SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 25, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

3871 The People of the State of New York, Respondent, Ind. 8678/99

-against-

Lesley Sanchez,
Defendant-Appellant.

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Joseph F. DeFelice, Kew Gardens, for appellant.

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

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Order, Supreme Court, New York County (Abraham L. Clott, J.), entered on or about March 9, 2016, which denied defendant's CPL 440.10 motion to vacate a judgment of conviction, same court (William Wetzel, J.), rendered August 17, 2000, convicting her, upon a plea of guilty, of attempted conspiracy in the second degree, and sentencing her to five years of probation, unanimously reversed, on the law, and the motion granted to the extent of remanding for a hearing on defendant's claim of ineffective assistance of counsel and a decision de novo on the

motion.

The court improvidently exercised its discretion in denying without a hearing defendant's CPL 440.10 motion alleging ineffective assistance of counsel for failure to render accurate advice on the immigration consequences of pleading guilty to a felony (*see People v Picca*, 97 AD3d 170 [2nd Dept 2012], *citing, inter alia, People v McDonald*, 1 NY3d 109 [2003]), without a hearing. Defendant said in an affidavit that she informed her plea counsel that she was not a U.S. citizen but was a legal permanent resident and was concerned about maintaining her immigration status and not being deported. Counsel advised her that, if she pleaded guilty to attempted second-degree conspiracy, she would receive five years of probation, with no jail time, and assured her that, by taking the plea and receiving probation, she would not have to fear any deportation proceedings. Defendant, age 26 at the time, had been in jail since her arrest, and wanted to be released as soon as possible, so that she could rejoin her two young children.

Accordingly, defendant pleded guilty, was sentenced as indicated, and successfully completed her probation.

However, in 2012, defendant was referred to U.S. Immigration and Customs Enforcement (ICE), and on June 5, 2012, ICE issued

her a Notice to Appear. Defendant said that she learned that conspiracy is considered an "aggravated felony" under the immigration law, which leaves her exposed to deportation proceedings, except under limited and difficult-to-meet exceptions under the Convention Against Torture.[1]

Defendant said that, if she had known that her guilty plea would subject her to a risk of deportation, she "never would have entered a guilty plea," but instead "would have contested the matter, tried to negotiate a better plea or taken the case to trial." She said that she believed that she "would have had a good defense as [she]was not involved in any drug activity, did not know that [her] stepfather was involved in drugs and never saw any drugs in the Bayside location."

Defendant submitted an affidavit by her plea counsel, who said that she no longer possessed a copy of defendant's file, and the plea transcript was not available. Nonetheless, counsel said she recalled speaking to defendant a few times, with her secretary acting as interpreter. Counsel recalled that defendant

[1]Her current counsel, noted that defendant's sister (Paola Sanchez-Lopez), who "took a similar offer" and "faced a similar dilemma" was subjected to removal proceedings and unsuccessfully asserted a Convention Against Torture claim. Defendant's sister avoided deportation only by having her conviction vacated and re-pleading to criminal trespass.

was a legal resident and not a U.S. citizen, but "[did] not recall any advice [she] may have given to [defendant] concerning the plea she eventually entered and the ramifications of that plea upon her status in the United States."

Counsel explained that her difficulty remembering was due not only to the passage of 15 years, but also to the fact that, at the time of the plea, she was going through "personal difficulties," including "alcoholism and addiction." In May 2000, counsel was indicted in Supreme Court, Ulster County, for first-degree promoting prison contraband, seventh-degree criminal possession of a controlled substance, and second-degree harassment.

Under these circumstances, a hearing should be held on whether counsel's performance rose to the level of ineffective assistance of counsel (*see People v Picca*, 97 AD3d 170).

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

ENTERED: MAY 25, 2017

CLERK

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

3407 Yoon Jung Kim, Index 155210/14
Plaintiff-Respondent,

-against-

Gahee An, et al.,
Defendants-Appellants,

New York City Parking
Violations Bureau, et al.,
Defendants.

_____

Song Law Firm, LLC, New York (Errol C. Deans, Jr. of counsel), for appellants.

Martin H. Bernsley, New York, for respondent.

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Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered on or about June 10, 2015, which, inter alia, granted plaintiff's motion for summary judgment on her cause of action for mortgage foreclosure, and denied defendants' cross motion to consolidate this foreclosure action with a related, plenary action, unanimously reversed, on the law, without costs, the motion for summary judgment denied, and the cross motion to consolidate granted.

Plaintiff commenced an action in August 2012 alleging that defendants Gahee An and her husband Chang Tae Seo, and others, defrauded her through an investment scheme and were liable for

related business torts. The eleventh cause of action in the complaint sought recovery on a promissory note in the amount of $609,000 that defendants had allegedly executed and delivered to plaintiff. In their verified answer, defendants admitted that they signed the note but asserted that it was unenforceable because it was the product of duress.

In a counterclaim, defendant An alleged that she had loaned plaintiff $600,000 for a college preparatory school that plaintiff owned and operated, and that plaintiff promised An a percentage of the tuition from students that An referred to the school and a share in an investment fund that plaintiff was starting. When the finances of the school plummeted and plans for the investment fund had to be abandoned, defendants asserted, plaintiff promised An the remaining portion of the money deposited in the investment fund. However, An alleged, plaintiff later changed her mind, and on February 7, 2012 called An and accused her of being a criminal, stating, "I want your house." Plaintiff (who was An's trusted friend) then told An to meet her at plaintiff's office to sign some papers. The papers turned out to be a note and a mortgage on a condominium that defendants owned. According to the counterclaim, plaintiff harassed, threatened, and harangued An for four hours, telling An

throughout the evening that if she did not sign the documents she would be sent to prison. Unfamiliar with United States laws, An believed plaintiff's threats that she would be prosecuted and, thereafter, deported.

An alleged that, left alone in plaintiff's office for two hours, from midnight to 2 a.m., An called her husband, tearfully explained the situation, and told him to come to plaintiff's office. Two hours later, at 4 a.m. on February 8, 2012, defendants, without the aid of counsel, signed the note and mortgage in the presence of plaintiff and plaintiff's attorney. Defendants further alleged that, beginning in February 2012, plaintiff's investigator began calling An and her husband daily and threatening imprisonment if they did not pay plaintiff the money plaintiff was seeking, and that, shortly thereafter, plaintiff had her daughter post on the Internet that An was a liar and a thief who could not be trusted. Then, An claims, on three occasions in May and June 2012, a relative of plaintiff and several accomplices went to the home of defendant Seo's family in Korea and threatened harm if defendants did not pay; in two of those instances, plaintiff's relative was arrested. An's counterclaim sought, among other things, rescission of the note and mortgage based on the foregoing allegations of duress and

harassment.

On April 16, 2014, plaintiff discontinued her claim on the mortgage note. On or about May 28, 2014, plaintiff commenced an action to foreclose on the mortgage on defendants' condominium. In their answer, defendants did not repeat the extensive factual allegations of their counterclaim in the initial action, but did state as an affirmative defense that the transaction "was the result of coercion." Plaintiff then moved for summary judgment in the mortgage foreclosure action. In support of the motion, plaintiff, and the attorney who prepared the mortgage and was present when defendants executed it, both swore in affidavits that defendants did so of their own free will.

Defendants cross-moved to consolidate the foreclosure action with the original action, in which they had counterclaimed. In an affirmation in opposition to plaintiff's motion for summary judgment and in support of the cross motion, defendants' counsel noted that defendants, in their verified answer and counterclaims to the original action, had "specifically denied the validity of the note based on it having been signed under duress," and annexed a copy of that pleading.

Defendant An submitted her own affidavit in opposition, which reiterated the facts concerning the duress defendants felt

when they executed the note and mortgage. In reply, plaintiff denied any harassment on the evening of the execution of the note and mortgage, and argued that defendants had failed to demonstrate that their free will was overcome. In any event, plaintiff contended, defendants failed to promptly disavow the mortgage transaction, waiting to do so until litigation had commenced eight months later.

The court granted plaintiff's motion for summary judgment and denied the cross motion as academic. The court found that defendant An's description of the execution of the documents did not rise to the level of a deprivation of her free will, noting that she attended the meeting at plaintiff's office voluntarily and there was no indication that she could not have left at any time without signing the mortgage and note. Moreover, the court observed, An had the opportunity to discuss the mortgage and note with her husband before signing them. The court further reasoned that, even if defendants' version of the circumstances surrounding the execution of the mortgage were true, defendants could not establish duress because they failed to show that they promptly disaffirmed the transaction, having done nothing for months while accepting the benefits of plaintiff's forbearance on collection of the prior business debt. The court observed that

it would be futile for defendants to consolidate the plenary action with the foreclosure action in the hope that the counterclaim in the plenary action setting forth the duress defense at length be deemed sufficient opposition, because the allegations of the counterclaim were not evidence and were thus insufficient to oppose a motion for summary judgment.

The defense of duress is established upon the showing of a wrongful threat precluding the exercise of free will (*see Austin Instrument v Loral Corp.*, 29 NY2d 124, 130 [1971]). The threat of criminal prosecution is sufficient for that purpose (*see Kranitz v Strober Org.*, 181 AD2d 441 [1st Dept 1992]; *Liffiton v Santiago*, 134 AD2d 924 [4th Dept 1987]). Here, defendants alleged that there was such a threat, as well as the additional threat of deportation, which has also been held to constitute duress (*see Matter of Guttenplan*, 222 AD2d 255 [1st Dept 1995], *lv denied* 88 NY2d 812 [1996]). Accordingly, the court erred in holding that defendants did not establish that they signed the note and mortgage under a state of duress.

