SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

**DECEMBER 29, 2015**

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Sweeny, Renwick, Saxe, Feinman, JJ.

15624-
15625 Index 101393/13
101384/13

In re the 60 East 12th Street Tenants' Association, et al.,
Petitioners-Respondents,

-against-

New York State Division of Housing and Community Renewal,
Respondent,

12 Broadway Realty LLC,
Respondent-Appellant.

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In re 12 Broadway Realty LLC,
Petitioner-Appellant,

-against-

New York State Division of Housing and Community Renewal,
Respondent,

The 60 East 12th Street Tenants' Association, et al.
Intervenors-Respondents-Respondents.

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Rosenberg & Estis, P.C., New York (Jeffrey Turkel of counsel), for appellant.

Collins, Dobkin & Miller, LLP, New York (Seth A. Miller of counsel), for respondents.

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Order, Supreme Court, New York County (Alice Schlesinger, J.), entered October 24, 2014, which, insofar as appealed from as limited by the briefs, granted the petition of 60 East 12th Street Tenants' Association and Jeffrey Schanback, as its President and Tenant Representative (collectively, Tenants), to the extent of annulling so much of the determination of the New York State Division of Housing and Community Renewal (DHCR), dated August 15, 2013, which effectively granted in part and denied in part the application of 12 Broadway Realty LLC (Owner) for a rent increase based on a claimed major capital improvement (MCI) involving resurfacing of exterior walls of the subject building, and remanded to DHCR with conditions precluding it from reconsidering that MCI issue, modified, on the law, to permit DHCR on remand to address Owner's application for an MCI rent increase based on resurfacing work consistent with this decision, and otherwise affirmed, without costs.

Owner applied for an MCI rent increase on or about November 13, 2007, claiming, among other things, that it expended $1,931,013.69 on resurfacing the exterior brick walls of its apartment building. DHCR's Rent Administrator denied this application, insofar as relevant on appeal, on October 9, 2009. Among other things, the Rent Administrator disapproved the

claimed work on the ground that the useful life of prior such work had not expired and Owner had not obtained a waiver from DHCR following its June 20, 1995 order granting an MCI rent increase. The 1995 order described the previous work, which was completed in or about 1993, as follows, without any elaboration or supporting fact findings: "RESURF EXT WALLS ETC." Then, in an order dated February 20, 1998, DHCR modified the 1995 order by offsetting the rent increase in light of Owner's receipt of a tax abatement. The 1998 order described the previous work as follows, again without elaboration or findings: "WATERPROOFING, POINTING, MASONRY."

Owner filed a request for reconsideration (RFR) of the 2009 order, which the Rent Administrator granted. On or about June 30, 2011, the Rent Administrator granted in part and denied in part Owner's RFR, finding the useful life requirement partly applicable, and rejecting Owner's contention that the 1998 order contradicted the 1995 order as to the nature of the previous work. Owner and Tenants each filed a separate, undisputedly timely petition for administrative review (PAR) from the Rent Administrator's 2011 order. On or about August 15, 2013, DHCR's Deputy Commissioner issued an order which granted Owner's PAR to the extent of modifying the MCI rent increase to $46.25 per room

per month, found that the Rent Administrator had improperly disallowed some of the claimed "exterior resurfacing costs," otherwise denied Owner's PAR, and denied Tenants' PAR in its entirety.

In these two ensuing consolidated article 78 proceedings, the court effectively annulled the determination to grant reconsideration of the resurfacing issue. By order entered January 23, 2015, the court granted Owner's motion for leave to appeal to this Court.

The court erred in finding that Owner failed to exhaust its administrative remedies. Notwithstanding that Owner filed an RFR rather than a PAR from the 2009 order, Owner undisputedly filed a timely PAR from the 2013 order challenged in these proceedings (*cf. Matter of Klein v New York State Div. of Hous. & Community Renewal*, 17 AD3d 186 [1st Dept 2005]).

Moreover, the court should not have effectively annulled DHCR's reconsideration of the MCI issue and precluded it on remand from resolving the discrepancy between the 1995 and 1998 orders as to the nature of the work performed on the building which justified the 1995 grant of an MCI rent increase. DHCR has the authority to apply its expertise to the question of Owner's entitlement to a subsequent MCI rent increase. Although the Rent

Administrator's 2011 order largely rejected Owner's MCI application and conclusorily disregarded the discrepancy between the 1995 and 1998 orders, the subsequent challenged order used the language of the 1998 order in describing the First Project as waterproofing and pointing. DHCR correctly viewed those several orders as so inconsistent and unclear about this matter as to constitute an irregularity in a vital matter, warranting a remand (*see* Rent Stabilization Code [9 NYCRR] § 2527.8; *see also Matter of Atkinson v Division of Hous. & Community Renewal*, 280 AD2d 326 [1st Dept 2001]). As this Court recognized in *Matter of Peckham v Calogero* (54 AD3d 27, 28 [1st Dept 2008], *affd* 12 NY3d 424 [2009]), when such an "irregularity in vital matters" is presented, and the agency is not merely attempting to reach a different determination, a remand is appropriate despite the otherwise final nature of the questioned order. This is in keeping with the deferential standard utilized in assessing the careful and considered approach to this problem taken by the administrative agency (DHCR) charged with the responsibility over the subject matter at issue. Contrary to Tenants' argument, such "irregularity in vital matters" is not limited to procedural defects but may be substantive in nature (*see e.g. Matter of Silverstein v Higgins*, 184 AD2d 644 [2d Dept 1992]).

In light of the inconsistency between the 1995 and 1998 orders, the court erred in finding that Owner is collaterally estopped by the 1995 order (*see Matter of Sherwood 34 Assoc. v New York State Div. of Hous. & Community Renewal*, 309 AD2d 529, 532 [1st Dept 2003]). Owner established that its predecessor did not have "a full and fair opportunity to litigate in the prior proceeding" (*Gersten v 56 7th Ave. LLC*, 88 AD3d 189, 201 [1st Dept 2011], *appeal withdrawn* 18 NY3d 954 [2012]; *see ABN AMRO Bank, N.V. v MBIA Inc.*, 17 NY3d 208, 226-227 [2011]), since the 1995 order granted the full relief sought by the predecessor (*see Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545 [1983]).

However, upon remand, DHCR must be "limited to the facts and evidence" previously submitted, except under the "narrow circumstances" in which a party submits "'certain facts or evidence which [it] establishes could not reasonably have been offered or included'" in the prior administrative proceedings (*Matter of Gilman v New York State Div. of Hous. & Community Renewal*, 99 NY2d 144, 150 [2002], quoting 9 NYCRR 2529.6).

We have considered Tenants' arguments on preservation, among other things, and find them unavailing.

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

FEINMAN, J. (dissenting)

These two joined appeals address the critical question of when an administrative determination is "final," such that no further attack on its merits is permitted.

While I agree with the majority that these two joined matters must be remanded to the Division of Housing and Community Renewal (DHCR) for further fact-finding, I differ slightly as to the scope of the hearing upon remand. Specifically, the DHCR should not be permitted to re-examine the nature of the work characterized in the 1995 order as resurfacing, because that order was a final order. The attempts to call it into question are in violation of administrative procedure and contradict case law. This is apparent when examining the pertinent regulations contained in the Rent Stabilization Code.

The Relevant Administrative Regulations

The Rent Stabilization Code (RSC) (9 NYCRR) § 2521.1 *et seq.* provides that an owner may seek an upward adjustment of the legal regulated rent for making capital improvements (MCI) on its building (RSC 2522.4). The burden of proof is clearly on the owner to establish its entitlement to an MCI rent increase (*see Matter of 985 Fifth Avenue v State Div. of Hous. & Community Renewal*, 171 AD2d 572, 574 [1st Dept 1991], *lv denied* 78 NY2d 861

[1991]).

The DHCR must be satisfied that the legal regulated rent was not previously adjusted for the same work performed within the number of years determined to be the "useful life" of the particular capital improvement (DHCR Office of Rent Administration, Operational Bulletin 84-4[1][c]; *see* RSC 2522.4 [a][2][I] [d] [Useful Life Schedule for Major Capital Improvements]). Work undertaken before the useful life of the original work has expired does not qualify for a rent increase unless the owner has been granted a waiver of the useful life requirement prior to commencing the work (RSC 2522.4[a][2][ii][8]). If, however, the work is done on an emergency basis to correct a condition that is "dangerous to human life and safety or detrimental to health," an owner may seek a waiver at the same time it submits its application for an MCI rent increase (RSC 2522.4[a][2][i])[e][1]).

A party aggrieved by an agency determination may file a petition for administrative review (PAR) within 35 days after the date the order was issued (RSC 2529.2). A PAR determination is the final order of the Commissioner (DHCR Office of Rent Administration Policy Statement 91-5), and is ripe for judicial review pursuant to article 78 of the CPLR (*see* RSC 2530.1).

A party may also make a request for reconsideration (RFR) of an order, as 12 Broadway Realty LLC (Owner) did here. As relevant, the RFR must "contain sufficient evidence to substantiate the irregularity in a vital matter which affected the determination" (DHCR Office of Rent Administration, Policy Statement 91-5; RSC 2527.8; *see Matter of Ponds v New York State Div. of Hous. & Community Renewal*, 191 AD2d 153 [1st Dept 1993], *lv denied* 82 NY2d 657 [1993]). An order issued upon reconsideration revokes the prior order to the extent that it is modified. The effective date is the date of issuance of the new order. A party may thereafter petition for administrative or judicial review, depending on whether the new order is issued by a Rent Administrator (RA) or the Commissioner, even if the time for appealing from the old order had expired (DHCR Office of Rent Administration, Policy Statement 91-5).

The DHCR has the authority, under RSC 2527.8, on application of either party or on its own initiative, to issue a superseding order modifying or revoking any order issued as a result of illegality, irregularity in vital matters or fraud (*see Matter of Sherwood 34 Assoc. v New York State Div. of Hous. & Community Renewal*, 309 AD2d 529, 531 [1st Dept 2003], citing *Matter of Alamac Estates v McGoldrick*, 2 NY2d 87 [1956]; *Matter of Yasser v*

*McGoldrick*, 306 NY 924 [1954]). An order issued as a result of one of these grounds may be reversed "even long after the time to appeal has expired" (*Sherwood 34 Assoc.*, at 531; *see also Luchetti v Office of Rent Control, Dept. of Rent & Hous. Maintenance, Hous. & Dev. Admin. of City of N.Y.*, 49 AD2d 532 [1st Dept 1975] [proceeding reopened and reversed two years after initial determination so as to correct and align the agency's ruling with the Rent, Eviction and Rehabilitation Regulations addressing what accommodations are subject to rent control]).

