SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 30, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

2763-
2764 Index 159846/14

Benjamin Dixon,
Plaintiff-Appellant,

-against-

105 West 75th Street LLC, et al.,
Defendants-Respondents.

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Moira C. Brennan, New York, for appellant.

Kucker & Bruh, LLP, New York (Robert H. Berman of counsel), for respondents.

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Orders, Supreme Court, New York County (Manuel J. Mendez, J.), entered April 13, 2015 and August 11, 2015, which, respectively, granted the landlord defendants' (landlord) motion to dismiss the complaint against them and for an award of attorneys' fees and costs, and, to the extent appealed from as limited by the briefs, denied plaintiff's motion to renew, modified, on the law, to declare that the apartment at issue is a legal apartment and no longer subject to rent stabilization, and to deny the motion for legal fees and costs, and otherwise

affirmed, without costs.

The complaint in this case alleges that apartment 5B in the subject building, for which plaintiff has been charged market rent since he entered into a one year lease in May 2013, is subject to rent stabilization. The tenant who immediately preceded plaintiff also paid market rent. Prior to that, the apartment was registered with DHCR, with a legal regulated rent of $1,117.42 per month as of July 31, 2002, when, according to DHCR rent records, the apartment became vacant. Landlord asserts that it purposely kept the apartment vacant at that time, waiting until the apartment next door, 5A, also became vacant. When 5A became vacant, landlord commenced a project to add a penthouse to the building and connect it to 5A and 5B, thus creating twin duplex apartments. When plaintiff inquired as to why he was being charged market rate, given the regulated status of the apartment as of July 31, 2002, landlord informed him that the project to convert the unit to a duplex substantially changed the physical character of the apartment so as to entitle landlord to charge a market rate "first rent." Alternatively, landlord informed plaintiff, the costs of the renovation to the apartment were such that, applying one-fortieth of them to the regulated rent as allowed by the Rent Stabilization Code, brought the rent

above the threshold necessary to permit high rent vacancy deregulation.

The complaint alleged that landlord was not entitled to first rent for the apartment because, after the conversion to a duplex, the apartment retained the same number of rooms and bathrooms, the same kitchen, plumbing and heating system and electrical wiring, the same amount of useable square footage, and because there was no substantial increase or decrease in the outer perimeter of the apartment. Plaintiff further asserted that landlord did not obtain proper approvals for the renovation until three years after it began charging market rent, and fraudulently obtained a new certificate of occupancy for the building. Plaintiff also alleged that landlord did not expend sufficient funds on individual apartment improvements to justify an increase in the legal regulated rent warranting high rent vacancy deregulation; and that the majority of the work performed in the apartment consisted of repairs and maintenance, which did not qualify as individual apartment improvements under the Code. The first cause of action in the complaint sought a declaratory judgment that the apartment was illegal and that plaintiff had no obligation to pay rent. The second cause of action requested an injunction directing landlord to legalize the apartment. The

third cause of action was for a declaratory judgment that the apartment was subject to rent stabilization. The fourth cause of action sought lease reformation and an injunction barring landlord from collecting rent in excess of the lawful stabilized rent. The fifth cause of action sought monetary damages for rent overcharges; and the sixth cause of action requested reimbursement of plaintiff's attorneys' fees and costs.

Landlord moved to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7), and for an award of legal fees and costs. In a supporting affidavit, defendant Nunzio Ruggiero, a principal of defendant 105 West 75th Street LLC, explained that after apartment 5A became vacant in September 2003, landlord decided to create an addition on the roof of the building to create two duplex apartments out of apartments 5A and 5B. An architect prepared plans, which were filed and approved by the Department of Buildings and the Landmarks Preservation Commission. A permit was issued for the new penthouse on the existing roof to be connected to the renovated apartments on the fourth floor of the building, where apartments 5A and 5B were located. In 2003 and early 2004, John & Joseph Bonanno Construction & Development Corp. (Bonanno) constructed the penthouse enclosure and connected it to the apartments, which were also renovated.

Ruggiero attached to his affidavit work permits issued by the DOB in 2003 and 2004 for the renovation of apartments 5A and 5B, including the installation of new bathrooms and kitchens, and a staircase to connect to a new penthouse on the existing roof. Ruggiero also attached an invoice from Bonanno dated September 7, 2004, which described the work to be performed, including framing a new penthouse on the roof and a new bathroom, and negotiated checks from January 6, 2003 through September 7, 2004 to Bonanno totaling $184,000, which was exactly the amount on the invoice. In addition, Ruggiero attached to his affidavit an invoice dated February 11, 2004 from Vin-Ray Plumbing & Heating Co. for $25,000, along with checks totaling that amount, indicating that plumbing work was performed in various areas, including the penthouse floor.

In opposition, plaintiff submitted an affidavit in which he asserted that he was the senior cost manager at a global consultancy company that offered a range of services to the construction and property industry, was a member of the Construction Financial Management Association, and a chartered surveyor. Based on that experience, he opined that the rooftop structure was different from the structure in the approved plans, because the plans permitted a penthouse covering 18 feet of the

roof, but the actual structure covered 35 feet, and the work was to be performed on apartments 4A and 4B, not 5B. Plaintiff stated that contrary to industry practice, the construction contract did not detail the scope of work or break out the costs for each element of the work, the Bonanno invoice was not marked "paid in full," some of the services listed on the invoice could not be verified, and only three of the checks were paid on or after the date of the invoice. Plaintiff opined that, based on his professional experience and expertise, landlord did not spend $100,000 on renovations to the apartment.

In reply, landlord submitted the affidavits of tenants who occupied apartments 5A and 5B before the penthouse was added. The prior occupant of 5B averred that during her residency the premises she occupied consisted of a one-bedroom apartment on the top floor of the five-story building, with nothing above the apartment except for the roof. The former occupant of 5A stated that in 2002, when 5B became vacant, Ruggiero asked him to relocate so that a penthouse addition could be constructed on the roof, making 5A and 5B duplexes, and he agreed to move. He further asserted that the two penthouses on the roof, which did not previously exist, were constructed and connected to the apartments with internal staircases, increasing the size of each

apartment.

Supreme Court granted landlord's motion to dismiss the complaint, and ordered an inquest as to the amount of reasonable costs and attorneys' fees incurred by landlord in defending the action. The court determined that the documentary evidence submitted by landlord refuted the allegations of the complaint and showed that the apartment was vacant prior to the renovations and that a newly created duplex apartment was constructed, which did not exist previously. The court found that the 2002 certificate of occupancy for the building showed that the building did not include rooftop living space, and that the work permits and subsequent certificates of occupancy demonstrated that additional living space was constructed, entitling landlord to "first rent," without rent stabilization restrictions. The court further found that the invoices and checks payable to Bonnano and the plumbing contractor showed that landlord spent approximately $200,000 for the renovation, which also entitled it to increase the rent by one-fortieth of the cost per apartment. The court noted that this increased the legal rent to well over $2,000 per month, the threshold amount required to remove an apartment from rent stabilization. Finally, the court awarded landlord its legal fees and expenses pursuant to a provision in

the lease that requires plaintiff to reimburse landlord's "legal fees and disbursements for legal actions or proceedings brought by [landlord] against [plaintiff] because of a Lease default by [plaintiff] or for defending lawsuits brought against [plaintiff] because of [plaintiff's] actions."

Plaintiff moved to renew and reargue. He asserted that the court did not properly credit his expert affidavit, that a financial statement of landlord's failed to establish an expenditure of $200,000 on major capital improvements or renovation, and that the DOB had received complaints about, and issued violations concerning, the penthouse. The court denied the motion, finding that none of the evidence presented on the motion was newly discovered, nor did plaintiff establish that the court misapprehended or overlooked any issue of fact or law.

Dismissal of a complaint pursuant to CPLR 3211(a)(1) is only appropriate where the documentary evidence presented conclusively establishes a defense to the plaintiff's claims as a matter of law (*Leon v Martinez*, 84 NY2d 83, 88 [1994]). The documents submitted must be explicit and unambiguous (*see Bronxville Knolls v Webster Town Ctr. Partnership*, 221 AD2d 248, 248 [1st Dept 1995]). In considering the documents offered by the movant to negate the claims in the complaint, a court must adhere to the

concept that the allegations in the complaint are presumed to be true, and that the pleading is entitled to all reasonable inferences (*see Leon*, 84 NY2d at 87-88). However, while the pleading is to be liberally construed, the court is not required to accept as true factual allegations that are plainly contradicted by documentary evidence (*Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept 2003]).

The documentary evidence submitted by landlord was designed to refute plaintiff's claim that the conversion of the apartment into a duplex did not meet the criteria for first rent or high rent vacancy deregulation. A landlord may charge first rent, pursuant to the Rent Stabilization Code, where the landlord "substantially alters the outer dimensions of a vacant housing accommodation, which qualifies for a first rent equal to or exceeding the applicable amount qualifying for deregulation" (9 NYCRR 2520.11[r][12]) which in this case, was $2,000 or more per month" (9 NYCRR 2520.11[r][4]). Stated somewhat differently, first rent is permitted "when the perimeter walls of the apartment have been substantially moved and changed and where the previous apartment, essentially, ceases to exist, thereby rendering its rental history meaningless" (*Matter of 300 W. 49th St. Assoc. v New York State Div. of Hous. & Community Renewal,*

Off. of Rent Admin., 212 AD2d 250, 253 [1st Dept 1995]). This Court has described the test for whether alterations qualify for first rent as "reconfiguration plus obliteration of the prior apartment's particular identity" (*Matter of Devlin v New York State Div. of Hous. & Community Renewal*, 309 AD2d 191, 194 [1st Dept 2003], *lv denied* 2 NY3d 705 [2004]).

In *Matter of 300 W. 49th St. Assoc.*, this Court offered examples of the types of alterations contemplated by the policy - namely, a two-bedroom apartment being split into two studio apartments, or two units being combined into one larger apartment (212 AD2d at 253-254). In both that case, where the landlord substantially remodeled the apartment but it remained "essentially intact" (*id.* at 254), and *Devlin*, where the landlord relocated a wall so as to remove 86 square feet of space and add it to the neighboring apartment (309 AD2d at 192), this Court found that the landlord was not entitled to charge first rent. In contrast, the landlord was found to be entitled to charge first rent where it made "significant dimensional changes to a single-floor apartment to create a new (duplex) apartment prior to tenant's occupancy" (*446-450 Realty Co., L.P. v Higbie*, 30 Misc 3d 71, 73 [App Term, 1st Dept 2010]).

Even if a landlord does not perform the type of alterations

necessary to charge first rent, it may escape rent regulation if it expends enough money renovating the apartment such that one-fortieth of the expenditure, added to the last regulated rent, brings the rent above the $2,000 threshold. To qualify, the work must fall under one of the categories described in 9 NYCRR 2522.4, which includes a "substantial increase . . . of dwelling space" (9 NYCRR 2522.4[a][1]).

Landlord satisfied its burden of demonstrating that it made the necessary improvements to qualify for first rent, since it established that it substantially altered the character of the apartment by connecting it to the new penthouse. It did this by submitting the approved plans for the addition, the work permit for the project, the certificates of occupancy from before and after the work, which reflect the absence of the penthouse in 2002 and its presence in 2007, and the contractors' invoices and proofs of payment. In response, plaintiff points to various infirmities in the individual pieces of evidence. For example, he notes certain discrepancies in the description of the apartments on the different certificates of occupancy, and claims that Ruggiero was not qualified to "self-certify" the certificates of occupancy. He further questions the probative nature of the contractors' documents, arguing that Bonnano's

invoice does not break out the cost for each item of work and postdates the move-in date for plaintiff's predecessor, that the checks do not state the apartment where the work that is being paid for was done, or the specific work being paid for, and that several of the checks were issued after plaintiff's predecessor took occupancy.

We find that none of the documents considered by Supreme Court was, as plaintiff claims, inauthentic. Moreover, they demonstrate in an unambiguous and conclusive fashion the basic premise that landlord made a significant change to the living space, thus satisfying CPLR 3211(a)(1) and the substantive statutory provisions that led to the rent increase. The plans clearly show the addition of a penthouse, to be attached to the existing apartment with a staircase. This is far from de minimis, and clearly constitutes a "reconfiguration plus obliteration of the prior apartment's particular identity" within the meaning of *Devlin (*309 AD2d at 194). The certificates of occupancy and contractors' documents confirm that the work was done.

Plaintiff's arguments attacking the documents are unavailing. That the certificates of occupancy submitted by defendants are inconsistent in their descriptions of the number

of units in the building does not lead to the conclusion that the work was insufficiently significant for purposes of first rent. Viewed together, Bonanno's invoice and the contractors' checks establish to our satisfaction that landlord commissioned and paid for the work that is reflected in the new certificate of occupancy. Again, the issue is whether landlord did work that changed the identity of the living space in the apartment, and those documents collectively establish that it did. Further, we are satisfied that the apartment was vacant at the time of the construction work, based on the DHCR registration records before us and the very fact that it would have been impractical to perform a project of that magnitude if the apartment were occupied.

We similarly find that the documents submitted by landlord established that it properly claimed a rent increase based on the costs of its project to substantially increase the space in the apartment. The contractors' documents (the Bonnano invoice in particular) establish that the essence of the work was to expand the apartment by building the penthouse and combining it with the existing space. Further, the bulk of the work described in the invoice, even if it did not necessarily relate to the apartment expansion, plainly qualifies as improvements. Accordingly, the

court was justified in finding that, since the same amount of work was necessary in each apartment, one-half of the costs were attributable to apartment 5B, thus bringing it over the deregulation threshold. The court was also correct in not requiring that landlord delineate between improvements and repairs (*see Jemrock Realty Co. LLC v Krugman*, 72 AD3d 438, 440 [1st Dept 2010, *lv dismissed*, 115 NY2d 366 [2010]).

We respectfully disagree with the dissent's view that landlord was required to show conclusively what the apartment looked like before the renovations were performed. The approved plans and certificates of occupancy establish quite clearly that the work resulted in a substantial reconfiguration of the apartment and expansion of the space such that it qualified for first rent. Whether the term "penthouse" has a definitive meaning among architectural and building professionals, it is evident that the new structure added significant space to the apartment and changed its identity in a substantive way. Nor do we think that landlord was required to authenticate the contractors' documents, where not even plaintiff appeared to question their authenticity, as opposed to their probative value, and where those documents merely bolstered the certificates of occupancy and DOB-approved plans, which were "essentially

undeniable" and thus qualified as documentary evidence for purposes of CPLR 3211(a)(1) (*Fontanetta v John Doe 1*, 73 AD3d 78, 84-85 [2d Dept 2010] [internal quotation marks omitted]). The Bonnano invoice clearly refers to apartments 5A and 5B, thus negating the dissent's concern that some of the itemized work was for other units or common spaces. In addition, as noted above, the work as contemplated by landlord was to be equally distributed between apartment 5A and 5B, and there is no reason to question why the contractors' work would not have reflected that intent. Regarding the dissent's concern whether any new equipment replaced similar equipment that was within the latter's useful life or that 9 NYCRR 2522.4(a)(13) precluded landlord's entitlement to a rent increase, we simply note that plaintiff does not appear to have raised these arguments on appeal.