Plaintiff argues that, even if defendants raised an issue of fact as to whether defendants were under duress when they executed the note and mortgage, their failure to disaffirm those documents before the commencement of litigation is fatal to their

claim. The failure to act promptly to disaffirm a contract entered into under duress can be fatal to the defense (*see Sosnoff v Carter*, 165 AD2d 486, 492 [1st Dept 1991]). "However, where during the period of acquiescence or at the time of the alleged ratification the disaffirming party is still under the same continuing duress, he has no obligation to repudiate until the duress has ceased" (*id.*). Here, in her counterclaim, defendant An related events through at least June 2012, only two months before plaintiff commenced the initial action, that constituted a continued, and continuing, pattern of harassment that a finder of fact could determine was part of the same duress that compelled her and her husband to execute the mortgage in the first place.

To be sure, since this is a motion for summary judgment, it was necessary for defendants to put these allegations of continuing duress before the court in admissible form (*see IDX Capital, LLC v Phoenix Partners Group LLC* (19 NY3d 850, 851 [2012]). An's affidavit in opposition did not do so, since it was limited to the events on the night defendants executed the note and mortgage. However, defendants' attorney's affirmation did submit for the record defendant's verified answer with An's counterclaim. It is well settled that CPLR 105(u) permits the

use of verified pleadings in lieu of affidavits, and that a verified pleading can be used to create an issue of fact sufficient to defeat summary judgment (*see Sanchez v National R.R. Passenger Corp.*, 21 NY3d 890, 891 [2013]). Accordingly, we find that, on this record, plaintiff should not have been awarded summary judgment on her foreclosure claim. Further, to the extent plaintiff argues that defendants did not raise the prompt disavowal issue below, we note that plaintiff discussed the issue below in her reply memorandum of law, and should not be heard now to complain that she did not have an opportunity to address it.

Consolidation of the two actions is appropriate, since they present common questions of law and fact (*see Karg v Kern*, 125 AD3d 527, 529 [1st Dept 2015]).

Finally, we see no reason to award costs to plaintiff based on the infirmities she notes in defendants' appendix.

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

ENTERED: MAY 25, 2017

CLERK

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

3529 Sung Hwan Co., Ltd., Index 112444/01
Plaintiff-Appellant,

-against-

Rite Aid Corporation,
Defendant-Respondent.

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Herzfeld & Rubin, P.C., New York (David B. Hamm of counsel), for appellant.

Morgan, Lewis & Bockius LLP, New York (Stephen Scotch-Marmo and Elizabeth Buechner of counsel), Thomas A. Schmutz, Washington, D.C., of the bar of the District of Columbia, admitted pro hac vice, of counsel, and Michael F. Healy, Washington, D.C., of the bar of the District of Columbia, admitted pro hac vice, of counsel, for respondent.

_____

Judgment, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered March 2, 2015, after a nonjury trial, dismissing the complaint, unanimously affirmed, without costs.

In this action pursuant to CPLR article 53 to enforce a foreign money judgment, plaintiff had the burden of establishing jurisdiction (*Venegas v Capric Clinic*, __ NY3d __, 2017 NY Slip Op 00936 [1st Dept 2017]; *Derso v Volkswagen of Am.*, 159 AD2d 937, 938 [4th Dept 1990]). On the record before us, we cannot conclude that Supreme Court erred in determining that plaintiff

failed to do so. Specifically at issue was whether defendant operated or controlled an ice cream factory owned by a subsidiary that allegedly supplied listeria-tainted ice cream to plaintiff in South Korea. The record does not support a conclusion that Supreme Court erred in determining that defendant did not operate or control the ice cream factory directly or through a subsidiary acting as a "department" of defendant (*see Volkswagenwerk Aktiengesellschaft v Beech Aircraft Corp.*, 751 F2d 117, 120 [2d Cir 1984]). Moreover, neither could apparent authority give rise to jurisdiction over defendant here.

Plaintiff relies upon cases from across the country involving defendant. We have reviewed these cases and find them inapposite. We have also considered plaintiff's remaining arguments and find them unavailing.

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

ENTERED: MAY 25, 2017

CLERK

Friedman, J.P., Sweeny, Renwick, Andrias, Manzanet-Daniels, JJ.

3535N In re Ryszard Grajko, Index 24793/16
Petitioner-Respondent,

-against

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

_____

Cornell Grace, P.C., New York (Porsha R. Johnson of counsel), for appellants.

Gregory J. Cannata & Associates, LLP, New York (Gregory J. Cannata of counsel), for respondent.

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Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered September 15, 2016, which, among other things, granted petitioner's motion for leave to serve a late notice of claim upon respondents, reversed, on the law and the facts, without costs, the motion denied, and the petition dismissed. The Clerk is directed to enter judgment accordingly.

The underlying facts of the accident are set forth by the dissent. The motion court improvidently exercised its discretion in granting the motion. Petitioner failed to establish any of the relevant statutory factors that would warrant leave to serve a late notice of claim (General Municipal Law § 50-e[5]; *Matter of Kelley v New York City Health & Hosps. Corp.*, 76 AD3d 824, 825 [1st Dept 2010]). Petitioner's alleged failure to realize the

severity of his injuries within 90 days after his accident did not constitute a reasonable excuse for his delay in serving a notice of claim, especially since petitioner filed a workers' compensation claim just weeks after the accident (*see e.g. Matter of Casale v City of New York*, 95 AD3d 744, 744-745 [1st Dept 2012]). Nor did petitioner show that respondents acquired actual knowledge of the essential facts constituting the claim within the statutory period, or a reasonable time thereafter (*see* General Municipal Law § 50-e[5]). There is no evidence that respondents received petitioner's workers' compensation claim form, which, in any event, makes no mention of the allegations against respondents (*see Colarossi v City of New York*, 118 AD3d 612, 612 [1st Dept 2014]). Absent any knowledge of even a potential Labor Law claim, respondents certainly had no basis to conduct their own investigations (*see Matter of Thomson v City of New York* 95 AD3d 1024 [2d Dept 2012]).

Petitioner also failed to establish a lack of prejudice to respondents. Petitioner's reliance on *Newcomb* (*Matter of Newcomb v Middle Country Cent. Sch. Dist.*, 28 NY3d 455 [2016]) is misplaced. In *Newcomb*, a timely notice of claim had already been filed against the other municipal defendants and the only question was whether to permit the filing of a late notice of

claim against the school district (*id*. at 461, 462). Notably, the petitioner in *Newcomb* pointed to several specific facts that negated any claim of prejudice on the part of the school district besides the passage of time, and thus his burden to show lack of prejudice in that case was easily met, shifting the burden to the school district (*id.* at 466-467). Our case has a completely different posture. As stated, there is no evidence respondents were aware of an accident even occurring. Petitioner here, unlike the petitioner in *Newcomb*, does no more than refer to numerous construction records that purportedly could be examined, yet provides no names of actual witnesses nor any reference to specific information in those records.

Even assuming petitioner here met his initial burden, the prejudice to respondents, shown herein, was clear and explicit.

All concur except Renwick and Manzanet-Daniels, JJ. who dissent in a memorandum by Manzanet-Daniels, J. as follows:

MANZANET-DANIELS, J. (dissenting)

In my view, the motion court correctly granted petitioner leave to file a late notice of claim. I would accordingly affirm the order appealed from.

Petitioner was injured on July 15, 2015, while working as a bricklayer for Abex at a job site located at an intermediate school in the Bronx. Petitioner alleges that while lifting 60 to 70 pound buckets, he tripped and fell due to an uneven floor on a makeshift scaffold. He filed a workers' compensation claim on July 29, 2015, but did not file a notice of claim until July 15, 2016, a year later. In the intervening year, he underwent a shoulder and a hip surgery.

The motion court has broad discretion to extend the time to serve a notice of claim pursuant to General Municipal Law § 50-e(5) (*see Matter of Feliciano v New York City Hous. Auth.*, 188 AD2d 296, 296 [1st Dept 1992]). In determining whether to permit late filing, a court shall consider whether the corporation acquired actual knowledge of the essential facts underlying the claim within the 90-day period or a reasonable time thereafter; whether the petitioner offered a reasonable excuse for the late notice; and whether the delay substantially prejudiced respondent's defense on the merits (*id.* at 296-297).

"[T]he statute is remedial in nature, and therefore should be liberally construed" (*Matter of Thomas v City of New York*, 118 AD3d 537, 538 [1st Dept 2014]).

Petitioner's lack of awareness of the seriousness and extent of his injuries is a reasonable excuse for failing to timely serve the notice of claim (*Matter of Newcomb v Middle Country Cent. Sch. Dist.*, 28 NY3d 455, 463, 465 [2016]). Petitioner did not immediately appreciate the extent of the injuries he suffered on July 15, 2015. His first surgery was on November 11, 2015, outside the 90-day window; his second surgery was performed almost a year after the incident and one week before his application for leave to serve a late notice of claim. Petitioner avers that he did not realize until after his second surgery that his career in construction was effectively over. Further, respondents' insurer received notice of the claim by virtue of the workers' compensation claim petitioner filed shortly after the accident.