Prior History

In June 1995, DHCR granted the then-owner of the premises an MCI rent increase for work completed in about 1993, described in the DHCR order as "RESURF EXT WALLS ETC."[1] Under the RSC, "resurfacing of exterior walls" pertains to "brick or masonry facing on entire area of all exposed sides of the building" (RSC 2522.4[a][3] [Schedule of Major Capital Improvements, no. 21]). Resurfacing work has a useful life of 25 years (RSC 2522.4[a][2][i][d] [Useful Life Schedule for Major Capital Improvements, no. 24]).

In February 1998, DHCR issued a form order modifying the

[1] The order identified the then-owner as Artnor Realty Co.

previous rent increase, in light of the then-owner's receipt of a tax abatement. The form order described the work for which the rent increase had been granted as "WATERPROOFING, POINTING, MASONRY." Under the RSC, "pointing" is performed on areas "as necessary on exposed sides of the building" (RSC 2522.4[a][3] [Schedule of Major Capital Improvements, no. 19]). Pointing has a useful life of 15 years (RSC 2522.4[a][2][i][d] [Useful Life Schedule for Major Capital Improvements, no. 4]). There is no indication that the then-owner challenged or sought to correct the seemingly different description of the work in the February 1998 order from that in the June 1995 order.

After the current owner, 12 Broadway Realty LLC acquired the building, it undertook various capital improvement projects beginning in late 2002. In November 2007, Owner applied for an MCI rent increase totaling more than $2,400,000, out of which $1,931,013.69 was claimed as expended on resurfacing the exterior brick walls of the apartment building. The section of its application pertaining to the resurfacing was disapproved on October 9, 2009 by the RA, who noted, among other things, that the 25-year useful life of the prior resurfacing work had not expired, and Owner "did not file a waiver [of the useful life requirement]" (RSC 2522.4 [a][2][e][1]).

Owner requested reconsideration by letter dated October 20, 2009, claiming "numerous irregularities" in the October 9, 2009 order. Owner repeated its argument made in response to Tenants' opposition to its application for an MCI rent increase that the 1995 MCI increase order incorrectly described the work for which that increase had been approved, and that there was "no evidence" that resurfacing of exterior walls had been undertaken before Owner began the project in about 2003. Owner again argued that the February 1998 modification order correctly described the actual work done in 1993 as pointing and waterproofing, a project of lesser scale and durability. Therefore, it argued that it was an irregularity in a vital matter for DHCR "to base denial of an MCI on a failure to exhaust the useful life of a completely different MCI." Owner did not address its failure to seek a waiver.

Tenants objected to reconsideration. In sum, they argued Owner had "fully and extensively briefed" its arguments before the RA, and was seeking a second bite of the apple. They noted the failure of Owner to address why it had not sought a waiver of the useful life requirement. They also argued that Owner had not substantiated any "irregularity in [a] vital matter[]," as required by RSC 2527.8, and therefore the request for

reconsideration must be denied.

The RA granted Owner's RFR by Notice dated November 19, 2009, "based upon fraud, illegality, or irregularity in a vital matter," without describing the nature of the fraud, the illegality, or the irregularity.

The RA's Order Pursuant to Reconsideration was issued in June 2011. The Order noted Owner's allegations of an irregularity in the agency's denial of the resurfacing although there was a lack of evidence that resurfacing work had actually been performed in the early 1990s, when compared to the work Owner itself had undertaken after 2002. The RA was unpersuaded by Owner's argument regarding the nature of the work for which an MCI increase was granted in 1995, and concluded that the "preponderance of evidence indicates that exterior resurfacing had been performed [as stated in the 1995 order] . . . and the useful life of that work had not expired when exterior resurfacing was done" by Owner. Nonetheless, the RA found that Owner's resurfacing qualified for an MCI rent increase because the statement by Owner's architect, submitted as part of Owner's 2007 request for an MCI rent increase, indicated that resurfacing was needed because the brickwork had been "in very poor condition," many bricks were "saturated," in many places "water

filled the cavities" resulting in "significant displacement and cracking of large areas of brick," and a there was a "possibility of a major failure of the [east] wall assembly." On that basis, the RA directed that the October 2009 Order should be modified, and an upward MCI adjustment should be made to account for Owner's resurfacing work. Other costs claimed by Owner, such as work on the roof, the architect's fee and a portion of the window installation, were excluded as non-MCI eligible.

In determining the amount of the rent increase, the RA reasoned that total amount granted for resurfacing the exterior walls should be reduced by the amount granted for the "previous MCI . . . for which the useful life had not expired." In substance, the RA reasoned as if a waiver of the useful life requirement had been included as part of Owner's 2007 application for an MCI rent increase on grounds of an emergency.

There is no dispute that Owner timely filed a PAR of the RA's June 2011 order issued upon reconsideration, as did Tenants. Owner sought in relevant part to reverse the exclusion of certain costs as not MCI-related. Tenants sought reversal of the 2011 order and reinstatement of the October 2009 order, arguing that the November 2009 RFR should not have been granted because no irregularity in a vital matter had been established, nor had

Owner sought a waiver of the useful life requirement.

The Deputy Commissioner partly granted Owner's PAR in its August 2013 order, and denied Tenants' PAR in its entirety. The Deputy Commissioner found that the RA's decision to reconsider the denial of a rent increase for the exterior resurfacing was "appropriate in light of evidence indicating an irregularity in a vital matter," although he, too, was silent as to the nature of the irregularity. The Deputy Commissioner held that the amount of the MCI rent increase per room should be further increased because the RA order upon reconsideration had incorrectly disallowed some of the claimed exterior resurfacing costs. He also noted that Tenants had not received "the benefit of the earlier work," which he described as "pointing and waterproofing," and concluded they "should not be made to pay a double rent increase for improvements to the exterior of the building which have essentially been undertaken to achieve the same purpose." The waiver requirement was, at best, addressed obliquely by the Deputy Commissioner's statement that the useful life of the previous work "is not an issue," because of the decision to deduct the cost of the earlier installation from the newly approved rent increase. This, interestingly, is the method by which DHCR calculates the amount of rent increase when a

waiver of the useful life requirement has been approved (*see* RSC 2522.4 [a][2][i][e][4][iii]).

Both parties timely commenced article 78 proceedings, now joined. Owner seeks to modify the August 2013 PAR determination on the ground that it is arbitrary and capricious in finding certain claimed expenses not to be MCI-related (CPLR 7803[3]). Tenants seek to annul the August 2013 PAR order on the ground that it was made in violation of lawful procedure, affected by errors of law, and arbitrary and capricious and an abuse of discretion (*id.*). They seek reinstatement of the October 2009 order. Separately, DHCR seeks to remit the matter to itself because "the petitions of the tenants and owners raise significant issues not adequately dealt with in the final determination of the Commissioner." Among the issues DHCR seeks to address are the different descriptions of the work performed in the early 1990s, reflected in the orders of 1995 and 1998, in the RA's 2009 opinion upon reconsideration, and in the Deputy Commissioner's 2013 opinion resolving the PAR, and, as well, Tenants' argument that there had been no basis to grant the RFR in 2009, because there was no explanation of the nature of the "irregularity in a vital matter." DHCR also noted that its file for the earlier MCI request no longer exists. Owner did not

oppose the motion to remit, but sought certain conditions. Tenants opposed the motion to remit, but requested various conditions should the motion be granted.

Supreme Court granted DHCR's motion to remit, but limited the agency's review to substantiating the existence and nature of the "irregularity in a vital matter." It directed that if reconsideration was found appropriate, DHCR was to address only the import of the "irregularity." By order entered January 23, 2015, Supreme Court granted Owner's motion for leave to appeal to this Court. Tenants have also appealed. DHCR has not submitted a brief on either the appeal or cross appeal.[2]

Analysis

In my view, the Owner is collaterally estopped from arguing that the 1995 order mistakenly characterized the work as resurfacing when it was actually pointing, or some other lesser project.

When an administrative agency has decided a matter "based upon a proper factual showing and the application of its own regulations and precedent," the parties "are entitled to have the

[2] According to Supreme Court's decision and order filed on January 23, 2015, at the time of its decision DHCR had begun work on its order to remit.

determination treated as final" (*Matter of Peckham v Calogero*, 54 AD3d 27, 28 [1st Dept 2008], *affd* 12 NY3d 424 [2009]). While DHCR may remit and reverse or modify prior orders (*id.* at 34 ["(t)here are many appropriate grounds for remand of a matter to the agency"]), it does not have unfettered power to reopen final matters. In *Gersten v 56 7th Ave., LLC* (88 AD3d 189, 204 [1st Dept 2011]), for example, we dismissed an action brought by cotenants seeking in part a declaration that the deregulation of their apartment 11 years earlier by the former building owner pursuant to a DHCR luxury decontrol order, was void ab initio, because of a recent change in the law concerning regulated apartments. We found that the cotenants had had a full and fair opportunity to litigate the issue of whether their apartment was subject to luxury decontrol before the DHCR, and held that the DHCR order issued 11 years earlier was a final order based on collateral estoppel (88 AD3d at 201-202, 207).

In *Gersten*, we made clear that unless a party can demonstrate the absence of a full and fair opportunity to litigate its issues before DHCR, the agency's determination on those issues will be entitled to collateral estoppel effect, and relitigation in court of the same issue determined by the agency will be precluded (*see Gersten* at 201-202, citing *9-10 Alden*

*Place v Chen*, 279 AD2d 618 [2d Dept 2001]; *Grassini v Paravalos*, 270 AD2d 52 [1st Dept 2000]). Furthermore, in a rent-stabilized system, the current owner steps into the shoes of the prior owner and a change in ownership does not confer additional or new rights on the new owner, who is bound by the former owner's acts and decisions (*see e.g. Matter of Charles H. Greenthal Co. v State Div. of Hous. & Community Renewal*, 126 Misc 2d 795, 804 [Sup Ct, NY County 1984]). Thus, Owner has no basis to argue that it should be granted an opportunity to argue the merits of the 1995 order granting an MCI rent increase simply because it was not the owner of the building at the time.