We further disagree that the fact that the certificates of occupancy and work permits offered by landlord may not have been certified is of any moment. Again, plaintiff offers no reason for us to doubt their basic authenticity. In addition, *Morton v 338 W. 46th St. Realty, LLC* (45 Misc 3d 544 [Civ Ct, NY County 2014]), on which the dissent relies, is inapposite. In that case, the issue before the court was whether the landlord knowingly applied for an exemption for rent regulation to which

it was not entitled (*id.* at 547). The basis for the claimed exemption was a substantial rehabilitation of the building pursuant to 9 NYCRR 2520.11(e) (*id.* at 547-548). The court noted that the certificate of occupancy presented by the landlord indicated that the number of apartments in the building had doubled, but that "[w]ithout knowing the scope of the work performed," it could not determine whether the landlord's predecessor (which had done the work) may have had a good faith belief that it was entitled to an exemption (*id.* at 553). Here, of course, we know the scope of the work based on the approved plans and the contractors' documents.

Finally, under paragraph 19(A)(5) of the lease, plaintiff was required to reimburse the landlord defendants' legal fees and expenses only where the action was brought based on his default or the costs were incurred in defending lawsuits because of his actions. This action does not fit into either category. As a result, the court improperly awarded landlord its legal fees and costs.

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

GESMER, J. (dissenting in part)

I agree with the majority's finding that the landlord defendants (landlord) are not entitled to legal fees and costs, and join in that portion of the memorandum. However, because I do not agree that the landlord submitted sufficient documentation in admissible form (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Advanced Global Tech., LLC v Sirius Satellite Radio, Inc.*, 44 AD3d 317, 318 [1st Dept 2007]) to "utterly refute[]" plaintiff's claims and establish a defense as a matter of law (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]), I respectfully dissent from the balance of the majority opinion. Specifically, the vast majority of the documents on which the landlord relies are neither certified (CPLR 4518[c]), identified as business records (CPLR 4518[a]), nor otherwise authenticated by a competent witness (*AQ Asset Mgt. LLC v Levine*, 128 AD3d 620, 621 [1st Dept 2015][unsworn email list not authenticated by the defendants' affiants was inadmissible hearsay]).

The landlord is the owner of a building at 105 West 75th Street. It is undisputed that it registered apartment 5B in the building with the Division of Housing and Community Renewal (DHCR) as rent stabilized through 2004, with the last regulated rent listed as $1,117, and with the apartment registered as

"vacant" in 2003 and 2004. It is further undisputed that the landlord did not register the apartment with the DHCR again until August 2014.

On April 4, 2013, plaintiff entered into a one-year lease for the apartment at a monthly rent of $3,200. The lease provides that the apartment is not subject to rent stabilization. On March 1, 2014, he signed a one-year renewal, titled "decontrolled apartment lease renewal" (capitalization omitted).

In or about June 2014, plaintiff obtained the rental history for the apartment from the DHCR. On or about August 14, 2014, plaintiff, through counsel, wrote to the landlord requesting that it provide him with a rent-stabilized lease and reimburse him for rent paid in excess of the regulated rent in effect on the date of the last registration filed with the DHCR. On or about August 18, 2014, the landlord filed a DHCR registration form alleging that the apartment is exempt from rent stabilization due to "[m]ajor capital improvements" and a "new duplex apartment," explaining that a "penthouse and terrace [were] added to [the] apartment making it a new duplex apartment with terrace entitling owner to a first rent."

On October 7, 2014, plaintiff commenced this action, in which he claims, inter alia, that "the extension purportedly

added to the subject apartment already existed in the apartment before the alleged renovations and therefore did not result in increased dwelling space or improvements." In his affidavit, plaintiff claims that the existing rooftop structure differs from the structure described in the landlord's plans. Plaintiff seeks a declaratory judgment that the apartment is illegal because the certificate of occupancy in effect at the time listed 9 units, rather than 10; an order directing the landlord to legalize the apartment by amending the certificate of occupancy; a declaratory judgment that the apartment is rent stabilized, and that the rent charged exceeds the lawful rent; an order directing the landlord to offer him a rent-stabilized lease at the legal rent, and to register the apartment with the DHCR; money damages for rent overcharge; and counsel fees.

In response, on or about December 9, 2014, the landlord filed a motion to dismiss the complaint based on documentary evidence. In support of the motion, the landlord submitted only two certified documents: (1) the Landmarks Preservation Commission's December 10, 2002 Certificate of No Effect, permitting construction of a "one-story rooftop addition . . . ; [the] install[ation of] a glass skylight and metal railing at the roof; and the demolition and construction of interior non-bearing

partitions and finishes . . . "; and (2) architectural drawings of the "4th floor plan" and "penthouse & roof plan" (capitalization omitted), which do not show clearly how the configuration of the apartment allegedly changed, and which plaintiff alleges do not conform to the actual dimensions of the apartment as it exists today. Although the landlord did not authenticate the remaining documents it attached, plaintiff does not dispute the authenticity of the DHCR printout showing the apartment's rental history, his lease and renewal, and the August 14, 2014 DHCR registration statement. He also acknowledges that the certificate of occupancy existing at the time he moved in listed the building as containing 9 units, when, in fact, there are 10.

On April 13, 2015, the motion court issued its decision and order on the landlord's motion, finding that the unit is "a newly created duplex apartment which did not previously exist," and that the landlord spent approximately $200,000 in renovation costs, entitling it to raise the legal rent to over $2,000 per month, the threshold for rent deregulation for apartments that were vacant prior to June 24, 2011 (9 NYCRR 2520.11[r][4]). The motion court based its finding on the certificates of occupancy issued before and after renovation of the apartment, Department

of Buildings work permits, and contractor's and plumber's invoices and canceled checks submitted by the landlord. None of these documents was certified or otherwise authenticated.

On June 23, 2015, plaintiff moved to renew and reargue, and for a stay of the Housing Court holdover proceeding the landlord had commenced against him, leave to file an amended complaint, sanctions, and an order directing that the DHCR decide the rent-stabilization status of the apartment. In his motion, plaintiff argued that the landlord had not submitted sufficient documentary evidence to prove its defenses as a matter of law, and claimed that the Department of Buildings had issued violations against the landlord and determined that the certificate of occupancy was issued in error because the roof structure does not comply with the plans submitted and violates provisions of the Multiple Dwelling Law.

On August 11, 2015, the motion court issued its decision and order denying plaintiff's motion in all respects.[1] He now appeals from both orders of the motion court.

A motion for dismissal based on documentary evidence under

[1]The landlord states in its appellate brief that plaintiff has since been evicted from the apartment. Since that is outside the record, we cannot consider it.

CPLR 3211(a)(1) "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen*, 98 NY2d at 326). Documentary evidence sufficient for dismissal under CPLR 3211(a)(1) must be in admissible form (*Advanced Global Tech., LLC*, 44 AD3d at 318).

Section 2522.4(a)(1) of the Rent Stabilization Code, cited by the majority, provides:

> "An owner is entitled to a rent increase where there has been a substantial increase, other than an increase for which an adjustment may be claimed pursuant to paragraph (2) of this subdivision,[2] of dwelling space or an increase in the services, or installation of new equipment or improvements, or new furniture or furnishings, provided in or to the tenant's housing accommodation . . . . In the case of vacant housing accommodations, tenant consent shall not be required" (9 NYCRR 2522.4[a][1]).

Where the landlord meets its burden (*Matter of West Vil. Assoc. v Division of Hous. & Community Renewal*, 277 AD2d 111, 113 [1st Dept 2000]), it may increase a tenant's rent by one-fortieth of the cost of the "substantial increase" created prior to September 24, 2011, exclusive of finance charges (9 NYCRR 2522.4[a][1],

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[2] 9 NYCRR 2522.4(a)(2) permits landlords to "file an application" for rent increases based on specified building wide "major capital improvement[s]" under certain circumstances (9 NYCRR 2522.4[a][2][i]).

[4]). A landlord who is entitled to a rent increase based upon the installation of new equipment, or new furniture or furnishings is not entitled to a further rent increase "based upon the installation of similar equipment, or new furniture or furnishings within the useful life of such new equipment, or new furniture or furnishings" (9 NYCRR 2522.4[a][11]). In addition, a landlord's request for a rental adjustment under this section shall not be granted if, inter alia, there exist any "immediately hazardous violations of any municipal, county, State or Federal law which relate to the maintenance of such services . . . ." (9 NYCRR 2522.4[a][13]). Furthermore,

> "[t]he determination of the appropriate adjustment of a legal regulated rent shall take into consideration all factors bearing on the equities involved, subject to the general limitation that the adjustment can be put into effect without dislocation and hardship inconsistent with the purposes of the RSL, and including as a factor a return of the actual cost to the owner, exclusive of interest or other carrying charges, and the increase in the rental value of the housing accommodations" (9 NYCRR 2522.4[a][6]).

The "substantial increase" provision is not the same as the much narrower policy governing the determination of a landlord's right to charge a "first" or "free market rent." The latter is

> "an administratively created policy implemented by DHCR in its capacity as the administrative agency which regulates residential rents. The policy applies only when the perimeter walls of the apartment have been

> substantially moved and changed and where the previous apartment, essentially, ceases to exist, thereby rendering its rental history meaningless" (*Matter of 300 W. 49th St. Assoc. v New York State Div. of Hous. & Community Renewal, Off. Of Rent Admin.*, 212 AD2d 250, 253 [1st Dept 1995]).

The landlord has the burden to show "reconfiguration plus obliteration of the prior apartment's particular identity" (*Matter of Devlin v New York State Div. of Hous. & Community Renewal*, 309 AD2d 191, 194 [1st Dept 2003], *lv denied* 2 NY3d 705 [2004]; *see also Matter of Myers v D'Agosta*, 202 AD2d 223, 224 [1st Dept 1994] [noting DHCR's 1987 ruling to this effect]).

Here, the landlord has not submitted sufficient documentation in admissible form to establish conclusively, as a matter of law, that it is entitled to a rental increase and deregulation based on either a "substantial increase" or reconfiguration and obliteration of the prior apartment.

There are at least three problems with the landlord's claim to a rent increase based on an alleged "substantial increase." First, it has offered no documentation establishing the configuration of the apartment prior to renovation, making it impossible to know whether or how the apartment's living space has increased. There is no affidavit by anyone with personal knowledge as to the original and post-construction

configurations. Although the landlord repeatedly refers to the rooftop structure as a "penthouse," it is not clear from any of the documents proffered what rooftop structure was added, since plaintiff claims that the existing rooftop structure does not match the structure outlined in the plans.[3] Second, the copies of the contractor's and plumber's invoices and canceled checks are not certified or otherwise authenticated. There is no affidavit by anyone that the invoices were "made in the regular course of . . . business and that it was the regular course of such business to make [them], at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter" (CPLR 4518[a]). Finally, even if these documents were in admissible form, they do not provide enough documentation to justify a rent increase. The unauthenticated bill from

[3]With its reply papers, the landlord submitted photographs purporting to show portions of the apartment and the affidavit of Carl Kissin, who claims he resided in the neighboring apartment prior to construction. However, the photographs are not properly authenticated in that no person with personal knowledge identifies them as an accurate representation of the subject apartment. Moreover, an affidavit that merely asserts the inaccuracy of plaintiff's claims, much less one that does not make any claims about the subject apartment, is not "documentary evidence" for 3211 purposes (*Solomons v Douglas Elliman LLC*, 94 AD3d 468, 469 [1st Dept 2012]). Similarly, the landlord's counsel's reply affirmation is also insufficient to prove the claims made about the work performed.

Bonanno Construction for a non-itemized total of $184,000 lists the "[d]eposit[]" paid as "0," yet all but three of the unauthenticated canceled checks (totaling just $26,000) submitted by the landlord predate the bill. Moreover, it is not clear from the documents submitted what sums are attributable to the subject apartment, rather than the apartment next door, which the landlord claims it was also renovating at the same time, or, for that matter, to work on other units or common spaces of the building. Nor do these documents establish whether any of the equipment installed replaced similar equipment that was "within the useful life of such . . . equipment" (9 NYCRR 2522.4[a][11]). Furthermore, plaintiff claims on his motion to renew and reargue that the work was conducted in violation of the Multiple Dwelling Law, raising a question as to whether the landlord is barred from collecting an increased rent under the Rent Stabilization Code (9 NYCRR 2522.4[a][13]).

The landlord's claim of entitlement to a "first rent" is similarly problematic. Indeed, the landlord's counsel concedes that "the perimeter of the existing 5th floor space was not altered."[4] Furthermore, the copies of the certificates of

[4] *446-450 Realty Co., L.P. v Higbie* (30 Misc 3d 71, 73 [App Term 1st Dept 2010]), cited by the majority, provides no facts,

occupancy and DOB work permits relied upon by the motion court were not certified, and were thus an improper basis for dismissal based on documentary evidence (CPLR 4518[c]; *see also Morton v 338 W. 46th St. Realty, LLC*, 45 Misc 3d 544, 553 [Civ Ct, NY County 2014] [the court could not determine from certificate of occupancy the scope of the work and whether the work performed qualified the unit for "first rent" status]). In addition, plaintiff claimed on his motion to renew and reargue that the DOB had determined that the certificate of occupancy contained errors, further calling into question its reliability.

While it may turn out that the landlord conducted renovations entitling it to remove the apartment from rent stabilization, I would find that the landlord has failed to meet its burden of proof based on the documentary evidence submitted. The cases cited by the landlord's counsel in support of its claim that this Court and the Appellate Term have previously accepted similar documentation do not support that position, since both decisions cited were issued after a trial at which a full

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other than to state that "significant dimensional changes" were made in creating a duplex apartment from what had been a single floor unit, resulting in first rent status. In any event, that case does not alter the landlord's burden to show that the alteration resulted in the "obliteration of the prior apartment's particular identity" (*Matter of Devlin*, 309 AD2d at 194).

evidentiary presentation was made (*Jemrock Realty Co., LLC v Krugman*, 18 Misc 3d 15 [App Term, 1st Dept 2007], *affd* 72 AD3d 438 [1st Dept 2010], *lv dismissed* 15 NY3d 866 [2010]; *206 W. 104th St. LLC v Cohen*, 41 Misc 3d 134[A] [App Term, 1st Dept 2013]).

