony as evidence in chief. Defendant's challenge to the content of the court's instructions regarding the grand jury testimony is unpreserved, and we decline to review it in the interest of

justice. As an alternative holding, although the standard CJI charge is preferable, the instructions here provide no basis for reversal (*see* CPL 60.35(2)).

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

ENTERED: MARCH 7, 2017



CLERK

Acosta, J.P., Richter, Manzanet-Daniels, Gische, Webber, JJ.

3338-
3339 Index 651524/13

Quik Park West 57 LLC, et al.,
Plaintiffs-Appellants-
Respondents/Respondents,

-against-

Bridgewater Operating Corporation,
Defendant-Respondent-
Appellant/Appellant.

_____

Feuerstein Kulick LLP, New York (David Feuerstein of counsel), for appellants-respondents.

Rosenberg & Estis, P.C., New York (Norman Flitt of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered June 5, 2015, which, inter alia, determined that there was no agency relationship between the parties, and order, same court and Justice, entered March 21, 2016, which, inter alia, granted plaintiffs' motion for a declaratory judgment that defendant failed to give the requisite contractual notice of default and opportunity to cure, dismissed defendant's counterclaim for an accounting, in part, its counterclaims for breach of fiduciary duty and conversion, and its request for punitive damages, and denied plaintiffs' motion for summary judgment on their unpleaded breach of contract claim and their

cause of action for breach of the covenant of good faith and fair dealing, and denied their requests for a judgment in their favor for $716,666.66 in management fees and a reference to a special referee for a determination of their damages relating to their share of "Net Revenue" under the contract and of their attorneys' fees and costs incurred in this action, unanimously affirmed, without costs.

An agency relationship results from a manifestation of consent by one entity to another that the agent shall act on the principal's behalf and subject to the principal's control (*see Gulf Ins. Co. v Transatlantic Reins. Co.*, 69 AD3d 71, 96-97 [1st Dept 2009]). As a general rule, control of the method and means by which work is to be performed is a critical factor in determining whether one is an independent contractor or an employee (*see Melbourne v New York Life Ins. Co.*, 271 AD2d 296, 297 [1st Dept 2000]).

The court properly concluded that the contract between the parties did not create an agency or fiduciary relationship because it expressly stated that plaintiffs were independent contractors and provided them with substantial control over the operations of the garages, including operating hours, rates, labor schedules, hiring, firing, and management of personnel, and

the terms and conditions of space rentals. The issue was properly determined by the court as a matter of law because there was no dispute as to the contract terms (*see id.*).

The record reflects issues of fact concerning whether either party breached the contract due to defendant's failure to provide plaintiffs with the opportunity to cure breaches, and as to whether plaintiffs actually cured the breaches. Plaintiffs' motion for summary judgment on their claim for breach of the covenant of good faith and fair dealing was properly denied on this ground as well. Moreover, plaintiffs' breach of contract claim was not pleaded prior to the filing of their motion.

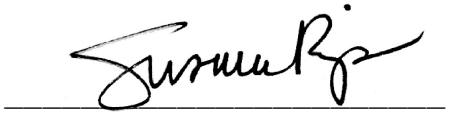
Defendant's request for punitive damages on its breach of contract counterclaim was properly denied because the conduct alleged was not "aimed at the public generally" (*Fischer v Machon Bais Yaakov,* 176 AD2d 655, 656 [1st Dept 1991]).

Defendant's conversion claim was properly dismissed because it did not result from a legal duty independent of the contract (*see Jeffers v American Univ. of Antigua*, 125 AD3d 440, 443 [1st Dept 2015]).

Referral to the special referee and awards of attorneys' fees and costs pursuant to the contract were premature in that the prevailing party had yet to be determined.

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

ENTERED: MARCH 7, 2017



CLERK

Acosta, J.P., Richter, Manzanet-Daniels, Gische, Webber, JJ.

3340-
3341N Index 153857/14

Vanessa Dennis,
Plaintiff-Respondent,

-against-

Marie Napoli, et al.,
Defendants,

Paul J. Napoli,
Defendant-Appellant.

- - - - -

Vanessa Dennis,
Plaintiff-Respondent,

-against-

Marie Napoli, etc.,
Defendant-Appellant,

Paul J. Napoli, et al.,
Defendants.

_____

L'Abbate, Balkan, Colavita & Contini, L.L.P., Garden City (Marian C. Rice of counsel), for Paul J. Napoli, appellant.