Most importantly, respondents have failed to show that they are substantially prejudiced by the late notice of claim (*Matter of Newcomb*, 28 NY3d 455; *Matter of Richardson v New York City Hous. Auth.*, 136 AD3d 484, 485 [1st Dept 2016], *lv denied* 28 NY3d 905 [2016]). In *Newcomb*, the Court of Appeals held that the

initial burden to demonstrate lack of substantial prejudice lies with the petitioner (28 NY3d at 466). While the showing need not be extensive, petitioner must show "some evidence or plausible argument that supports a finding of no substantial prejudice" (*id.*); thereafter, the burden is on the respondent to make a "particularized evidentiary showing that the corporation will be substantially prejudiced if the late notice is allowed" (*id.* at 467 [the respondent failed to make showing of substantial prejudice where its opposition consisted of only an attorney's affirmation asserting that the respondent had no actual notice of the accident, and that it was prejudiced by the passage of time due to the fading memory of witnesses] [*id.* at 463]). The passage of time alone does not constitute substantial prejudice in the absence of specific evidentiary proof in the record to support the finding (*id.* at 466). We have previously held that a public corporation must demonstrate an actual attempt at investigation in order to show prejudice (*see Thomas v New York City Hous. Auth.*, 132 AD3d 432, 434 [1st Dept 2015] [prejudice not established where the defendant failed to investigate the subject stairwell]).

Petitioner here met his burden of showing lack of substantial prejudice. Petitioner's affidavit describes in

detail the subject scaffold and the nature of the work performed, including the fact that the scaffold was dismantled on a daily basis and thus not susceptible to investigation even if timely notice had been given, a fact that weighs against a finding of prejudice (*see Matter of Caridi v New York Convention Ctr. Operating Corp.*, 47 AD3d 526 [1st Dept 2008]). Petitioner relies upon the availability of several witnesses who can testify concerning the condition of the scaffold and petitioner's injuries, as well as photos that would permit respondents to reconstruct and investigate the accident. Respondents' claim that construction records "will not provide any insight into the happenings of [petitioner's] accident" is without merit. Respondents can identify witnesses through attendance and payroll records, including Abex employees onsite who worked alongside petitioner, the persons who erected the scaffold, and respondents' own supervisors and employees. Daily work records, log books, inspection records, and safety reports, among others, detail the work performed on any given day and the materials and equipment used on site; these are precisely the records that will enable respondents to investigate and defend. The various records outlined by petitioner are in the possession of respondents or available to them through their contractor, Abex.

It defies logic that respondents would not have access to their own work records (*see Matter of Edwards v City of New York*, 2 AD3d 110, 111 [1st Dept 2003] [granting motion to file a late notice of claim upon finding, inter alia, a lack of prejudice as a result of the delay; noting, "It is not credible that [respondent] lacks records of its employees' work assignments and its provision of protective equipment"]).

Respondents fail to make the requisite "particularized evidentiary showing that [they] will be substantially prejudiced if the late notice is allowed" (*Newcomb*, 28 NY3d at 467). Respondents' opposition is predicated on the "passage of time" argument expressly rejected in *Newcomb* (*id.* at 463, 466), and consists solely of an affirmation of counsel, without any supporting affidavits from a person with knowledge of the construction site. Respondents failed to submit evidence that

they even attempted to investigate the site or the circumstances of the accident.

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

ENTERED: MAY 25, 2017

CLERK

Tom, J.P., Sweeny, Richter, Kapnick, Webber, JJ.

4105 Deena Fellner, Index 21470/12E
Plaintiff-Appellant,

-against-

Aeropostale, Inc.,
Defendant-Respondent.

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Mitchell Dranow, Sea Cliff, for appellant.

Goldman & Grossman, New York (Eleanor R. Goldman of counsel), for respondent.

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Order, Supreme Court, Bronx County (Joseph E. Capella, J.), entered on or about August 5, 2016, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant established its entitlement to judgment as a matter of law, in this action where plaintiff alleges that she slipped and fell on water on the floor of defendant's store, near the cash registers. Defendant demonstrated that it lacked actual or constructive notice of the hazardous condition by submitting a surveillance video depicting its assistant manager walking past the alleged wet condition minutes before plaintiff's fall, as well as the employee's deposition testimony and affidavit stating that she observed no water or liquid in that area (*see Siero v*

Western Beef Props. Inc., 119 AD3d 488 [1st Dept 2014]).

In opposition, plaintiff failed to raise an issue of fact as to whether defendant had notice of the condition. There is no evidence showing how long the wet condition existed in the first instance. Moreover, both defendant's assistant manager and plaintiff testified that they did not see the water before plaintiff's fall. Thus, there was no proof that the condition was "visible and apparent" so as to constitute constructive notice (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]; *see Gomez v J.C. Penny Corp., Inc.*, 113 AD3d 571, 572 [1st Dept 2014]).

Plaintiff's argument that defendant refused to produce other videotapes in discovery is precluded by her failure to perfect her appeal from the orders denying her prior motion for discovery relief, and the dismissal of her appeal therefrom (*see Bray v Cox*, 38 NY2d 350, 353 [1976]).

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

ENTERED: MAY 25, 2017

CLERK

Tom, J.P., Sweeny, Richter, Kapnick, Webber, JJ.

4106 In re De'Lyn D. W.,

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

Liza Carmen T., etc.,
Respondent-Appellant,

MercyFirst,
Petitioner-Respondent.

_____

Steven N. Feinman, White Plains, for appellant.

Warren & Warren, P.C., Brooklyn (Ira L. Eras of counsel), for respondent.

Tennille M. Tatum-Evans, New York, attorney for the child.

_____

Resettled order, Family Court, New York County (Stewart Weinstein, J.), entered on or about May 27, 2015, which, upon a finding of permanent neglect, terminated respondent mother's parental rights to the subject child, and committed custody and guardianship of the child to petitioner agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

The determination of permanent neglect is supported by clear and convincing evidence that respondent failed to plan for the child's future, despite diligent efforts by the agency to encourage and strengthen the parental relationship (Social

Services Law § 384-b[7]). The agency fulfilled its duty to make diligent efforts to provide respondent with assistance by developing a comprehensive service plan to address respondent's hoarding problem, maintaining frequent contact with her, ensuring her participation in scheduled services, and facilitating her visits and contact with the child. "The parent must assume some measure of initiative and responsibility [and] [t]he agency will be deemed to have fulfilled its duty if its reasonable efforts are rebuffed by an uncooperative or indifferent parent" (*Matter of Imani Elizabeth W.*, 56 AD3d 318, 319 [1st Dept 2008] [internal citation omitted]).

Despite the agency's meaningful efforts, respondent failed to plan for the future of the child by demonstrating a complete lack of insight regarding her inability to provide the child with a safe and appropriate home (*see Matter of Jennifer S.*, 61 AD3d 613, 614 [1st Dept 2009]). Respondent failed to correct the unsanitary and unsafe conditions in her apartment over a four-year period, and failed to account for the well-being of the child in foster care by repeatedly violating the visitation orders and making comments to the child about her foster mother (*see Matter of Jonathan NN. [Michelle OO.]*, 90 AD3d 1161, 1163-1164 [3d Dept 2011], *lv denied* 18 NY3d 808 [2012]).

A preponderance of the evidence at the dispositional hearing supported the determination that the best interests of the child warranted termination of respondent's parental rights so as to facilitate adoption.

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

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

ENTERED: MAY 25, 2017

CLERK

Tom, J.P., Sweeny, Richter, Kapnick, Webber, JJ.

4107 Leslie Benzies, Index 651920/16
Plaintiff-Respondent-Appellant,

-against-

Take-Two Interactive Software, Inc., et al.,
Defendants-Appellants-Respondents.

Dechert LLP, New York (Andrew J. Levander of counsel), for appellants-respondents.

Lewis Brisbois Bisgaard & Smith LLP, New York (Peter T. Shapiro of counsel), for respondent-appellant.

Appeal and cross appeal from order, Supreme Court, New York County (Barry R. Ostrager, J.), entered December 22, 2016, which granted in part and denied in part defendants' motion to dismiss the complaint, unanimously dismissed, without costs, as moot.

After defendants submitted papers on their appeal, but before plaintiff submitted papers on his opposition and cross appeal, plaintiff filed an amended complaint before Supreme Court. A motion to dismiss the amended complaint is pending before Supreme Court. We take judicial notice of the amended complaint (*see Assured Guar. [UK] Ltd. v J.P. Morgan Inv. Mgt. Inc.*, 80 AD3d 293, 303 [1st Dept 2010], *affd* 18 NY3d 341 [2011]),

and find that it renders the present appeals moot (*see Federated Project & Trade Fin. Core Fund v Amerra Agri Fund, LP*, 106 AD3d 467 [1st Dept 2013]; *100 Hudson Tenants Corp. v Laber*, 98 AD2d 692, 692 [1st Dept 1983]).

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

ENTERED: MAY 25, 2017

CLERK

Tom, J.P., Sweeny, Richter, Kapnick, Webber, JJ.

4108 PSW NYC LLC, Index 650390/16
Plaintiff-Appellant-Respondent,

-against-

Bank of America, N.A., etc., et al.,
Defendants-Respondents-Appellants.

_____

Meister Seelig & Fein LLP, New York (Stephen B. Meister of counsel), for appellant-respondent.

Venable LLP, New York (Gregory A. Cross of counsel), for respondents-appellants.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered on or about November 1, 2016, which, to the extent appealed from as limited by the briefs, granted defendants' motion to dismiss the complaint and denied plaintiff's cross motion for partial summary judgment, unanimously affirmed, with costs.

The motion court correctly determined that plaintiff failed to state a cause of action for defendants' breach of an assignment agreement in which plaintiff sold and assigned to defendant PCV-M Holdings LLC all of its rights relating to and in certain loans (*see e.g. Ull v Lerner*, 308 AD2d 396, 396 [1st Dept 2003]). The complaint fails to identify any provision of the agreement in which defendants promised to abide by a separate

agreement governing foreclosure rights relating to the loans or giving plaintiff rights to assert claims relating to those loans after the assignment.