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

ENTERED: MARCH 30, 2017

CLERK

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

2828 Dee Cee Associates LLC, Index 652005/13
Plaintiff-Appellant,

-against-

44 Beehan Corp., et al.,
Defendants-Respondents,

John Maloney,
Defendant.

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Robert M. Olshever, P.C., New York (Robert M. Olshever of counsel), for appellant.

David A. Kaminsky & Associates, P.C., New York (James A. English of counsel), for 44 Beehan Corp. and John Higgins, respondents.

Dennis Houdek, New York, for Brendan Bowes, respondent.

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Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered on or about January 7, 2016, which denied plaintiff's motion for summary judgment on the complaint and granted defendants' cross motion for summary judgment to the extent of dismissing the first cause of action as against defendants 44 Beehan Corp., John Higgins and Brendan Bowes, unanimously modified, on the law, to grant plaintiff's motion to the extent it seeks partial summary judgment as to liability on the second cause of action for rent arrears for the period commencing July 1, 2009, and ending May 31, 2013, and to grant

plaintiff summary judgment as to liability on the third cause of action for attorney's fees, and otherwise affirmed, without costs.

Plaintiff landlord, Dee Cee Associates, LLC, (Dee Cee) entered into a lease agreement with defendant tenant 44 Beehan Corp. (44 Beehan) on February 1, 1998, to lease restaurant premises located at 696 Eighth Avenue in New York City. The lease agreement was for a term of fifteen years, commencing on June 1, 1998, and ending on May 31, 2013. The lease agreement rider provided that the annual rent would increase incrementally on an annual basis, from $360,000 for the first year to $599,412 for the fifteenth year.

On January 29, 1998, Dee Cee entered into a "good guy" guarantee agreement with defendants John Higgins, Brenden Bowes, and John Maloney (collectively, the guarantors), under which the guarantors promised to fulfill any of 44 Beehan's obligations that accrued prior to surrender of the premises.

On January 8, 1999, Dee Cee and 44 Beehan entered into a letter agreement affecting the lease. Neither Dee Cee nor 44 Beehan has presented a copy of the letter agreement, each representing that its copy has been lost. Further, neither side has offered an affidavit reconstructing the terms of the letter

agreement. As explained below, the 1999 letter agreement may have changed the dates of the lease from June 1, 1998, through May 31, 2013, to December 1, 1998, through November 30, 2013.

On November 27, 2001, Dee Cee and 44 Beehan entered into an agreement to address 44 Beehan's rent arrears of $25,478.91, and 44 Beehan's assertion that it could not pay the full base rent for the next four months. The parties agreed to a payment schedule for the rent arrears, and further agreed that 44 Beehan would pay half of its regular rent for the next four months while the remaining half of the monthly rent would be deducted from its security deposit. 44 Beehan further agreed to pay an additional $5,000 of rent each month, beginning on April 1, 2002, until the security deposit was restored to its original amount.

The 2001 agreement included three provisions which are particularly pertinent to the instant appeal. First, the agreement contained a "whereas" clause stating that the parties had entered into a lease "dated February 1, 1998 for a term of fifteen (15) years which commenced December 1, 1998 and will end on November, 30, 2013 (hereinafter the 'Lease')." As defendants' counsel noted during oral argument in Supreme Court, the 1999 letter agreement may have changed the term of the lease from June 1, 1998, through May 31, 2013, to December 1, 1998, through

November 30, 2013, because the 2001 agreement refers to the later dates without explanation. Second, the 2001 agreement specified that the base monthly rent for October 2001 is $31,200, which corresponds precisely to the monthly rent for the third year of the lease stated in the rider to the original lease. This provision indicates that the schedule of annual rent increases stated in the original lease rider was not changed by the 1999 letter agreement. Third, the agreement stated that "[e]xcept as expressly set forth herein, all of the terms, conditions, covenants and obligations set forth in the Lease remain in full force and effect and without modification or change." Both Dee Cee and 44 Beehan signed the 2001 agreement, which reaffirms that all of the terms of the original lease not specifically altered by the 2001 agreement remain in effect.

As of September 30, 2006, 44 Beehan had accumulated rent arrears totaling $244,733.11. On November 16, 2006, Dee Cee and 44 Beehan entered into an agreement (the 2006 agreement) under which Dee Cee agreed to discount the base rent by 30 percent beginning on October 1, 2006, and to consider the discounted rent "deferred rent." In exchange, 44 Beehan granted Dee Cee the right to terminate the lease on January 1, 2009, or at any time thereafter, "by giving notice to [44 Beehan], no less than ninety

(90) days prior" to the effective date of the termination set forth in the notice. Dee Cee agreed to pay a termination payment of $2,000,000, less the $244,733.11 rent arrears and any deferred rent, in the event Dee Cee exercised its termination right on Jan 1, 2009. The sum of the termination payment would be reduced by 1/35 over the ensuing 35 months until November 30, 2011, after which date Dee Cee would be entitled to terminate the lease without making any termination payment. The 2006 agreement further provides: "In the event that the Lease is not terminated by [Dee Cee], the $244,733.11 arrears owed through September 30, 2006, plus the Deferred Rent, shall be forgiven at the end of the term of the Lease."

As of June 1, 2013, 44 Beehan had allegedly accumulated rent arrears totaling $479,601.00 including the rent for June 1, 2013, through June 30, 2013. On June 7, 2013, 44 Beehan surrendered the premises to Dee Cee. An employee of 44 Beehan signed a surrender agreement acknowledging that 44 Beehan was surrendering the premises. The surrender agreement included a provision noting that Dee Cee reserved all of its rights and remedies with respect to any rent arrears accrued through June 7, 2013. At his deposition in this action, Dee Cee's principal, Philip Katz, acknowledged that the mutually agreed-upon surrender of the

premises was not an exercise of Dee Cee's option under the 2006 agreement to terminate the lease unilaterally.

On June 6, 2013, Dee Cee filed the complaint in this action against 44 Beehan and the guarantors, asserting three causes of action. The first cause of action seeks $244,733.11 in rent arrears for the period from the inception of the tenancy through September 30, 2006. The second cause of action seeks $479,601.00 in rent arrears for the period from July 1, 2009, through June 7, 2013. The third cause of action seeks attorney's fees based on a clause in the lease providing that Dee Cee was entitled to attorney's fees incurred to collect rent. Defendant John Maloney failed to answer the complaint, and on December 5, 2013, Dee Cee was granted a default judgment against him. The remaining defendants answered the complaint and discovery ensued. On October 7, 2014, Philip Katz, Dee Cee's managing member, was deposed and explained various calculations in Dee Cee's statement of outstanding rent.

On March 9, 2015, Dee Cee moved for summary judgment on all three causes of action in the complaint, and submitted in support of its motion the original lease, the 2001 and 2006 agreements, the surrender agreement, and a statement of outstanding rent calculating rent arrears of $479,601.00 for the period from July

1, 2009, through June 7, 2013. In response, defendants cross-moved for summary judgment dismissing the first cause of action. As to the second cause of action, defendants argued that Dee Cee had failed make a prima facie showing because they did not submit the 1999 letter agreement, and further argued that Dee Cee's statement of arrears did not reflect numerous payments made by 44 Beehan. In reply, Dee Cee argued that they had properly credited all of defendant's rent payments and submitted a revised statement of outstanding rent that allegedly noted all of defendant's rent payments. Dee Cee did not explain why the second statement calculated rent arrears of $469,932.15, rather than the figure of $479,601.00 appearing in the complaint and the original statement of arrears. Further, Dee Cee included the rent and real estate taxes for the entire month of June 2013 on the theory that the rent for the entire month of June 2013 was due on June 1, 2013.

In the order on appeal, Supreme Court granted defendants' cross motion to dismiss the first cause of action and denied Dee Cee's motion for summary judgment in its entirety. Upon Dee Cee's appeal, we modify to grant it partial summary judgment as to liability on its second and third causes of action, and otherwise affirm.

Supreme Court correctly granted defendants' cross motion to the extent it sought dismissal of the first cause of action for rent arrears through September 2006. The 2006 agreement gave Dee Cee the right to terminate the lease upon payment of a termination amount. In exchange, among other things, at the end of the lease term, the rent arrears through September 2006 would be forgiven if Dee Cee never exercised its termination right. As previously noted, Dee Cee, through its principal at his deposition, acknowledged that it never exercised that right before the end of the lease term. Therefore, in accord with the plain meaning of the terms of the 2006 agreement, the arrears through September 2006 were forgiven (*see Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]; *Jet Acceptance Corp. v Quest Mexicana S.A. de C.V.*, 87 AD3d 850, 854 [1st Dept 2011]).

Moreover, this claim is barred by the six-year statute of limitations, which began to run from the date on which the rent payments became due – September 30, 2006, at the latest (*see Vigilant Ins. Co. of Am. v Housing Auth. of City of El Paso, Tex.*, 87 NY2d 36, 45 [1995]; *Arnav Indus., Inc. v Pitari*, 82 AD3d 557, 558 [1st Dept 2011], *lv dismissed* 19 NY3d 949 [2012]; CPLR 213[2]). This suit was not commenced until more than six years later. The provision in the 2013 surrender agreement

acknowledging, without more, that Dee Cee was accepting the surrender "with a full reservation of all of its rights and remedies with respect to . . . arrears owed through September 30, 2006 in the liquidated sum of $244,733.11" did not revive the expired claim, nor did it negate the effect of the aforementioned forgiveness provision of the 2006 agreement. A reservation of rights does not create new rights.[1]

Supreme Court erred, however, in denying the portions of Dee Cee's motion that sought summary judgment on the second cause of action for rent arrears from July 1, 2009, through May 31, 2013, and the third cause of action for attorney's fees. In support of its motion, Dee Cee submitted the original lease, the 2001 and 2006 agreements, and a detailed rent statement documenting defendant's outstanding rent for the period from July 1, 2009, through June 7, 2013. Nevertheless, Supreme Court held that Dee Cee could not establish a prima facie case as to the second and third causes of action without submitting the missing 1999 letter

[1]Because the surrender agreement did not, by its terms, revive Dee Cee's expired claim for arrears through September 2006, and because that claim was forgiven, in any event, under the terms of the 2006 agreement, we need not resolve the parties' dispute over whether the employee of 44 Beehan who executed the surrender agreement had actual or apparent authority to bind defendants with respect to any claim by Dee Cee for those arrears.

agreement because the letter agreement might be material if it changed the dates of the lease.

We agree with Supreme Court that Dee Cee failed to make a prima facie showing of liability for rent arrears accruing beyond May 31, 2013, because the original lease stated a termination date of May 31, 2013. Dee Cee's argument that the "whereas" clauses in the 2001 and 2006 agreements note a termination date of November 30, 2013, is unavailing because, as a matter of law, a "whereas" clause cannot create a new right (*see Grand Manor Health Related Facility, Inc. v Hamilton Equities Inc.*, 65 AD3d 445, 447 [1st Dept 2009]). However, whether or not the parties agreed to extend the term of the lease through November 30, 2013 (and Dee Cee will have an opportunity to prove such an agreement upon remand), Dee Cee submitted sufficient evidence to make a prima facie showing for rent arrears accruing through May 31, 2013, the termination date set forth in the original lease, by submitting the original lease, the 2001 and 2006 agreements, and a detailed statement documenting outstanding rent arrears. As it is uncontroverted that the term of the lease extended at a minimum until May 31, 2013, Dee Cee is entitled to summary judgment as to liability for rent arrears accruing through that date from July 1, 2009.

We find unavailing defendants' argument that Dee Cee is not entitled to summary judgment due to the absence of the 1999 letter agreement. Each side has lost its copy or copies of this document, so the adverse inference against each side arising from the failure to preserve this evidence is canceled out by the corresponding adverse inference against its adversary. Lacking a copy of the document or any recollection of its contents, defendants cannot meet their burden to demonstrate a triable issue of fact by speculating that the 1999 letter agreement may in some manner "impact" their rent arrears accrued through May 31, 2013. Having failed to turn up a copy of the document or evidence of its contents through discovery, defendants are unable to explain how a trial will shed further light on this matter. Moreover, after the 1999 letter agreement was signed, 44 Beehan signed the 2001 agreement which noted the annual rent amounts and reaffirmed that all of the terms of the lease remained in effect. Plainly, the record establishes that, throughout the period at issue, the parties were operating under the terms of the lease that are in evidence.

Turning to the third cause of action, the lease agreement provides that 44 Beehan will reimburse Dee Cee for legal fees if Dee Cee prevails in an action to recover rent arrears.

Accordingly, Dee Cee is entitled to legal fees incurred in prosecuting the second cause of action, to the extent Dee Cee has prevailed thereon.

While Dee Cee is entitled to summary judgment as to liability on its second and third causes of action in accordance with the foregoing, further proceedings are required to determine the damages recoverable upon these claims (*see Moon 170 Mercer, Inc. v Vella*, 122 AD3d 544, 545 [1st Dept 2014]). Issues of fact exist as to the damages to which Dee Cee is entitled for the rent arrears for the period from July 1, 2009 through May 31, 2013 and for legal fees. Initially, while Dee Cee in the complaint seeks $479,601.000 in rent arrears, the second statement of outstanding rent notes an outstanding balance of $469,932.15. Further, Dee Cee's rent statement improperly includes rent for the month of June of 2013, and defendants claim that certain rent payments

were not reflected on Dee Cee's statement of outstanding rent. Finally, the attorney's fees reasonably incurred by Dee Cee in prosecuting the second cause of action must be determined in evidentiary proceedings.

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

ENTERED: MARCH 30, 2017

CLERK

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

2831 In re New York Civil Liberties Union, Index 102436/12
Petitioner-Respondent,

-against-

New York City Police Department, et al.,
Respondents-Appellants.

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The New York Times Company, Advance Publications, Inc., The Associated Press, Inc., Daily News L.P., Dow Jones & Company, Inc., Gannett Co., Inc., Hearst Corporation, Newsday LLC, News 12 Networks LLC and NYP Holdings, Inc.,
Amici Curiae.

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Zachary W. Carter, Corporation Counsel, New York (Aaron M. Bloom of counsel), for appellants.

New York Civil Liberties Union Foundation, New York (Christopher Dunn of counsel), for respondent.