Despite Owner's arguments to the contrary, there is no evidence that the 1995 order granting an MCI rent increase for exterior resurfacing was based on anything other than a proper factual showing, or that DHCR did not apply its own regulations and precedents to the facts when it granted the increase. The form modification in 1998 reducing the amount of the rent increase because of a tax abatement can in no way be understood as modifying anything other than the amount of the rent increase; the form's description of the work as pointing is dispositive of nothing other than a ministerial error. In any event, Owner had a full and fair opportunity at the time of its MCI rent increase

application, to make its arguments before the RA concerning the 1995 and 1998 orders. Notably, the RA rejected those arguments in the initial October 2009 order, and again upon reconsideration in the June 2011 order, finding that the preponderance of the evidence showed that the work undertaken that resulted in the 1995 MCI order was resurfacing. To the extent that Owner argues that the 1995 and 1998 orders call into question the nature of the work granted an MCI rent increase in 1995, and tend to prove that the earlier work was not resurfacing, this argument is based solely on conjecture and surmise.

A final administrative determination will not be reopened to give a party an opportunity to make a new argument based on the existing administrative record (*see Gersten,* 88 AD3d at 204). In particular, Owner's continued attempts to reargue the denial of various costs as being non-MCI related, arguments that have generally proved successful as seen in the 2011 order on reconsideration and the 2013 PAR, are simply attempts to get a more favorable outcome and increase the amount of rent allowed to be charged (*see Matter of Pantelidis v New York City Bd. of Stds. & Appeals*, 43 AD3d 314, 315 [1st Dept 2007] [remand is not appropriate where a party is "merely seeking a second chance to reach a different determination on the merits"] [internal

quotation marks omitted], *affd* 10 NY3d 846 [2008]).

An agency's interpretation and construction of its own regulations and the legislation under which it functions are given special deference by the courts, if that construction is not irrational or unreasonable (*see Samiento v World Yacht Inc.*, 10 NY3d 70, 79 [2008]; *Matter of Chesterfield Assoc. v New York State Dept. of Labor,* 4 NY3d 597, 604 [2005]). Supreme Court granted DHCR leave to remit these matters for further fact-finding and decision making, on the basis that its prior orders have unresolved inconsistencies, and certain of the parties' arguments were not sufficiently examined.

As this Court stated in *Matter of Peckham v Calogero* (54 AD3d at 34), appropriate grounds for remanding a matter to DHCR include when an order was the result of irregularity in a vital matter, and when fact-finding or technical analysis by the agency is needed for a proper adjudication. "Irregularity in a vital matter" is defined by DHCR as the "[f]ailure by the agency to accurately calculate the rent or penalty, or to comply with established rules of practice and procedure." (DHCR Office of Rent Administration, Policy Statement 91-5). In *Sherwood 34 Assoc.*, the DHCR sought to remit because it had issued two directly conflicting orders, one year apart, concerning its

jurisdiction over a particular building, and there needed to be further fact-finding and a final determination as to the building's status (*Sherwood,* 309 AD2d at 532). In *Matter of Hakim v Div. of Hous. & Community Renewal* (273 AD2d 3 [1st Dept 2000], *app dismissed* 95 NY2d 887 [2000]), the motion to remit was granted because DHCR conceded that although the owner had argued reliance on a then-recently issued internal agency document concerning the issue claimed by the tenants as affording a rent reduction, the agency had not properly considered the document, thus failing to adhere to existing standards and precedent when making its decision (*see also Matter of Porter v New York State Div. of Hous. & Community Renewal,* 51 AD3d 417 [1st Dept 2008], *lv denied* 11 NY3d 703 [2008] [remand was proper where DHCR conceded that its review of several issues raised by the tenants was inadequate, and there was contradiction between the agency's finding that the owner had sufficient financial ability to complete the project and DHCR's own finding that the owner had greatly underestimated certain expenses]).

Here, DHCR articulates several issues that it believes it has failed to sufficiently address, and seeks to remit. However, the agency's previous orders in this matter have contained violations of lawful procedure, were affected by errors of law,

and were an abuse of discretion. Without the Court's guidance, it is likely that further error will occur. In particular, the DHCR is in error in its contention that it is proper to attack the 2009 order to the extent it relies on the 1995 order. The 1995 order and, by extension the 1998 form order, are final orders, never challenged. Reopening such an order, in particular given the number of years that has passed, requires Owner to provide very substantive evidence of an irregularity in a vital matter.

I disagree with the majority that the 1995 and 1998 orders are "so inconsistent and unclear" as to constitute an irregularity in a vital matter. Owner's "evidence" of such an irregularity is very thin, resting on its arguments that the work done in the early 1990s could not have been a resurfacing because of the amount claimed as expenditures by the previous owner, despite having been approved by the agency, and because of the condition of the building, and that the 1998 form order for some reason more accurately describes the nature of the work, even though the form order was issued solely to indicate a change in the amount of rent to be charged and there is no evidence whatsoever of new fact-finding. These arguments, notably, are the substitute for what would have been a meritorious argument,

if true, which is that a waiver of the useful life requirement was granted, and the resurfacing work undertaken in the early 2000s was eligible for an MCI rent increase. They reflect Owner's wish to have a new hearing on the application that resulted in the 1995 MCI rent increase.

The orders of the RA and the Deputy Commissioner also violate the rules set forth in the RSL, and appear to be an abuse of their decision-making discretion. This is clear in at least two respects. First is that although the RA granted reconsideration of the 2009 order because the Owner had allegedly shown an illegality *or* an irregularity in a vital matter *or* fraud in its determination, there is no description of the content of any of these serious issues, thus calling into question the legality of granting reconsideration. The 2011 order upon reconsideration indicates what Owner alleged were irregularities in a vital matter, namely the "inconsistencies" between the 1995 and 1998 orders, but then finds that Owner's contention is unpersuasive.[3] The Deputy Commissioner's PAR determination

[3] As Supreme Court noted, there was an irregularity in that the RA did not consider the proof of the final payment for the roof and windows. It was addressed upon reconsideration, and the PAR determination added those costs to the calculations for the rent increase, along with other claims made by Owner that were denied by the 2009 and 2011 order. Addressing the irregularity

voices approval of the RA's finding of an irregularity. The decisions are tainted with error.

Second is that the 2009 order denied the MCI request because the useful life of the previous resurfacing had not expired, and Owner had not sought a waiver in order to legally do its resurfacing. The 2011 order reiterated that the useful life had not expired and there was no waiver, but nonetheless found that Owner's request for an MCI increase should be granted because of the condition of the building's brickwork. In other words, the reasoning was made *as if* a waiver for emergency repairs had been submitted at the time of the application for an MCI rent increase. Additionally, the calculations of the amount of rent increase to be charged were those used when there was a waiver of the useful life requirement. The PAR determination confirmed this manner of calculation. This is all in clear violation of RSL 2522.4[a][2][i][e][4], and an abuse of the agency's discretion.

Nonetheless, the motion to remit to DHCR should be granted, and I would modify Supreme Court's directives as to the scope of review, only to the extent of omitting the statement that "the

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of overlooked payments, however, should not have opened the door to wholesale reargument of all of Owner's claims.

only possible irregularity" was the agency's failure to consider certain documentation submitted by Owner. To reiterate, the 1995 and 1998 orders are final, and collateral estoppel prohibits further reexamination, including the scope of the work performed as represented in those orders. I would note that should DHCR find that it was error to grant reconsideration of the 2009 order, and it is reinstated, Owner's time to file a PAR from that order has long passed (*see* RSL 2529.2).

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

ENTERED: DECEMBER 29, 2015

CLERK

Gonzalez, P.J., Friedman, Renwick, Moskowitz, JJ.

15656 Natasha, Inc., etc., et al., Index 653477/13
Plaintiffs-Respondents,

-against-

Stanley Shopkorn,
Defendant-Appellant.

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Wachtell, Lipton Rosen & Katz, New York (David Gruenstein of counsel), for appellant.

Studin Young, Garden City (Tamir Young of counsel), for respondents.

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Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered on or about February 3, 2015, which, to the extent appealed from, denied defendant's motion to dismiss the first, second, third, eighth, and eleventh causes of action, unanimously reversed, on the law, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint.

The first, second, third, and eighth causes of action, which allege oppression of plaintiff minority shareholders by defendant as a controlling member of the majority, fail to state a cause of action. The rights claimed by plaintiffs exist solely by virtue of section 184I of the British Virgin Islands Companies Act of 2004, since, under the common law, the British Virgin Islands did not recognize any fiduciary duty owed by majority shareholders to

the minority (*see Dragon Inv. Co. II LLC v Shanahan*, 49 AD3d 403, 404 [1st Dept 2008], citing *Peskin v Anderson*, (2001) BCC 874, (2001) 1 BCLC 372, 2000 WL 1841707 [2000]). Moreover, under the Act, the High Court of the British Virgin Islands has exclusive adjudicatory authority over such claims. Plaintiffs' foreign law expert stated that he knew of no instance in which a British Virgin Islands court had enjoined a foreign action claiming oppression under the laws of the foreign jurisdiction; he did not opine about any bar on foreign litigation of claims under the British Virgin Islands statute at issue here. In any event, contrary to plaintiffs' contention, nothing about the exclusive jurisdiction aspect of the subject statute warrants denying it recognition (*see Welsbach Elec. Corp. v MasTec N. Am., Inc.*, 7 NY3d 624, 629 [2006]).

The eleventh cause of action, brought by plaintiff Weinstein, alleges tortious interference with contract. This claim is also inextricably intertwined with the statutory causes of action, which, as previously discussed, must be litigated in the British Virgin Islands. Accordingly, we dismiss the eleventh cause of action because, among other infirmities, New York is not

a convenient forum for its adjudication.

We have considered and rejected the parties' additional claims.

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ENTERED: DECEMBER 29, 2015

CLERK

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

15767 Jose Alvarez, et al., Index 307785/08
Plaintiffs-Appellants,

-against-

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

Bader Yakaitis & Nonnenmacher, LLP, New York (Jesse M. Young of counsel), for appellants.

Zachary W. Carter, Corporation Counsel, New York (Elizabeth S. Natrella of counsel), for respondents.

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Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered May 27, 2014, which granted defendants' motion for summary judgment dismissing the complaint, affirmed, without costs.

Gonzalez, P.J. and Sweeny, J. concur in a separate memorandum by Sweeny, J.; Mazzarelli, J. concurs in a separate memorandum; and Richter and Manzanet-Daniels, JJ. dissent in a memorandum by Manzanet-Daniels, J. as follows:

SWEENY, J. (concurring)

Plaintiff Jose Alvarez alleges that, at approximately 7:30 p.m. on April 30, 2008, he was falsely arrested by members of the New York City Police Department (NYPD). In his notice of claim, filed against defendant City of New York and "the New York City Police Department" in June 2008, Alvarez alleged, inter alia, that he was the subject of "[a]ssault, battery, excessive force, police brutality, false imprisonment, [and] false arrest." His notice of claim, as well as those filed on behalf of the other family member plaintiffs, did not specifically name any members of the NYPD responsible for these alleged acts, nor did they contain a generic reference to individual officers such as "Police Officer John Doe" or any similar language indicating that plaintiffs were making a claim against any police officers individually.

