SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 18, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Sweeny, J.P., Renwick, Mazzarelli, Manzanet-Daniels, JJ.

3409 Celeste Sapp, Index 155189/14
Plaintiff-Respondent,

-against-

S.J.C. 308 Lenox Avenue Family Limited Partnership,
Defendant-Appellant.

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Milber Makris Plousadis & Seiden, LLP, Woodbury (Samantha B. Lansky of counsel), for appellant.

Silbowitz, Garafola, Silbowitz, Schatz & Frederick, LLP, New York (Lora H. Gleicher of counsel), for respondent.

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Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered on or about August 19, 2016, which, in this action for personal injuries sustained in a slip and fall, denied defendant's motion for summary judgment dismissing the complaint without prejudice to renewal upon completion of discovery, and granted plaintiff's cross motion to compel discovery, unanimously reversed, on the law, without costs, the motion for summary judgment granted, and the cross motion denied as academic. The

Clerk is directed to enter judgment dismissing the complaint.

Defendant leased the entire third and fourth floors of the building it owned to plaintiff's employer, Bill Lynch Associates (BLA). The leased premises were only accessible via a door located at street level that opened onto a staircase that went directly to, and only to, the leased premises. Pursuant to the lease between defendant and BLA, BLA was responsible for maintenance of "the demised premises or any other part of the building and the systems and equipment thereof, whether requiring structural or nonstructural repairs caused by or resulting from carelessness, omissions, neglect or improper conduct of [BLA], [BLA]'s subtenants, agents, employees, invitees or licensees, or which arise out of any work, labor, service or equipment done for or supplied to [BLA] or any subtenant arising out of the installation, use or operation of the property or equipment of [BLA] or any subtenant." The rider to the lease provided that BLA "shall provide cleaning and maintenance of" the premises.

On June 15, 2012, plaintiff slipped and fell on the staircase, due to an allegedly wet condition, and commenced this action. After the parties engaged in some discovery, but before they conducted depositions, defendant moved for summary judgment. The motion was based primarily on the affidavit of its general

partner, Solomon Cromwell. Cromwell referenced the lease provisions cited above, and averred that defendant never cleaned, or hired someone else to clean, the subject premises, including the stairwell where plaintiff slipped. In fact, Cromwell asserted, BLA controlled access to the door and the staircase; neither the other tenant in the building nor defendant itself had a key to the door that led to the staircase. Thus, even if defendant had wanted to clean the staircase, it could not have. Cromwell further denied that defendant created or had notice of the wet condition responsible for the accident.

Plaintiff opposed the motion, arguing in an attorney's affirmation that it was premature, since discovery had not been completed and there were still facts within the exclusive knowledge of defendant that it was entitled to uncover. Her cross motion sought to compel such disclosure. Specifically, plaintiff asserted that she was not afforded an opportunity to depose Cromwell and ask him whether defendant hired anyone to clean and maintain the stairwell on a daily or weekly basis or had an employee who did so, that she had no chance to obtain documents regarding whether there was a leak in the stairwell, and that she was deprived of any logbooks regarding cleaning the stairwell so that she could determine whether defendant had

actual or constructive notice of any slippery condition. Plaintiff further contended that defendant failed to satisfy its prima facie burden. This was because defendant failed to submit an affidavit from BLA stating that BLA was the only entity that had access to the stairwell or any responsibility to maintain it, and otherwise failed to establish that the stairwell was not part of the building's common areas for which only defendant was responsible.

The court denied defendant's motion for summary judgment, without prejudice to renewal upon completion of discovery, and granted plaintiff's cross motion to compel discovery to the extent of directing defendant to comply with the court's most recent discovery order. The court found that there were triable issues, among other things, as to the nature and source of the substance on the stairwell, defendant's notice of the alleged defective condition, and defendant's contractual obligation to clean and maintain the stairwell. The court noted that, although paragraph 4 of the lease and paragraph 46 of the lease rider provided that the tenant was responsible for maintaining the premises, the lease also provided that the owner shall maintain the public portions of the building interior and that the tenant was required to give the owner prompt notice of any defective

condition on the premises for which the owner may be responsible, which, according to the court, was language "indicating that the owner had some responsibility for the stairwell." The court further pointed to the absence in Cromwell's affidavit of any mention of a property manager or anyone else connected with defendant who may have been present in the building more than once per month, if not on a daily basis, and the lack of any allegations as to the other tenant's access and responsibilities for maintaining the stairwell.

Defendant argues on appeal that it cannot be held liable for plaintiff's accident because the record is clear, without the need for further discovery, that it was an out-of-possession landlord. An out-of-possession landlord "is generally not liable for negligence with respect to the condition of property . . . unless [it] is either contractually obligated to make repairs and/or maintain the premises or has a contractual right to reenter, inspect and make needed repairs at the tenant's expense and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision" (*Johnson v Urena Serv. Ctr.*, 227 AD2d 325, 326 [1st Dept 1996], *lv denied* 88 NY2d 814 [1996]). The first question, then, is whether, specifically with respect to the staircase where

plaintiff slipped, there was a "transfer of possession and control" from defendant to BLA (*id.*). As Cromwell stated in his affidavit, the staircase was exclusively for access to the third and fourth stories that BLA leased; it did not go to the other parts of the building that were leased to another tenant. Moreover, only BLA and its invitees had the ability to access the door through a key or a buzzer system, and defendant did not have a key that would it permit it to access the stairwell. This was sufficient for defendant to shift the burden to plaintiff to raise an issue of fact.

Plaintiff failed to offer any evidence to rebut defendant's position that it did not possess and control the staircase for liability purposes. Instead, she complained that defendant did not secure an affidavit from BLA buttressing that claim. However, defendant does not control BLA; indeed, as its employee, plaintiff had an equal opportunity to request an affidavit from BLA. Plaintiff ignores that CPLR 3212(f), on which she relies, permits denial of a summary judgment motion as premature if the nonmovant can establish that "facts essential to justify opposition may exist but cannot then be stated." Plaintiff has not offered any reason why she could not have submitted an affidavit from BLA at the time her opposition to defendant's

motion was due.

Defendant also satisfied its prima facie burden of demonstrating that neither of the exceptions to the out-of-possession landlord doctrine apply. First, the lease provisions cited by Cromwell clearly establish that defendant did not have a contractual obligation to maintain the demised premises. Plaintiff argues on appeal that the lease attached to Cromwell's affidavit expired before plaintiff's accident, and so defendant cannot rely on those provisions, but she did not raise that issue below and so is precluded from doing so now (*see Lopez v Gramuglia*, 133 AD3d 424, 424 [1st Dept 2015]). In any event, Cromwell's reference in his affidavit to "[a] true copy of the lease between [defendant] and BLA in effect on June 15, 2012" (the day of the accident) suggests that BLA renewed the lease pursuant to the option contained in the copy attached to Cromwell's affidavit, with the same terms and conditions. Indeed, the fact that plaintiff was working for BLA at the building on the day of the accident suggests that the lease was renewed. Under those circumstances, the burden was on plaintiff to secure an affidavit from BLA raising a question as to the status of the lease on the day of the accident, or at least to explain why she could not.

Second, whether or not defendant had a right to reenter the leased premises, the accident was not caused by a structural or design defect that violated a specific statutory safety provision (*Johnson*, 227 AD2d at 326). Plaintiff alleged that defendant violated Administrative Code of the City of New York sections 27-127 and 27-128, which she acknowledges were repealed but states were recodified in substantially similar form as Administrative Code section 28-301.1. However, those provisions, which set forth a general duty of maintenance and repair, are insufficiently specific to impose liability on an out-of-possession landlord (*see Dixon v Nur-Hom Realty Corp.*, 254 AD2d 66, 67 [1st Dept 1998]).