Boies, Schiller & Flexner LLP, New York (Luke Nikas of counsel), for Marie Napoli, appellant.

David Ratner Law Firm, Brooklyn (David Ratner of counsel), and Law Offices of Clifford James, New York (Clifford James of counsel), for respondent.

_____

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered August 17, 2015, which, to the extent appealed from as limited by the briefs, denied defendant Paul J. Napoli's motion

to dismiss the causes of action for defamation, intentional infliction of emotional distress, and prima facie tort as against him, and granted plaintiff's motion for a preliminary injunction restraining defendant Marie Napoli from sending unsolicited written and verbal communications about plaintiff to plaintiff's professional contacts, family, and friends and from posting derogatory comments about plaintiff on plaintiff's social media profiles or pages on which plaintiff is tagged, unanimously affirmed, with costs.

Plaintiff alleges that defendant Paul J. Napoli authorized defendant Marie Napoli's access to plaintiff's work email account and personnel file and allowed Marie Napoli to use his personal email and Facebook accounts in her endeavor to harass and defame plaintiff. These allegations state causes of action for defamation, intentional infliction of emotional distress and prima facie tort under a theory of concerted action liability (*see Bichler v Eli Lilly & Co.*, 55 NY2d 571, 580-581 [1982]; *see e.g. Wilson v DiCaprio*, 278 AD2d 25, 25-26 [1st Dept 2000]).

Plaintiff demonstrated a likelihood of success on the merits, irreparable harm in the absence of an injunction, and a balancing of the equities in her favor (*see Aon Risk Servs. v Cusack*, 102 AD3d 461, 463-464 [1st Dept 2013]). We reject Marie

Napoli's argument that her unsolicited communications to plaintiff's professional colleagues, friends, and family about plaintiff's alleged sexual proclivities are constitutionally protected speech; the record supports plaintiff's claims that these communications cause injury to her reputation, jeopardize her employment, and otherwise unnecessarily intrude upon her right to privacy (*see Ansonia Assoc. Ltd. Partnership v Ansonia Tenants' Coalition*, 253 AD2d 706 [1st Dept 1998]; *Bingham v Struve*, 184 AD2d 85, 89 [1st Dept 1992]; *see generally People v Shack*, 86 NY2d 529 [1995]). Moreover, contrary to defendant's contention that it is overly broad, the preliminary injunction is narrowly tailored to protect plaintiff's privacy.

Finally the court properly rejected defendant Paul Napoli's contention that plaintiff's claims are barred by the letter agreement. "The test for determining whether specific activities are within the scope of employment or purely personal is whether the activities are both reasonable and sufficiently work related

under the circumstances" (*Richardson v Fiedler Roofing, Inc.*, 67 NY2d 246, 249 (1986).

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

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

ENTERED: MARCH 7, 2017

CLERK

Acosta, J.P., Richter, Manzanet-Daniels, Gische, Webber, JJ.

3342N Aron Grinshpun, et al., Index 115376/10
Plaintiffs-Respondents,

-against-

Gennady (also known as Eugene) Borokhovich,
Defendant-Appellant,

Vitaly Zaretsky,
Defendant.

_____

Krol & O'Connor, New York (Igor Krol of counsel), for appellant.

Michael Konopka & Associates, P.C., New York (Michael Konopka of counsel), for respondents.

_____

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered November 9, 2015, which denied defendant Gennady Borokhovich's motion to vacate the default judgment entered November 11, 2011, unanimously affirmed, with costs.

Defendant failed to show, in support of vacatur pursuant to CPLR 5015(a)(2), that the agreements in which plaintiffs allegedly released him from liability "could not have been previously discovered by the exercise of due diligence" (*Prote Contr. Co. v Board of Educ. of City of N.Y.*, 230 AD2d 32, 39 [1st Dept 1997]). Defendant has been in possession of the agreements since the inception of the litigation. While he claims that he

was unable to access the agreements due to hurricane damage to his home office and marital difficulties, lack of access did not prevent him from alerting the court to their existence. Defendant claims that he did not know of the releases. However, he admits knowing that plaintiffs "promised to release him" and that, in consideration for one of the agreements, he was to be "left in peace." This knowledge should have prompted further inquiry. At the very least, defendant should have brought the November 2006 release to the court's attention when it was produced to his attorneys, one year before the instant motion was made.