In September 2008, plaintiffs commenced the present action against the City, NYPD and "Police Officer John Doe a/k/a Officer Green and Police Officer John Doe Badge Number 14007." An amended complaint was filed on March 28, 2011 to add four additional named police officers as defendants. Neither the complaint nor the amended complaint allege that any of the officers acted in other than their official capacities, which

allegation would obviate the need to file a notice of claim against them (*Gorgone v Capozzi*, 238 AD2d 308, 310 [2d Dept 1997], *lv denied* 95 NY2d 767 [2000]). To the contrary, the pleadings contained specific allegations that the police officers acted wholly within their official capacities.

In early 2012, defendants moved to dismiss certain claims. By order entered July 17, 2013, the motion court, inter alia, dismissed the claims against the NYPD on the ground it is a "non-suable entity."

In September 2013, the individual police officer defendants moved pursuant to CPLR 3211(a)(7) to dismiss the state law claims against them, arguing that they had not been named in the notice of claim. Plaintiffs opposed, arguing, inter alia, that the plain language of General Municipal Law § 50-e, strictly construed, does not require individual municipal employees to be specifically identified in a notice of claim in order to be named as individual defendants in the subsequent action. The motion court, relying on the decisions in *Tannenbaum v City of New York* (30 AD3d 357 [1st Dept 2006]) and *Matter of Rattner v Planning Commn. of Vil. of Pleasantville* (156 AD2d 521, 526 [2d Dept 1989], *lv dismissed* 75 NY2d 897 [1990]), granted defendants' motion, noting that, since the amended complaint alleged that the

individual defendants were liable for the conduct undertaken in their official capacities, such claims had to be dismissed where they were not specifically named in the notice of claim.

The dissent would now reinstate the state law claims against the individual defendants, contending that the failure to specifically identify the police officers in the notice of claim is not a condition precedent to commencing an action against them. In order to reach this result, the dissent rejects our holdings in *Tannenbaum* and *Cleghorne v City of New York* (99 AD3d 443, 446 [1st Dept 2012]) and makes an unwarranted interpretation of General Municipal Law § 50-e(1)(b) and (2). The facts of this case, as well as the precedents cited by the dissent in support of their position, do not warrant a departure from our prior precedents.

The dissent cites *Brown v City of New York* (95 NY2d 389 [2000]) in support of its position. However, *Brown* is not inconsistent with *Tannenbaum*. The issue in *Brown* concerned the adequacy of the notice of claim in a trip and fall personal injury case. The plaintiff's notice of claim alleged that he sustained injuries "after tripping on a broken and defective portion of *sidewalk* and curb, located on West 33rd Street, approximately 65 feet and 7 inches south of the southwest corner

of Mermaid Avenue and West 33rd Street, and 8 feet and 4 inches east from the lot line on the west side of West 33rd Street" (*id.* at 391). The photographs accompanying the notice of claim referenced the "*aforesaid defective sidewalk* and curb" (*id.* at 392) and each contained a circle drawn around the curb and a small section of the sidewalk. The plaintiff testified at his 50-h hearing, deposition and trial, that he fell on the sidewalk and never reached the curb. The defendant City had prior written notice of the sidewalk condition but not the alleged defects in the curb.

After a verdict in favor of the plaintiff, wherein the jury specifically found he had fallen on the sidewalk, the City moved to set aside the verdict alleging, inter alia, that the notice of claim was defective because the photos had circled the curb, not the sidewalk. The trial court agreed and the Second Department affirmed. The Court of Appeals reversed.

The Court held that "[t]he test of the sufficiency of a Notice of Claim is merely 'whether it includes information sufficient to enable the city to investigate. Nothing more may be required'" (95 NY2d at 393)(internal quotation marks omitted). The Court further stated that a court reviewing the sufficiency of a notice of claim "should focus on the purpose served by a

Notice of Claim: whether based on the claimant's description, municipal authorities can locate the place, fix the time and understand the nature of the accident" (*id.*). The plaintiff's repeated references in the notice of claim was sufficient to put the City on notice that it was not only the curb, but the adjacent sidewalk that caused his injuries, giving it sufficient notice to commence and timely investigate the allegations and assess its liability. On particular note in *Brown* is the fact that no individual defendants were named in the action.

The reasoning in *Pierce v Hickey* (129 AD3d 1287 [3d Dept 2015]), cited by the dissent, is neither applicable to the facts of our case, nor persuasive in its own right. The defendant Hickey was a machine equipment operator employed by the defendant County of Schoharie. On the day of the incident in question, he was tasked with transporting open containers of storm debris, collected as part of the cleanup after Tropical Storm Lee, from a DPW garage to a disposal station. As the plaintiff's vehicle approached his truck from the opposite direction, Hickey, looking in his side view mirrors, noticed debris, including building material, was strewn across the highway. As the plaintiff passed Hickey's truck, a large piece of wood struck her as it flew through her open driver's side window, causing her to sustain

injury. Plaintiff filed a notice of claim against the county but did not individually name Hickey as a defendant. Subsequently, she commenced a personal injury action against Hickey individually and the county. Hickey moved to dismiss on the ground that he had not been named in the notice of claim.

The Third Department affirmed the motion court's denial of Hickey's motion, holding that "plaintiff was not required to individually list Hickey on the underlying notice of claim" (129 AD3d at 1288). As relevant to our case, the Court held that General Municipal Law 50-e(2) does not require that an individual municipal employee be named in the notice of claim, reasoning that "the purpose underlying the notice of claim requirement - to provide a municipality with sufficient information to enable it to promptly investigate the subject claim and ascertain its potential exposure liability (*see Brown v City of New York*, 95 NY2d 389, 394 [2000]) - 'may be served without requiring a plaintiff to name the individual agents, officers of employees in the notice of claim' (*Goodwin v Pretorius*, 105 AD3d 207, 216 [2013])'" (*Pierce* at 1289).

This is not the situation before us. Indeed, in *Pierce*, the plaintiff knew the name of the individual who was the driving the truck from the outset of the case. No reason was given as to why

he was not named in the notice of claim, either at the time it was originally filed, or in a timely filed amended notice of claim. Nevertheless, the county defendant was able to promptly investigate and evaluate the claim as well as its employee's conduct. The Court obviously arrived at its decision relying on the rationale set forth in *Goodwin*, because, as discussed above, *Brown* does not require such a result.

*Goodwin* is also distinguishable from our case. *Goodwin* involved a medical malpractice claim against a county medical facility. The notice of claim named the medical facility as the sole defendant. An action was subsequently commenced against the medical center and five named employee medical providers, who subsequently moved to dismiss on the ground that they had not been named in the notice of claim. The motion court denied the motion and the Appellate Division, Fourth Department affirmed.

The Court reasoned that, in a medical malpractice action, it is difficult to identify, let alone name, particular defendants within the 90-day time frame to file a notice of claim. It overruled its prior decision in *Rew v County of Niagara* (73 AD3d 1463, 1464 [2010]) to the extent that it required *service* of a notice of claim upon individual defendants, which the defendants conceded and which is not an issue here. The Court also traced

the precedents requiring that individual defendants be named in a notice of claim back to *White v Averill Park Cent. Sch. Dist.*, (195 Misc 2d 409, 411 [Sup Ct, Rensselaer County 2003]), noting that the court in *White* cited no precedent for its conclusion. The *Goodwin* Court acknowledged our decision in *Tannenbaum* and numerous other state and federal decisions which held that the failure of a plaintiff to name individual defendants in a notice of claim required dismissal of a subsequent action against them. It also acknowledged that "[w]here the governmental entity would be required to indemnify the individual employees named in a lawsuit, that governmental entity must be afforded the same opportunity to investigate the claim made against the individuals" (105 AD3d at 212). Nevertheless, the Court held that specific individual municipal employees need not be named in a notice of claim as a condition precedent to commencing an action against them. It did not explain how a municipality can undertake an adequate and timely investigation of the "claim made against the individuals" where those individuals are not named in a notice of claim, but rather become defendants in an action commenced at a much later date, some, as in our case, named in an amended complaint filed long after the incident occurred. The problems with attempting to conduct such an investigation and

assess the merits of the claims against the individual defendants, as required by *Brown* are manifest, as will be discussed herein.

Of further note is the *Goodwin* Court's discussion regarding service of a notice of claim upon municipal employees, which the dissent adopts in its writing. The *Goodwin* Court attempted to buttress its argument by noting, correctly, that GML 50-e(1)(b) provides that service of a notice of claim upon the employee is not a condition precedent to commencing an action against that employee if the municipality has been served with a proper notice of claim. The Court reasoned that the legislature, by obviating the need for service, could easily have made the naming of individuals in a notice of claim a requirement and, since it did not, it must have intended that they need not be named. This of course, leads to the question: how can service of the notice of claim upon the municipality be sufficient service upon an individual not named in such notice? Since the statute waives the requirement of *service* on the individual employee of the municipality, does it not reasonably follow that one must be named in the notice of claim, for service upon the municipality to constitute service on that individual? The *Goodwin* Court and the dissent are silent in this regard. In fact, the statute only

excuses *failure to serve* the notice of claim on an individual defendant; it does not condone the *failure to name* him or her (*see DC v Valley Cent. Sch. Dist*, 2011 WL 3480389, *2, 2011 US Dist LEXIS 90260 *7 [SD NY 2011]).

Far more compelling than *Pierce* of *Goodwin* is the reasoning in *White*. There, the plaintiff brought an action against a school district and some of its employees to recover damages for a student-on-student hazing incident. A notice of claim had only been filed against the school district. The individual defendants (coaches, athletic director, principal, superintendent and assistant superintendent) moved to dismiss the complaint against them on the ground that they were not named in the notice of claim. As with our case, the complaint in *White* did not allege any of the individual defendants acted outside of the scope of employment or state a cause of action in their individual capacities, which would thus obviate the need to file a notice of claim. The court correctly reasoned that GML 50-e "makes no provision for directing the notice of claim at one entity and then prosecuting an action against another. It certainly does not authorize actions against individuals who have not been individually named in a notice of claim" (195 Misc2d at 411). The court also noted the exception as to *service* of the

notice of claim upon individual defendants as discussed above, but rejected that as a ground for failure to name the individual defendants.