Because defendant established that it was an out-of-possession landlord with respect to the staircase, any discovery into whether and how often it or its employees and representatives visited the premises, or whether there was a leak condition on the staircase that landlord had notice of, would be

irrelevant. Accordingly, since plaintiff failed to raise an issue of fact as to who was responsible for maintaining the staircase, the complaint should have been dismissed.

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

ENTERED: MAY 18, 2017

CLERK

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

3662 The People of the State of New York, Ind. 359/14
Respondent,

-against-

Joel Farez,
Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (David Crow of counsel), and Davis Polk & Wardwell LLP, New York (Peter John Davis counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Emily Anne Aldridge of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Eugene Oliver, Jr. J.), rendered February 6, 2015, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the fifth degree, and sentencing him, as a second felony drug offender, to a term of 3 years, reversed, on the law, and the matter remanded for a new trial.

Supreme Court improperly limited both defense counsel's discovery of *Rosario* material and his ability to cross-examine the police witnesses at trial. The *Rosario* material in question consisted of police documentation of the arrest of a third party. Supreme Court denied defendant's discovery request, rejecting his trial counsel's argument that defendant and the third party, both

Hispanic males, had been contemporaneously arrested and separately charged with selling drugs to the same undercover officer at approximately the same time and location. In the absence of Supreme Court's discovery limitations, defense counsel might have reasonably established a motive to fabricate the evidence due to police confusion between defendant and the third party (*see People v Hudy*, 73 NY2d 40, 56 [1988] ["extrinsic proof tending to establish a reason to fabricate is never collateral and may not be excluded on that ground"], *overruled in part on unrelated grounds by Carmell v Texas*, 529 US 513 [2000]). Furthermore, as we have stated, where there is evidence raising the possibility of a "police motive to fabricate," cross-examination of police witnesses is "highly relevant" (*People v Rios*, 223 AD2d 390, 392 [1st Dept 1996], *appeal withdrawn* 87 NY2d 1024 [1996]). Thus, Supreme Court's errors deprived defendant of his right to present a defense (*see Hudy*, 73 NY2d at 56; *Rios*, 223 AD2d at 392). As there was "a reasonable possibility that the non-disclosure materially contributed to the result of the trial" (CPL 240.75), Supreme Court's errors were not "harmless beyond a reasonable doubt" (*People v Crimmins*, 36 NY2d 230, 237 [1975]).

Were we not reversing on the basis of error regarding the

Rosario material and the related cross-examination, we would reverse on another ground – namely, Supreme Court's communication with the jury off the record and outside the presence of defendant and his counsel. After the jurors had been deliberating for four days, they sent a note to the court stating they were deadlocked on the third count of the indictment and asking for guidance. The court discharged the jury for the day in contemplation of taking further actions, possibly including the delivery of an *Allen* charge, in the morning. The next morning, in defendant's and his counsel's absence, the court instructed the jury, off the record, to resume deliberations. The same afternoon, the court informed defendant and his counsel of this instruction, and counsel did not object.

"[T]he presence of the defendant and his counsel is constitutionally required whenever supplemental instructions are given, and failure to notify them is a fundamental error" (*People v Ciaccio*, 47 NY2d 431, 436-437 [1979]). Moreover, "CPL 310.30 makes a defendant's right to be present during instructions to the jury absolute and unequivocal" (*People v Mehmedi*, 69 NY2d 759, 760 [1987]). Here, the absence of defendant and his counsel during the court's undisputedly substantive instruction to resume deliberating notwithstanding the reported deadlock was a mode of

proceedings error, requiring reversal despite the lack of any objection (*id.* at 760; *see also People v Bonilla*, 186 AD2d 748, 748 [2d Dept 1992]). Additionally, harmless error analysis is inapplicable (*see Mehmedi*, 69 NY2d at 760).

All concur except Andrias and Kahn, JJ. who concur in a separate memorandum by Andrias, J. as follows:

ANDRIAS, J. (concurring)

I agree with the majority that the judgment convicting defendant of criminal possession of a controlled substance in the fifth degree should be reversed, and the matter remanded for a new trial, on the grounds that the trial court improperly limited both defense counsel's discovery of *Rosario* material and his ability to cross-examine the police witnesses at trial. However, I write separately because, under the particular circumstances of this case, I disagree with the majority's alternative holding that the court committed a mode of proceedings error, requiring reversal without preservation, when, upon the jurors' return to the courthouse on the morning of November 18, 2014, it communicated to them, off the record and outside the presence of defendant and counsel, that they should continue deliberations.

Contrary to the majority's view, there was no mode of proceedings error because the record establishes that when the court received the jury's deadlock note on the previous afternoon, it complied with its core responsibilities under CPL 310.30 by (i) reading the note to defendant and counsel verbatim, (ii) affording counsel an opportunity to participate in formulating a response, (iii) advising defendant and counsel that the jury would have one more day to deliberate, possibly with

another *Allen* charge, and (iv) instructing the jurors to cease deliberations until they reassembled the next day. Preservation is required under these circumstances, where counsel and defendant were apprised of the procedure the court intended to employ and, upon defendant's production the next morning, were immediately informed that the court had given a brief directive to the jury to resume deliberations. However, not only did defense counsel fail to raise an objection, he in fact agreed with the procedure employed by the court. Moreover, even if there was a mode of proceedings error, it was cured when, later in the day, the court, afer consulting with the parties, subsequently gave the *Allen* charge in defendant's presence, after which the jury reached its verdict.

Defendant allegedly sold 10 strips of Suboxone to an undercover police officer. His defense was that the police confused him with another man, who was arrested five minutes later for selling the same amount of Suboxone to the same undercover at the same location, and then lied about defendant to cover up their mistake.

On November 12, 2014, the jury began deliberating. On November 13, an *Allen* charge was given after the jury indicated varying degrees of deadlock. On November 17, the court took a

partial verdict acquitting defendant of criminal sale of a controlled substance in the fourth and fifth degrees. Later that day, the court received another note stating: "We, the [j]ury, cannot come to an agreement on Charge 3 [the criminal possession count], 10 to 2." The court read the note on the record, in the presence of defendant and his counsel, and stated:

> "It sounds to me like a deadlock. After concensus [sic] off the record between the parties, I'll probably end the day and have them come back Tuesday -- tomorrow.
>
> "In the interim, if you all work out an agreement or whatever, then I would probably give them another Allen charge. But not keep them beyond tomorrow. Is that all right?"

Defense counsel replied: "The first part sounds fine. Keeping them beyond tomorrow, if we have to make a record." The court responded that "[t]hey certainly had enough time to deliberate on this, all right. And if it looks like we'll go there. Anything else? Everybody agree?" Defense counsel answered, "Nothing from this side," and the People answered, "Yes." The jury then returned to the courtroom, at which time the court instructed them, in the presence of defendant:

> "All right this is what I'm going to do . . . you guys look very tired . . . . We are going to quit for the day. I'm going to have you come back tomorrow . . . . I'll tell you what I'm going to do tomorrow and we'll proceed from there. But get a goodnight's sleep. You

> guys are pooped right now. I can understand why. So let's come back with some fresh minds and a fresh focus tomorrow.
>
> "So deliberations must be conducted only in . . . the jury room . . . when all jurors are present. Therefore all deliberations must now cease. They must not be resumed until all 12 of you have returned and are together again [in] the jury room . . . .
>
> "Let's hope we can do this tomorrow and we'll hope you come to some conclusion. So have a goodnight's sleep. Let's go with ten o'clock again so we can start fresh and a new day. . . ."