Media Freedom & Information Access Clinic, Abrams Institute for Freedom of Expression, Yale Law School, New York (David A. Schulz of counsel), for The New York Times Company, Advance Publications, Inc., The Associated Press, Inc., Daily News L.P., Dow Jones & Company, Inc., Gannett Co., Inc., Hearst Corporation, Newsday LLC, News 12 Networks LLC and NYP Holdings, Inc., amici curiae.

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Judgment, Supreme Court, New York County (Shlomo Hagler, J.), entered April 21, 2015, adhering to orders, same court (Geoffrey D. Wright, J.), entered October 16, 2012, July 29, 2014, and October 2, 2014, which, insofar as appealed from as limited by the briefs, granted, to a limited extent, the petition

brought pursuant to CPLR article 78 seeking to compel respondents to disclose certain records pursuant to the Freedom of Information Law (FOIL), unanimously reversed, on the law, the petition denied, and the proceeding dismissed, without costs.

Public Officers Law § 87(2)(a) provides that an agency "may deny access to records" that "are specifically exempted from disclosure by state . . . statute." The NYPD disciplinary decisions sought here fall within Civil Rights Law § 50-a, which makes confidential police "personnel records used to evaluate performance toward continued employment or promotion" (*see Matter of Daily Gazette Co. v City of Schenectady*, 93 NY2d 145 [1999]; *Matter of Prisoners' Legal Servs. of N.Y. v New York State Dept. of Correctional Servs.*, 73 NY2d 26 [1988]).

The fact that NYPD disciplinary trials are open to the public (38 RCNY 15-04[g]) does not remove the resulting decisions from the protective cloak of Civil Rights Law § 50-a (*see Matter of Newsday, Inc. v Sise*, 71 NY2d 146, 153 [1987], *cert denied* 486 US 1056 [1988]). Whether the trials are public and whether the written disciplinary decisions arising therefrom are confidential are distinct questions governed by distinct statutes and regulations (*see Matter of Doe v City of Schenectady*, 84 AD3d 1455, 1459 [3d Dept 2011]). Further, the disciplinary decisions

include the disposition of the charges against the officer as well as the punishment imposed, neither of which is disclosed at the public trial.

In *Matter of Short v Board of Mgrs. of Nassau County Med. Ctr.* (57 NY2d 399, 401 [1982]), the Court of Appeals held that where, as here, there is a "specific exemption from disclosure by State . . . statute," an agency is not required to disclose records with identifying details redacted. The Court of Appeals subsequently reaffirmed this principle in *Karlin v McMahon* (96 NY2d 842, 843 [2001]), where the agency responding to a FOIL request invoked the statutory exemption for documents that tend to identify the victim of a sex offense (Civil Rights § 50-b[1]). The Court of Appeals, citing *Short*, held that the agency was not obligated to provide the records "even though redaction might remove all details which tend to identify the victim" (*Karlin*, 96 NY2d at 843 [internal quotation marks omitted]). In view of this controlling precedent, this Court cannot order respondents to disclose redacted versions of the disciplinary decisions.[1]

[1] The question of whether respondents *may*, in their discretion, turn over redacted decisions, is not before us (*see e.g. Short*, 57 NY2d at 404 ["Nothing in the Freedom of Information Law . . restricts the right of the agency if it so chooses to grant access to records within any of the statutory exceptions, with or without deletion of identifying details"]).

Petitioner's reliance on *Daily Gazette* in support of its request for redacted decisions is unavailing. In that case, the Court of Appeals concluded that Civil Rights Law § 50-a barred the disclosure of records regarding disciplinary action taken against 18 police officers. Although the Court made brief reference to the hypothetical possibility of redaction, it did so in dicta, and did not address whether ordering the redaction and disclosure of documents protected by section 50-a could be reconciled with the holding in *Short*. Further, despite having mentioned redaction, the Court in *Daily Gazette* dismissed the article 78 FOIL petitions in their entirety, and did not order disclosure of redacted records. There is no merit to petitioner's contention that the holding in *Short* was abrogated by *Daily Gazette*. As noted earlier, *Short* was reaffirmed by *Karlin*, which came down two years after *Daily Gazette*, and we have no choice but to follow *Short* and *Karlin*.

Respondents' previous disclosure of other redacted records did not waive their objections to redacting the disciplinary decisions at issue here (*see Matter of City of New York v City Civil Serv. Commn.*, 60 NY2d 436, 449 [1983] ["estoppel may not be applied to preclude a . . . municipal agency from discharging its statutory responsibility"]; *Matter of Mazzone v New York State*

Dept. of Transp., 95 AD3d 1423, 1424-1425 [3d Dept 2012] [agency's right to claim FOIL exemption not waived where documents are inadvertently disclosed]).

Our decision in *Matter of New York Civ. Liberties Union v New York City Police Dept.* (74 AD3d 632 [1st Dept 2010]) does not require a different result because in that case, unlike here, the FOIL request was limited to one narrow category of statistical data. Because the only issue presented in this appeal is whether respondents are required to disclose the redacted written disciplinary decisions themselves, we make no determination as to whether any information contained in those decisions can, consistent with section 50-a, be disclosed in another format or by a different method.

We appreciate the various policy arguments made by petitioner and amici curiae, and agree that the public has a compelling interest in ensuring that respondents take effective steps to monitor and discipline police officers. Likewise, we recognize that the principles of confidentiality that underlie section 50-a may very well be protected by the redaction of identifying details from the disciplinary decisions sought here. However, as an intermediate appellate court, we cannot overrule

the Court of Appeals' decisions in *Short* and *Karlin*, and are obligated to reverse based on this controlling precedent. The remedy requested by petitioner must come not from this Court, but from the legislature or the Court of Appeals.

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

ENTERED: MARCH 30, 2017

CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Webber, Gesmer, JJ.

3450 Bodum USA, Inc., a Delaware corporation, Plaintiff-Appellant, Index 151790/15

-against-

Thomas Perez, et al., Defendants-Respondents.

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Vedder Price P.C., New York (Marc B. Schlesinger of counsel), for appellant.

Levine Lee LLP, New York (Seth L. Levine of counsel), for respondents.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered October 8, 2015, which granted defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

The complaint fails to adequately allege that plaintiff's former chief executive officer Perez breached the noncompete clause set forth in section 11.1(a) of the service agreement. A plaintiff alleging a competition-based claim must identify the relevant market with reference to the rule of reasonable interchangeability (*see Continental Guest Servs. Corp. v International Bus. Servs., Inc.*, 92 AD3d 570, 572 [1st Dept 2012]). Plaintiff has pleaded nothing but conclusory statements

without factual support for its claim that its products are competitive with those of defendant Alpha The only allegation in the complaint concerning competition is that both plaintiff and defendant Alpha "market[] [their] coffeemakers to commercial customers, such as hotels, restaurants and coffee specialty companies." There are no allegations that Alpha's products are sold to the same relevant market, for a similar purpose, let alone to the same customers. The complaint further fails to allege that plaintiff lost any customers to Alpha (*see Pitcock v Kasowitz, Benson, Torres & Friedman LLP*, 74 AD3d 613, 615 [1st Dept 2010] ["vague, boilerplate allegations of damages . . . insufficient to sustain the causes of action"]). At oral argument, more than a year after Perez joined Alpha, plaintiff conceded that it was not aware or, and could not allege, any lost business. The same remains true today, yet another year later. Given that plaintiff's complaint is comprised solely of conclusory allegations of competition, the motion court properly dismissed the breach of contract claim as a matter of law.

Plaintiff's remaining claims for breach of contract were also properly dismissed. Allegations that Perez will "inevitably" solicit defendant's customers or disclose trade secrets are conclusory and insufficient to state a cause of

action. The other tort claims were properly dismissed as conclusory and insufficient.

We have considered plaintiff's remaining contentions, including its request for leave to amend the complaint, and find them unavailing.

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

ENTERED: MARCH 30, 2017

CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Webber, Gesmer, JJ.

3458 & M-951 Board of Directors of Windsor Owners Corp.,
Plaintiff-Respondent,

-against-

Elaine Platt,
Defendant-Appellant.

Index 155985/14

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Elaine Platt, appellant pro se.

Gallet Dreyer & Berkey, LLP, New York (Morrell I. Berkowitz of counsel), for respondent.

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Order, Supreme Court, New York County (Jennifer G. Schecter, J.), entered on or about May 17, 2016, which, to the extent appealed from, granted plaintiff's motion to hold defendant in civil contempt for violation of a permanent injunction order, unanimously affirmed, without costs.

This appeal is based on admitted disclosures of attorney/client communications by defendant Platt – a former board member of plaintiff Board of Directors of Windsor Owners Corp. (Board) – to a cooperative shareholder and Platt's violation of a permanent injunction order that specifically enjoined her from making such disclosures.

The vast majority of defendant's arguments on appeal are an impermissible collateral attack on the underlying permanent

injunction order, from which she did not appeal. The validity of an order underlying a contempt proceeding may not be attacked except on the ground that the court entering it was without jurisdiction to do so or that the order had been stayed (*see e.g. Gottlieb v Gottlieb*, 137 AD3d 614, 618 [1st Dept 2016]; *Seril v Belnord Tenants Assn.*, 139 AD2d 401, 401 [1st Dept 1988]). Accordingly, defendant's arguments designed to collaterally attack the preliminary injunction order will not be entertained.

Defendant's contentions that she should not be held in contempt for violating the permanent injunction order also fail. There is no legitimate defense to defendant's violation of the literal terms of the permanent injunction order, which she fully admits. Judiciary Law § 753 does not require a showing of wilfulness or monetary harm as a precondition to a finding of civil contempt (*see also El-Dehdan v El-Dehdan*, 26 NY3d 19, 34-36 [2015]). Indeed, in *El-Dehdan*, the Court of Appeals specifically stated that the Court had "not imposed a wilfulness requirement" for a civil contempt finding (*id.* at 34).

Platt's arguments based on a lack of harm to the Board also fail. Civil contempt is established, regardless of the contemnor's motive, when "disobedience of the court's order 'defeats, impairs, impedes, or prejudices the rights or remedies

of a party'" (*El-Dehdan,* 26 NY3d at 35). The motion court determined that plaintiff showed that it suffered potential harm from Platt's disclosures and that Platt's disclosures to Mazzocchi had strengthened his lawsuits against the Board and caused the Board to incur additional legal fees in defending against them.

M-951 - *Board of Directors of Windsor Owners Corp. v Elaine Platt*

Motion to strike reply brief denied as moot.

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

ENTERED: MARCH 30, 2017

CLERK

Tom, J.P., Moskowitz, Feinman, Gische, Kapnick, JJ.

3562-
3562A The People of the State of New York, Respondent,

Ind. 3982/11
116/14

-against-

Anonymous,
Defendant-Appellant.

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

Darcel D. Clark, District Attorney, Bronx (Lori Ann Farrington of counsel), for respondent.

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Judgments, Supreme Court, Bronx County (Ethan Greenberg, J.), rendered July 22, 2014, convicting defendant, upon his pleas of guilty, of criminal sale of a controlled substance in the third degree and burglary in the third degree, and sentencing him, as a second drug felony offender, to an aggregate term of three to six years, unanimously affirmed.

Defendant received ample opportunity to make a motion to withdraw his pleas, in a process that extended over many adjournments, in which defendant received the advice of several successive attorneys. The record, as a whole, does not support the conclusion that the court coerced defendant into deciding not to proceed with such a motion. Furthermore, at a time when it

was unclear whether defendant still wished to withdraw his pleas, defendant's ultimate counsel did not take a position adverse to his client by making a simple and accurate statement that a plea withdrawal motion had little chance of success; accordingly, unlike the situation of an actual conflict (*see e.g. People v Mitchell*, 21 NY3d 964 [2013]), the court was not obligated to relieve this attorney sua sponte.

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 30, 2017

CLERK

Tom, J.P., Moskowitz, Feinman, Gische, Kapnick, JJ.

3564 In re Margot M.,
Petitioner-Appellant,

-against-

Chante T., et al.,
Respondents-Respondents.

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Carol I. Kahn, New York, for appellant.

Michael Gasi, East Elmhurst, for respondents.

Karen D. Steinberg, New York, attorney for the child.

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Order, Family Court, New York County (Carol Goldstein, J.), entered on or about March 18, 2016, which, after a hearing, determined that petitioner grandmother had not established standing to seek visitation, and dismissed her visitation petition with prejudice, unanimously affirmed, without costs.

The record supports Family Court's determination that conditions did not exist to warrant an equitable intervention granting the grandmother standing to seek visitation (Domestic Relations Law § 72[1]). The court properly conducted a hearing on the issue and considered all the relevant factors, including the nature and basis of the respondent parents' objection to the grandmother's visitation with the subject child and the nature of the grandmother's relationship with the child (*Karr v Black*, 55

AD3d 82, 85 [1st Dept 2008], *lv denied* 11 NY3d 712 [2008]; *see also Matter of E.S. v P.D.*, 8 NY3d 150, 157 [2007]). The record demonstrated that the grandmother made a false ACS report against respondent father in retaliation for his eviction of respondent mother and that the grandmother was aggressive and angry. The grandmother admitted that she had not seen the child since March 2013, and that the child did not recognize her at that time. There is no evidence to suggest that the grandmother attempted to visit the child after the child and the father moved upstate or to contact the child prior to 2014. While the grandmother did leave voice mails on the father's phone between 2014 and 2015, they primarily addressed the grandmother's relationship with the mother, not the child. Based on the foregoing, the parents had valid objections to the grandmother visiting the child.

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

ENTERED: MARCH 30, 2017

CLERK

Tom, J.P., Moskowitz, Feinman, Gische, Kapnick, JJ.

3566- Index No. 23247/15E
3567-
3568 John Pirraglia,
Plaintiff-Respondent,

-against-

Jofsen, Inc., et al.,
Defendants-Appellants.

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Herrick Feinstein LLP, New York (Janice I. Goldberg of counsel), for appellants.

Maldonado & Cruz, PLLC, Bronx (Angel Cruz of counsel), for respondent.

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Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered August 2, 2016, which, insofar as appealed from, denied defendants' motion to compel arbitration, unanimously modified, on the law, and the motion granted to the extent of remanding the matter for a framed-issue hearing only as to whether defendant Jofsen, Inc. had a valid agreement to arbitrate, and otherwise affirmed, without costs. Order, same court (Doris M. Gonzalez, J.), entered August 22, 2016, which denied defendants' motion to stay the enforcement of a notice to quit, unanimously reversed, on the law, without costs, and the motion granted. Order, same court and Justice, entered September 1, 2016, which granted plaintiff's motion to permanently stay the arbitration

proceedings, unanimously modified, on the law, to grant the stay pending the disposition of the framed-issue hearing, and otherwise affirmed, without costs.