Plaintiff's fraudulent inducement claim is barred by the assignment agreement's mutual release (*see Centro Empresarial Cempresa S.A. v América Móvil, S.A.B. de C.V.*, 17 NY3d 269, 276 [2011]) and by the integration clause in the assignment agreement and in the release (*see e.g. General Bank v Mark II Imports*, 293 AD2d 328, 328-329 [1st Dept 2002]). In any event, plaintiff failed to plead its claim with the requisite particularity (*see* CPLR 3016[b]; *see e.g. Gregor v Rossi*, 120 AD3d 447, 447 [1st Dept 2014]).

We have considered plaintiff's remaining arguments and find them unavailing.

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

ENTERED: MAY 25, 2017

CLERK

Tom, J.P., Sweeny, Richter, Kapnick, Webber, JJ.

4109 Atlas New York Limited Liability Company doing business as Atlas Real Estate New York, Plaintiff-Respondent, Index 650553/16

-against-

Michael Eisenberg, et al., Defendants-Appellants.

_____

Daniel M. Kolko, White Plains, for appellants.

Crosby & Higgins, LLP, New York (Frank W. Eucalitto of counsel), for respondent.

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Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered September 27, 2016, which, to the extent appealed from, denied defendants' motion to dismiss the cause of action for breach of contract pursuant to CPLR 3211(a)(3) and (7), unanimously affirmed, without costs.

Plaintiff, which lacked a real estate brokerage license in its own name, had the capacity to commence this action to recover for unpaid brokerage services pursuant to brokerage agreements "made for its benefit in its assumed name" (*see Mail & Express Co., Inc. v Parker Axles, Inc.*, 204 App Div 327, 329 [1st Dept 1923]; Real Property Law § 442-d). The record supports the motion court's finding that plaintiff, whose principal was a

licensed real estate broker, properly applied for a real estate license to conduct its real estate brokerage business under the assumed name, which it also properly registered with the New York State Department of State. We take judicial notice that the Department of State authorizes a real estate brokerage limited liability company to do business under an assumed name, as can be seen on the Real Estate Broker Application form available from the Division of Licensing Services (*see* https://www.dos.ny.gov/forms/licensing/0036-a-f.pdf at 11).

The compensation terms in the brokerage agreements, which include stated commission percentages in relation to rental amounts agreed to, are sufficiently definite to convey "what was promised" (*see Kenneth D. Laub & Co. v Bear Sterns Cos.*, 262 AD2d 36, 36 [1st Dept 1999] [internal quotation marks omitted]; *Abrams Realty Corp. v Elo*, 279 AD2d 261 [1st Dept 2001], *lv denied* 96 NY2d 715 [2001]).

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

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

ENTERED: MAY 25, 2017

CLERK

Tom, J.P., Sweeny, Richter, Kapnick, Webber, JJ.

4110 The People of the State of New York, Ind. 397/14
Respondent,

-against-

Omix Serrano,
Defendant-Appellant.

_____

Feldman and Feldman, Uniondale (Steven A. Feldman of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Matthew B. White of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Peter J. Benitez, J.), rendered May 15, 2015, as amended June 4, 2015, convicting defendant, upon his plea of guilty, of attempted rape in the first degree, and sentencing him, as a second violent felony offender, to a term of seven years, unanimously affirmed.

Defendant made a valid waiver of his right to appeal (*see People v Bryant*, 28 NY3d 1094 [2016]), which forecloses review of his claim that his sentencing was procedurally deficient. Regardless of whether defendant made a valid waiver, defendant did not preserve his claim that the sentencing court should have asked him if he had opportunity to read the presentence report, if he had discussed it with counsel, and if he wanted to challenge any facts stated in the report. Furthermore, we

decline to review this claim in the interest of justice. As an alternative holding, we also reject it on the merits. The sentencing was conducted in full accordance with the Criminal Procedure Law, which provides a defendant with ample opportunity to refute a presentence report, and the court was under no obligation to import additional sentencing procedures from another jurisdiction.

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

ENTERED: MAY 25, 2017

CLERK

Tom, J.P., Sweeny, Richter, Kapnick, Webber, JJ.

4111 William Rubino, et al., Index 110134/11
Plaintiffs-Respondents, 590378/12
590447/13

-against-

330 Madison Company, LLC, et al.,
Defendants-Appellants,

W5 Group LLC doing business as
Waldorf Demolition, et al.,
Defendants-Respondents.

- - - - -

330 Madison Company, LLC, et al.,
Third-Party Plaintiffs-Appellants,

-against-

Waldorf Demolition, et al.,
Third-Party Defendants-Respondents,

Corporate Electric Group, Inc.,
Third-Party Defendant.

- - - - -

[And Other Third-Party Actions]

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Barry, McTiernan & Moore LLC, New York (Laurel A. Wedinger of counsel), for appellants.

Sacks and Sacks, LLP, New York (Scott N. Singer of counsel), for William Rubino and Nicole Rubino, respondents.

O'Connor Redd, LLP, Port Chester (Joseph M. Cianflone of counsel), for Michael Mazzeo Electric Corp., respondent.

Law Office of Keith J. Conway, Melville (Patricia K. Rech of counsel), for W5 Group LLC, respondent.

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Order, Supreme Court, New York County (Cynthia S. Kern, J.),

entered July 18, 2016, which, insofar as appealed from as limited by the briefs, granted plaintiffs' motion for partial summary judgment on the Labor Law § 241(6) claim as against defendants 330 Madison Company, LLC and Tishman Construction Corp. (collectively appellants), granted the motion of defendant Michael Mazzeo Electric Corp. (Mazzeo) for summary judgment dismissing appellants' contractual and common-law indemnification and contribution claims against it, and granted the cross motion of defendant W5 Group LLC d/b/a Waldorf Demolition (Waldorf) for summary judgment dismissing appellants' contractual indemnification claim against it, unanimously modified, on the law, to deny Waldorf's motion, and otherwise affirmed, without costs.

The court properly granted plaintiffs' motion for partial summary judgment on the Labor Law § 241(6) claim as against appellants. It is undisputed that violations of Industrial Code (12 NYCRR) § 23-1.13(b)(3) and (4) proximately caused the injuries sustained by plaintiff when a metal part of his safety harness contacted a live electrical wire, known as a BX cable, which was hanging down from a drop ceiling of a building under renovation. Appellants, as owner and general contractor, may be held liable for violation of those provisions, even though they

impose obligations on the employer, since they have a nondelegable duty to provide adequate safety protections (*see Rivera v Ambassador Fuel & Oil Burner Corp.*, 45 AD3d 275 [1st Dept 2007]; *Johnson v Ebidenergy, Inc.*, 60 AD3d 1419 [4th Dept 2009]). Appellants fail to point to any evidence that would support a finding that plaintiff was comparatively negligent, since he was acting pursuant to his foreman's instructions and neither knew nor should have known that the cable was electrified, in the absence of any warnings, caution tape, or other such indications that workers should avoid the area (*cf. Snowden v New York City Tr. Auth.*, 248 AD2d 235, 237 [1st Dept 1998]). Appellants' assertion that they lacked notice of the presence of the exposed, electrified cable is irrelevant, "[s]ince an owner or general contractor's vicarious liability under section 241(6) is not dependent on its personal capability to prevent or cure a dangerous condition" (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]).

The court properly dismissed appellants' contractual and common-law indemnification and contribution claims against Mazzeo. Appellants' theory that Mazzeo negligently installed the wiring in the area of the accident more than one year before the

accident occurred is speculative, in light of other work performed by other subcontractors in the period following the completion of Mazzeo's work (*see Bernstein v City of New York*, 69 NY2d 1020, 1021-1022 [1987]; *see also Beckford v New York City Hous. Auth.*, 84 AD3d 441 [1st Dept 2011]; *cf. Fiorentino v Atlas Park LLC*, 95 AD3d 424, 427 [1st Dept 2012]).

The court should have denied as untimely Waldorf's cross motion for summary judgment dismissing appellants' contractual indemnification claim against it without considering the merits, since the motion was filed after the applicable deadline and Waldorf failed to show good cause for the delay (*see Brill v City of New York*, 2 NY3d 648 [2004]). Waldorf's purported cross motion against appellants, nonmoving parties, was not a true cross motion (*see Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 87-88 [1st Dept 2013]), and did not merely raise issues

"nearly identical" to those raised by plaintiffs and Mazzeo in their timely motions (*Maggio v 24 W. 57 APF, LLC*, 134 AD3d 621, 628 [1st Dept 2015] [internal quotation marks omitted]).

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

ENTERED: MAY 25, 2017

CLERK

Tom, J.P., Sweeny, Richter, Kapnick, Webber, JJ.

4113 Nicola Cleasby, et al., Index 800189/11
Plaintiffs-Respondents,

-against-

Suchitra S. Acharya, M.D., et al.,
Defendants-Appellants.

_____

Heidell, Pittoni, Murphy & Bach, LLP, New York (Daniel S. Ratner of counsel), for appellants.

Morelli Law Firm PLLC, New York (Sara A. Strickland of counsel), for respondents.

_____

Order, Supreme Court, New York County (Douglas E. McKeon, J.), entered May 27, 2016, which denied defendants' motion for summary judgment dismissing the complaint or, alternatively, to preclude plaintiffs' expert opinion or to direct a *Frye* hearing on plaintiffs' theories of causation, unanimously affirmed, without costs.

As an initial matter, plaintiffs' expert affirmation does not comply with CPLR 2106(a), because the expert failed to state that he or she is licensed to practice medicine in the State of New York. This defect should have been corrected by submission of a compliant affirmation, but the affirmation raises a triable issue of fact, and plaintiffs may correct the defect before the motion court.