On the next morning, November 18, the jury returned at approximately 10:00 a.m., as instructed. Defendant was not produced until shortly before noon, at which time the court advised counsel, in defendant's presence:

> "All right, good morning. Almost--oh, actually good afternoon. Well, boy, all right, we had a long time getting [defendant] here. No absence on his part. But it is now after the noon. I told the jurors to continue deliberations so they wouldn't just be sitting back there, however, the [November 17] note did indicate [that the jury] cannot come to an agreement on charge 3, 10 to 2. So we can do it one or two ways. I can give them another Allen charge if that's what you wish or let them continue deliberating and wait for another note. Or if I do that I will do it just before lunchtime."

Defense counsel replied that he did not think another Allen charge would do much good. The court responded: "Okay. So then I'11 let them continue deliberating. We'll wait for the note and the note comes fine." After a discussion off the record, the

court stated, "I will give the Allen at about 12:30." Again, defense counsel did not object.

At or about 12:30 p.m., in the presence of defendant and counsel, the court referenced the jury's last note of November 17, and reread its *Allen* charge. At 3:24 p.m., the jury sent a note to the court stating that it had reached a verdict. Defendant moved to set aside the verdict pursuant to CPL 330.30(1) and (2). In support of defendant's claim that the court "violated the mode of proceedings, and denied [his] rights to be present at all material stages of his trial," his counsel stated:

> "At no time, on or off the record, was counsel apprised of the decision to instruct the jury to continue to deliberate [on the morning of November 18], despite the deadlock note of the previous afternoon and the Court's statement at that time that 'I'll tell you what I'm going to do tomorrow morning and we'll proceed from there.' Defense counsel was in the courtroom all morning waiting for [defendant] to be produced. The jury was not brought out and told to continue deliberating on the record. [Defendant] was not even in the building. The defense contends that the jury was instructed to keep deliberating by a court officer at the direction of the Court itself, with no notice given to either party."

The court denied the motion, holding that it had abided by CPL 310.30 and had not relinquished its authority. In so ruling,

the court found that the jurors had conducted themselves in accordance with the instructions provided to them at the end of the afternoon of November 17, including that they cease deliberations for the day and not begin again until they were all together again on November 18, at which time available options would be considered. Furthermore, the parties, having been read the jury's note and given an opportunity to provide their input, had agreed to this procedure, and when the jurors reassembled on the 18th "they were escorted by a designated officer to their deliberation room."

When the court receives a substantive note from the jury, CPL 310.30 requires it to (i) provide counsel with "meaningful notice" of the contents of the note so that counsel may help frame the court's response, and (ii) provide a "meaningful response" to the jury (*People v Kisoon*, 8 NY3d 129, 134 [2007]; *see People v O'Rama*, 78 NY2d 270, 276-277 [1991]).

"[N]ot every departure from the *O'Rama* procedure, even in the context of a substantive jury inquiry, is a mode of proceedings error" (*People v Nealon*, 26 NY3d 152, 161 [2015]). In *People v Mack* (27 NY3d 534, 537 [2016]), the Court of Appeals held "that where counsel has meaningful notice of the content of a jury note and of the trial court's response, or lack thereof,

to that note, the court's alleged violation of the meaningful response requirement does not constitute a mode of proceedings error, and counsel is required to preserve any claim of error for appellate review." The Court explained that mode of proceeding error designations are "reserved for the most fundamental flaws . . . [that] go to the essential validity of the process and [are] so fundamental that the entire trial is irreparably tainted" (*id.* at 541 [internal quotation marks omitted]), and that it had "generally refused to classify alleged errors as mode of proceedings errors in the jury note context when the record demonstrates that counsel had all the knowledge required to object, and a timely objection would have allowed the court to easily cure the claimed error" (*id.* at 542 [internal quotation marks and alteration omitted]).

The record establishes that counsel was provided with meaningful notice of the jury's November 17 deadlock note (*see O'Rama*, 78 NY2d at 277-278). The court read the note into the record verbatim in the presence of defendant and counsel, and afforded counsel an opportunity to provide input as to an appropriate response. Defendant and his counsel were aware of what the court's response would be based upon the court's statement that it would end deliberations for the day, and

probably give them another *Allen* charge tomorrow "if [they] all work out an agreement or whatever," but that it would not keep the jury past that day. Accordingly, as counsel received meaningful notice, there was no mode of proceedings error and preservation was required (see *People v Navarro,* 143 AD3d 522, 523 [1st Dept 2016] ["since it is undisputed that counsel had full notice of the jury note in question, there was no mode of proceedings error"]).

In finding a mode of proceedings error, the majority cites *People v Ciaccio* (47 NY2d 431, 436-437 [1979]), where the Court of Appeals stated that "the presence of the defendant and his counsel is constitutionally required whenever supplemental instructions are given, and failure to notify them is fundamental error."

In *Ciaccio*, during deliberations, the court clerk made an unauthorized statement to the jurors, represented as a message from the Judge, which neither defendant nor his counsel knew of at the time (47 NY2d at 435-436). The Court of Appeals held that the ex parte communications by the clerk and the failure to notify the defendant or his counsel of such communication was a fundamental error, violating defendant's absolute right to be present with his counsel whenever his presence has a reasonably

substantial relation to the fullness of his opportunity to defend against a criminal charge, which right is protected by the New York and United States Constitutions and by statute (*id.* at 436-437).

In contrast, here, on November 17, after reading the jury note on the record and discussing it with counsel, the court instructed the jury to quit for the day and to come back tomorrow and "we'll proceed from there." The court further instructed that deliberations must not resume until all 12 members returned to the jury room, and that the jurors should return at "ten o'clock again so we can start fresh and a new day." Implicit in these instructions, given in the presence of defendant and counsel, was the court's intention that the jurors would resume deliberations when they reassembled the next morning.[1] Consequently, at most, the trial court committed a de minimis violation of defendant's right to be present rather than a mode of proceedings error, when, in conformity with its prior instructions, which were given in the presence of counsel and defendant, it told the jury to continue deliberations when they

[1]Indeed, the notes of the court clerk for November 17 state "Jurors to Continue Deliberations @10am on 11/18 on Final Counts."

reassembled the next morning on November 18 (*see People v Roman*, 88 NY2d 18, 26 [1996]; *People v Morales*, 80 NY2d 450, 457 n 2 [1992]).

The majority also cites *People v Mehmedi* (69 NY2d 759, 760 [1987]), where the Court of Appeals stated that "CPL 330.30 makes a defendant's right to be present during instructions to the jury absolute and unequivocal." In *Mehmedi*, the court consulted with counsel in framing its answer to a jury note, but proceeded to instruct the jury by sending in a written note, in the absence of defendant (*id.*). Here, given the instructions the jury received at the end of the previous day's proceedings, the court did not formulate its sole response to the jury's note in defendant's absence. Moreover, the court disclosed to defendant and counsel that it had instructed the jury "to continue deliberations so they wouldn't just be sitting back there" while the Department of Correction was attempting to produce defendant. This gave defense counsel the opportunity to propose a different course of action and suggest curative measures. However, rather than raising an objection, counsel stated that the jury should continue deliberations, as the court had instructed. "[C]ounsel's silence at a time when any error by the court could have been obviated by timely objection renders the claim

unpreserved and unreviewable here" (*People v Starling*, 85 NY2d 509, 516 [1995]).