Defendants' motion to compel arbitration was properly denied with respect to Jorgenson's Landing, Inc. and John P. Jorgenson, since they were not parties to the original 1986 arbitration agreement (*see* CPLR 7503[a]; *Matter of Lubin v Board of Educ. of City of N.Y.*, 119 AD2d 497, 500 [1st Dept 1986]). Their rights were governed by a 2003 lease agreement, which provided that all disputes were to be resolved in a court of law.

However, as to defendant Jofsen, Inc., there is a "substantial question" whether a valid arbitration agreement was in place, requiring the motion court to conduct a framed-issue hearing on that question (*see* CPLR 7503[a]; *Matter of Frankel v Citicorp Ins. Servs., Inc.*, 80 AD3d 280 [2d Dept 2010]; *see generally Matter of S.M. Wolff Co. [Tulkoff]*, 9 NY2d 356, 363 [1961]). Although Jofsen, Inc. was a party to the 1986 agreement, which required arbitration of all disputes, it was also a party to a subsequent lease agreement that stated contradictorily that the terms of the 1986 agreement remained in full force and existence and that all disputes were to be settled in a court of law. Thus, a framed-issue hearing is necessary to

determine whether the latter agreement superseded the arbitration provision in the 1986 agreement.

Defendants established their entitlement to a stay of the notice to quit, served by plaintiff on defendants Jorgenson's Landing, Jorgenson, and Carl D. Madsen. They demonstrated a likelihood of success on the merits of whether the Jorgenson defendants and Madsen could be evicted from using the easement and pier at the center of plaintiff and Jofsen's dispute; the use of the pier and easement belonged to Jofsen, and the remaining defendants made use of the easement and pier as Jofsen's invitees (*see Menucha of Nyack, LLC v Fisher*, 110 AD3d 1037, 1042 [2d Dept 2013]). The record also shows that they would suffer irreparable harm if the notice to quit were enforced.

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

ENTERED: MARCH 30, 2017

CLERK

Tom, J.P., Moskowitz, Feinman, Gische, Kapnick, JJ.

3571 The People of the State of New York Ind. 2143N/14
Respondent,

-against-

Darren Murray,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Marcy L. Kahn, J.), rendered May 22, 2015, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of four years, unanimously affirmed.

The verdict, which rejected defendant's agency defense, was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Moreover, there was overwhelming evidence "that defendant acted as a steerer whose duties included escorting customers to the place of the sale, and there was no evidence suggesting that he was doing a risky 'favor' for a total stranger" (*People v Gonzalez*, 145 AD3d 586, 587 [1st Dept 2016]).

In the course of attempting to place in evidence the lone drug conviction that the court had allowed to be elicited to refute the agency defense, the prosecutor improperly displayed a voluminous document and referred to it as defendant's rap sheet. However, the error was harmless in light of the trial court's ameliorative actions and overwhelming evidence of defendant's guilt (*see People v Crimmins*, 36 NY2d 230 [1975]).

The court providently exercised its discretion in permitting expert testimony on the possible meanings of text messages between defendant and the seller. Defendant's specific claim that this testimony usurped the jury's role is unpreserved and we decline to review it in the interest of justice. In any event, the testimony was admissible because the communications were primarily conducted in street language beyond the knowledge of the typical juror (*see People v Williams*, 146 AD3d 410 [1st Dept 2017]), and the defects identified by the Court of Appeals in *People v Inoa* (25 NY3d 466, 474 [2015]) were not present. In any event, any prejudice was minimized by the court's limiting instructions (*see People v Brown*, 97 NY2d 500, 506 [2002]), and any error was harmless, given the overwhelming evidence.

Defendant expressly waived his claim regarding the events

surrounding the taking of the verdict, and we decline to review them in the interest of justice. As an alternative holding, we reject it on the merits.

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 30, 2017

CLERK

Tom, J.P., Moskowitz, Feinman, Gische, Kapnick, JJ.

3572 In re Suzanne Varriale, Index 652189/14
Petitioner-Appellant,

-against-

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

_____

Glass Krakower LLP, New York (Bryan D. Glass of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Kathy Chang Park of counsel), for respondents.

_____

Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered November 10, 2015, which, after a hearing, denied the petition to vacate the determination of respondent New York City Board of Education, dated July 7, 2014, which terminated petitioner's employment as a tenured school teacher, and dismissed the proceeding, unanimously affirmed, without costs.

Although petitioner was a thirteen-year employee with no prior disciplinary history, and no charges had ever previously been preferred against her, in light of the seriousness of the allegations herein, the penalty of termination was not shocking to one's sense of fairness (*see Altsheler v Board of Educ. of Great Neck Union Free School Dist.*, 62 NY2d 656, 657 [1984]). The record showed that petitioner strayed from her duties as a

school teacher by deliberately escalating a confrontation with a student by yelling expletives and threatening him with violence. Even after security personnel defused the situation by removing the student from the classroom, petitioner subsequently confronted him again, later that day, yelling at least six times that her husband, an armed police officer, would kill him. Petitioner then brought her husband to school the following morning, to the student's scheduled class in the gymnasium, although the student, having been suspended from school, was not there (*compare Riley v City of New York*, 84 AD3d 442 [1st Dept 2011]). Further, as noted by the hearing officer, had the student been in class that morning, the possibility of violence occurring was very real, and petitioner conveyed a message to other students that she could not rely upon school authorities to control threats of violence against a teacher by a student.

Petitioner also showed no remorse nor appreciation for the seriousness of her conduct (*see e.g. Matter of Villada v City of New York*, 126 AD3d 598, 599 [1st Dept 2015]) to support a finding that she would not engage in similar conduct if faced with such circumstances in the future. Petitioner declined to take the stand, and thus, the hearing officer was permitted to draw the

strongest inference against her permitted by the record (*Matter of Carangelo v Ambach*, 130 AD2d 898, 900 [3d Dept 1987], *appeal denied* 70 NY2d 609 [1987]).

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

ENTERED: MARCH 30, 2017

CLERK

Tom, J.P., Moskowitz, Feinman, Gische, Kapnick, JJ.

3573 Joan H. Mendez, et al,, Index 157759/14
Plaintiffs-Respondents,

-against-

21 West 86th Street LLC, et al.,
Defendants-Appellants,

Nationwide Insurance Company,
Defendant.

_____

Kellner Herlihy Getty & Friedman LLP, New York (Carol Anne Herlihy of counsel), for appellants.

Law Office of Barry Yellen, New York (Barry J. Yellen of counsel), for respondents.

_____

Order, Supreme Court, New York County (Gerald Lebovits, J.), entered on or about February 19, 2016, which, to the extent appealed from, denied the portion of defendants 21 West 86th Street LLC and Adellco Management, LLC's CPLR 3212 motion that sought dismissal of plaintiffs' second and third causes of action in the amended complaint, unanimously reversed, on the law, without costs, and that part of the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiffs alleged in their second cause of action that defendants breached their promise to provide building-wide systems to the rent-stabilized tenants of the building. However,

plaintiffs failed to submit any evidence that they had given any consideration in exchange for defendants' alleged promise, and thus failed to raise an issue of fact as to whether they had a binding contract with defendants (*see Presbyterian Church of Albany v Cooper*, 112 NY 517, 520 [1889]; *Delor Corp. v Quigley, Langer, Hames, Perlmutter, Mankes & Nuskind, Partnership*, 287 AD2d 680, 682 [2d Dept 2001]).

The record refutes the third cause of action's allegations that defendants removed the building's rooftop garden and denied plaintiffs' access to it. The record demonstrates that defendants renovated the rooftop garden and the recreational area on the roof for the benefit of the tenants.

We have considered the other arguments and find them unavailing.

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

ENTERED: MARCH 30, 2017

CLERK

Tom, J.P., Moskowitz, Feinman, Gische, Kapnick, JJ.

3576 The People of the State of New York, Ind. 1036/12
Respondent,

-against-

Robert Cassandro,
Defendant-Appellant.

_____

Langone & Associates, PLLC, Garden City (Richard M. Langone and Peter J. Tomao of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered July 29, 2014, convicting defendant, after a jury trial, of scheme to defraud in the first degree, and sentencing him to a term of 1⅓ to 4 years, and restitution in the amount of $5,870,168, unanimously affirmed.

Defendant's arguments concerning the jury charge on first-degree grand larceny are moot, since he was acquitted of that charge (*see People v Moore*, 35 AD3d 291 [1st Dept 2006], *lv denied* 8 NY3d 988 [2007]). Defendant's assertion that the alleged deficiency in the larceny charge may have affected the scheme to defraud conviction is unavailing. His arguments concerning the jury charge on scheme to defraud are unpreserved, and we decline to review them in the interest of justice. As an

alternative holding, we find that the court was not required to give the "moral certainty" charge set forth in Penal Law § 155.05(2)(d), because scheme to defraud has no such special burden of proof (*see People v Burks*, 195 AD2d 1014 [4th Dept 1993], *lv denied* 82 NY2d 804 [1993].

Defendant's arguments concerning the prosecutor's cross-examination and summation are unpreserved (*see People v Heide*, 84 NY2d 943, 944 [1994]), and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]). Moreover, any error was harmless in light of the overwhelming evidence of defendant's guilt (*see People v Crimmins*, 36 NY2d 230 [1975]).

Defendant's challenges to the court's restitution order as

to five of the victims are also unpreserved (*see People v Horne*, 97 NY2d 404, 414 n 3 [2002]), and we decline to review them in the interest of justice. As an alternative holding, we perceive no basis for reducing the amount of restitution.

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

ENTERED: MARCH 30, 2017

CLERK

Tom, J.P., Moskowitz, Feinman, Gische, Kapnick, JJ.

3577 In re Anthony Jones, Index 250013/16
Petitioner-Appellant.

_____

Anthony Jones, appellant pro se.

_____

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered January 27, 2016, which denied petitioner's application for poor person relief pursuant to CPLR 1101, unanimously modified, on the law and the facts and in the exercise of discretion, to grant the application to the extent of waiving costs and fees under CPLR 1101(d), and otherwise affirmed, without costs.

Citing *Matter of Ellerby* (99 Misc 2d 691 [Civ Ct, Kings County 1979]), the motion court denied petitioner's application for poor person relief in this statutory name-change proceeding on the ground that the general common-law right to a name change renders the statutory proceeding unnecessary. However, the common-law name-change procedure, which is effected simply through use and habit (*see Smith v United States Cas. Co.*, 197 NY 420 [1910]; *Matter of Halligan*, 46 AD2d 170 [4th Dept 1974]; *see also Matter of Golden*, 56 AD3d 1109, 1110 [3d Dept 2008]), assumes a freedom of action not necessarily available to a prison

inmate (*see* 7 NYCRR 270.2[B][110.20], [110.21]). Rather than being surplus to the common-law procedure, a statutory name-change proceeding may be petitioner's only available remedy.

The costs of publication for a statutory name change (*see* Civil Rights Law § 63) are not among the costs and fees that may be waived under CPLR 1101(d) (*cf. Deason v Deason*, 32 NY2d 93, 94-95 [1973] [poor person relief available in case where "auxiliary expense" of service of process by publication denies access to the courts]). However, the denial of all poor person relief is not warranted (*see e.g. Carter v County of Erie*, 255 AD2d 984, 985 [4th Dept 1998]; *see also* CPLR 1101[f]).

We note that Civil Rights Law § 63 only requires publication in one designated periodical.

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

ENTERED: MARCH 30, 2017

CLERK

Tom, J.P., Moskowitz, Feinman, Gische, Kapnick, JJ.

3578 Russell W. Rosen, et al., Index 157124/15
Plaintiffs-Appellants,

-against-

Jonathan Schwartz,
Defendant-Respondent.

_____

Warshaw Burstein, LLP, New York (Linda Genero Sklaren of counsel), for appellants.

Goldfarb Abrandt Salzman & Kutzin LLP, New York (Michael S. Kutzin of counsel), for respondent.

_____

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered February 29, 2016, which granted defendant's motion to dismiss the complaint, unanimously reversed, on the law, without costs, and the complaint reinstated.

Although defendant was found not guilty by reason of mental disease or defect in connection with the stabbing death of his mother, the complaint stated a viable wrongful death claim against him pursuant to EPTL 5-4.1, since an insane person may be liable in tort for his actions (*see Hirsch v Mastroianni,* 80 AD2d 633, 634 [2d Dept 1981]; *Albicocco v Nicoletto,* 11 AD2d 690 [2d Dept 1960], *affd* 9 NY2d 920 [1961]). A wrongful death claim was also stated on behalf of defendant's brother, who committed suicide after his mother's murder. To the extent Supreme Court

decided whether defendant may inherit from his mother's estate, no ruling on that question was sought by plaintiffs, and, in any event, the ruling was not only premature, but should be determined in the Surrogate's Court (*see e.g. Matter of Demesyeux*, 42 Misc 3d 730 [Sur Ct, Nassau County 2013]).

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

ENTERED: MARCH 30, 2017

CLERK

Tom, J.P., Moskowitz, Feinman, Gische, Kapnick, JJ.

3581 The People of the State of New York, Ind. 2768/11
Respondent,

-against-

Theodore Clarke,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Carol Berkman, J. at plea; Laura A. Ward, J. at re-plea and sentencing), rendered June 2, 2014, 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 30, 2017

CLERK

Tom, J.P., Moskowitz, Feinman, Gische, Kapnick, JJ.

3582 Bennett Sprecher, Index 158846/14
Plaintiff-Respondent-Appellant,

-against-

Marc Thibodeau,
Defendant-Appellant-Respondent.

_____

Nesenoff & Miltenberg LLP, New York (Philip A. Byler of counsel), for appellant-respondent.

Schlam Stone & Dolan LLP, New York (Erik S. Groothuis and Jonathan Mazer of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered August 2, 2016, which, upon defendant's motion to dismiss the second amended complaint, granted the motion as to the negligence claim, and denied the motion as to the tortious interference with business relations claim, unanimously modified, on the law, to grant the motion as to the tortious interference claim insofar as it is premised on the attorney comments, and otherwise affirmed, without costs.

This dispute stems from a series of statements made by or on behalf of defendant, a press agent, about plaintiff, an aspiring Broadway producer, in connection with a Broadway musical plaintiff was producing entitled "Rebecca - The Musical." Nonparty Mark Christopher Hotton perpetrated a fraud on the

musical involving the invention of fictitious investors, and in the statements at issue, defendant or his agents accused plaintiff of being complicit in the fraudulent scheme.