Defendants established prima facie that they did not depart from good and accepted medical practice through affidavits by three medical experts opining that the post-stroke treatment of the infant plaintiff with an anticoagulant for three months and then aspirin, after his condition had apparently improved, was good and accepted medical care.

In opposition, plaintiffs raised triable issues of fact as to whether there was a departure and whether such departure caused the infant's injuries. Plaintiffs' expert opined that defendants departed from accepted practice by discontinuing the anticoagulation therapy and treating the infant with aspirin when the radiology scans showed a moderate- to high-grade stenosis of the cerebral artery associated with his initial stroke. The expert opined that defendants also departed from accepted practice by discontinuing the anticoagulants before confirming the infant's lipoprotein(a) levels, which are associated with a high risk of stroke. The expert opined further that these departures were a substantial factor in causing the infant's second stroke and consequent disabilities (*see Malone v Kim*, 96 AD3d 477, 477 [1st Dept 2012]).

Contrary to defendants' contention, plaintiffs' expert's opinion is not based on novel theories subject to preclusion

under *Frye v United States* (293 F 1013 [DC Cir 1923]), and does not warrant a preliminary *Frye*-type hearing. Plaintiffs' expert opined that defendants discontinued the anticoagulation therapy prematurely, which contributed to the infant's second stroke. Following the second stroke, anticoagulants were resumed, and the infant remained on them. In light of the record support for anticoagulation as the preferred treatment for this patient, there is nothing novel about the theory that post-stroke anticoagulation therapy was correct or was superior to aspirin in this instance (*see Marsh v Smyth*, 12 AD3d 307, 311-112 [1st Dept 2004] [Saxe, J., concurring]).

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

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

ENTERED: MAY 25, 2017

CLERK

Tom, J.P., Sweeny, Richter, Kapnick, Webber, JJ.

4114 The People of the State of New York, Ind. 394/13
Respondent,

-against-

Rafy Duma,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered December 22, 2014, convicting defendant, upon his plea of guilty, of robbery in the first degree and burglary in the first degree, and sentencing him to concurrent terms of nine years, unanimously modified, on the law, to the extent of vacating the sentence and remanding for a youthful offender determination, and otherwise affirmed.

As the People concede, based on *People v Middlebrooks* (25 NY3d 516 [2015]) and *People v Rudolph* (21 NY3d 497 [2013]), defendant is entitled to an express youthful offender determination.

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

ENTERED: MAY 25, 2017

CLERK

Tom, J.P., Sweeny, Richter, Kapnick, Webber, JJ.

4115-
4116 Index 22577/13E

Norma Fowler,
Plaintiff-Respondent,

-against-

Salvatore D. Buffa, M.D., et al.,
Defendants-Appellants,

Anurag Shrivastava, M.D.,
Defendant.

_____

Martin Clearwater & Bell LLP, New York (Barbara D. Goldberg of counsel), for Salvatore D. Buffa, M.D., Victoria A. Brand, CRNA and Alliance Anesthesiology Associates, P.L.L.C., appellants.

James W. Tuffin, Islandia, for Surgicare Ambulatory Center, Inc., appellant.

Law Office of Robert F. Danzi, Jericho (Christine Coscia of counsel), for respondent.

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Orders, Supreme Court, Bronx County (Stanley Green, J.), entered October 3, 2016, which denied the motions of defendants Salvatore D. Buffa, M.D., Victoria A. Brand, CRNA, and Alliance Anesthesiology Associates, P.L.L.C. (Alliance), and defendant Surgicare Ambulatory Center, Inc. (Surgicare) for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

In this medical malpractice action, defendants Buffa, Brand, and Alliance failed to establish entitlement to judgment as a

matter of law as to plaintiff's claims that, inter alia, Dr. Buffa failed to devise an anesthesiology plan sufficient to sedate and anesthetize plaintiff during her cataract surgery, and that Brand failed to notice and address that plaintiff was experiencing increasing levels of pain during the procedure (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

The court also correctly denied summary judgment to Surgicare. It is unclear from the record, in which Surgicare is listed in plaintiff's informed consent agreement as administering and directing anesthesia, whether Dr. Buffa was acting as an employee of, or on behalf of, Surgicare when he created the anesthesia plan for plaintiff (*see Brown v Speaker*, 33 AD3d 446, 447 [1st Dept 2006]; *Harrington v Neurological Inst. of Columbia Presbyt. Med. Ctr.*, 254 AD2d 129, 130 [1st Dept 1998]).

We have considered the remaining contentions and find them unavailing.

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

ENTERED: MAY 25, 2017

CLERK

Tom, J.P., Sweeny, Richter, Kapnick, Webber, JJ.

4119 The People of the State of New York, Ind. 639/14
Respondent,

-against-

Jason Garcia,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Justin J. Braun of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (John Moore, J.), rendered March 16, 2016,

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

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

ENTERED: MAY 25, 2017

CLERK

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

Tom, J.P., Sweeny, Richter, Kapnick, Webber, JJ.

4121N Peter Sicoli, et al., Index 152480/15
Plaintiffs-Respondents,

-against-

Riverside Center Parcel 2 Bit Associates, LLC, et al.,
Defendants-Appellants.

Cornell Grace, P.C., New York (Porsha Johnson of counsel), for appellants.

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

Order, Supreme Court, New York County (David B. Cohen, J.), entered November 25, 2016, which, in this action for personal injuries sustained by plaintiff Peter Sicoli while working at a construction project, denied defendants' motion for leave to renew and reargue the previously granted application of plaintiffs to direct defendants to produce unredacted accident reports, unanimously affirmed, as to the denial of leave to renew, and the appeal therefrom otherwise dismissed, without costs.

That part of defendants' motion seeking leave to renew plaintiffs' oral application for the production of unredacted accident report, was properly denied. Defendants did not

demonstrate the existence of new facts warranting a change in the motion court's prior determination (*see* CPLR 2221[e][2]; *Mano Enters., Inc. v Metropolitan Life Ins. Co.*, 143 AD3d 597 [1st Dept 2016]). Furthermore we see no reason to alter the court's discovery ruling. The denial of reargument is not appealable (*Oyang v NYU Hosp. Ctr.*, 139 AD3d 531 [1st Dept 2016]).

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

ENTERED: MAY 25, 2017

CLERK

Tom, J.P., Sweeny, Richter, Kapnick, Webber, JJ.

4122N M.A. Angeliades, Inc., etc., Index 601955/09
Plaintiff-Respondent,

-against-

Hill International, Inc.,
Defendant-Appellant,

New York City Department of Design
and Construction, et al.,
Defendants.

_____

Lewis Brisbois Bisgaard & Smith LLP, New York (Erica E. Amin of counsel), for appellant.

Georgoulis PLLC, New York (Peter Plevritis of counsel), for respondent.

_____

Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered July 29, 2016, which granted plaintiff's motion to amend the complaint, unanimously affirmed, without costs.

The motion court properly exercised its discretion in allowing plaintiff to amend the complaint, because the facts underlying the amendment were made known to defendant when the original complaint was filed and the amendment seeks only to add a new theory of liability based on those facts (*see Estrella v New York City Tr. Auth.*, 6 AD3d 305, 306 [1st Dept 2004]). Although defendant had the burden to establish prejudice, it submitted no evidence suggesting that it would be hindered in the

preparation of its case or prevented from taking measures to support its position, and examinations before trial have not yet been held (*see Aldrich v Northern Leasing Sys., Inc.*, 127 AD3d 543 [1st Dept 2015]; *Carey v Schwab*, 122 AD3d 1142 [3d Dept 2014], *lv dismissed* 25 NY3d 1062 [2015]; *Leslie v Hymes*, 60 AD2d 564 [1st Dept 1977]).

Contrary to defendant's contention, plaintiff has set forth sufficient evidence to establish that the proposed amendment seeking to add a cause of action for lien law trust fund diversion together with a request for punitive damages is not specious (*see Pier 59 Studios, L.P. v Chelsea Piers, L.P.*, 40 AD3d 363, 366 [1st Dept 2007]). Defendant's argument that there is nothing in the record to support plaintiff's claim that prior to January 2010, defendant diverted at minimum $671,686.82 in payments from codefendant for the work plaintiff performed is

more appropriately raised on a motion for summary judgment or at trial, since a motion to amend is not a proper vehicle for the determination of the merits (*see Dumesnil v Proctor & Schwartz*, 199 AD2d 869, 871 [3d Dept 1993]).

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

ENTERED: MAY 25, 2017

CLERK

Tom, J.P., Sweeny, Richter, Kapnick, Webber, JJ.

4123-
4124N Index 113227/09

Michael I. Knopf, et al.,
Plaintiffs-Appellants,

-against-

Michael Hayden Sanford, et al.,
Defendants-Respondents.

_____

Berry Law PLLC, New York (Eric W. Berry of counsel), for Michael I. Knopf and Delphi Capital Management, LLC, appellants.

Gary Greenberg, New York, for Norma Knopf, appellant.

Michael Hayden Sanford, respondent pro se.

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Orders, Supreme Court, New York County (Richard F. Braun, J.), entered on or about November 3, 2016, which (1) granted defendants' motion to vacate plaintiffs' note of issue and recognized defendants' right to a jury trial on damages, and (2) denied plaintiffs' motion to confirm the report of JHO Gammerman, unanimously reversed, on the law and the facts, without costs, the motion to vacate denied, the note of issue reinstated, the request for a jury trial denied, and the matter remanded for further proceedings.