In assessing the sufficiency of the notice of claim the court in *White* found that it must be "judged by whether it includes enough information to enable the municipality to adequately investigate the claim," and significantly, to also "assess the merits of the claim" (*id.*). This is consistent with the holding in *Brown*, as well as *Tannenbaum* and its prodigy. The ability to "assess the merits of the claim" is one of the key reasons for the requirement of a notice of claim. The court rejected plaintiff's argument that where a municipality does, in fact, conduct an investigation that may involve some of the individuals later named in the action, the requirements of GML 50-e will be met. Notably, this very argument is made by the dissent in stating that "in cases of alleged false arrest, it would appear that the municipal defendant is uniquely positioned to know the facts of any such claim - at a minimum, which officers were on duty and in the vicinity." The same argument holds true for a plaintiff: he or she, during the course of the criminal proceedings leading up to a dismissal of any charges would know, at a minimum, the names and badge numbers of the

arresting officers, thus making it simple to name those officers in a notice of claim. Indeed, at a bare minimum, the notice of claim must use the "Police Officer John Doe" or similar language, such as used in the complaint herein, to put the municipality on notice that its employees will be sued in their personal capacities, thus meeting the statute's notice requirements. The *White* court properly held that the municipality's "efforts to investigate the plaintiffs' claims cannot serve as a substitute for compliance with . . . § 50-e. Similarly, the fact that the individuals' liability would be covered by the school district cannot supplement an inadequate notice of claim." (195 Misc 2d at 412).

Unlike the prior cases discussed herein, *Tannenbaum* involved claims similar to those presented in the case before us, and considered the concerns raised by the dissent. The plaintiff was arrested in January 1999. After filing a notice of claim naming, inter alia, the City of New York and an individual NYPD detective who was involved in his case, he commenced an action in December 1999 against those defendants. In February 2000, the plaintiff was acquitted of all charges and he filed a second notice of claim against the City, the NYPD, and the same detective. He also added as defendants Bronx County D.A. Johnson and a named

Bronx County ADA. In January 2001, the plaintiff commenced a second action against those defendants. He subsequently amended his complaint in the second action to add as defendants two additional Bronx County ADAs (the prosecutor defendants) who were not named in either notice of claim. Ultimately, the prosecutor defendants moved to dismiss the amended complaint on the ground, inter alia, that the plaintiff had failed to name them in the notice of claim. The motion court granted the motion and, citing *White* and *Rattner*, we affirmed that portion of the decision with respect to the dismissal of the state law claims against the prosecutor defendants (*Tannenbaum at 358)*.

Underlying our decision in *Tannenbaum* was the purpose of requiring a notice of claim as a precondition to commencing a suit against a municipality, which is, as stated by the *Brown* Court, "[t]o enable the authorities to investigate, collect evidence and evaluate the merit of a claim" (95 NY2d at 392). Certainly, the City was provided with the information necessary to investigate and evaluate the claims against the named defendants in *Tannenbaum's* second notice of claim. However, the commencement of an action over 11 months after a notice of claim had been filed, against two additional ADAs, who were entitled to indemnification from the City (Administrative Code of City of New

York § 7-110; GML 50-k) deprived the City of the opportunity to investigate or assess the potential merit of the claim against them. This, of course, defeats the purpose of GML § 50-e and does not pass the sufficiency test set forth in *Brown* and we ruled accordingly.

The dissent would now set aside *Tannenbaum* on similar facts. Plaintiffs here did not put the City on notice that it would seek to impose liability upon specific employees of the NYPD. Indeed, as the action progressed, more and more police officers were added as individual defendants, the last of which over three years removed from the incident in question, thus rendering a timely investigation into and assessment of the claims impossible. To permit such a result raises questions of fundamental fairness for the individual defendants, since they were not put on notice, even in a generic way by way of "Police Officer John Doe" or similar language, that they were going to become defendants. Moreover, the prejudice accruing to both the municipal and individual defendants from such a delay is obvious, since memories fade over time, records that could have easily been obtained early on may have been archived, lost or discarded, and witnesses may have relocated, just to name a few of the potential obstacles. Delay in investigating and evaluating a

claim defeats the purpose of GML § 50-e.

We are not suggesting that we should apply the doctrine of stare decisis in a slavish manner by following precedent which may have become obsolete or overcome by events. We agree with the dissent that in such cases, "we must not be loath to depart from precedent." However, this is not such a case. The rationale set out in *Pierce* and *Goodwin* is not so compelling as to warrant abandonment of our own precedents in *Tannenbaum* and *Cleghorne*, as well as that of the Second Department in *Rattner*. Indeed, at least one Federal court has affirmatively rejected *Goodwin* in favor of our decision in *Tannenbaum* (*see DiRuzza v Village of Mamaroneck, N.Y.*, 2014 WL 6670101, 2014 US Dist LEXIS 166208 [SD NY 2014].

The motion court's order should therefore be affirmed.

MAZZARELLI, J. (concurring)

I concur, but strictly on constraint of *Tannenbaum v City of New York* (30 AD3d 357 [1st Dept 2006]). While the dissent's argument is compelling that the statutory language in General Municipal Law § 50-e(1)(b) and (2) does not require naming individual municipal actors as a condition precedent to commencing an action against them, this Court has already held that it does. There is no discernible difference between the facts presented here and the facts presented in *Tannenbaum*. Accordingly, I am constrained to affirm.

MANZANET-DANIELS, J. (dissenting)

The issue in this case is whether the relevant provisions of the General Municipal Law governing the sufficiency of notices of claim oblige a plaintiff to name individual defendants in the notice of claim. I believe that neither the express language of the statute nor our precedent compels this result. I therefore dissent.

Plaintiff alleges that he was falsely arrested on April 30, 2008, at approximately 7:30 p.m. in front of 1459 Wythe Place in the Bronx. He filed a notice of claim against the City and the "New York City Police Department" alleging "[a]ssault, battery, excessive force, police brutality, false imprisonment, false arrest, negligence, abuse of process, violation of Civil Rights, violation of claimant's Civil Rights under 42 USC Section 1983 and negligent retention and hiring, loss of services, loss of earnings and attorneys' fees."

In September 2008, plaintiff commenced the instant action for false arrest, false imprisonment, and malicious prosecution, against the City, the Police Department, and "Police Officer John Doe A/K/A Officer Green and Police Officer John Doe Badge Number 14007." The complaint was amended to add, inter alia, additional defendants Sergeants Keri Thompson and Natel, and Police Officers

John Stollenborg and Ryan Weiss.

In September 2013, defendants moved to dismiss the state law claims against the individual defendants pursuant to CPLR 3211(a)(7), arguing that the individual defendants were not identified in the notice of claim. The court granted the City's motion for summary judgment to the extent it sought dismissal of all claims against the individual defendants, and also, sua sponte, dismissed the action as against the City itself on the ground the City could not be held vicariously liable for the actions of its individual employees/agents (i.e., police officers) once the action was dismissed as against the individual employees.

On appeal, plaintiff argues that the naming of individual officers in the notice of claim is not mandated by the statute. I am compelled to agree.

Section 50-e(2) of the General Municipal Law, governing the contents of the notice of claim, nowhere requires the naming of individual defendants in the notice of claim. The statute requires only the following to be enumerated: (1) the name and address of each claimant and his or her attorney, if any; (2) the nature of the claim; (3) the time, place and manner in which the claim arose; and (4) an itemization of damages or injuries

claimed to have been sustained as far as practicable.

Moreover, the § 50-e notice of claim service requirements make plain that direct service of a notice of claim upon a culpable individual municipal actor is not required. General Municipal Law § 50-e(1)(b), explicitly provides that an individual municipal actor need not be served with a notice of claim as a precondition to commencing a subsequent action against such individual actor. The same subsection provides that a municipality need be served with a notice of claim only if the municipality would be obligated to indemnify a claimant for the alleged tortious actions of the individual actor.

Justice Sweeny's argument that naming of individual actors is required by the statute because the statute dispenses with service upon those actors is circular. One could just as easily make the counterargument that the statute dispenses with service on individual actors because the statute does not require that they be named in the notice of claim.

The Court of Appeals, in construing section 50-e, has stated that the purpose of a notice of claim is to provide the municipality an opportunity to collect sufficient evidence promptly in order to properly assess the merits of a claim (*see Brown v City of New York* (95 NY2d 389, 393 [2000]). The test of

the sufficiency of a notice of claim is merely "whether it includes information sufficient to enable the city to investigate. Nothing more may be required" (*id.* [internal quotation marks and citation omitted]).

In determining whether the requirements of General Municipal Law § 50-e have been met, courts should evaluate "whether based on the claimant's description municipal authorities can locate the place, fix the time and understand the nature of the accident" (*id.*).

In this case, it is not seriously alleged that the failure to name the individual defendants in the notice of claim hampered the investigation of plaintiff's claim or prevented the municipal defendant from ascertaining the time, place and nature of the accident. Indeed, in cases of alleged false arrest, it would appear that the municipal defendant is uniquely positioned to know the facts of any such claim – at a minimum, which officers were on duty and in the vicinity. These officers are employees of the municipal defendant and presumably available for interviews. Plaintiff, the alleged victim, is in no better position to ascertain the identities of the officers alleged to have used excessive force in falsely arresting him. In many cases, the officer filling out the arrest paperwork is not the

officer or officers who actually effectuated the arrest, but one who may have later appeared on the scene.

Justice Sweeny's argument that "John Doe" language in the notice of claim would suffice to put the municipality on notice is difficult to apprehend. "John Doe" language will not enable the municipality to better identify the arresting officers in the unlikely event the City is unaware of their identities. A claim for false arrest, by definition, presupposes that an arrest has been effectuated by one or more members of the department. Having been apprised of the time, place and manner of the claim, the department is in the best position to identify the officers involved.

Justice Sweeny, in reaching his result, relies entirely on the earlier decisions in *Cleghorne v City of New York* (99 AD3d 443, 446 [1st Dept 2012]) and *Tannenbaum v City of New York* (30 AD3d 357, 358 [1st Dept 2006]). *Cleghorne* follows *Tannenbaum* without discussion (indeed, it cites as authority § 50-e, which imposes no such requirement). The decision in *Tannenbaum* is devoid of any reasoning whatsoever, and cites as its sole authority a lower court decision in *White v Averill Park Cent. School Dist.*, 195 Misc 2d 409 [Sup Ct, Rensselaer County 2003]). *Tannenbaum*, moreover, involved not the failure to name individual

police officers implicated in a false arrest but the failure to name assistant district attorneys in a notice of claim.