The negligence claim was properly dismissed because the facts alleged are inseparable from the tort of defamation, which was admittedly time-barred (*see Como v Riley*, 287 AD2d 416, 417 [1st Dept 2001]; CPLR 215[3]). "[A] defamation cause of action is not transformed into one for negligence merely by casting it as [such]" (*Colon v City of Rochester*, 307 AD2d 742, 744 [4th Dept 2003], *lv denied* 100 NY2d 628 [2003] [internal quotation marks omitted]). The negligence claim additionally fails because the alleged false statements were made to third parties, not to plaintiff directly, and plaintiff did not rely on them (*see White v Guarente*, 43 NY2d 356, 362-363 [1977]; *Citytrust v Atlas Capital Corp.*, 173 AD2d 300, 302 [1st Dept 1991]).

Although the motion court denied defendant's motion to dismiss a prior version of the complaint containing the negligence claim, it appears to have done so not because the negligence claim was viable but because the complaint "outlined the basics" of a properly pleaded tortious interference claim. In any event, the doctrine of law of the case only applies to courts of coordinate jurisdiction and is not binding on this

Court (*see Martin v City of Cohoes*, 37 NY2d 162, 165 [1975]; *Myles v Spring Val. Marketplace, LLC*, 141 AD3d 425, 427-428 [1st Dept 2016]).

The tortious interference claim was properly sustained insofar as it was premised on emails sent by defendant to a key investor, but not insofar as it was premised on comments made by defendant's attorney that were quoted in various news articles.

As to the emails, plaintiff adequately pled that defendant's conduct was unlawful or for the sole purpose of inflicting intentional harm on plaintiff (*see Carvel Corp. v Noonan*, 3 NY3d 182, 190 [2004]) - as we observed in a related action premised on these same emails (*see Rebecca Broadway L.P. v Hotton*, 143 AD3d 71, 77 [1st Dept 2016]). Specifically, plaintiff alleged that, in sending the emails, defendant misappropriated confidential information he was privy to as a result of his position as the musical's press agent and committed the independent tort of defamation (*see Stapleton Studios, LLC v City of New York*, 26 AD3d 236 [1st Dept 2006]).

Dismissal is also not warranted on the ground that the tortious interference claim is duplicative of a claim brought against defendant in a related litigation by two corporate entities indirectly owned by plaintiff. CPLR 3211(a)(4)

authorizes dismissal where "there is another action pending between the same parties for the same cause of action." Here, there does not exist the requisite "substantial" identity of parties (*see White Light Prods. v On the Scene Prods.*, 231 AD2d 90, 94 [1st Dept 1997]). Although Thibodeau is named as a defendant in both actions, there is no overlap in plaintiffs. "[I]ndividual principals of a corporation are legally distinguishable from the corporation itself" and a court may not "find an identity of parties by, in effect, piercing the corporate veil without a request that this be done and, even more importantly, any demonstration by defendant that such a result is warranted" (*Morgulas v Yudell Realty*, 161 AD2d 211, 213 [1st Dept 1990]).

Furthermore, the subject matter of the two suits, although related, is not sufficiently similar to merit dismissal. While both actions involve claims for tortious interference with business relations based at least in part on the same set of emails, the claim in the instant action relates to interference with plaintiff's relationships with parties who would otherwise have been willing to work with him on theater projects, whereas the claim in the related action focuses solely on the corporate entities' relationship with the key investor. Similarly, whereas

the damages sought in the instant action are to plaintiff himself and his career, the damages sought in the related action are to the musical as a result of the investor's withdrawal of support.

As to the attorney comments, comments made to the media by a party's attorney regarding an ongoing lawsuit constitute nonactionable opinions (*see Gotbetter v Dow Jones & Co.*, 259 AD2d 335 [1st Dept 1999]; *see also Sabharwal & Finkel, LLC v Sorrell*, 117 AD3d 437 [1st Dept 2014]). Such comments are thus not wrongful in the manner required to support a tortious interference claim (*see id.* at 438; *Phillips v Carter*, 58 AD3d 528 [1st Dept 2009]).

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

ENTERED: MARCH 30, 2017

CLERK

Tom, J.P, Moskowitz, Feinman, Gische, Kapnick, JJ.

3584 The People of the State of New York, Ind. 4825/14
Respondent,

-against-

Esau Davis,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Ross D. Mazer 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 (Gregory Carro, J.), rendered November 19, 2015,

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 30, 2017

CLERK

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

Tom, J.P., Moskowitz, Feinman, Gische, Kapnick, JJ.

3585N Dan Ehrlich, Index 162389/15
Petitioner-Appellant,

-against-

Henry Giminez, et al.,
Respondents-Respondents.

_____

Edward H. Odesser, LLC, White Plains (Edward H. Odesser of counsel), for appellant.

Thomas Stanziale, Mineola, for respondents.

_____

Order and judgment (one paper), Supreme Court, New York County (Robert R. Reed, J.), entered on or about March 17, 2016, which denied petitioner's motion and dismissed the petition to permanently stay arbitration, unanimously reversed, on the law and the facts, without costs, the denial of petitioner's motion vacated, the petition reinstated, the matter remanded for a hearing, pursuant to CPLR 7503(a), to determine whether there was an agreement to arbitrate the disputed issues, and the motion to stay the arbitration held in abeyance pending the outcome of this hearing.

Petitioner notes that the limited liability company (LLC) to which the parties belong, Powerhouse Beverage Company LLC, has an LLC agreement dated January 28, 2014, which contains no agreement to arbitrate, and which states, at section 14.7, that it supersedes all prior agreements between the parties. Respondents, however, note the existence of a December 10, 2012 LLC agreement, apparently executed four days after the formation of the LLC, which contains a mandatory arbitration clause. Section 14.5 of the 2014 agreement states that, in the event of any conflicts between the 2014 agreement and the "Certificate" or the Delaware Limited Liability Act, the provisions of the Certificate or the Act will control. It is clear that the Delaware Limited Liability Act is not the 2012 agreement. However, it is not clear whether the 2012 agreement is the "Certificate of formation" filed at the time of the LLC's creation. If it is, then the arbitration clause in the 2012 agreement would control, assuming the 2012 agreement was properly executed. If it is not, then the 2014 agreement would supersede the 2012 agreement, and there would be no agreement to arbitrate.

Given this dispute, the matter should be "tried forthwith" (CPLR 7503[a]).

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

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

ENTERED: MARCH 30, 2017

CLERK

Tom, J.P., Moskowitz, Feinman, Gische, Kapnick, JJ.

3586N Gregory C. Woodward, Index 652052/15
Plaintiff-Respondent,

-against-

Millbrook Ventures LLC, etc.,
et al.,
Defendants-Appellants.

_____

Corbally, Gartland & Rappleyea, LLP, Poughkeepsie (Kyle C. Van De Water of counsel), for appellants.

Amos Weinberg, Great Neck, for respondent.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered on or about December 10, 2016, which denied defendants' motion to change venue from New York County to Dutchess County, unanimously affirmed, without costs.

Supreme Court properly concluded that defendants' motion was untimely. Having consented to electronic filing, defendants were required to serve their papers electronically (Uniform Rules for Trial Cts [22 NYCRR] § 202.5-b[d][1]), and indeed served their demand for change of venue, together with their answer, by e-filing the documents on July 14, 2015 (22 NYCRR 202.5-b[f][2][ii]). Having served their demand, defendants were required to bring their motion to change venue within 15 days, or by July 29, 2015 (CPLR 511). However, defendants did not bring

their motion until July 31, 2015, rendering it untimely. That defendants also elected to serve their demand via United States mail did not extend the deadline for their motion under CPLR 2103(b)(2). Because they consented to participate in Supreme Court's e-filing system, defendants were bound by the applicable rules governing service.

It is further noted that defendants failed to show that a change of venue was warranted due to the inconvenience of material witnesses (CPLR 510[3]), as their motion papers did not address the factors enumerated in *Cardona v Aggressive Heating* (180 AD2d 572 [1st Dept 1992]) and its progeny.

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

ENTERED: MARCH 30, 2017

CLERK

Sweeny, J.P., Acosta, Moskowitz, Kapnick, Kahn, JJ.

2979 In re Justine Luongo, etc., Index 100250/15
Petitioner-Respondent,

-against-

Records Access Officer, Civilian
Complaint Review Board,
Respondent-Appellant,

Officer Daniel Pantaleo,
Intervenor Respondent-Appellant.

- - - - -

Communities United for Police Reform,
The Association of Muslim American
Lawyers, Center for Constitutional
Rights, Center for Popular Democracy,
JustLeadershipUSA, Katal Center for Health,
Equity, and Justice, LatinoJustice PRLDEF,
New York Civil Liberties Union, The Public
Science Project, Urban Justice Center,
Alliance for Quality Education, Arab
American Association of New York, Bill of
Rights Defense Committee/Defending
Dissent Foundation, The Black Institute,
Brooklyn Movement Center, CAAAV Organizing
Asian Communities, Citizen Action of New
York NYC Chapter, Equality for Flatbush,
FIERCE, Filipino American Democratic
Club of NY, The Gathering for Justice/Justice
League NYC, Girls for Gender Equity, Jews for
Racial & Economic Justice, Justice Committee,
Make the Road New York, Malcolm X Grassroots
Movement, NAACP New York State Conference,
New York City Gay and Lesbian Anti-Violence
Project, New York Communities for Change, The
Peace Poets, Picture the Homeless, Queens
Neighborhood United, T'ruah: The Rabbinic
Call for Human Rights, UPROSE, The Progressive
Caucus and Black, Latino, and Asian Caucus of the
New York City Counsel, United States Congressman
Hakeem Jeffries, Manhattan Borough President Gale

Brewer, New York City Public Advocate Letitia James, The Reporters Committee for Freedom of the Press, Advance Publications, Inc., The Associated Press ("AP"), BuzzFeed, Daily News, LP, Dow Jones & Company, Inc., The E. W. Scripps Company, First Look Media Works, Inc., Gannett Co., Inc., Gawker Media LLC, Hearst Corporation, MPA-The Association of Magazine Media ("MPA"), The National Press Club, The National Press Photographers Association ("NPPA"), The New York Times Company, News 12, The News Guild - CWA, Newsday LLC ("Newsday"), Online News Association ("ONA"), Radio Television Digital News Association ("RTDNA") and The Tully Center for Free Speech,
Amici Curiae.

Zachary W. Carter, Corporation Counsel, New York (Aaron M. Bloom of counsel), for Records Access Officer, Civilian Complaint Review Board, appellant.

Worth, Longworth & London, New York (Mitchell Garber of counsel), for Officer Daniel Pantaleo, appellant.

Seymour W. James, Jr., The Legal Aid Society, New York (Cynthia Conti-Cook of counsel), for respondent.

Rankin & Taylor, PLLC, New York (Jane L. Moisan of counsel), for Communities United for Police Reform, The Association of Muslim American Lawyers, Center for Constitutional Rights, Center for Popular Democracy, JustLeadershipUSA, Katal Center for Health, Equity, and Justice, LatinoJustice PRLDEF, New York Civil Liberties Union, The Public Science Project, Urban Justice Center, Alliance for Quality Education, Arab American Association of New York, Bill of Rights Defense Committee/Defending Dissent Foundation, The Black Institute, Brooklyn Movement Center, CAAAV Organizing Asian Communities, Citizen Action of New York NYC Chapter, Equality for Flatbush, FIERCE, Filipino American Democratic Club of NY, The Gathering for Justice/Justice League NYC, Girls for Gender Equity, Jews for Racial & Economic Justice, Justice Committee, Make the Road New York, Malcolm X Grassroots Movement, NAACP New York State Conference, New York City Gay and

Lesbian Anti-Violence Project, New York Communities for Change, The Peace Poets, Picture the Homeless, Queens Neighborhood United, T'ruah: The Rabbinic Call for Human Rights and UPROSE, amici curiae.

Cleary Gottlieb Steen & Hamilton LLP, New York (Avram E. Luft of counsel), for Progressive Caucus of the New York City Council, Black, Latino, and Asian Caucus of the New York City Council, United States Congressman Hakeem Jeffries, Manhattan Borough President Gale Brewer and New York City Public Advocate Letitia James, amici curiae.

Davis Wright Tremaine LLP, Washington, DC (Alison Schary of counsel), for The Reporters Committee for Freedom of the Press, Advance Publications, Inc., The Associated Press ("AP"), BuzzFeed, Daily News, LP, Dow Jones & Company, Inc., The E. W. Scripps Company, First Look Media Works, Inc., Gannett Co., Inc., Gawker Media LLC, Hearst Corporation, MPA-The Association of Magazine Media ("MPA"), The National Press Club, The National Press Photographers Association ("NPPA"), The New York Times Company, News 12, The News Guild - CWA, Newsday LLC ("Newsday"), Online News Association ("ONA"), Radio Television Digital News Association ("RTDNA") and The Tully Center for Free Speech, amici curiae.

Order and judgment (one paper), Supreme Court, New York County (Alice Schlesinger, J.), entered July 27, 2015, reversed, on the law, without costs, the judgment vacated, the petition denied, and the proceeding brought pursuant to CPLR article 78 dismissed.

Opinion by Sweeny, J.P. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

John W. Sweeny, Jr., J.P.
Rolando T. Acosta
Karla Moskowitz
Barbara R. Kapnick
Marcy L. Kahn, JJ.

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In re Justine Luongo, etc.,
Petitioner-Respondent,

-against-

Records Access Officer, Civilian
Complaint Review Board,
Respondent-Appellant,

Officer Daniel Pantaleo,
Intervenor Respondent-Appellant.