Plaintiffs commenced this action to recover amounts allegedly owed by defendants pursuant to various loan agreements. This Court previously determined plaintiffs' entitlement to

partial summary judgment on their breach of contract claims (*see* 123 AD3d 521 [1st Dept 2014]), but the decision did not provide for entry of judgment. Accordingly, Supreme Court, on July 23, 2015, issued an order of reference to the inquest part to calculate damages. No defendant objected to or appealed from the order. Per court directive and the parties' stipulation, plaintiffs filed a note of issue on December 9, 2015 to have the case calendared in the inquest part, and, by email and regular mail, served the note of issue and certificate of readiness on defendants' counsel Holwell Schuster & Goldberg LLP and also on defendant Sanford, who, at times, had appeared pro se. Plaintiffs offer affidavits swearing that the addresses used for service were correct and acknowledging that the affirmation of service includes multiple typographical errors as to the addresses used.

In response to email service of the note of issue, Holwell Schuster, which had filed in this Court a notice of appearance as counsel to all defendants, replied it was "not counsel in the [Supreme Court] case" and plaintiffs' counsel should accordingly "not proceed on the assumption that serving our firm constitutes service."

Defendants Pursuit and Sanford filed jury demands on January

14, 2016, the day the inquest on damages was scheduled to begin before JHO Gammerman. At their initial appearance before JHO Gammerman on January 14, 2016, defendants raised, for the first time, the issue of proceeding by jury trial rather than inquest. JHO Gammerman stated such issues could be decided only by the referring court, and adjourned the inquest for several days. Despite JHO Gammerman's explanation and despite appearing before the court later that day, defendants did not raise the jury trial issue and instead only sought an adjournment of the inquest, which request was denied. The inquest resumed on January 19 and defendants' counsel again raised the jury trial issue, and JHO Gammerman again stated his recommendation had been to raise the issue before the court, as only the court could decide the issue, and stated that he had granted the adjournment for that purpose. On learning that counsel had nevertheless failed to raise the jury trial issue with the court during the adjournment, JHO Gammerman proceeded to start the inquest in earnest. Multiple days of hearings followed, at the end of which JHO Gammerman concluded the amount due plaintiffs from Sanford individually totaled $10,937,850, and of that amount, defendants Sanford and Pursuit were jointly liable to plaintiffs for $8,336,488. Ten days later, defendants' co-counsel demanded that plaintiffs'

counsel withdraw the note of issue on grounds of improper service, an issue never before raised.

Supreme Court erred in granting the motion to vacate on grounds of improper service. The record establishes that service by email was effected on Holwell, Schuster, counsel to all defendants. Supreme Court appropriately rejected defendants' argument that Holwell, Schuster's representation was limited to appellate matters, as the notice of appearance does not so indicate and they furnish no proof of either having given informed consent to a limited representation or proof that notice of such limited representation was provided to the court or opposing counsel (*see* Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.2[c]). Service by email was valid, as the notice of appearance expressly requested such service (*see Alfred E. Mann Living Trust v ETIRC Aviation S.A.R.L.*, 78 AD3d 137, 141-142 [1st Dept 2010]), and the record establishes a pattern of email service between opposing counsel. As Holwell, Schuster was counsel to defendant Sanford at the time, this resolves the inquiry as to the propriety of service on him as well.

Supreme Court also erred in recognizing defendants' right to a jury trial on damages. As the note of issue was properly served by email on December 9, 2015, their jury demands were due

by December 24 (*see* CPLR 4102(a)), and they made no application to extend their time under CPLR 4102(e). Their objections to JHO Gammerman do not affect this result, as they knew the objections could only be raised to the referring court but they did not raise them, even when granted an adjournment of the inquest for that purpose.

As Supreme Court's denial of the motion to confirm was based solely on its decision to vacate the note of issue, the order denying the motion is reversed and the motion remanded to the court to confirm, reject, or modify JHO Gammerman's report on the merits (*see* 22 NYCRR 202.44).

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

ENTERED: MAY 25, 2017

CLERK

Tom, J.P., Richter, Gische, Gesmer, JJ.

2673 James Taylor, et al., Index 151560/14
Plaintiffs-Respondents,

-against-

72A Realty Associates, L.P., et al.,
Defendants-Appellants.

_____

Joel M. Zinberg, New York, for appellants.

Law Offices of Sokolski & Zekaria, P.C., New York (Daphna Zekaria of counsel), for respondents.

_____

Order, Supreme Court, New York County (Jennifer G. Schecter, J.), entered January 29, 2016, modified, on the law, solely to declare that the increases made to the rent-stabilized rent in 2000, based upon IAIs before plaintiffs took occupancy, were legally permissible, and otherwise affirmed, without costs.

Opinion by Gische, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Rosalyn H. Richter
Judith J. Gische
Ellen Gesmer, JJ.

2673
Index 151560/14

_____x

James Taylor, et al.,
Plaintiffs-Respondents,

-against-

72A Realty Associates, L.P., et al.,
Defendants-Appellants.

_____x

Defendants appeal from the order of the Supreme Court, New York County (Jennifer G. Schecter, J.), entered January 29, 2016, which, to the extent appealed from, denied their motion for summary judgment insofar as it sought dismissal of the complaint as against the Owner, and granted plaintiffs' cross motion for summary judgment declaring that apartment 5M is rent-stabilized.

Joel M. Zinberg, New York, and Murray Shactman, New York, for appellants.

Law Offices of Sokolski & Zekaria, P.C., New York (Daphna Zekaria of counsel), for respondents.

GISCHE, J.

There are interlocking complex issues framed by this appeal involving plaintiffs' claims that the apartment they have continuously rented for the last 16 years (apartment 5M), was improperly removed from rent stabilization. The overarching issue is whether the apartment should be restored to rent stabilization because defendant 72A Realty Associates L.P. (the Owner) deregulated the apartment pursuant to the luxury decontrol laws while it was simultaneously receiving tax incentives under the City's J-51 program[1] (*see* Administrative Code § 11-243). There can be little dispute that following *Roberts v Tishman Speyer Props., L.P.,* (13 NY3d 270 [2009]) and its progeny applying *Roberts* retroactively (*Gersten v 56 7th Ave.* LLC, 88 AD3d 189, 198 [1st Dept 2011]) the subject apartment must be returned to rent stabilization as of 2000, when the Owner first treated the apartment as exempt. The thornier issues implicated by returning the apartment to rent stabilization concern the

[1] In New York City, multiple dwellings may qualify for tax incentives designed to encourage rehabilitation and improvements (*see* Administrative Code of City of NY § 11-243 [previously § J51-2.5]). The City's J-51 program, authorized by Real Property Tax Law §489, allows property Owners who complete eligible projects to receive tax exemptions and/or abatements that continue for a period of years (see Admin Code § 11-243[b][2], [3], [8]; 28 RCNY 5-03[a]). Rental units in buildings receiving these exemptions and/or abatements must be registered with the Division of Housing Community Renewal (DHCR), and are generally subject to rent stabilization for at least as long as the J-51 benefits are in force (*see* 28 RCNY at 5-03[f]).

setting of the stabilized rent, the base date for, and the statute of limitations applicable to, the setting of such rent, and the possible imposition of treble damages and attorney fees. We agree with Supreme Court that plaintiffs are entitled to a declaration that the apartment was and still is subject to rent stabilization and that they are the rent-stabilized tenants thereof. We also agree with Supreme Court that the issues of the legal rent, as well as the issues of possible overcharge, treble damages and attorneys fees cannot be resolved on a motion for summary judgment. We disagree with Supreme Court only insofar as it held that the increases made to the rent-stabilized rent in 2000, based upon individual apartment improvements (IAIs) before the plaintiffs took occupancy, are subject to challenge on this record.

Apartment 5M is a two bedroom apartment at 187 East 4th Street in Manhattan. Plaintiff Tamara Jenkins moved into the apartment in February 2000 upon signing a two-year vacancy lease at a monthly rent of $2,200.[2] The lease consisted of an altered, standard, printed rent-stabilized lease. The words "RENT STABILIZATION" were crossed out in the heading of the lease as was the entirety of paragraph 32, pertaining to "[r]ent regulations." There was a separate rider that contained the

[2] Plaintiff James Taylor moved in later on and was added to the lease. Jenkins and Taylor are collectively referred to as plaintiffs in this opinion.

following notice:

> "39. Tenant acknowledges that he/she has been informed that the demised apartment is exempt from and not subject to any rent control or rent stabilization laws or regulations (e.g. the NYC Rent Stabilization Law and Code or the Emergency Tenant Protection Act). Paragraph 32 of the printed form of this lease is not applicable and is deemed deleted."[3]

Peter Zajonc occupied the apartment before Jenkins. Zajonc was the first rent-stabilized tenant of apartment 5M after it was removed from rent control in 1993. Zajonc filed a fair market rent appeal (FMRA) with DHCR challenging the initial rent-stabilized rent of $1,265 charged by the Owner. DHCR denied the FMRA. He continued to reside in the apartment until 1999 when he surrendered it. At that time Zajonc's rent was $1,464 per month, which was the legal rent registered with DHCR at that time.

Before Jenkins moved in and while the apartment was still vacant, the Owner undertook certain improvements to the apartment, including the installation of new thermal break windows; the demolition of walls and construction of a new closet in one bedroom; the removal and installation of new kitchen

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[3] The lease did not contain any notice that upon expiration of the J-51 benefits the Owner would seek to have the legal status of the apartment changed (*see Gersten*, 88 AD3d at 194-195, *citing East W. Renovating Co. v New York State Div. of Hous. & Community Renewal*, 16 AD3d 166 [1st Dept 2005] and *Matter of Lomagno v Division of Hous. & Community Renewal*, 38 AD3d 897 [2d Dept 2007]). The Owner believed at the time that the apartment was exempt from rent stabilization, which, if true, would have rendered any such provision meaningless.

cabinets and countertops; the installation of new appliances, including a dishwasher and refrigerator; the installation of a new sink, faucet and floor in the kitchen; the refinishing of all doors; and the installation of new tiles around the plumbing work and new closet shelving. Janet Zinberg,[4] the current managing agent, provided business records she claims were maintained in the Owner's files by her now deceased father, the managing agent at the relevant time. The records include bills, statements and invoices from contractors, service providers and suppliers, either marked paid, or supported by cancelled checks proving payment. Ms. Zinberg contends the records support the Owner's claim that it spent $18,343.07 in improvements to the apartment before Jenkins moved in.