Defendant failed to show, in support of vacatur pursuant to CPLR 5015(a)(3), the existence of fraud (*see Thakur v Thakur*, 49 AD3d 861 [2d Dept 2008]; *see also Sanchez v Avuben Realty LLC*, 78 AD3d 589, 590 [1st Dept 2010]). We note, moreover, that his motion was not brought within a reasonable time (*see Mark v Lenfest*, 80 AD3d 426, 426 [1st Dept 2011]).

Defendant's arguments with respect to the necessity of an

inquest and the merits of plaintiffs' claims are foreclosed by our prior order upholding the default judgment (*see Grinshpun v Borokhovich*, 100 AD3d 551 [1st Dept 2012], *lv denied* 21 NY3d 857 [2013]).

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

ENTERED: MARCH 7, 2017

CLERK

Acosta, J.P., Richter, Manzanet-Daniels, Gische, Webber, JJ.

3343N Misrahi Realty Corp., Index 653660/14
Plaintiff-Appellant,

-against-

18 Orchard Realty LLC,
Defendant-Respondent.

_____

Amos Weinberg, Great Neck, for appellant.

_____

Order, Supreme Court, New York County (Robert R. Reed, J.), entered on or about April 22, 2016, which denied plaintiff's motion to strike defendant's answer or, inter alia, compel defendant to respond to interrogatories, unanimously affirmed, without costs.

Supreme Court providently exercised its discretion in denying plaintiff's motion to strike the answer, since defendant's conduct was not shown to be willful, contumacious or due to bad faith (*cf. Henderson-Jones v City of New York*, 87 AD3d 498, 504, 505 [1st Dept 2011]). Moreover, the branch of the motion seeking to compel was properly denied based on the motion court's determination that the numerous interrogatories, with

subparts, were overbroad and burdensome (*see Botsas v Grossman*, 7 AD3d 654, 655 [2d Dept 2004]; *Editel, New York v Liberty Studios*, 162 AD2d 345, 345 [1st Dept 1990]; *see also* Uniform Rules for Trial Courts [22 NYCRR] § 202.70[g], Rule 11-a[a]).

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

ENTERED: MARCH 7, 2017

CLERK

Sweeny, J.P., Acosta, Mazzarelli, Manzanet-Daniels, Webber, JJ.

3059 Christine Barkley, Index 107780/10
Plaintiff-Appellant,

-against-

Plaza Realty Investors Inc.,
et al.,
Defendants-Respondents.

_____

Albert, Slobin & Rubenstein, LLP, Garden City (Lisa M. Comeau of counsel), for appellant.

McGaw, Alventosa & Zujac, Jericho (Joseph Horowitz of counsel), for Infinity Elevator Co., respondent.

Mischel & Horn, P.C., New York (Scott T. Horn of counsel), for Plaza Realty Investors Inc., Algin Management Co., LLC and Laurence Towers Company, LLC, respondents.

_____

Judgment, Supreme Court, New York County (Nancy M. Bannon, J.), entered September 21, 2015, reversed, on the law, without costs, the complaint reinstated, and the matter remanded for a new trial.

Opinion by Manzanet-Daniels, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

John W. Sweeny, Jr, J.P.
Rolando T. Acosta
Angela M. Mazzarelli
Sallie Manzanet-Daniels
Troy K. Webber, JJ.

3059
Index 107780/10

_____x

Christine Barkley,
Plaintiff-Appellant,

-against-

Plaza Realty Investors Inc.,
et al.,
Defendants-Respondents.

_____x

Plaintiff appeals from the judgment of the Supreme Court, New York County (Nancy M. Bannon, J.), entered September 21, 2015, after a jury trial, in favor of defendants.

Albert, Slobin & Rubenstein, LLP, Garden City (Lisa M. Comeau and Morton Alpert of counsel), for appellant.

McGaw, Alventosa & Zujac, Jericho (Joseph Horowitz of counsel), for Infinity Elevator Co., respondent.

Mischel & Horn, P.C., New York (Scott T. Horn and Naomi M. Taub of counsel), for Plaza Realty Investors Inc., Algin Management Co., LLC and Laurence Towers Company, LLC, respondents.

MANZANET-DANIELS, J.

Plaintiff was struck by the door of a service elevator in a building owned by defendant Plaza Realty and managed by defendant Infinity pursuant to an agreement with the owner. Plaintiff, a tenant in the building, was injured when the door of the elevator forcibly closed upon her as she was attempting to enter the elevator, striking her on the right side of her body, and propelling her to the ground. Plaintiff observed that the inner and outer doors of the elevator were separated; she testified that only one of the doors hit her. She pressed the button to exit the elevator and the doors went back into position. Plaintiff testified that she had experienced a similar problem with the same elevator the week before. At that time, the door "slammed" into her laundry cart as she was entering the elevator. She notified the doorman of the prior incident.