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Communities United for Police Reform,
The Association of Muslim American
Lawyers, Center for Constitutional
Rights, Center for Popular Democracy,
JustLeadershipUSA, Katal Center for Health,
Equity, and Justice, LatinoJustice PRLDEF,
New York Civil Liberties Union, The Public
Science Project, Urban Justice Center,
Alliance for Quality Education, Arab
American Association of New York, Bill of
Rights Defense Committee/Defending
Dissent Foundation, The Black Institute,
Brooklyn Movement Center, CAAAV Organizing
Asian Communities, Citizen Action of New
York NYC Chapter, Equality for Flatbush,
FIERCE, Filipino American Democratic
Club of NY, The Gathering for Justice/Justice
League NYC, Girls for Gender Equity, Jews for

Racial & Economic Justice, Justice Committee, Make the Road New York, Malcolm X Grassroots Movement, NAACP New York State Conference, New York City Gay and Lesbian Anti-Violence Project, New York Communities for Change, The Peace Poets, Picture the Homeless, Queens Neighborhood United, T'ruah: The Rabbinic Call for Human Rights, UPROSE, The Progressive Caucus and Black, Latino, and Asian Caucus of the New York City Counsel, United States Congressman Hakeem Jeffries, Manhattan Borough President Gale Brewer, New York City Public Advocate Letitia James, The Reporters Committee for Freedom of the Press, Advance Publications, Inc., The Associated Press ("AP"), BuzzFeed, Daily News, LP, Dow Jones & Company, Inc., The E. W. Scripps Company, First Look Media Works, Inc., Gannett Co., Inc., Gawker Media LLC, Hearst Corporation, MPA-The Association of Magazine Media ("MPA"), The National Press Club, The National Press Photographers Association ("NPPA"), The New York Times Company, News 12, The News Guild - CWA, Newsday LLC ("Newsday"), Online News Association ("ONA"), Radio Television Digital News Association ("RTDNA") and The Tully Center for Free Speech,

Amici Curiae.

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Respondent Records Access Officer, Civilian Complaint Review Board (CCRB) and intervenor respondent Officer Daniel Pantaleo appeal from the order and judgment (one paper) of the Supreme Court, New York County (Alice Schlesinger, J.), entered July 27, 2015, directing CCRB to produce to petitioner, pursuant to the Freedom of Information Law (FOIL), a summary of its records indicating (a) the number of substantiated complaints brought against Officer Pantaleo before the July 17, 2014 death of Eric Garner and (b) any CCRB recommendations made to the Police Department based on such complaints.

Zachary W. Carter, Corporation Counsel, New York (Aaron M. Bloom, Richard Dearing and Devin Slack of counsel), for Records Access Officer, Civilian Complaint Review Board, appellant.

Worth, Longworth & London, New York (Mitchell Garber of counsel), for Officer Daniel Pantaleo, appellant.

Seymour W. James, Jr., The Legal Aid Society, New York (Cynthia Conti-Cook of counsel) and Kramer Levin Naftalis & Frankel LLP, New York (Jeffrey L. Braun and Anna K. Ostrom of counsel), for respondent.

Rankin & Taylor, PLLC, New York (Jane L. Moisan, David B. Rankin and Vanessa Selbst of counsel), for Communities United for Police Reform, The Association of Muslim American Lawyers, Center for Constitutional Rights, Center for Popular Democracy, JustLeadershipUSA, Katal Center for Health, Equity, and Justice, LatinoJustice PRLDEF, New York Civil Liberties Union, The Public Science Project, Urban Justice Center, Alliance for Quality Education, Arab American Association of New York, Bill of Rights Defense Committee/Defending Dissent Foundation, The Black Institute, Brooklyn Movement Center, CAAAV Organizing Asian Communities, Citizen Action of New York NYC Chapter, Equality for Flatbush, FIERCE, Filipino American Democratic Club of NY, The Gathering for Justice/Justice League NYC, Girls for Gender Equity, Jews for Racial & Economic Justice, Justice Committee, Make the Road New York, Malcolm X Grassroots Movement, NAACP New York State Conference, New York City Gay and Lesbian Anti-Violence Project, New York Communities for Change, The Peace Poets, Picture the Homeless, Queens Neighborhood United, T'ruah: The Rabbinic Call for Human Rights and UPROSE, amici curiae.

Cleary Gottlieb Steen & Hamilton LLP, New York (Avram E. Luft, Nefertiti J. Alexander, Mark E. McDonald and Grace J. Kurland of counsel), for Progresive Caucus of the New York City Council, Black, Latino, and Asian Caucus of the New York City Council, United States Congressman Hakeem Jeffries, Manhattan Borough President Gale Brewer and New York City Public Advocate Letitia James, amici curiae.

Davis Wright Tremaine LLP, Washington, DC (Alison Schary of counsel), for The Reporters Committee for Freedom of the Press, Advance Publications, Inc., The Associated Press ("AP"), BuzzFeed, Daily News, LP, Dow Jones & Company, Inc., The E. W. Scripps Company, First Look Media Works, Inc., Gannett Co., Inc., Gawker Media LLC, Hearst Corporation, MPA-The Association of Magazine Media ("MPA"), The National Press Club, The National Press Photographers Association ("NPPA"), The New York Times Company, News 12, The News Guild - CWA, Newsday LLC ("Newsday"), Online News Association ("ONA"), Radio Television Digital News Association ("RTDNA") and The Tully Center for Free Speech, amici curiae.

SWEENY, J.P.

The issues before us stem from the extensively publicized arrest and death of Eric Garner on July 17, 2014. Intervenor Police Officer Daniel Pantaleo was depicted in a bystander video applying a choke hold to Mr. Garner during the incident. An investigation followed, and on December 2, 2014, a grand jury declined to indict Officer Pantaleo in connection with Mr. Garner's death.

Petitioner submitted a Freedom of Information Law (FOIL) letter request to respondent Records Access Officer, Civilian Complaint Review Board (CCRB), dated December 18, 2014, seeking eight categories of records concerning Officer Pantaleo, dating from 2004 to the date of Mr. Garner's death. Petitioner sought: (1) the number of complaints filed against Officer Pantaleo; (2) the number of allegations contained within each complaint; (3) the outcome of CCRB's investigation of each allegation; (4) any prosecution by CCRB in response to such finding; (5) the outcome of any prosecution by CCRB; (6) any charges and specifications filed by the New York City Police Department's (NYPD) Department Advocate Office; (7) the outcome of any Department Advocate Office proceedings; and (8) any other agency actions in response to the above requests.

On December 24, 2014, CCRB denied the request, citing the

statutory exemption from disclosure provided for police personnel records contained in Public Officers Law § 87(2)(a) and Civil Rights Law § 50-a. In addition to the statutory exemptions, CCRB noted that the request for records relating to unsubstantiated matters would constitute "an unreasonable invasion of privacy." Finally, CCRB noted that it was not possible to redact any responsive records "in a way that will disassociate allegations against [Officer Pantaleo] given the nature of" petitioner's request. Petitioner appealed to the CCRB on December 29, 2014, but received no response.

This article 78 proceeding was commenced on February 17, 2015, and sought an order directing the CCRB to produce "a summary of the number of allegations, complaints and outcomes brought against" Officer Pantaleo. Much of petitioner's broader initial request was thus abandoned. During the proceedings, petitioner further narrowed its FOIL request, seeking only information as to "whether the CCRB substantiated complaints against Officer Pantaleo and, if so, whether there were any related administrative proceedings, and those outcomes, if any." Officer Pantaleo applied for and was granted intervenor status as a party respondent. His opposition papers alleged, among other things, that even the requested summary of the CCRB records was exempt from disclosure because it would endanger his life and the

lives of his family members. In support, he referenced online, unsubstantiated reports of alleged misconduct on his part that resulted in the arrest of a Michigan man in February 2015 for posting Facebook death threats against him. Officer Pantaleo also stated that the NYPD's Threat Assessment Unit had assigned police officers to watch over him and his family 24 hours a day, 7 days a week, and implemented other security measures as well. He also agreed with the CCRB that the requested documents constituted "personnel records" within the meaning of Civil Rights Law § 50-a(1) and were therefore exempt from disclosure.

Supreme Court found, without conducting an in camera review of the requested information, that the summary sought by petitioners did not constitute a "personnel record" exempted from disclosure by Civil Rights Law § 50-a because the CCRB is "a city agency independent of the NYPD." The court further found that even if the summary constituted a "personnel record," nondisclosure would not be "'reasonably necessary to effectuate the purposes of [Civil Rights Law 50-a] to prevent the potential use of information in the records in litigation to degrade, embarrass, harass or impeach the integrity of the officer'" (quoting *Matter of Daily Gazette Co. v City of Schenectady*, 93 NY2d 145, 157-158 [1999]). Finally, the court was "not convinced" that release of the records was likely to cause harm

to Officer Pantaleo, finding that intervenor had not established a causal connection between the online, unsubstantiated reports and the Facebook death threats. The court opined that a backlash from the release of the summary, if any, would be directed at the NYPD and not Officer Pantaleo. The CCRB was directed to prepare the requested summary and release it to petitioner. We now reverse.

We begin our analysis by reviewing the regulatory and statutory framework applicable to this case.

The CCRB is the New York City agency that receives and investigates complaints made by a member of the public against an officer employed by the NYPD alleging misconduct of any of four specific categories: use of excessive force, abuse of authority, offensive language, or discourtesy (New York City Charter § 440[c][1]). After investigating the complaint, the CCRB determines whether the complaint is substantiated and, if so, it submits findings and disciplinary recommendations to NYPD's Commissioner (*id.*). These complaints, whether substantiated or not, and disciplinary recommendations, if any, "are recorded in the officers' personnel records and can affect assignments and promotions."[1]

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[1]*See* CCRB website at http://www.nyc.gov/html/ccrb/html/police/police.html

The officer against whom the complaint is filed is entitled to a hearing before the NYPD's Deputy Commissioner of Trials or an Assistant Deputy Commissioner. This trial is open to the public (*see* 38 RCNY 15-03; 15-04[g]; Administrative Code of the City of New York § 14-115[b]). Pursuant to a Memorandum of Understanding (MOU) dated April 2, 2012 between the CCRB and NYPD, in the event an officer requests a hearing, the CCRB is authorized to prosecute the complaint before the Deputy Commissioner of Trials or an Assistant Deputy Commissioner. Paragraph 8 of the MOU provides that the Police Commissioner "shall retain in all respects the authority and discretion to make final disciplinary determinations."

Paragraph 25 of the MOU provides, in pertinent part: "Documents provided to CCRB by NYPD or created by CCRB pursuant to this MOU that are by law police personnel records are therefore confidential pursuant to NYS Civil Rights Law §50-a. Such documents are also confidential information pursuant to NYC Charter §2604(b)(4)." Paragraph 26 further provides that any verbal information provided shall be treated as confidential and shall not be disclosed. While certainly not binding on this Court, the MOU, in substance, acknowledges the absence of a statutory definition of "personnel records" in CRL § 50-a and attempts to fill that gap.

At the conclusion of the hearing, the Deputy Commissioner or Assistant Deputy Commissioner prepares a Report and Recommendation containing findings of fact and conclusions of law. If the NYPD Commissioner approves it, the Report and Recommendation is so marked and a separate document is prepared, containing the final disposition and penalty to be imposed (*see* 38 RCNY 15-08[a]). These documents are thereafter placed in the officer's personnel file.

FOIL (Public Officers Law §§ 84-90) presumes that all agency records are available for public inspection and copying, unless an exemption expressly provides otherwise (*see* Public Officers Law §§ 84; 87(2); *Matter of Data Tree, LLC v Romaine*, 9 NY3d 454, 462 [2007]). An agency may withhold public documents requested pursuant to FOIL only if it "articulate[s] particularized and specific justification for not disclosing requested documents" (*Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 275 [1996] [internal quotation marks omitted]). The agency bears the burden of establishing that the requested material falls within one of the narrow exemptions to the general mandate of open access to government documents (*Matter of Town of Waterford v New York State Dept. of Envtl. Conservation*, 18 NY3d 652, 657 [2012]; *Data Tree*, 9 NY3d at 462).

FOIL further provides that agencies may deny access to

records or portions thereof that are specifically exempted from disclosure by state or federal statute (Public Officers Law § 87[2][a]). Civil Rights Law § 50-a(1) contains one of those statutory exemptions. It provides, in pertinent part, that "[a]ll personnel records used to evaluate performance toward continued employment or promotion . . . shall be considered confidential and not subject to inspection or review without the express written consent of such police officer . . . except as may be mandated by lawful court order."

We are called upon to determine whether the documents sought herein are the type of documents that fall within the parameters of "personnel records" and are thus protected from disclosure. Civil Rights Law § 50-a does not define "personnel records," leaving it to the courts to determine the kind of documents qualify for this exemption.

Statutes should be interpreted in a manner designed to effectuate the Legislature's intent, construing clear and unambiguous statutory language "so as to give effect to the plain meaning of the words used" (*Patrolmen's Benevolent Assn. of City of N.Y. v City of New York*, 41 NY2d 205, 208 [1976]; *Matter of Raritan Dev. Corp. v Silva*, 91 NY2d 98, 106-107 [1997]). In that regard, the text of the statute remains the best evidence of the Legislature's intent (*Matter of Polan v State of N.Y. Ins. Dept.*,

3 NY3d 54, 58 [2004]).

We are not without guidance with respect to the kinds of documents that constitute "personnel records." The Court of Appeals has spoken several times on this issue, and we now turn to an analysis of the relevant cases.

There is "no definition or other language explaining or qualifying what is covered by the term 'personnel records' except that such records must be under the control of the particular agency or department and be used to evaluate performance toward continued employment or promotion" (*Matter of Prisoners' Legal Servs. of N. Y. v New York State Dept. of Correctional Servs.*, 73 NY2d 26, 31 [1988]). Significantly, it is the document's "nature and its use in evaluating an officer's performance -- not its physical location or its particular custodian" that determines whether a particular document constitutes a personnel record (*id.* at 32). The threshold criterion, therefore, is whether the document is "of significance to a superior in considering continued employment or promotion" (*id.* at 32). The analysis of Civil Rights Law § 50-a and its legislative history in *Matter of Daily Gazette Co. v City of Schenectady* (93 NY2d 145 [1999], *supra*) is highly instructive. The petitioners in *Gazette* were two newspapers that sought "records regarding disciplinary action against 18 officers" of the Schenectady police department arising

out of allegations that they were involved in throwing eggs at a civilian vehicle while off-duty (*id.* at 152). The petition alleged that the officers had disciplinary sanctions confidentially imposed upon them as a result of that incident (*id.*).

The Court rejected the petitioners' argument that the statutory exemption should be narrowly construed to apply only to parties likely to use the records in litigation, on the ground that this interpretation "conflicts with the plain wording of the statute, is contrary to its legislative history," and "would undermine the paramount objectives of the Legislature in enacting section 50-a" (*id.* at 153). The plain text of the statute "unambiguously defines the records that are immune from indiscriminate disclosure" and establishes "a legal process whereby the confidentiality of the records may be lifted by a court, but only after an in camera inspection," with notice to the parties and an opportunity to be heard (*id.* at 154). The Court observed that "[a]s a policy choice, undisputably within its constitutional prerogatives which we are constrained to respect, the Legislature elected to shield the personnel records of these officers from disclosure upon request with only a strictly limited statute/purpose exception" (*id.*).