In setting the rent for the vacant apartment in 2000, the Owner sought to take advantage of two increases that were available to it under the rent regulation laws. One increase was simply due to the apartment becoming vacant; that increase, which was equal to 20% of the registered rent, was $292.80.[5] The other increase was based upon an allowable percentage of the cost of IAIs made to the vacant apartment (Rent Stabilization Law of 1969 [Administrative Code] [RSL] § 26-511[c][13]; Rent Stabilization

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[4] She was dismissed from the case as an individual defendant.

[5] There has never been any claim by plaintiffs that the vacancy increase charged by the Owner at the inception of their tenancy was impermissible.

Code [9 NYCRR] [RSC] § 2522.4[a][1]). In this case 1/40th of the improvements, or the sum of $458.58, was added on to the registered rent ($1,464). The two increases, taken together, increased the rent to $2,215.38 per month.

Because the new rent for apartment 5M exceeded $2,000 per month, the Owner then decontrolled the apartment, returning it to the free market, on the basis that the permitted rent exceeded the high-rent/vacancy threshold for luxury decontrol (RSL § 26-504.2[a]). Despite the building's enrollment in the J-51 tax abatement program in 2000, the Owner believed it could rely on the luxury decontrol laws to return the apartment to the free market. This was consistent with DHCR's interpretation of the relevant laws and regulations at that time (*Roberts*, 13 NY3d at 281). The Owner's belief that it could rely on the luxury decontrol laws while simultaneously receiving J-51 benefits, however, proved to be erroneous for the reasons articulated in *Roberts* (13 NY3d at 286).

DHCR's registration records contain an entry, made in 2000, indicating that the apartment was "exempt" from registration. Although the entry indicates that the reason for the exemption is based upon the apartment being either a coop or condo, this is a clerical error; the exemption was based upon luxury decontrol. At or about the time Jenkins accepted the first lease, the Owner filed a rent registration form (an RR-2A) with DHCR, stating that

apartment 5M was permanently exempt from annual rent registration due to "[h]igh [r]ent [v]acancy." The Owner's records show that a copy of this filing was mailed to Jenkins in August 2001. Jenkins did not challenge the rent increases at that time.

Plaintiffs have renewed their lease several times since taking occupancy. Their renewal lease for the period of March 2013 to February 2014 was at a rent of $3,783 per month. On November 22, 2013, 90 days before the lease was due to expire, the Owner offered plaintiffs a rent-stabilized renewal lease (RSC § 2523.5[a]). Plaintiffs signed a two-year renewal lease at a rent of $4,076.18 per month. On March 24, 2014, shortly after plaintiffs commenced this action, the Owner first filed annual rent registrations for years 2009 through 2013. Each of these filings lists a "legal regulated rent" that is higher than what the Owner charged under plaintiffs' renewal leases and the amounts plaintiffs were actually charged in rent are denominated "prefer[ential] rents]" (all capitalization omitted). The buildings's J-51 benefits have since expired.

Supreme Court correctly declared that plaintiffs are rent-stabilized tenants. Contrary to the Owner's argument, the fact that it has now offered plaintiffs a rent-stabilized lease, which only began in March 2014, does not render the issue of plaintiffs' rent-stabilized status moot. The declaration required in this case is retroactive to the inception of

plaintiffs' tenancy and affects their rights from that point in time to the present.

Before the 2009 Court of Appeals decision in *Roberts* there was a widespread practice among owners of certain rent-stabilized buildings of taking simultaneous advantage of the luxury decontrol laws while also enrolled in and receiving J-51 tax benefits.[6] This practice was premised on DHCR's 1996 administrative interpretation of these laws. In deciding *Roberts*, the Court of Appeals rejected DHCR's interpretation, holding that apartments in buildings receiving J-51 benefits remain subject to rent stabilization for at least as long as the J-51 benefits are in force (*see* 28 RCNY 5-03[f]; *Roberts*, 13 NY3d at 286). The net result of *Roberts* is that any rent-stabilized apartment that was luxury deregulated while also receiving J-51 benefits was improperly deregulated. *Roberts*, however, expressly left open certain important issues, including whether its decision had retroactive effect and the statute of limitations applicable to the disputes (13 NY3d at 287). The Court of Appeals did not address what effect expiration of J-51 benefits

[6] DHCR's interpretation distinguished between those owners of buildings that were rent-regulated before receiving such tax benefits from those owners whose buildings became regulated "solely" due to receiving such benefits. That distinction meant that owners of already regulated buildings could take advantage of high-rent/luxury decontrol, but not owners whose buildings were regulated "solely" as a result of receiving those benefits (*see Roberts*, 13 NY3d at 286).

would have on the rent-regulated status of affected apartments, or how to calculate the rent-stabilized rents for apartments that were improperly removed from rent regulation. Subsequent decisions by this Court, however, have now resolved some of these crucial issues and inform the decision in this case.

In 2011, this Court decided the issue of retroactivity, holding that *Roberts* has retroactive application because the Court of Appeals did not establish a new principle of law, it had only construed law that had been in effect for years (*Gersten v 56 7th Ave., LLC*, 88 AD3d 189, 198 [1st Dept 2011]). Although our decision in *Gersten* was appealed, the appeal was withdrawn in March 2012 (18 NY3d 954 [2012]), making it clear from that point forward that owners had an obligation to retroactively restore affected apartments to rent stabilization and register them (*Matter of Park v New York State Div. of Hous. & Community Renewal*, __ AD3d __ [1st Dept 2017], 2017 NY Slip Op 02745, *3-4 [1st Dept 2017]).

This Court has also decided the impact that subsequent expiration of J-51 benefits has on the availability of the luxury decontrol laws. We have held that an apartment that is subject to rent stabilization before receiving J-51 benefits reverts to its former pre-J-51 rent-stabilized status upon the expiration of those benefits (*Matter of Bramwell v New York State Div. of Hous. and Community Renewal,* 147 AD3d 556, 556 [1st Dept 2017], citing

Matter of Schiffren v Lawlor, 101 AD3d 456, 457 [1st Dept 2012]). The reversion to pre-J-51 benefit rent regulation includes the right of an Owner to seek luxury decontrol in appropriate cases (*Schiffren*, 101 AD3d at 457). In *72A Realty Assoc. v Lucas* (101 AD3d 401 [1st Dept 2012][*Lucas*]), however, a case involving this very same Owner and building, we recognized that a tenant in occupancy at the time an apartment was improperly deregulated by a landlord receiving J-51 benefits retains its rent-regulated status for the duration of its tenancy (*id.* at 401-402). *Roberts* and *Gersten* make it clear that the Owner had no right to return apartment 5M to the free market in 2000 when it was first leased to Jenkins. *Lucas* compels the further result that even though the J-51 benefits have since expired, the apartment was improperly deregulated and remains rent-stabilized. Jenkins was the legal tenant of apartment 5M while the J-51 tax benefits were in effect and after they expired, plaintiffs continued to occupy the apartment. Because plaintiffs have continuously occupied the same apartment since the inception of Jenkins's tenancy in 2000, apartment 5M remains subject to rent stabilization.

The collateral issues raised by this appeal concern the setting of the rent-stabilized rent for the apartment, which implicates the applicable statute of limitations and look back period. The Owner argues that there is no basis to look beyond the four-year limitations period applicable to rent overcharge

complaints, set forth in the Rent Stabilization Code (RSC § 2522.3[a]). Plaintiffs argue that the four-year limitations period should be disregarded and the entire rent history should be examined, including the Owner's charges for the IAIs it contends to have made in 2000, because such improvements may have been fraudulent.

In general, while the regulatory status of an apartment may be challenged at any time during a tenancy, challenges to the level of rent charged must be made within a four-year limitations period (CPLR 213-a; *Gersten*, 85 AD3d at 199). Moreover, examination of the rental history is usually limited to the four-year period immediately preceding the filing of a complaint or petition (*Matter of Gilman v New York State Div. of Hous. & Community Renewal*, 99 NY2d 144, 149 [2002]). At bar, four years before the instant action was filed was February 21, 2010. This date serves as the base date by which to calculate overcharges, if any.

We recognize that under certain circumstances, especially where a landlord has engaged in fraud in initially setting the rent or in removing an apartment from rent regulation, the court may examine the rental history for an apartment beyond the four-year statutory period allowed by CPLR 213-a (*Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.*, 15 NY3d 358, 367 [2010]; *Thornton v Baron*, 5 NY3d 175

[2005]). In this case, however, the Owner in its motion for summary judgment disproved any fraud in the setting of rent when Jenkins first took occupancy. Plaintiffs' assertions of possible fraud in connection with the apartment improvements made in 2000 are pure speculation and insufficient to create an issue of fact or warrant discovery (*Matter of Boyd v New York State Div. of Hous. & Community Renewal*, 23 NY3d 999 [2014]).