Furthermore, the court remedied the purported error when it waited until defendant was present before giving an *Allen* charge (*see People v Kadarko*, 14 NY3d 426, 429-430 [2010] ["Although the [trial] court's decision not to read the entire note until after the jury had resumed deliberations may have been error, it was not a mode of proceedings error and the court later corrected itself without objection"]). The fact that the jury did not reach its verdict until several hours after the final *Allen* charge further evidences that it was not improperly swayed by the court's earlier noncoercive instruction to continue deliberations, and that any purported error was cured.

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

ENTERED: MAY 18, 2017

CLERK

Tom, J.P., Mazzarelli, Andrias, Manzanet-Daniels, Webber, JJ.

3839 Tanya Gonzalez, Index 302570/10
Plaintiff-Appellant, 84027/11

-against-

Riverbay Corporation, et al.,
Defendants-Respondents,

William Thomas,
Defendant.
- - - - -
[And a Third Party Action]

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

Smith Mazure Director Wilkins Young & Yagerman P.C., New York (Marcia K. Raicus of counsel), for respondents.

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about October 5, 2015, which, to the extent appealed from, granted defendants Riverbay Corporation and Marion Scott Real Estate, Inc.'s motion for summary judgment dismissing the complaint as against them, unanimously reversed, on the law, without costs, and the motion denied.

On August 10, 2009, plaintiff was sexually assaulted in the laundry room of her apartment building in Co-op City by an individual who was not a resident of the complex but had entered the building by "piggy backing" on a tenant who entered after

unlocking the front door with a key. The evidence showed that the perpetrator had entered other buildings unimpeded in the complex by similarly "piggy backing" off of other tenants and engaged in inappropriate behavior towards women in the laundry rooms, including assaulting and following them, on at least several separate occasions known to defendants since 2006. Such evidence presents an issue of fact whether the assault on plaintiff was reasonably foreseeable (*see Jacqueline S. v City of New York*, 81 NY2d 288, 294-295 [1993]).

Given the existence of an issue of fact as to foreseeability, an issue of fact also exists whether defendants discharged their common-law duty to take minimal precautions to protect the tenants from the foreseeable harm (*see id.*; *Miller v State of New York*, 62 NY2d 506, 513 [1984]; *Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 519-520 [1980]). In particular, in view of the previous incidents, issues of fact exist whether the security measures in place adequately protected female tenants from the risks posed and whether reasonable measures should have included, among others, warnings to tenants about the perpetrator, advising security staff of the perpetrator's prior arrest in the complex, providing security staff and tenants with the perpetrator's photograph, real-time

monitoring of surveillance videos, or increasing the presence of lobby attendants, who were absent on the day of the assault. In other words, under the unique circumstances of this case, an issue is raised as to whether defendants, who had notice of this repeat intruder, took minimal security steps with respect to preventing his ability to easily access the interior of their buildings and attempt to sexually assault female tenants (*see Nallan*, 50 NY2d at 520 n 8; *Garrett v Twin Parks Northeast Site 2 Houses*, 256 AD2d 224, 226 [1st Dept 1998] [Rubin, J., concurring]).

Finally, an issue of fact exists whether any negligence on defendants' part was a proximate cause of the assault (*see Burgos v Aqueduct Realty Corp.*, 92 NY2d 544 [1998]). The record shows that the perpetrator was able to gain entry into plaintiff's building not as a guest but as an intruder; given defendants' awareness of the practice of "piggy backing" in general and "piggy backing" by this perpetrator specifically, the tenant's act of permitting the perpetrator to enter the building by "piggy backing" does not, as a matter of law, amount to a superseding intervening act that breaks the chain of causation between any deficient security and the assault on plaintiff (*see Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980]).

We reject defendants' argument that no amount of security could have deterred the mentally ill perpetrator from his irrational and determined acts. In contrast to the perpetrators in the cases defendants cite, the perpetrator in this case did not intentionally target specific victims, but committed the acts randomly, based on opportunity (*cf. Flynn v Esplanade Gardens, Inc.*, 76 AD3d 490 [1st Dept 2010]; *Cynthia B. v 3156 Hull Ave. Equities, Inc.*, 38 AD3d 360 [1st Dept 2007]; *Flores v Dearborne Mgt., Inc.*, 24 AD3d 101 [1st Dept 2005]). We also note that the perpetrator's most recent intrusions into the subject buildings, including the day of the assault, were on Mondays and Tuesdays - days when lobby attendants were regularly not on duty.

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

ENTERED: MAY 18, 2017

CLERK

Sweeny, J.P., Gische, Kahn, Gesmer, JJ.

3903-
3904 Index 21532/12E

Magaly Rojas,
Plaintiff-Respondent,

-against-

New York Elevator & Electric
Corporation, et al.,
Defendants-Respondents-Appellants,

45 West Hotel Limited Partnership,
Defendant-Appellant-Respondent,

Rockrose Development Corporation,
Defendant.

- - - - -

[And a Third Party Action]

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Mauro Lilling Naparty LLP, Woodbury (Anthony DeStefano of counsel), for appellant-respondent.

Babchik & Young, LLP, White Plains (Matthew J. Rosen of counsel), for respondents-appellants.

Diamond and Diamond, LLC, Brooklyn (Stuart Diamond of counsel), for respondent.

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Order, Supreme Court, Bronx County (Donna M. Mills, J.), entered October 6, 2016, which denied defendants New York Elevator & Electric Corporation and ThyssenKrupp Elevator Corporation's motion for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Order, same court and Justice, entered November 2, 2016, which

denied defendant 45 West Hotel Limited Partnership's motion for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Plaintiff is employed by nonparty 35 Street Hotel Corp. d/b/a Hotel Metro, which occupies premises pursuant to a lease with defendant 45 West Hotel Limited Partnership (45 West). Plaintiff alleges that she was injured when she attempted to remove a cart from the hotel's service elevator after it misleveled.

Defendant 45 West failed to make a prima facie showing that it is an out-of-possession landlord with no obligation to make repairs, because the lease that it produced is illegible. In addition, the record shows that 45 West executed a repair contract with defendant New York Elevator & Electric Corporation, predecessor to defendant ThyssenKrupp Elevator Corporation. Accordingly, the motion court properly denied its motion for summary judgment.

The misleveling of an elevator does not ordinarily occur in the absence of negligence, and the misleveling of the elevator in this case was caused by an instrumentality or agency within the defendants' exclusive control and was not due to any voluntary action on plaintiff's part. Accordingly, the evidence is

sufficient to warrant submission of the case against the defendants to a jury on a theory of res ipsa loquitur (*see Ezzard v One E. Riv. Place Realty Co., LLC*, 129 AD3d 159, 163 [1st Dept 2015] ["Notice of a defect is inferred when the doctrine applies and the plaintiff need not offer evidence of actual or constructive notice in order to proceed"]; *see also Ardolaj v Two Broadway Land Co.*, 276 AD2d 264 [1st Dept 2000]; *Felder v Host Marriott Corp.*, 276 AD2d 276 [1st Dept 2000]; *Dickman v Stewart Tenants Corp.*, 221 AD2d 158 [1st Dept 1995]; *Burgess v Otis El. Co.*, 114 AD2d 784, 785-787 [1st Dept 1985], *affd* 69 NY2d 623 [1986]).

Contrary to defendants' contention, plaintiff's attempt to remove her supply cart from the allegedly misleveled elevator was not extraordinary, unforeseeable, or so far removed from the defendants' conduct as to constitute a superseding act as a

matter of law (*see Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980]).