In its review of the statute's legislative history, the

Court noted that § 50-a "was first enacted into law (L 1976, ch 413) some two years after passage of the original FOIL legislation (L 1974, ch 578)," by which time the Legislature "was well aware of the use of FOIL to obtain such records", and that the "statute was designed to prevent abusive exploitation of personally damaging information contained in officers' personnel records" (*id.* at 155). While acknowledging that such abuse would most often occur in the context of a criminal defense attorney's FOIL request for an officer's records to use on cross-examination of the officer, the Court, citing memoranda from the legislative record, nevertheless refused to limit nondisclosure to litigation, noting that the legislation "was sponsored and passed as a safeguard against potential harassment of officers through unlimited access to information contained in personnel files" (*id.*).

Since the statute's enactment, each Judicial Department has had the occasion to address the issue of whether civilian complaints constitute "personnel records" within the meaning of Civil Rights Law § 50-a(1), and each has held that information similar to that sought here falls squarely within the statutory exemption. For example, in *Matter of Gannett Co. v James* (86 AD2d 744, 745 [4th Dept 1982], *lv denied* 56 NY2d 502 [1982]), the court determined that records of complaints filed with the

Internal Affairs Divisions of several police departments and documents reflecting the final disposition of hearings held with respect thereto "[c]learly . . . fall within the statutory exemption." The court also noted that "the confidentiality afforded to those who wish it in reporting abuses is an important element in encouraging reports of possible misconduct which might not otherwise be made" (*id.*; *see also Matter of Hearst Corp. v New York State Police*, 132 AD3d 1128, 1129-1130 [3d Dept 2015] ["Proof that information was generated for the purpose of assessing an employee's alleged misconduct brings that information within the protection of Civil Rights Law § 50-a (1)" and need not actually be used in disciplinary proceedings to acquire protection from disclosure]; *Matter of Columbia-Greene Beauty Sch., Inc. v City of Albany*, 121 AD3d 1369, 1370 [3d Dept 2014] ["Personnel records include documents relating to misconduct or rule violations by police officers"]; *Matter of McGee v Johnson*, 86 AD3d 647 [2d Dept 2011], *lv denied* 19 NY3d 804 [2012] [affirming dismissal of petition to compel the disclosure of the Carmel Police Department's final determination of a "civilian complaint" made against police officers because the determination was a personnel record exempt under Public Officer's Law § 87(2)(a) and Civil Rights Law §50-a]; *Espady v City of New York*, 40 AD3d 475, 476 [1st Dept 2007] [in an action

to obtain misconduct complaints and records against police officers who executed a no-knock warrant, disclosure was denied since "any personnel or disciplinary records, reprimands, complaints and investigations of the police officers . . . involved in any manner with this matter are protected under Civil Rights Law § 50-a"]; *Matter of Argentieri v Goord*, 25 AD3d 830, 832 [3d Dept 2006] [a complaint against officers, whether substantiated or not, "subjects the officer to possible disciplinary sanctions and is thus an evaluative tool," bringing it within the ambit of Civil Rights Law § 50-a]; *Matter of Ruberti, Girvine & Ferlazzo v New York Division of State Police*, 218 AD2d 494, 497 [3d Dept 1996] ["(I)t cannot seriously be argued that . . . any personnel or discrimination complaints filed against respondent's members [] fail to qualify as 'personnel records' within the meaning of Civil Rights Law § 50-a(1). . . The records at issue here, particularly those relating to complaints of misconduct, are the very types of documents that the statute was designed to protect in the first instance"]; *Matter of Lyon v Dunne,* 180 AD2d 922, 923 [3d Dept 1992], *lv denied* 79 NY2d 758 [1992] [dismissing article 78 petition on the ground that "complaints, reprimands and incidents of misconduct of three State Police officers . . . are used to evaluate performance toward continued employment of the three officers and

are exempt pursuant to Public Officers Law § 87(2)(a) and Civil Rights Law § 50-a"]).

Matter of Capital Newspapers Div. of the Hearst Corp. v City of Albany (15 NY3d 759 [2010]) does not require a different result. That case involved FOIL requests seeking documents from the 1990s pertaining to the alleged use of official Albany Police Department channels to arrange for the purchase of assault-type rifles for personal, nonofficial use by several individual police officers. The documents in question in that case were 42 "gun tags," although the record, as the Appellate Division noted, "does not make clear exactly what these documents actually are" (63 AD3d 1336, 1337 n 1 [3d Dept 2009]). The parties agreed that the documents were "tags put on the guns returned to the police department by individuals who had the guns in their personal possession" and contained "an individual's name, a serial number and some sort of identification number." (*id.*). The Appellate Division determined that any "gun tags" containing the names of current or former police department employees were "personnel records" as envisioned by Civil Rights Law § 50-a (*id.* at 1338-1339). The court stated that redaction of the names of those current or former members of the department would adequately protect the officers and directed that the records, as so redacted, be released.

The Court of Appeals modified that decision (15 NY3d 759 [2010]). The Court held that the City of Albany had failed to meet its burden of demonstrating that the "gun tags" were personnel records as envisioned by Civil Rights Law § 50-a(1) in that there was no evidence that "the documents were 'used to evaluate performance toward continued employment or promotion,' as required by that statute." The Court of Appeals held that "the unredacted gun tags do not fall squarely within a statutory exemption and are subject to disclosure" under FOIL (*id.*).

Here, by contrast, there is no question that the summary sought involves one officer and are part and parcel of his personnel file. There is also no question that the records sought are "used to evaluate performance toward continued employment or promotion," as required by the statute. Unlike those at issue in *Capital Newspapers*, the requested documents here do "fall squarely within a statutory exemption" of Civil Rights Law § 50-a(1) and are thus not subject to disclosure, under applicable precedent.

CCRB findings and recommendations are clearly of significance to superiors in evaluating police officers' performance. As noted, all complaints filed with the CCRB, regardless of the outcome, are filed with and remain in an officer's CCRB history, which is part of his or her personnel

record maintained by the NYPD.[2] We therefore hold that the CCRB met its burden of demonstrating that those documents constitute "personnel records" for purposes of Civil Rights Law § 50-a, and that they fall squarely within a statutory exemption of the statute (*see Matter of Daily Gazette Co. v City of Schenectady*, 93 NY2d 145 [1999], *supra*; *Matter of Prisoners' Legal Servs. of N.Y. v New York State Dept. of Correctional Servs.*, 73 NY2d 26 [1988], *supra*).

It bears noting that CRL § 50-a makes no distinction between a summary of the records sought and the records themselves. Releasing a summary of protected records would serve to defeat the legislative intent of the statute in exempting those records from disclosure. It is hard to imagine that in a situation like this, where the legislative intent is so clear, the simple expedient of releasing a summary of protected records concerning substantiated complaints against an identified police officer can be used to circumvent the statute's prohibitions on disclosure. "Such a facile means of totally undermining the statutory protection of section 50-a could not have been intended by the Legislature" (*Matter of Daily Gazette*, 93 NY2d at 158; *see Prisoners Legal Servs.*, 73 NY2d at 31). The requested

[2]*See* CCRB website, n 1, *supra*.

information here is far different from the "neutral" information which "did not contain any invidious implications capable facially of harassment or degradation of the officer" (*Matter of Daily Gazette*, 93 NY2d at 158) as the information released in *Matter of Capital Newspapers Div. of Hearst Corp. v Burns* (67 NY2d 562 [1986] [affirming the disclosure of a redacted police officer's attendance record of absences from duty for a specific month]).

Petitioners attempt to distinguish *Prisoners' Legal Servs.* on the basis that the records in that case were maintained in the correctional facility itself, as part of the facility's prisoner grievance program, and not by a separate agency such as the CCRB. This is a distinction without a difference. The Court of Appeals addressed this issue head on by holding that

> "whether a document qualifies as a personnel record under Civil Rights Law § 50-a(1) depends upon its nature and its use in evaluating an officer's performance - not its physical location or its particular custodian. Indeed, it has been held that applicability of the statute 'cannot be determined simply on the basis of where the information is stored'" (*Prisoners' Legal Servs.* 73 NY2d at 32 [emphasis added], quoting *Matter of Capital Newspapers v Burns*, 109 AD2d 92, 95 [3d Dept 1985], *affd* 67 NY2d 562 [1986].

To hold otherwise would be to defeat the clear legislative purpose of the statute. In light of its not insignificant role in the police disciplinary process, the fact that CCRB is a

separate agency from NYPD is of no moment, and its records are subject to the constraints of Civil Rights Law § 50-a (*see Prisoners' Legal Servs.*, 73 NY2d at 32; *Telesford v Patterson*, 27 AD3d 328 [1st Dept 2006]).

Respondents' prior disclosure of records concerning other officers cannot act as an estoppel against objections to releasing the records requested herein (*see Matter of New York Civ. Liberties Union v New York City Police Dept.*, __ AD3d __ [1st Dept 2017], decided herewith, citing *Matter of City of New York v City Civ. Serv. Commn.*, 60 NY2d 436, 449 [1983]; *Matter of Mazzone v New York State Dept. of Transp.*, 95 AD3d 1423, 1424-1425 [3d Dept 2012]). Nor does the fact that the NYPD has released, in other matters on prior occasions, results of disciplinary actions act as a waiver. As stated in the context of other statutory exemptions: "[N]othing in the Freedom of Information Law . . . restricts the right of the agency if it so chooses to grant access to records within any of the statutory exceptions, with or without deletion of identifying details" (*Matter of Short v Board of Mgrs. of Nassau County Med. Ctr.*, 57 NY2d 399, 404 [1982]; *see also Matter of New York Civ. Liberties Union v New York City Police Dept.*, __ AD3d __ [1st Dept 2017]).

Respondents contend that the production of the requested summary has a sufficient potential for abusive use against

Officer Pantaleo, and that is an additional reason to support CCRB's decision to withhold disclosure.

Where a document qualifies as a "personnel record," "nondisclosure will be limited to the extent reasonably necessary to effectuate the purposes of [Civil Rights Law] § 50-a - to prevent the potential use of information in the records in litigation to degrade, embarrass, harass or impeach the integrity of the officer" (*Daily Gazette*, 93 NY2d at 157-158). Additionally, Civil Rights Law § 50-a also protects documents outside of litigation, in order to prevent "harassment or reprisals against an officer or his/her family" (*id.* at 156 [citation and quotation marks omitted]). The Court of Appeals has emphasized that "[d]ocuments pertaining to misconduct or rules violations . . . - which could well be used in various ways against the officers - are the very sort of record which, the legislative history reveals, was intended to be kept confidential" (*Prisoners' Legal Servs.*, 73 NY2d at 31).

Thus, an "agency or other party opposing disclosure of officers' personnel records carries the burden of demonstrating that the requested material falls squarely within the exemption" by demonstrating "a substantial and realistic potential of the requested material for the abusive use against the officer" (*Daily Gazette*, 93 NY2d at 158-159).

Petitioner argues that there can be no potential for abusive use of these documents, since there has been no showing of any causal connection between leaks of CCRB documents that have already occurred and the death threat against Officer Pantaleo. This argument misses the mark.

While there may be no intent to embarrass or humiliate the officer in question by any of the parties or amici herein, there can be no question that once this information is released, it "will be fully available for all of the forms and practices of abusive exploitation that Civil Rights Law § 50-a was designed to suppress" (*Matter of Daily Gazette*, 93NY 2d at 158; *see Prisoners Legal Servs.*, 73 NY2d at 31).

Where "a substantial and realistic potential" of endangerment or harassment to either public servants or potential witnesses resulting from disclosure has been shown, the appellate courts of this state have consistently denied disclosure under both Civil Rights Law 50-a and Public Officers Law 87(2)(a).

"Public Officers Law § 87(2)(f) permits an agency to deny access to records, that, if disclosed, would endanger the life or safety of any person. The agency in question need only demonstrate 'a possibility of endanger[ment]' in order to invoke this exemption" (*Matter of Bellamy v New York City Police Dept.*, 87 AD3d 874, 875 [1st Dept 2011], quoting *Matter of Connolly v*

New York Guard, 175 AD2d 372, 373 [3d Dept 1991], *affd* 20 NY3d 1028 [2013]; *see Matter of Ruberti v New York Div. of State Police*, 218 AD2d 494, 499 [3d Dept 1996], *supra*). The respondent need not demonstrate the existence of a specific threat or intimidation, but rather a showing must be made of a "possibility of endanger[ment]" to invoke this exemption (*Matter of Exoneration Initiative v New York City Police Dept.*, 114 AD3d 436, 438 [1st Dept 2014] [internal quotation marks omitted]; *see Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 277-278 [1996], *supra*).

Here, in light of the widespread notoriety of Mr. Garner's death and Officer Pantaleo's role therein, and the fact that hostility and threats against Officer Pantaleo have been significant enough to cause NYPD's Threat Assessment Unit to order around-the-clock police protection for him and his family, and notwithstanding the uncertainty of further harassment, we find that the gravity of the threats to Officer Pantaleo's safety nonetheless demonstrate that disclosure carries a "substantial and realistic potential" for harm, particularly in the form of "harassment and reprisals," and that nondisclosure of the requested records under Civil Rights Law § 50-a is warranted (*see Daily Gazette*, 93 NY2d at 157, 159).

The points raised in the various amici briefs can be

summarized, in the main, as raising various public policy concerns. However, with all due respect to the seriousness of those concerns, we take no position on whether the statute should be amended to address those concerns. We are bound to apply the law as it exists, and as interpreted by controlling Court of Appeals precedents (*Matter of New York Civil Liberties Union v New York City Police Dept.*, __ AD3d __ [1st Dept 2017]). Such policy and public interest arguments have been found to be inconsistent with the legislative history of Civil Rights Law § 50-a (*see Daily Gazette*, 93 NY2d at 154-155). Petitioner's remedies, under our tripartite system of government, rest with the Legislature as the policy making branch of government, not the courts, which are tasked with interpretation of the laws.

We have considered petitioner's remaining arguments and those of the amici curiae and find them unavailing.

Accordingly, the order and judgment (one paper), of the Supreme Court, New York County (Alice Schlesinger, J.), entered July 27, 2015, directing respondent to produce to petitioner, pursuant to the Freedom of Information Law (FOIL), a summary of CCRB's records indicating (a) the number of substantiated complaints brought against intervenor before the July 17, 2014 death of Eric Garner and (b) any CCRB recommendations made to the Police Department based on such complaints, should be reversed,

on the law, without costs, the judgment vacated, the petition denied, and the proceeding brought pursuant to CPLR article 78 dismissed.

All concur.

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

ENTERED: MARCH 30, 2017

CLERK