The Third and Fourth Departments have recognized the flaw in *Tannenbaum*'s reasoning, and the Fourth Department has explicitly overruled its earlier precedent to the extent it adhered to the flawed rationale of *Tannenbaum*. Our sister courts have reasoned, correctly in my view, that the "underlying purpose of [§ 50-e] may be served [i.e., the ability of a municipality to conduct an adequate and timely investigation] without requiring a plaintiff to name the individual agents, officers or employees in the notice of claim," expressly rejecting the reasoning of prior cases that purported to have imposed such a requirement (*Goodwin v Pretorius*, 105 AD3d 207, 216 [4th Dept 2013]; *see e.g. Pierce v Hickey*, 129 AD3d 1287 [3d Dept 2015]; *Bailey v City of New York*, 79 F Supp 3d 424, 453 [ED NY 2015]; *Chamberlain v City of White Plains*, 986 F Supp 2d 363, 397 [SD NY 2013]). We should do the same.

While I understand concurrences' fidelity to *Tannenbaum*, we must not be loath to depart from precedent where it cannot be reconciled with the plain meaning and purpose of a statute. The decisions in *Tannenbaum* and *Cleghorne* imposed a requirement for notices of claim that went beyond those enumerated by the General

Municipal Law. The requirements for notices of claim are in derogation of a plaintiff's rights and must therefore be strictly construed. Certainly, we ought not to impose judicially a requirement that is nowhere to be found in the statute. It is well settled that "where as here the statute describes the particular situations in which it is to apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded" (*Patrolmen's Benevolent Assn. of City of N.Y. v City of New York*, 41 NY2d 205, 208-209 [1976] [internal quotation marks omitted]).

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

ENTERED: DECEMBER 29, 2015

CLERK

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

16162 Facebook, Inc., et al., Index 653183/14
Plaintiffs-Respondents,

-against-

DLA Piper LLP (US), et al,
Defendants-Appellants,

Paul Argentieri & Associates, et al.,
Defendants.

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Dontzin Nagy & Fleissig LLP, New York (Tibor L. Nagy, Jr. of counsel), for DLA Piper LLP (US), Christopher P. Hall, John Allock, Robert W. Brownlie and Gerard A. Trippitelli, appellants.

Brown Rudnick LLP, New York (Sigmund S. Wissner-Gross of counsel), for Lippes Mathias Wexler Friedman LLP, Dennis C. Vacco and Kevin J. Cross, appellants.

Joseph Hage Aaronson LLC, New York (Gregory P. Joseph of counsel), for Milberg LLP, Sanford P. Dumain and Jennifer L. Young, appellants.

Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C., Washington, DC (Kevin B. Huff of the bar of the District of Columbia, admitted pro hoc vice, of counsel), for respondents.

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Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered May 11, 2015, which denied the pre-answer motions of defendants-appellants DLA Piper LLP (US), Christopher P. Hall, John Allcock, Robert W. Brownlie, and Gerard A. Trippitelli (collectively the DLA Piper defendants); Milberg LLP, Sanford P. Dumain and Jennifer L. Young (collectively, the Milberg

defendants); and Lippes Mathias Wexler Friedman LLP, Dennis C. Vacco and Kevin J. Cross (collectively, the Lippes defendants) to dismiss the complaint under CPLR 3211(a)(7), unanimously reversed, on the law, without costs, the motions granted, and the complaint dismissed. The Clerk is directed to enter judgment accordingly.

This case arises from dealings dating back over a decade between plaintiff Mark Elliot Zuckerberg and nonparty Paul Ceglia. The underlying facts of this case are as follows:

On April 28, 2003, Ceglia hired Zuckerberg to design a website for a company called Street Fax, Inc. Ceglia and Zuckerberg executed a two-page contract (the Street Fax Contract) and Zuckerberg performed some work under the contract, although he was not paid in full by Ceglia.

In December 2003, Zuckerberg conceived of Facebook, which he launched on February 4, 2004.

On June 30, 2010, Ceglia, through defendant attorney Paul Argentieri, filed a complaint in Allegheny County Supreme Court against Facebook and Zuckerberg (the Ceglia action), alleging that on April 28, 2003, Zuckerberg and Ceglia purportedly entered into a "Work For Hire Contract." This purported contract allegedly reflected Ceglia's agreement to pay Zuckerberg for

developing the Street Fax website and a separate website with the working title of "The Face Book," and Ceglia's purported acquisition of a 50% interest in the software, programming language and business interests derived from any expansion of The Face Book, along with an additional 1% interest for each day the website was delayed beyond January 1, 2004. At the time they filed the complaint, Ceglia's representatives obtained an ex parte TRO from the court restraining Facebook from transferring, selling, or assigning any assets owned by it. The TRO was served on Facebook on July 6, 2010, and expired on or before July 23, 2010.

On July 9, 2010, the case was removed to federal court based on diversity jurisdiction. From the outset of the litigation, Zuckerberg took the position that the Work For Hire Contract was a forgery and the Ceglia action was fraudulent.

In early 2011, Ceglia and Argentieri offered a contingency fee arrangement to various law firms via a "Lawsuit Overview" document, which mapped out the strategy and bases of the lawsuit. Several law firms, including the DLA Piper and the Lippes defendants, as well as Kasowitz, Benson, Torres and Friedman, LLP (Kasowitz), agreed to represent Ceglia.

On March 30, 2011, a forensic e-discovery consultant

working with Kasowitz discovered the original Street Fax Contract on Ceglia's computer hard drive and concluded it had been altered to create the "Work For Hire Contract" by adding references to Facebook. Kasowitz notified Argentieri of these findings several times and immediately withdrew as Ceglia's counsel.

On April 11, 2011, the DLA Piper and the Lippes defendants (DLA-Lippes) filed an amended complaint in the Ceglia action repeating Ceglia's claims against Facebook based on the Work For Hire Contract, and quoting, but not attaching, purported emails between Zuckerberg and Ceglia discussing the development of Facebook.

On April 13, 2011, Kasowitz sent a letter to the DLA-Lippes defendants, informing them that on March 30, it had seen documents on Ceglia's computer that established that the Work For Hire Contract was a forgery and that it had communicated these findings to Argentieri on March 30, April 4, and April 12. The letter further stated that Kasowitz would agree, pending an investigation that defendant Vacco of Lippes Mathias had promised to undertake, to refrain from reporting its findings to the Federal Court.[4] This investigation was indeed undertaken as

[4]The complaint in the instant action alleges, *on information and belief*, that shortly after notifying Argentieri of its

discussed infra.

On June 2, the parties moved and cross-moved for expedited discovery concerning the Work For Hire Contract, complete with affidavits and expert evidence both for and against the authenticity of the contract. On June 29, on the eve of the hearing for expedited discovery, the DLA-Lippes defendants withdrew from the case without explanation.[5] The Federal Magistrate ordered expedited discovery into the authenticity of the Work For Hire Contract and the purported emails.

During the expedited discovery period, Ceglia hired the Milberg defendants, which first entered an appearance on March 5, 2012. They moved to withdraw from representing Ceglia on May 20, 2012.

On November 26, 2012, Ceglia was indicted for mail and wire fraud as a result of his scheme to defraud plaintiffs. He subsequently fled the jurisdiction and is currently a fugitive.

On March 26, 2013, following discovery, the Federal

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findings, and *prior* to April 11, 2011, the date the amended complaint in the Ceglia action was filed, Kasowitz advised the DLA and Lippes defendants what had been discovered concerning the Street Fax Contract.

[5]Ceglia was represented by 23 other attorneys after the DLA-Lippes defendants withdrew.

Magistrate recommended that the District Court dismiss the Ceglia action with prejudice, finding that the Work for Hire Contract and purported emails were all forgeries and that the lawsuit was a massive fraud on the court. This recommendation was adopted by the District Court on March 25, 2014, and the complaint was dismissed.

Based on these factual allegations, plaintiffs commenced the instant action, asserting claims for malicious prosecution and attorney deceit against defendants-appellants (defendants), among others, alleging that they initiated the Ceglia lawsuit without probable cause, and thereafter continued it even as they knew, or reasonably should have known, that it was fraudulent, without merit, and based on fabricated evidence from the moment the original complaint was filed and at all times while the action was pending.

Defendants moved to dismiss the complaint, alleging, among other things, that the allegations regarding malicious prosecution failed to demonstrate that they acted with "actual malice," that they lacked "probable cause" to maintain the action, or that plaintiffs sustained a "special injury." With respect to the claims brought under Judiciary Law § 487 for attorney deceit, defendants argued that the complaint should be

dismissed because it failed to allege with the requisite particularity that they intended to deceive the court or plaintiffs, that they engaged in a chronic and extreme pattern of legal delinquency, or that they were aware of the fraud and deceit during the Ceglia action. Plaintiffs opposed those respective motions and the motion court denied all motions. For the following reasons, we now reverse.

On a motion to dismiss pursuant to CPLR 3211, we must accept as true the facts as alleged in the complaint and accord plaintiffs the benefit of every favorable inference (*see Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]). However, "[f]actual allegations presumed to be true on a motion pursuant to CPLR 3211 may properly be negated by affidavits and documentary evidence" (*Wilhelmina Models, Inc. v Fleisher*, 19 AD3d 267, 269 [1st Dept 2005], citing *Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *affd* 94 NY2d 659 [2000]; *see also Matter of Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995]).

With respect to the civil malicious prosecution claim, that cause of action should have been dismissed. The tort of malicious prosecution requires proof of each of the following elements: "(1) the commencement or continuation of a . . .

proceeding by the defendant against the plaintiff, (2) the termination of the proceeding in favor of the [plaintiff], (3) the absence of probable cause for the . . . proceeding and (4) actual malice" (*Broughton v State of New York*, 37 NY2d 451, 457 [1975], *cert denied sub nom. Schanbarger v Kellogg*, 423 US 929 [1975]). Additionally, a plaintiff must also allege and prove "special injury" (*Engel v CBS, Inc.*, 93 NY2d 195, 201 [1999]).

With respect to the element of probable cause, a plaintiff must allege that the underlying action was filed with "a purpose other than the adjudication of a claim" and that there was "an entire lack of probable cause in the prior proceeding" (*Engel*, 93 NY2d at 204). Moreover, the lack of probable cause must be "patent" (*Butler v Ratner*, 210 AD2d 691, 693 [3d Dept 1994], *lv dismissed* 85 NY2d 924 [1995]). In this context, the Court of Appeals has stated as follows:

> "Probable cause is the knowledge of facts, actual or apparent, strong enough to justify a reasonable man in the belief that he has lawful grounds for prosecuting the defendant in the manner complained of. The want of probable cause does not mean the want of any cause, but the want of any reasonable cause, such as would persuade a man of ordinary care and prudence to believe in the truth of the charge" (*Burt v Smith*, 181 NY 1, 5-6 [1905]).