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

ENTERED: MAY 18, 2017

CLERK

Tom, J.P., Mazzarelli, Manzanet-Daniels, Webber, JJ.

4047 The People of the State of New York, Ind. 1819/11
Respondent,

-against-

Jason Diaz,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Juan M. Merchan, J. at suppression hearing; Ronald A. Zweibel, J. at jury trial and sentencing), rendered April 4, 2013, convicting defendant of two counts of criminal possession of a weapon in the second degree, and sentencing him, as a second violent felony offender, to concurrent terms of 15 years, unanimously reversed, on the law, and the matter remanded for a new trial.

The record does not reflect that the court read or showed a jury note to the parties or afforded them an opportunity to provide input before the court responded to the note, and it cannot be presumed that the court complied with CPL 310.30 in a preceding off-the-record conference (*see People v Silva*, 24 NY3d 294, 299-300 [2014]; *People v Walston*, 23 NY3d 986, 990 [2014]).

Although defendant's challenge to the court's handling of the note is concededly unpreserved, the court failed to comply with the core requirements of *People v O'Rama* (78 NY2d 270 [1991]), which constitutes a mode of proceedings error requiring reversal (*see id.* at 279-280; *see also People v Tabb*, 13 NY3d 852 [2009]; *People v Robinson*, 144 AD3d 40 [1st Dept 2016]). Since the note, along with all other jury notes in this case, have been lost, it is impossible to determine whether the court read the note verbatim in court when it gave its supplemental instruction. Moreover, the phrasing of the court's description of the note is consistent with it having been a paraphrase or summary of the note. Therefore, the preservation requirement set forth in *People v Nealon* (26 NY3d 152, 154 [2015]) does not apply.

Since we are remanding for a new trial, we find it unnecessary to consider defendant's remaining arguments, except

that we find that defendant's suppression motion was properly denied (*see e.g. People v Montague*, 175 AD2d 54 [1st Dept 1991]).

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

ENTERED: MAY 18, 2017

CLERK

Tom, J.P., Mazzarelli, Manzanet-Daniels, Webber, JJ.

4049 In re Jolanda K.,
Petitioner-Respondent,

-against-

Damian B.,
Respondent-Appellant.

_____

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

Law Office of Cabelly & Calderon, Jamaica (Lewis S. Calderon of counsel), for respondent.

_____

Order, Family Court, Bronx County (Tracey A. Bing, J.), entered on or about November 5, 2015, which, after a fact-finding determination that respondent committed the family offenses of disorderly conduct, harassment in the second degree, and assault in the third degree, granted petitioner an order of protection, unanimously affirmed, without costs.

The finding that respondent committed the offenses of disorderly conduct, harassment in the second degree, and assault in the third degree is supported by a fair preponderance of the evidence (*see* Family Court Act § 832). Petitioner testified that, while she was nine months pregnant, respondent grabbed her forcefully by the wrist, then grabbed her by the shoulders and shook her, causing her substantial pain, and refused to allow her

to use the bathroom. These acts constitute harassment in the second degree (Penal Law § 240.26[1]; *see Matter of Chigusa Hosono D. v Jason George D.*, 137 AD3d 631 [1st Dept 2016]; *Matter of Tamara A. v Anthony Wayne S.*, 110 AD3d 560, 561 [1st Dept 2013]). These acts also constitute assault in the third degree (Penal Law § 120.00[1]; *see Matter of Martha B. v Julian P.*, 133 AD3d 418 [1st Dept 2015]). Petitioner was concerned for the safety of her unborn child, who was kicking in a way that petitioner had not previously experienced, and she was in so much pain that she went to the emergency room for medical treatment.

Petitioner's testimony as to respondent's behavior at the property managers's office as well as on the street outside the office establishes disorderly conduct (Penal Law § 240.20[1], [3]; *see Matter of William M. v Elba Q.*, 121 AD3d 489 [1st Dept 2014]; *Matter of Rebecca M.T. v Trina J.M.*, 134 AD3d 551 [1st Dept 2015]).

We perceive no basis for disturbing the court's credibility determinations (*see Matter of Melind M. v Joseph P.*, 95 AD3d 553, 555 [1st Dept 2012]).

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

ENTERED: MAY 18, 2017

CLERK

Tom, J.P., Mazzarelli, Manzanet-Daniels, Webber, JJ.

4050 Excelsior 57th Corp., Index 113665/09
Plaintiff-Appellant,

-against-

Excel Associates,
Defendant-Respondent.

_____

Kuzman Eisenberg Corbin & Lever, LLP, White Plains (Fred D. Weinstein of counsel), for appellant.

Michael B. Kramer & Associates, New York (Michael B. Kramer of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Arthur Engoron, J.), entered August 22, 2016, in favor of defendant, and bringing up for review an order, same court and Justice, entered March 2, 2016, which, after a nonjury trial, declared that plaintiff was obligated to pay for structural repairs to a parking garage leased to defendant, unanimously affirmed, with costs.

The trial court properly declined to entertain expert evidence proffered by plaintiff seeking to establish that the routing and filling of cracks in the concrete slabs located in the parking garage constituted non-structural repairs that, under the parties' lease, were defendant's responsibility. This testimony was precluded by the doctrine of law of the case because the motion court, and this Court on a prior appeal (126

AD3d 479 [1st Dept 2015]), had previously found that these repairs constituted structural repairs of the garage, and were therefore plaintiff's responsibility (*People v Evans*, 94 NY2d 499 [2000]; *Martin v City of Cohoes*, 37 NY2d 162, 165 [1975]).

Based on the foregoing, it is unnecessary for us to reach plaintiff's remaining contention.

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

ENTERED: MAY 18, 2017

CLERK

Tom, J.P., Mazzarelli, Manzanet-Daniels, Webber, JJ.

4051 The People of the State of New York, Ind. 1601/14
Respondent,

-against-

Adrian Holliday,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Elizabeth A. Plimpton and David J. Klem of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Charles H. Solomon, J. at suppression hearing; Thomas Farber, J. at plea and sentencing), rendered June 16, 2015, as amended July 7, 2015, convicting defendant of criminal possession of a controlled substance in the third degree, and sentencing him to a term of one year, unanimously affirmed.

Defendant made a valid waiver of his right to appeal, which forecloses his suppression claims. The plea court's oral colloquy with defendant concerning the waiver met or exceeded the minimum standards for such a colloquy (*see People v Bryant*, 28 NY3d 1094 [2016]), and, after consulting with counsel, defendant also signed a written waiver that supplemented the oral waiver.

Regardless of whether defendant made a valid waiver of his right to appeal, his suppression claims are unpreserved and the record does not establish that the motion court "expressly decided" these issues "in re[s]ponse to a protest by a party" (CPL 470.05[2]; *see People v Turriago*, 90 NY2d 77, 83-84 [1997]; *People v Colon*, 46 AD3d 260, 263-264 [1st Dept 2007]). We decline to review them in the interest of justice. As an alternative holding, we find that the hearing record supports the court's findings that the police conduct leading up to defendant's arrest was lawful and that drugs were recovered through a valid inventory of defendant's property, pursuant to police department regulations.

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

ENTERED: MAY 18, 2017

CLERK

Tom, J.P., Mazzarelli, Manzanet-Daniels, Webber, JJ.