Infinity's service manager described the elevator in question as having a single-slide door, meaning that it had an outside and inside door that moved in tandem when the elevator was operating properly. The movement of the doors was controlled by a door operator and controller located on top of the elevator car. The elevator also had an electric eye on the edge of the car door that would detect if the door encountered an obstacle, and cause the door to retract. The electric eye was not

"foolproof," but was "pretty close." There was no rubber edging on the moving door of the elevator. The service manager identified possible causes of a fast-closing door as a resistor or diode malfunction or a malfunction in the door operator.

Infinity's service manager testified that the inner and outer doors would not have moved separately in the manner described by plaintiff in the absence of a malfunction. The evidence showed that Infinity had in fact repaired a problem with the door operator controller the very day before the accident. The service manager described the elevator equipment as being "on its last legs," and in need of replacement. The elevators in the building were approximately 30 years old.

Plaintiff sought to have the case submitted to the jury on a theory of res ipsa loquitur. Plaintiff also asked the trial court to charge section 78 of the Multiple Dwelling Law, pursuant to which an owner has a nondelegable duty to maintain the premises in safe condition. The trial court refused to charge either res ipsa or Multiple Dwelling Law § 78. The court found that plaintiff's failure to offer expert testimony precluded her from establishing that she did not contribute to the happening of the accident, and that the event was of a kind that ordinarily does not occur in the absence of negligence. The court found that the evidence supported the conclusion that the elevator was

within defendants' exclusive possession and control.

The court refused to admit into evidence an elevator log that multiple witnesses testified was kept contemporaneously and in the ordinary course of business and which detailed multiple problems with the service elevator. The log indicated, inter alia, that in the months preceding the accident the service elevator had been stuck on various floors; that the door was not opening on various floors; that the elevator had been stuck and unleveled on the 30th floor; that the elevator had been stuck on the 22nd floor, with the door staying open; and that on April 2, 2008, the door "slamm[ed] hard." Plaintiff took exception to the court's rulings.

The jury returned a verdict unanimously finding that neither defendants nor plaintiff had been negligent in connection with the happening of the accident. Plaintiff's motion to set aside the verdict was denied, and this appeal ensued. We now reverse and remand for a new trial.

Res ipsa loquitur is an evidentiary doctrine which "permits the inference of negligence to be drawn from the circumstances of the occurrence" when a plaintiff can establish that (1) the event is of a kind that ordinarily does not occur in the absence of negligence; (2) the event was caused by an agency or instrumentality within the exclusive control of defendant; and

(3) the event was not caused by the plaintiff's actions (*Dermatossian v New York City Tr. Auth.*, 67 NY2d 219, 226 [1986]). "To rely on res ipsa loquitur a plaintiff need not conclusively eliminate the possibility of all other causes of the injury. It is enough that the evidence supporting the three conditions afford a rational basis for concluding that 'it is more likely than not' that the injury was caused by the defendant's negligence" (*Kambat v St. Francis Hosp.*, 89 NY2d 489, 494 [1997]).

The doctrine of res ipsa loquitur has frequently been applied in cases involving elevator malfunctions, including those involving doors which unexpectedly closed upon and injured plaintiffs while attempting to enter and exit an elevator (*see e.g. Ianotta v Tishman Speyer Props., Inc.*, 46 AD3d 297, 298-299 [1st Dept 2007] [res ipsa applicable in a case in which elevator door with an electric eye unexpectedly closed upon the plaintiff, even in the absence of prior incidents of a similar nature noted in the service log]; *see also Rogers v Dorchester Assoc.*, 32 NY2d 553, 557-559 [1973] [testimony that an elevator door had malfunctioned in the six months preceding the plaintiff's accident sufficient circumstantial evidence to permit a jury to permit the inference of negligent inspection and repair as against the elevator maintenance company]).

As we noted in *Ianotta*, "[A]s between defendants and the members of the public passing through the elevator doors without access to the[] mechanisms designed to make the doors retract, the greater probability [of responsibility for the alleged malfunction] lies at defendant's door" (46 AD3d at 299 [internal quotation marks omitted]).