In a malicious prosecution action, the burden of proof to establish a want of probable cause is on the plaintiffs (*id.* at

10).

Here, the Allegheny court's granting of a TRO at the inception of the Ceglia action, prior to any of the defendants' representation of Ceglia, created a presumption that Ceglia had probable cause to bring the case. This presumption must be overcome by specifically pleaded facts (*see Hornstein v Wolf*, 67 NY2d 721, 723 [1986]). Moreover, a plaintiff's factual allegations regarding lack of probable cause and malice may be disproved by the evidentiary material submitted by defendant in support of a motion to dismiss (*Shaffer v Gilberg*, 125 AD3d 632, 635 [2d Dept 2015]).

Applying these principles to this case, we find that the allegations in the instant complaint concerning defendants' lack of probable cause are entirely conclusory, and are thus inadequate to support the lack of probable cause element of the malicious prosecution claim (*see Web Mgt. v Sphere Drake Ins.*, 302 AD2d 273, 273 [1st Dept 2003]). Despite plaintiffs' claims that the Work For Hire Contract was an obvious forgery, the Allegheny court granted a TRO after reviewing it. Defendants produced experts who took issue with plaintiffs' experts on that score and the authenticity of the document was vigorously contested throughout the Ceglia litigation. Moreover, the DLA-

Lippes defendants conducted a quite thorough investigation after being advised of Kasowitz's findings, going so far as subjecting Ceglia to a polygraph test, which he passed. The Kasowitz letter alone is not sufficient to support a claim that any further representation of Ceglia was patently unsupported by probable cause.

Inasmuch as plaintiffs cannot demonstrate the existence of the element of probable cause, we need not consider the remaining elements of actual malice or special injury. The cause of action for malicious prosecution should have been dismissed.

We turn now to the Judiciary Law claims. Relief under a cause of action based upon Judiciary Law § 487 "is not lightly given" (*Chowaiki & Co. Fine Art Ltd. v Lacher*, 115 AD3d 600, 601 [1st Dept 2014]) and requires a showing of "egregious conduct or a chronic and extreme pattern of behavior" on the part of the defendant attorneys that caused damages (*Savitt v Greenberg Traurig, LLP*, 126 AD3d 506, 507 [1st Dept 2015]). Allegations regarding an act of deceit or intent to deceive must be stated with particularity (*see Armstrong v Blank Rome LLP*, 126 AD3d 427, 427 [1st Dept 2015]); the claim will be dismissed if the allegations as to scienter are conclusory and factually insufficient (*see Briarpatch Ltd., L.P. v Frankfurt Garbus Klein*

*& Selz, P.C.*, 13 AD3d 296, 297-298 [1st Dept 2004], *lv denied* 4 NY3d 707 [2005]; *Agostini v Sobol*, 304 AD2d 395, 396 [1st Dept 2003]).

Here, the allegations that defendants knew of Ceglia's fraud are conclusory and not supported by the record. Although plaintiffs allege that the DLA-Lippes defendants had been advised by Kasowitz that the Work For Hire Contract was a forgery *prior* to the filing of the amended complaint in the Ceglia action on April 11, the record unequivocally shows that the Kasowitz letter to that effect was dated April 13, two days *after* the amended complaint was filed. There is nothing to indicate that this information had been communicated to the defendants prior to the issuance of that letter. Moreover, plaintiffs offer no support for their claim that defendants had actual knowledge of the fraudulent nature of the claim based on statements made to them by Ceglia. In fact, the opposite is true. As noted, Ceglia consistently maintained that the Work For Hire Contract was genuine and even passed a polygraph test covering the contract and his other claims. Statements made in pleadings upon information and belief are not sufficient to establish the necessary quantum of proof to sustain allegations of fraud (*see Angel v Bank of Tokyo-Mitsubishi, Ltd.*, 39 AD3d 368, 370 [1st

Dept 2007]). Even assuming that the DLA-Lippes defendants knew of Kasowitz's finding before they filed the amended complaint, and regardless of the fact that the Milberg defendants knew about the Street Fax Contract when they represented Ceglia, at any of those times, there was no conclusive proof of Ceglia's fraud that rendered their representation deceptive. In fact, the dispute over the authenticity of the contract remained central to the Ceglia litigation throughout that action, and was the subject of expert testing and opinion, both in favor of, and against, its authenticity. As a result, the Judiciary Law § 487 claim should have been dismissed.

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

ENTERED: DECEMBER 29, 2015

CLERK

Gonzalez, P.J., Tom, Mazzarelli, Renwick, Manzanet-Daniels, JJ.

16201- Index 350053/00
16201A Steven G. Schulman,
Plaintiff-Appellant,

-against-

Apryl N. Miller,
Defendant-Respondent.

_____

Kenneth David Burrows, New York, for appellant.

Iris Manon Darvin, New York, for respondent.

_____

Orders, Supreme Court, New York County (Lori S. Sattler, J.), entered October 22, 2014, which, to the extent appealed from as limited by the briefs, denied plaintiff's motions for a declaration that the parties' older child was emancipated upon ceasing to be a full-time student at age 21, or, alternatively, that she would be emancipated on her 22nd birthday in December 2014, and a recomputation of his support obligations accordingly, and to compel financial disclosure by defendant, and granted defendant's motion to direct plaintiff to resume payment of all basic child support and add-on expenses pursuant to the parties' stipulation of settlement, and reserved decision on defendant's application for counsel fees pending her submission of an affidavit in support thereof, affirmed, without costs.

The parties' stipulation of settlement requires plaintiff to pay unallocated child support for the parties' two children in a monthly sum, plus cost of living adjustments, as well as all other expenses of each child, including education and college, provided that the child complete college within six years after graduating from high school. It does not provide for the reduction or recalculation of plaintiff's child support obligation upon the emancipation of the older child.

Notably, there are provisions in the stipulation that do provide for a termination or reduction of plaintiff's financial obligations upon the happening of specified events, including, for example, plaintiff's obligation to pay maintenance to defendant mother, his obligation to maintain medical insurance for each child, payments for car service, and the like. The provision concerning medical insurance explicitly states that plaintiff "shall have the right to terminate such coverage for either Child at the time she becomes emancipated." The parties' stipulation of settlement is an exhaustive, 62-page document. Both parties were represented by counsel during its negotiation (indeed, plaintiff himself is an experienced attorney). The inescapable conclusion is that the parties did not intend to include a similar provision concerning the termination or

reduction of child support upon the emancipation of the older child.

There is no evidence, other than plaintiff's testimony, that the parties had agreed to a reduction in child support on account of any purported emancipation of the older child. Indeed, their agreement, freely entered into, does not allocate plaintiff's child support obligation as between the children or provide a formula for a reduction in the event of one child's emancipation (*compare Gallina v Gallina*, 162 AD2d 219, 220 [1st Dept 1990] [stipulation expressly provided for reduction of support upon a child's emancipation]). "When child support has been ordered for more than one child, the emancipation of the oldest child does not automatically reduce the amount of support owed under an order of support for multiple children" (*Lamassa v Lamassa*, 106 AD3d 957, 959 [2d Dept 2013] [internal quotation marks omitted]). Plaintiff's arguments concerning the interplay of the stipulation of settlement and the judgment of divorce (into which the stipulation was incorporated by reference but not merged) are unavailing given that the stipulation specifically provides that neither party will request that "any provision inconsistent with any of the provisions of this Stipulation" be inserted into the judgment.

Plaintiff is free to make a motion for a downward modification of the unallocated support obligation upon a proper showing. We ought not, however, rewrite the agreement in order that he might achieve this end.

The stipulation sets forth events of emancipation for either child, which include, as pertinent here, reaching the age of 21 or the age of 22, if the child is enrolled full-time in an accredited college. Contrary to plaintiff's contention, the older child was not emancipated at 21, when she temporarily reduced her class load and applied for transfer to another accredited college; she will be emancipated when she turns 22.

The court correctly directed plaintiff to pay the older child's summer school tuition in accordance with the terms of the stipulation.

For purposes of attorneys' fees, defendant is the prevailing party to the extent plaintiff's unilateral and willful reduction of his support payments by half necessitated her motion to compel him to resume payments pursuant to the stipulation (*see Lamassa*, 106 AD3d at 960; Domestic Relations Law § 237[c]).

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

All concur except Gonzalez, P.J. and Tom, J. who dissent in part in a memorandum by Tom, J. as follows:

TOM, J. (dissenting in part)

In this matrimonial action, the parties entered into a stipulation of settlement, which provided, inter alia, for distributing the parties' assets and for support of the parties' two children. The stipulation obligated plaintiff to pay for all educational expenses through college graduation and health insurance for each child until the child become emancipated. Article 9.1 of the stipulation defines six events that would result in the "emancipation" of a child, including:

> "A. Attaining the age of twenty-one (21) years or the age of twenty-two (22) in the event she is then enrolled for full-time attendance in a course of study matriculating toward a degree as an undergraduate student at an accredited college or university, within six (6) years immediately following the Child's graduation from high school."

The judgment of divorce, entered August 13, 2002, incorporated the stipulation by reference and provided that the Stipulation would survive and not merge in the judgment.

On or about March 11, 2013, plaintiff moved for an order declaring that the older child, Dylan, was emancipated as of age 21 because she was no longer a full-time matriculated student and recomputing his child support obligations or, in the alternative, declaring that Dylan will be emancipated within the meaning of the Stipulation when she reaches her 22nd birthday, on December

12, 2014, and recomputing his child support obligation as of January 1, 2015.

The motion court denied plaintiff's motion seeking a declaration of Dylan's emancipation at age 21 and a declaration that his basic support obligation is subject to reduction upon Dylan reaching age 22 since the stipulation did not provide for such recalculation. The court found that there was no suggestion that the parties had agreed to reduce the amount, and "it does not happen automatically."

I agree with the majority that the parties' older child was not emancipated at 21 when she temporarily reduced her class load and applied for transfer to another college, and that she will be emancipated pursuant to the Stipulation when she turns 22. I also agree that defendant is the prevailing party for purposes of counsel fees because plaintiff unilaterally and willfully reduced his child support payments by half, necessitating her motion to compel him to resume payments pursuant to the Stipulation. However, I dissent from the majority's holding that the parties did not agree to a reduction in child support upon the occurrence of an emancipation event, and that plaintiff cannot seek recalculation of his support obligation upon such event.