4053-
4053A-
4054

651762/12
401074/13
401313/13
401438/13

Getty Properties Corp., et al.,
Plaintiffs-Respondents-Appellants,

-against-

Getty Petroleum Marketing Inc.,
Defendant,

1314 Sedgwick Ave. LLC, et al.,
Defendants-Appellants-Respondents,

1714 New York Ave., LLC, et al.,
Defendants-Respondents.

- - - - -

One Pleasantville Road LLC,
Plaintiff-Appellant,

-against-

Getty Properties Corp.,
Defendant-Respondent.

- - - -

1224 Route 22 LLC, et al.,
Plaintiffs-Appellants,

-against-

Getty Properties, Corp.,
Defendant-Respondent.

- - - - -

857 RT 6 Mahopac LLC, et al.,
Plaintiffs-Appellants,

-against-

Getty Properties Corp.,
Defendant-Respondent.

_____

Corso Law LLC, Rehoboth, MA (Frank C. Corso of the bar of the State of Massachusetts, admitted pro hac vice, of counsel), and White & Wolnerman, PLLC, New York (Randolph White of counsel), for 286 Ashburton Avenue LLC, appellant; One Pleasantville Road LLC, 1224 Route 22 LLC, 310 Bay Shore Road LLC, 1245 Nepperham Ave. LLC, 600 White Plains Road LLC, 49-25 Van Dam Street LLC, 857 Route 6 Mahopac LLC, 67 Quaker Ridge Road LLC, 26-27 College Point Boulevard #2 LLC, 31-05 Queens Blvd. LLC, and 2 Montauk Highway LLC, appellants/appellants-respondents; and 1314 Sedwick Ave. LLC, 262 Hillside Ave. LLC, 751 White Plains Road LLC, 69 BK Street LLC, 894 Route 109, LLC, 185 East Lincoln Avenue LLC, and Robert G. Del Gadio, appellants-respondents.

Rosenberg & Estis, P.C., New York (Howard W. Kingsley of counsel), for Getty Properties Corp., respondent-appellant/respondent and Gettymart Inc., respondent/appellant.

Guararra & Zaitz LLP, New York (Michael J. Guararra of counsel), for 1714 New York Ave., LLC, 292 Railroad Ave., LLC, 286 Ashburton Ave., LLC, and Frank Mascolo, respondents.

_____

Judgment, Supreme Court, New York County (Anil C. Singh, J.), entered July 6, 2016, in Index No. 651762/12, in favor of plaintiffs, unanimously modified, on the law, to award plaintiffs attorneys' fees incurred after March 31, 2015, and otherwise affirmed, with costs against Del Gadio. Appeal from order, same court and Justice, entered January 26, 2016, unanimously dismissed, without costs, as subsumed in the appeal from the judgment. Judgment, Supreme Court, New York County (Anil C. Singh, J.), entered June 1, 2016, dismissing the complaints in Index Nos. 401074/13, 401313/13, and 401438/13, unanimously affirmed.

Defendants-appellants' challenge to the award of double use and occupancy is largely an impermissible attempt to relitigate issues that were resolved by this Court in two prior appeals (*see Getty Props. Corp. v Getty Petroleum Mktg. Inc.*, 115 AD3d 616, 617 [1st Dept 2014], *lv dismissed* 23 NY3d 1006 [2014]; *Getty Props. Corp. v Getty Petroleum Mktg. Inc.*, 106 AD3d 429 [1st Dept 2013]). They do not argue that the referee's findings were not supported by the record (*see Atlantic Aviation Inv. LLC v Varig Logistica, S.A.*, 73 AD3d 467, 468 [1st Dept 2010]). Defendants-appellants' argument as to the award of attorneys' fees is an impermissible challenge to an order from which they failed to perfect their appeal (*see Pier 59 Studios, L.P. v Chelsea Piers, L.P.*, 40 AD3d 363, 366 [1st Dept 2007]).

Contrary to plaintiffs' contention, the court correctly found the individual defendants jointly and severally liable only for those LLCs for which they were guarantors, not for all other defendants (*see Becker v Empire of Am. Fed. Sav. Bank*, 177 AD2d 958, 959 [4th Dept 1991]; *compare Ravo by Ravo v Rogatnick*, 70 NY2d 305 [1987]). However, plaintiffs are correct that they are entitled to recover costs and attorneys' fees incurred after March 31, 2015, such as those incurred in defending the instant appeal.

The actions in Index Nos. 401074/13, 401313/13, and 401438/13 are barred by res judicata (*see O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]). The issue of improvements made to the demised premises arose out of the transactions at issue in the previously decided action and was raised in that action (*see Getty Props. Corp.*, 115 AD3d 616; *Getty Props. Corp.*, 106 AD3d 429). To the extent some plaintiffs declined to interpose counterclaims in the action against them for ejectment, they are barred from asserting them now, since those claims could impair plaintiffs' rights established in the ejectment action (*see Henry Modell & Co. v Minister, Elders & Deacons of Ref. Prot. Dutch Church of City of N.Y.*, 68 NY2d 456, 461 [1986]).

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

ENTERED: MAY 18, 2017

CLERK

Tom, J.P., Mazzarelli, Manzanet-Daniels, Webber, JJ.

4055 Claudine Brown, Index 22560/12E
Plaintiff-Respondent,

-against-

Garda CL Atlantic, Inc.,
Defendant-Appellant,

Garda International, Inc.,
et al.,
Defendants.

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The Law Office of David S. Klausner, PLLC, White Plains (David S. Klausner of counsel), for appellant.

Jaroslawicz & Jaros PLLC, New York (David Tolchin of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Lizbeth Gonzalez, J.), entered on or about May 2, 2016, which, insofar as appealed from as limited by the briefs, denied defendant Garda CL Atlantic, Inc.'s (defendant) motion for summary judgment dismissing plaintiff's negligence claim, unanimously affirmed, without costs.

Plaintiff bank teller seeks damages in connection with personal injuries allegedly sustained when she tripped over boxes of quarters delivered to the bank by defendant.

Defendant is a delivery company and did not own, lease, or control the premises on which the accident occurred. "[A] party

who enters into a contract to render services may be said to have assumed a duty of care - and thus be potentially liable in tort - to third persons" where, as relevant here, it "launches a force or instrument of harm," such as by "negligently creat[ing] or exacerbat[ing] a dangerous condition" (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140-143 [2002]; *see also Gordon v Pitney Bowes Mgt. Servs., Inc.*, 94 AD3d 813, 813-814 [2d Dept 2012]; *Sainval-Brice v All Seasons Indus. Servs., Inc.*, 85 AD3d 1004, 1004 [2d Dept 2011]). Here, summary judgment was properly denied because defendant failed to demonstrate as a matter of law that it did not create a dangerous condition by placing the boxes of coins where plaintiff was likely to trip over them.

Contrary to defendant's assertion, it is not dispositive that the delivery was complete and the boxes transferred to the bank's custody and control at the time of the accident, which occurred only a few minutes later (*see Allen v Turyali Fast Food, Inc.*, 51 AD3d 468, 469 [1st Dept 2008]; *cf. Armstrong v Ogden Allied Facility Mgt. Corp.*, 281 AD2d 317, 318 [1st Dept 2001]).

It is also not clear as a matter of law that the boxes were both "open and obvious" and not "inherently dangerous" (*see Powers v 31 E 31 LLC*, 123 AD3d 421, 422 [1st Dept 2014]). "[T]he question of whether a condition is open and obvious is generally

a jury question" (*Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69, 72 [1st Dept 2004]) and this Court has previously found summary judgment unwarranted under very similar circumstances (*see Furment v Ziad Food Corp.*, 104 AD3d 562, 563 [1st Dept 2013]).