In moving for summary judgment the Owner provided documentation of the actual improvements.[7] It also proved that in 2000 these very plaintiffs were aware that the apartment had been removed from rent stabilization pursuant to luxury decontrol. The information was contained in their lease; they were provided with the required rent stabilization notice, further informing them that the apartment was now exempt from rent stabilization because of high-rent/vacancy decontrol, and the exempt status of the apartment was a matter of public record because it was on file with DHCR. The rent charged Zajonc, the previous tenant, was a matter of public record as well because the rent was registered with DHCR. Clearly, Jenkins knew the condition of the apartment when she first moved in 2000, and that year she had the right to contest the basis for the claimed

[7] In this regard we distinguish our earlier decision in *Lucas* (101 AD3d 401), although it involved the same Owner and building, but a different tenant. In *Lucas*, the Owner failed to support its claimed apartment renovations with sufficient documentary evidence (*id.* at 402-403).

increases in rent that brought it beyond the $2,000 per month threshold. Plaintiffs were aware of the facts that would have permitted them to mount a challenge to the rent at that time, which challenge could have been for fraud or even on a less onerous standard, for instance, the reasonableness of the costs attributable to the claimed improvements. Moreover, plaintiffs had every incentive to contest the level of rent charged when they first took occupancy, because any successful challenge to the IAIs in 2000 could have potentially brought the rent below the $2,000 luxury decontrol threshold, and the apartment would have remained rent-stabilized even without regard to any issues considered in *Roberts*.

In response to the Owner's prima facie showing that there was no fraud underlying the IAI rent increases in 2000, plaintiffs failed to raise any issue of fact requiring a trial or further discovery. Although plaintiffs originally alleged that the Owner had not made any improvements at all, but only minor repairs to the apartment, they now concede that the Owner may have installed "a few appliances and kitchen cabinets." They still contend, nonetheless, that they need further discovery regarding the condition of the apartment before the professed improvements were made so they can gauge the accuracy of the amount the Owner claims to have spent on them.

A mere allegation of fraud, alone, is insufficient to

justify any further discovery (*Conason v Megan Holding, LLC*, 25 NY3d 1, 16 [2015], citing *Matter of Grimm*, 15 NY3d at 367) as it would defeat the salutary purpose of the four-year statute of limitations, which is to "alleviate the burden on honest landlords to retain rent records indefinitely" (*Thornton*, 5 NY3d at 181, citing *Gilman*, 99 NY2d at 149). As in *Boyd* (23 NY3d 999), plaintiffs have "failed to set forth sufficient indicia of fraud" in connection with improvements that were made more than a decade ago (*id.* at 1000-1001, citing *Grimm*, 15 NY3d at 366–367). Mere skepticism about the quality of the improvements or how extensive they were is insufficient to require any further inquiry, particularly where, as here, Jenkins was the first tenant to live in the apartment after the improvements were made. Despite having direct knowledge of the condition of the apartment, Jenkins fails to identify or contradict a single improvement the Owner claims it made. Moreover, she was given sufficient notice of the increases to the rent at or about the time she accepted the lease and moved in so as to trigger any rights she had at the time to contest the improvements.

Contrary to plaintiffs' arguments, the Owner's business records provided in this case are admissible under a hearsay exception and are properly considered on the Owner's motion for summary judgment (CPLR 4518[a]; *DeLeon v Port Auth. of N.Y. and N.J.*, 306 AD2d 146 [1st Dept 2003]). By providing records that

include itemized bills from contractors, and record of payment, such as cancelled checks, the Owner has produced sufficient information and detail to validate the 1/40th increase in the rent attributable to those improvements (*compare Lucas* at 402-403 [significant increase for improvements, but no records]; *Altschuler v Jobman 478/480*, 135 AD3d 439, 440 [1st Dept 2016] [affidavit provided, but no documentary proof of improvements], *lv dismissed* 28 NY3d 945 [2016], *lv denied* __ NY3d __, 2017 NY Slip Op 68891 [2017]).

Equally unavailing is plaintiffs' reliance on *Jemrock Realty Co., LLC v Krugman* (13 NY3d 924 [2010]) for their contention that discovery is required. *Jemrock* does not, as plaintiffs argue, mandate that a hearing must be held each and every time a tenant challenges improvements. *Jemrock* actually clarifies that there is no inflexible rule of proof or requirement that a landlord provide an item-by-item breakdown of the improvements it made (*id.* at 926). What is required is that the fact-finder review the record and render the judgment that is warranted by the facts (*id.*). Plaintiffs do not provide any basis for their claim that further discovery will lead to additional relevant evidence on the issue of fraud (*see Nascimento v Bridgehampton Constr. Corp.*, 86 AD3d 189, 192 [1st Dept 2011]). Since we have decided that the increases in rent attributable to the vacancy and improvements were legally permissible, it follows that the Owner

was justified in raising the rent by the designated percentage of those amounts at the inception of Jenkins's tenancy. The rent in 2000, with permissible increases could have been $2,215.38, a sum that is more than what Jenkins was actually charged for rent in the initial vacancy lease made as of February 2000. The initial rent, which exceeded $2,000 per month, was still permissible even though the apartment was still subject to rent stabilization. We have previously recognized that a rent-stabilized tenant in a building receiving J-51 benefits can be charged rent in excess of the vacancy threshold, while still retaining the other benefits of stabilization, including the right to renewal leases and capped increases (*Matter of Park v New York State Div. of Hous. & Community Renewal*, __ AD3d __, 2017 NY Slip Op. 02745, *4 [1st Dept 2017]).

While there is no evidence of fraud by the Owner in setting plaintiffs' initial rent in 2000, and the base date for setting the rent is February 21, 2010 (*cf Grimm*, 15 NY3d 358), the Owner's motion for summary judgment was properly denied. The Owner is still required to prove what the legally regulated rent was on the base date (*Grimm* at 365, citing 9 NYCRR 2520.6[e], [f][1]; 2526.1[a][3][i]). At bar, the Owner simply claims that because it charged plaintiffs $3,500 a month in rent pursuant to a lease and it later registered that rent with DHCR, that amount should be accepted as the legal, regulated rent for the apartment

and used by the court to decide plaintiffs' overcharge claims. We know, however, that the rent set in that lease was based on the Owner's misapprehension that apartment 5M was not subject to rent stabilization. Although the Owner could charge plaintiffs a rent greater than $2,000 per month in 2000, this did not withdraw the apartment from rent stabilization; it remained rent-stabilized despite a rent in excess of $2,000. This was due to the fact that the same tenants (plaintiffs) remained in occupancy throughout the relevant time. Rent stabilization, at a minimum, entitled plaintiffs to renewal leases at capped increases in rent (*Park* at *4). There is no evidence in this record that the rent Owner charged thereafter was limited to lawful rent guidelines increases rather than fair market, unregulated rent. We cannot reconcile a mechanical application of CPLR 213-a and give effect to the retroactive application of *Roberts*, as we must (*Gersten*, 88 AD3d at 198), without considering the permitted rent stabilization increases after the expiration of the 2000 lease and preceding February 21, 2010. Only in this manner can it be determined whether the rent the Owner charged plaintiffs on the base date bears any relation to a permissible, rent-stabilized rent. In other words, a contrary ruling would essentially allow the Owner to collect rent that might be in excess of what it could have otherwise charged plaintiffs, based upon its own misapprehension of the law (*id.*). Therefore, a determination of

the legally permissible rent-stabilized rent that plaintiffs should have been charged on the base date requires a mathematical calculation of the applicable rent guidelines (and any other) legally permissible increases since February 2002, the expiration date of the first lease.

Although the Owner filed retroactive DHCR registrations in 2014, these registrations do not establish that the 2010 rent it charged plaintiffs was in accordance with the applicable rent stabilization guidelines. These registrations were filed less than four years before the filing of plaintiffs' complaint and they are only retroactive to 2009. They do not address the period of time after Jenkins's initial lease through 2009. Thus, they are subject to dispute. We have recognized that in a *Roberts* situation where an Owner had discontinued DHCR rent registrations based upon a justifiable belief that the apartment was not subject to rent regulation, it should not be penalized by rolling the rent back to the last registered rent (*Park* at *4 citing *Jazilek v Abart Holdings, LLC*, 72 AD3d 529, 531 [1st Dept 2010]). However, on the other hand, an Owner cannot use the lack of registration or misapprehension of the law as a sword to establish a rent that clearly bears no relation to the appropriate parameters of rent regulation.

The timing of these retroactive registrations may play a role in this case on the issue of willfulness. We have

recognized that at least by March 2012 the law clearly required the retroactive return of apartments like these to rent regulation (*Park* at *3-4). In the *Lucas* decision involving this very Owner and the same building (101 AD3d 401 [1st Dept 2012]), we made it clear that an improperly deregulated apartment was required to be returned to rent stabilization and that the base date rent should not have been set at the market rate (*id*. at 402). The Owner here failed to register apartment 5M and readjust the rent until 2014 when faced with this litigation. These facts preclude any determination at this time about whether an overcharge, if any, was willful, and the Owner should be allowed the opportunity to explain the reasons for such delay and the steps, if any, it undertook to bring itself in compliance. Legal fees also cannot be determined without the underlying issues of overcharge and penalty being decided.

Accordingly, the order of the Supreme Court, New York County (Jennifer G. Schecter, J.), entered January 29, 2016, which, to the extent appealed from, denied defendants' motion for summary judgment insofar as it sought dismissal of the complaint as against the Owner, and granted plaintiffs' cross motion for summary judgment declaring that apartment 5M is rent-stabilized, should be modified, on the law, solely to declare that the increases made to the rent-stabilized rent in 2000, based upon IAIs before plaintiffs took occupancy, were legally permissible,

and otherwise affirmed, without costs.

All concur.

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

ENTERED: MAY 25, 2017

CLERK