Plaintiff was injured attempting to enter the elevator car when the door forcibly closed and struck her, knocking her to the ground. The elevator door did not have a rubber bumper, but operated via an electric eye, located on the edge of the door, that would cause the door to retract if it encountered something in its path. Plaintiff also testified that the inner and outer doors did not close in tandem, which the service manager identified as a malfunction. As in *Ianotta*, an unexpectedly closing door that fails to detect the presence of someone entering is not the type of event that ordinarily occurs in the absence of negligence, and the accident could not have been the result of an action on the part of plaintiff (*id.*; *see also Allen v Woods Mgt. Co.*, 86 AD2d 530, 531 [1st Dept 1982] [plaintiff's injuries were the result of the type of event that should not occur when an elevator functions properly where the plaintiff's arm was caught by the door closing, and the car thereafter descended from the 9th to the 1st floor]; *Stone v Courtyard Mgt.*

*Corp.*, 353 F3d 155, 161 [2d Cir 2003] [plaintiff's injury, which occurred while walking through automatic doors, "'suggests a malfunction which in turn suggests neglect'"]).

The service manager's testimony and other proof adduced at trial established that the operation of the door was reflective of a malfunction; that the mechanism in question (i.e., the electronic eye and door operator controller) was not accessible to persons using the elevator; there had been multiple problems with the elevator, including the same problem encountered by plaintiff, which had necessitated a service call and repairs the day before the accident; and that the elevator equipment was at the end of its useful life.

The evidence further showed that nothing plaintiff did or did not do contributed to the accident. There is no merit to defendants' argument that plaintiff somehow caused the accident by "angling toward the direction in which the doors were opening" or by "trying to beat the elevator door." For one, defendants fail to show how walking through the door at an angle could have affected the operation of the doors. The service manager testified that the elevator was equipped with an electric eye designed to retract if it encountered something in its path. It is undisputed that plaintiff did not have access to the mechanism that controlled the door, which was located atop the elevator,

distinguishing this case from others involving rubber-edged doors (*compare Feblot v New York Times Co.*, 32 NY2d 486 [1973] [involving an elevator with a rubber edge door, not an electric eye sensor as here]; *Narvaez v New York City Housing Auth.*, 62 AD3d 419, 420 [1st Dept 2009] [res ipsa inapplicable where elevator had a safety edge bumper the public could touch to open the doors, and someone inside the elevator may have inadvertently pressed the door close button], *lv denied* 13 NY3d 703 [2009]; Graham *v Wohl*, 283 AD2d 261 [1st Dept 2001] [res ipsa inapplicable where the plaintiff did not claim that she put any pressure on the door's safety bumper in order to cause the door to retract, and testified that she was able to free herself from a door closing with "medium force"]).

The proof showed that plaintiff merely walked through a door that was designed to open automatically and not close until she was over the threshold, and to detect her presence in the path of the door.

Defendants' argument that the element of exclusive control was not established is similarly without merit. The mechanism of injury related to the electronic eye and the door operator and controller located atop the car, which were inaccessible to the general public and in the exclusive control of defendant owner/managers and the elevator repair company. As such, the

doctrine of res ipsa loquitur is applicable.

The trial court erred in refusing to instruct the jury regarding the owner's nondelegable duty under Multiple Dwelling Law § 78. A building owner's duty under the statute extends to elevator maintenance and repair (*see Bonifacio v 910-930 S. Blvd.*, 295 AD2d 86, 91 [1st Dept 2002]). The court's refusal to charge section 78 erroneously led the jury to believe that the owner's negligence could only be predicated on its actual or constructive notice of an elevator problem.

Plaintiff was further prejudiced by the trial court's refusal to admit the elevator logbook into evidence as a business record under CPLR 4518(a). The doorman testified that the log was a record made and kept in the ordinary course of business in which problems and complaints with the elevator would be notated. He further testified that he was under a business duty to make such entries. The building superintendent similarly testified that the log was required to be kept and was kept in the ordinary course of business, that it was accurate when made, and that entries were made contemporaneously. Plaintiff having satisfied the criteria for admission as a business record, the trial court erred in failing to admit the log into evidence.

The error could not be said to have been harmless, since the exclusion of the log prevented the jury from fully learning

about, and having access during deliberations, to relevant evidence establishing the nature and extent of the problems with the service elevator.

In light of the above, it is unnecessary to reach plaintiff's further argument that the verdict was against the weight of the evidence.

Accordingly, the judgment of the Supreme Court, New York County (Nancy M. Bannon, J.), entered September 21, 2015, after a jury trial, in favor of defendants, should be reversed, on the law, without costs, the complaint reinstated, and the matter remanded for a new trial.

All concur.

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

ENTERED: FEBRUARY 7, 2017

CLERK