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

ENTERED: MAY 18, 2017

CLERK

Tom, J.P., Mazzarelli, Manzanet-Daniels, Webber, JJ.

4056 The People of the State of New York, Ind. 3897/09
Respondent,

-against-

Luigi Jaquez,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Margaret E. Knight of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Herbert J. Adlerberg, J.H.O. at suppression hearing; Eduardo Padro, J. at plea and sentencing), rendered October 29, 2014, as amended December 2, 2014, convicting defendant of criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of two years, unanimously affirmed.

The court properly denied the motion to suppress drugs recovered from defendant's person. While the record demonstrates that they were discovered as the result of a statement that was suppressed, they were nevertheless admissible pursuant to the doctrine of inevitable discovery. Because defendant would have been subjected to several thorough searches following his arrest,

there was a "very high degree of probability" that "normal police procedures" would inevitably have led to the discovery of the drugs, even without the statement (*People v Turriago*, 90 NY2d 77, 86 [1997]; *see also Silver*, 178 AD2d at 500). In light of this determination, as in *People v Garcia* (132 AD3d 405, 406 [1st Dept 2015], *lv denied* 26 NY3d 1039 [2015]), "we find it unnecessary to reach the issue of whether, given United States Supreme Court authority to the contrary (*see United States v Patane*, 542 US 630 [2004]), physical evidence may be suppressed as fruit of a *Miranda* violation."

Defendant's challenges to the court's basis for terminating his participation in a diversion program and imposing a two-year sentence are unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we reject them on the merits. The record, viewed as a whole, establishes that defendant was aware that under the terms of his plea agreement he was obligated to inform the court of any arrests. Accordingly, defendant violated the agreement when he failed to report a significant drug arrest, notwithstanding that this arrest did not lead to a conviction. Moreover, the court was entitled to consider that it already had given defendant a second chance despite an earlier arrest while he was in the program (*see e.g.*

People v Darcy, 34 AD3d 230 [1st Dept 2006], *lv denied* 8 NY3d 879 [2007]). Defendant's failure to disclose the arrest, combined with his previous failure to comply with the plea conditions, provided ample grounds upon which to terminate defendant's participation in the program and impose a prison sentence, regardless of the validity of other comments made by the court in making its determination.

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

ENTERED: MAY 18, 2017

CLERK

Tom, J.P., Mazzarelli, Manzanet-Daniels, Webber, JJ.

4057 In re Michelle M.,
Petitioner-Respondent,

-against-

David S.,
Respondent-Appellant.

_____

Leslie S. Lowenstein, Woodmere, for appellant.

Akerman LLP, New York (Steven M. Cordero of counsel), for respondent.

_____

Order, Family Court, New York County (Marva A. Burnett, Referee), entered on or about June 22, 2016, which, upon findings of aggravated circumstances and that respondent husband had committed the family offenses of assault in the second degree, harassment in the second degree, menacing in the second degree, and strangulation in the second degree, granted petitioner wife a five-year order of protection against respondent, unanimously affirmed, without costs.

Petitioner proved by a fair preponderance of the evidence that respondent had committed the aforementioned family offenses against her (*see* Family Ct Act § 832; *Matter of Everett C. v Oneida P.*, 61 AD3d 489 [1st Dept 2009]). Petitioner's testimony is supported by an audio recording of one incident, and Family

Court's determination, including its credibility findings, is entitled to "great deference" (*Matter of Everett C.*, 61 AD3d at 489).

Respondent improperly argues for the first time on appeal that Family Court never considered the medication he was taking at the time of his testimony, and there is no evidence to support his argument.

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

ENTERED: MAY 18, 2017

CLERK

Tom, J.P., Mazzarelli, Manzanet-Daniels, Webber, JJ.

4058 Laura Barone, etc., Index 110404/10
Plaintiff-Appellant,

-against-

Elizabeth Firehouse, LLC, et al.,
Defendants-Respondents.

_____

Barasch McGarry Salzman & Penson, New York (Dominique Penson of counsel), for appellant.

Harfenist Kraut & Perlstein, LLP, Lake Success (Steven J. Harfenist of counsel), for Elizabeth Firehouse, LLC, Elizabeth Street Gallery Inc., and Elizabeth Street Gallery, LLC, respondents.

Chesney & Nicholas, LLP, Syosset (John F. Janowski of counsel), for Major Elevator Corp., respondent.

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Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered April 19, 2016, which granted defendants' motions for summary judgment dismissing the wrongful death causes of action as against them, unanimously reversed, on the facts and the law, without costs, and the motions denied.

Defendants failed to establish their prima facie case. Defendants merely pointed out perceived gaps in plaintiff's case (*see Dabbagh v Newmark Knight Frank Global Mgt. Servs., LLC*, 99 AD3d 448, 450 [1st Dept 2012]; *Salgado v Port Auth. of N.Y. & N.J.*, 105 AD3d 417 [1st Dept 2013]).

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

ENTERED: MAY 18, 2017

CLERK

Tom, J.P., Mazzarelli, Manzanet-Daniels, Webber, JJ.

4059 Jose Santiago, Index 303510/12
Plaintiff-Appellant,

-against-

New York City Housing Authority,
Defendant-Respondent.

_____

Ferro, Kuba, Mangano, Skylar, P.C., Hauppauge (Kenneth Mangano of counsel), for appellant.

Herzfeld & Rubin, P.C., New York (Linda M. Brown of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Barry Salman, J.), entered January 22, 2016, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant established entitlement to judgment as a matter of law, in this action where plaintiff was injured when he slipped and fell while attempting to walk on snow that had been pushed to the side of a walkway that was near the rear entrance of a building owned and maintained by defendant. Plaintiff alleges that he did not walk on the 16-inch wide shoveled pathway made by defendant's employee approximately a half an hour before the accident, because there was an icy condition on it and he believed that it would be safer to walk on the snow that was

beside the shoveled path. However, defendant submitted evidence, including certified climatological records, showing that freezing rain and snow started falling approximately one hour before the accident, as temperatures were decreasing from 34 to 31 degrees. Under these circumstances, defendant is entitled to the storm-in-progress defense, because the evidence shows that the icy condition that allegedly forced plaintiff from the shoveled path developed during the snow storm that commenced shortly before the happening of the accident (*see Clement v New York City Tr. Auth.*, 122 AD3d 448 [1st Dept 2014]; *Weinberger v 52 Duane Assoc., LLC*, 102 AD3d 618 [1st Dept 2013]).

In opposition, plaintiff failed to raise a triable issue of fact as to whether defendant created or exacerbated the icy condition through its snow removal activities, or that the ice existed on the walkway's shoveled path prior to the storm (*compare Ndiaye v NEP W. 119th St. LP*, 124 AD3d 427, 428 [1st Dept 2015]). The record shows that plaintiff testified that he did not know how long the ice had been on the path prior to the accident and that he saw it for the first time when he fell. Plaintiff's reliance upon his errata sheet to amend his testimony to support his claim that he saw the ice on the shoveled path from his window two days before the accident fails, because the

testimony and amendments refer to snow on the entire walkway rather than ice on the path that was shoveled shortly before his fall. Furthermore, the record is devoid of evidence that defendant's snow removal efforts during the storm made the walkway more dangerous, or that defendant was negligent in permitting the accumulation of snow on either side of the shoveled pathway to exist (*compare Santiago v New York City Hous. Auth.*, 274 AD2d 335 [1st Dept 2000).

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

ENTERED: MAY 18, 2017

CLERK

Tom, J.P., Mazzarelli, Manzanet-Daniels, Webber, JJ.

4060 Wells Fargo Bank, National Association, etc.,
Plaintiff-Respondent,

-against-

Donna Ferrato,
Defendant-Appellant,

The Simon & Mills Building Condominium Board, et al.,
Defendants.

Index 850034/15

_____

Wrobel Markham Schatz Kaye & Fox LLP, New York (Steven I. Fox of counsel), for appellant.

Greenberg Traurig LLP, New York (Shan P. Massand of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered July 8, 2015, which denied defendant Ferrato's motion to dismiss the complaint for lack of personal jurisdiction, unanimously modified, on the law, and the motion granted to the extent of directing that, in the event plaintiff moves to restore the matter to the calendar, the matter be referred for a traverse hearing, and otherwise affirmed, without costs.

Plaintiff's process server attempted to serve defendant at her apartment, which was a loft accessed directly from an elevator. The process server averred that a woman was standing

inside holding a baby and a party was in progress, so he dropped the papers. Denying that service was properly made pursuant to CPLR 308(2), plaintiff submitted the affidavit of a woman who stated that she was at the entrance to the apartment and holding a baby at the time specified by the process server, but that he never identified himself, did not ask her to take the papers, did not attempt to gain access, and did not hand any papers to her or drop papers near her. Instead, the elevator door closed with the process server and the papers still inside.

Under this version of the events, service was not properly made pursuant to CPLR 308(2). While plaintiff argued that the "outer bounds" of defendant's dwelling extended to include the elevator, it did not establish either that its process server was not permitted to proceed or that service was made upon "a person of suitable age and discretion" (*see F.I. duPont, Glore Forgan & Co. v Chen*, 41 NY2d 794, 797 [1977]). Further, since plaintiff did not establish that service was refused upon the process server informing the person at the apartment that service was being made by leaving a copy of the summons outside the door (inside the elevator) of the person to be served, plaintiff did not demonstrate that the process server made the person aware that such service was being made (*Bossuk v Steinberg*, 58 NY2d

916, 918 [1983]). In light of the factual issues as to the validity of service, the threshold issue of personal service should have been resolved with a traverse hearing (*see NYCTL 1998-1 Trust & Bank of N.Y. v Rabinowitz*, 7 AD3d 459 [1st Dept 2004]).

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

ENTERED: MAY 18, 2017

CLERK

Tom, J.P., Mazzarelli, Manzanet-Daniels, Webber, JJ.

4061 The People of the State of New York, Ind. 4851/14
Respondent,

-against-

Shaina Foster,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Andrew E. Seewald of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Michael J. Obus, J.), rendered August 6, 2015, convicting defendant, upon her plea of guilty, of robbery in the second degree, and sentencing her to a term of five years, unanimously affirmed.

Defendant made a valid waiver of her right to appeal (*see People v Bryant*, 28 NY3d 1094 [2016]), which forecloses review of her claims that her sentence was excessive and that the court should have granted youthful offender treatment (*see People v*

White, 141 AD3d 463 [1st Dept 2016], *lv denied* 28 NY3d 975 [2016]). Regardless of the validity and scope of defendant's waiver of her right to appeal, we perceive no basis for reducing the sentence or substituting a youthful offender adjudication.

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

ENTERED: MAY 18, 2017

CLERK

Tom, J.P., Mazzarelli, Manzanet-Daniels, Webber, JJ.

4062N In re Signal Perfection, Ltd., Index 652823/13
doing business as SPL Integrated Solutions,
Petitioner-Respondent,

-against-

Litespeed Electric, Inc.,
Respondent-Appellant.

_____

Matthew A. Kaufman, New York, for appellant.

The Marantz Law Firm, Rye (Neil G. Marantz of counsel), for respondent.

_____

Order, Supreme Court, New York County (Alice Schlesinger, J.), entered on or about April 14, 2016, which denied respondent's motion for leave to file a late notice of settlement of a proposed judgment, unanimously reversed, on the law, without costs, and the motion granted.

Assuming without deciding that the 60-day time limit of 22 NYCRR 202.48(a) applies in this case, which involves an order adjudging that respondent was entitled to recover a sum certain and confirming an arbitration award, as modified (*see Farkas v Farkas*, 11 NY3d 300, 309-310 [2008]; *Funk v Barry*, 89 NY2d 364, 367 [1996]), we find that respondent demonstrated good cause for its delay in submitting a judgment for settlement. Respondent demonstrated good cause by providing affidavits detailing its

diligence in following up with its prior counsel, who misled it concerning the status of the case and the need to enter judgment (*see Russo v Russo*, 289 AD2d 467 [2d Dept 2001]; *Parisi v McElhatton*, 209 AD2d 495 [2d Dept 1994]). In light of the effort expended arbitrating the dispute, opposing the petition to vacate, and pursuing the matter after the court largely confirmed the award, it is clear that respondent did not intend to abandon this action (*see Platt v Parklex Assoc.*, 234 AD2d 115 [1st Dept 1996]), and entry of judgment upon an order confirming the arbitration award is required (CPLR 7514).

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

ENTERED: MAY 18, 2017

CLERK

Tom, J.P., Mazzarelli, Manzanet-Daniels, Webber, JJ.

4063N In re Francisco L. Camara, Index 163157/15
Petitioner-Respondent,

-against-

Skanska, Inc., et al.,
Respondents-Appellants.

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Segal McCambridge Singer & Mahoney, Ltd., New York (Simon Lee of counsel), for appellants.

Javerbaum Wurgaft Hicks Kahn Wikstrom & Sinins, P.C., New York (Christina Ctorides of counsel), for respondent.

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Order, Supreme Court New York County (Carol R. Edmead, J.), entered February 24, 2016, which, to the extent appealable, granted petitioner's application for pre-action disclosure pursuant to CPLR 3102©, unanimously modified, on the facts and as a matter of discretion, to delete paragraphs 3 and 4 of the order, which provide for a deposition, and otherwise affirmed, without costs.

Although respondents have already largely complied with petitioner's pre-action disclosure requests, respondents still have an ongoing obligation to "amend or supplement" their responses (CPLR 3101[h]), and the order imposes additional outstanding disclosure obligations. Accordingly, the order has potential continuing practical consequences to respondents and

their appeal is not moot (*see Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 811-812 [2003], *cert denied* 540 US 1017 [2003]; *Saratoga Harness Racing v Roemer*, 290 AD2d 928, 928 n [3d Dept 2002]).

The court properly exercised its discretion in directing pre-action disclosure pursuant to CPLR 3102©. Petitioner, a construction laborer who, while working for respondents, was injured while extracting a pin from a concrete roadblock, established that he likely has a meritorious products liability claim against the pin's manufacturer, and further showed that the limited information sought, which included information that would identify the defendant manufacturer, was material and necessary to the actionable wrong (*see Holzman v Manhattan & Bronx Surface Tr. Operating Auth.*, 271 AD2d 346, 347 [1st Dept 2000]; *Matter of Uddin v New York Tr. Auth.*, 27 AD3d 265 [1st Dept 2006]; *Stump v 209 E. 56th St. Corp.*, 212 AD2d 410 [1st Dept 1995]). However, the order granting the petition exceeded the scope of the information sought, as it required respondents to furnish a witness with specific knowledge of the accident site for a

deposition. As petitioner did not request and shows no need for such disclosure in order to frame a complaint, the order is modified to the extent indicated (*see Matter of Verdon v New York City Tr. Auth.*, 92 AD2d 465 [1st Dept 1983]).

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

ENTERED: MAY 18, 2017

CLERK