The majority's holding would foreclose plaintiff from

seeking recomputation of child support upon emancipation of the child, a result that is both inequitable and inconsistent with the parties' intent. Furthermore, the majority's statement that "[p]laintiff is free to make a motion for downward modification of the unallocated support obligation upon a proper showing" contradicts its central holding that the parties did not agree to a support reduction upon the emancipation of the older child, and its affirmance of the motion court's denial of plaintiff's motion to declare the older child emancipated on her 22nd birthday and for a recomputation of support at that time. The majority adheres to the reasoning of the motion court that there is no evidence that the parties agreed to a reduction in child support upon the emancipation of a child because the stipulation does not explicitly provide a formula for the reduction or recalculation of plaintiff's child support obligation upon the emancipation of one child, and because it does not allocate the child support obligation between the children.

A stipulation of settlement that is incorporated but not merged into a judgment of divorce "is a contract subject to the principles of contract construction and interpretation" (*Matter of Meccico v Meccico*, 76 NY2d 822, 823-824 [1990]; *Rainbow v Swisher*, 72 NY2d 106, 109 [1988]; *see Kosnac v Kosnac*, 60 AD3d

636 [2d Dept 2009]). "In construing a contract, one of a court's goals is to avoid an interpretation that would leave contractual clauses meaningless" (*Two Guys from Harrison-N.Y. v S.F.R. Realty Assoc.*, 63 NY2d 396, 403 [1984]). "Stated otherwise, [c]ourts are obliged to interpret a contract so as to give meaning to all of its terms" (*150 Broadway N.Y. Assoc., L.P. v Bodner*, 14 AD3d 1, 6 [1st Dept 2004] [internal quotation marks omitted]). It is also a fundamental precept of contract interpretation that "agreements are construed in accord with the parties' intent" (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). The parties' intention can be gleaned from the entire agreement so as to give full meaning and effect to its provisions and should not render any portion meaningless (*see Beal Sav. Bank v Sommer*, 8 NY3d 318, 324 [2007]).

The stipulation of settlement dedicates an entire article to defining an emancipation event, and, although there is no formula provided for recalculation of child support, paragraph 8.2 explicitly grants plaintiff the right to terminate health insurance coverage for each child at the time she becomes emancipated. While it may have been helpful to provide in the stipulation a formula for reducing the unallocated basic child support obligation upon the emancipation of the older child,

contrary to the majority's view, the fact that the parties did not do so is not indicative of an intent not to have such a reduction. Indeed, it is likely that the cessation of basic child support upon emancipation was such an obvious intention that the parties and their attorneys did not feel it necessary to provide an exact formula for recomputation. Thus, the majority's focus on the explicit termination of maintenance to defendant on a date certain, and the termination of medical coverage upon emancipation, is unpersuasive. Nor is it relevant or supportive of the majority's view that the agreement is a "62-page document" or that the parties were represented by counsel and that plaintiff is himself "an experienced attorney." Construing the parties' agreement so as to effectuate their intent, and so as not to render any clauses meaningless, it is reasonable to infer that the parties intended a reduction of the basic child support obligation upon the emancipation of the older child.

This intent is also found in the judgment of divorce, which explicitly provides for payment of the basic child support obligation "until the occurrence of an emancipation event." Neither party objected to this language in the judgment. Nor is this language inconsistent with any express provisions of the stipulation, and thus, contrary to the majority's reading, the

clause in the stipulation prohibiting the parties from adding any provisions inconsistent with it to the judgment is not invoked.

Of course, "absent unusual circumstances," and none exist here, "the provisions of the judgment are final and binding on the parties" (*Rainbow v Swisher*, 72 NY2d at 110). Further, this court should read the agreement and the judgment of divorce "in tandem" to conclude "that the emancipation language is designed to permit the father to discontinue child support for a child upon emancipation of the child" (*Luken v Luken*, 48 Misc 3d 559, 564 [Sup Ct, Monroe County 2015]).

Moreover, it is fundamental public policy in New York that parents of minor children are responsible for their children's support only until age 21 (see Family Ct Act § 413[1][a]; *Matter of Roe v Doe*, 29 NY2d 188, 192-193 [1971]) unless, by express agreement, they obligate themselves to support a child over the age of 21 (*see Hoffman v Hoffman*, 122 AD2d 583 [4th Dept 1986], *lv dismissed* 69 NY2d 706 [1986]). Plaintiff obligated himself to support his children beyond the statutory requirement, but only until each of his children reach the age of 22 or are otherwise emancipated, at which point his support obligation is suspended (*see Matter of Natoli v Mueller*, 71 AD3d 899 [2d Dept 2010], *lv denied* 15 NY3d 701 [2010]). To deny plaintiff the right to

recompute his child support obligations upon the emancipation of the older child would, in effect, force plaintiff to continue payment of the child's educational and health expenses well after she reaches the age of 22, a result inconsistent with the terms of the stipulation and the judgment of divorce.

*Lamassa v Lamassa* (106 AD3d 957 [2d Dept 2013]), upon which the majority relies, does not permanently bar plaintiff from seeking relief. *Lamassa* only stands for the proposition that a parent cannot unilaterally reduce the amount of support payments and must seek appropriate relief by application to the court because "[w]hen child support has been ordered for more than one child, the emancipation of the oldest child does not automatically reduce the amount of support owed under an order of support for multiple children" (106 AD3d at 959, quoting *Matter of Wrighton v Wrighton*, 61 AD3d 988, 989 [2d Dept 2009]). Nor does *Lamassa* result in plaintiff having no recourse because the stipulation does not contain an explicit affirmative provision delineating how child support is to be reduced at the occurrence of an emancipation event. Despite the majority's suggestion, we do not need to rewrite the agreement in order for plaintiff to make a proper motion for reduction of support. Thus, plaintiff may seek recalculation, or downward modification, upon a showing

that the child support award is excessive for the minor child's needs.

Because the parties' intention to reduce the child support payments upon emancipation of the older child is clear from a review of their entire agreement, and because the judgment expressly provides for the same, upon the older child's emancipation, plaintiff is entitled to apply for a reduction of child support. In support of such application, plaintiff "has the burden of proving that the amount of unallocated child support is excessive based on the needs of the remaining children" (*Lamassa*, 106 AD3d at 959).

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

ENTERED: DECEMBER 29, 2015

CLERK

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

16203 Joseph Maggio, Index 106407/09
Plaintiff-Respondent-Appellant, 590715/10
590788/11

-against-

24 West 57 APF, LLC, et al.,
Defendants-Appellants-Respondents,

Richter & Ratner Contracting Corp., et al.
Defendants-Respondents.

- - - - -

24 West 57 APF, LLC, et al.,
Third-Party Plaintiffs,

-against-

O'Kane Construction, Inc.,
Third-Party Defendant-Respondent,

Atlantic Hoist & Scaffolding, LLC,
Third-Party Defendant.

- - - - -

[And A Second Third-Party Action]

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Pillinger Miller Tarallo, LLP, Elmsford (Daniel O. Dietchweiler of counsel), for appellants-respondents.

Bisogno & Meyerson, Brooklyn (Elizabeth Mark Meyerson of counsel), for respondent-appellant.

The Law Offices of Christopher P. DiGiulio, P.C., New York (William Thymius of counsel), for Richter & Ratner Contracting Corp., respondent.

Lewis Brisbois Bisgaard & Smith LLP, New York (Sana Suhail of counsel), for Atlantic Heydt Corp. and Atlantic Hoist & Scaffolding, LLC, respondents.

Hardin Kundla McKeon Poletto & Polifroni, P.A., New York (Stephen A. Donahue of counsel), for O'Kane Construction, Inc., respondent.

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Order, Supreme Court, New York County (Joan M. Kenney, J.), entered June 13, 2014, which, insofar as appealed from as limited by the briefs, denied the motion of defendants 24 West 57 APF, LLC (24 West) and Ana Tzarev New York, LLC (ATNY) for summary judgment dismissing plaintiff's claims for violation of Labor Law § 200 and for common-law negligence, denied 24 West and ATNY judgment on their cross claims and third-party claims for contractual and common-law indemnification against defendants Richter & Ratner Contracting Corp. (R&R) and Atlantic Hoist & Scaffolding, LLC, and third-party defendant O'Kane Construction, Inc., and denied as untimely plaintiff's cross motion for partial summary judgment on his Labor Law § 240(1) claim, unanimously modified, on the law, to grant summary judgment to ATNY to the extent it seeks conditional contractual indemnification against R&R, and otherwise affirmed, without costs.

Plaintiff, a drywall installer employed by O'Kane, was injured at premises owned by defendant 24 West and leased to ATNY. ATNY was converting the space into a gallery to display the work of the artist Ana Tsarev, and had hired R&R as the

general contractor. R&R retained Atlantic to construct a scaffold on the premises for use in the renovation. Because the ceiling in the premises was 30 feet high, Atlantic's scope of work in its subcontract included building a staircase within the scaffold to reach the top. However, the standard sets of stairs that Atlantic had in its inventory, which were approximately nine feet long, did not precisely fit from the bottom of the scaffold to the top. To solve this problem, a smaller set of stairs was cut and "sistered" to the standard set of stairs that was closest to the ceiling. While the standard stairs were made of steel with perforations in them to prevent slippage, the area where the "sister" stairs were coupled to the standard set was covered with plywood. Thus, in that area certain stairs had no slip protection. Further, the addition of plywood to some of the stairs caused the rise of those steps to be higher than others.

Plaintiff testified that his accident occurred as he was descending from the top of the scaffold stairs. He claims that he navigated the first five steps, but when he came to the area where the "sistering" had been done and the stairs were covered with plywood, he "went flying" down the flight of stairs to the next landing, which he rolled off. He stated that he then fell to the floor approximately 12-16 feet below, striking against,

and temporarily grabbing, the side of the scaffold to stop his fall, before landing on piles of sheetrock and other debris. Plaintiff attributed the fall to the steep pitch of the steps, the lack of anti-slip material on the plywood stair that he stepped on immediately before his fall, and the fact that slippery sheetrock powder and sawdust had collected on the staircase, which was "always there" because "they" did not do a very good job cleaning. Nobody witnessed the accident.

Plaintiff filed a note of issue and certificate of readiness for trial before depositions of 24 West, ATNY or Atlantic had been conducted. R&R moved to strike the note of issue. Nevertheless, within 30 days of plaintiff's filing the note of issue, 24 West and ATNY moved for summary judgment, seeking dismissal of plaintiff's causes of action alleging common-law negligence and violation of Labor Law § 200. They also sought summary judgment on their cross claims against R&R and Atlantic, and on their third-party claim against O'Kane, for common-law and contractual indemnification. Defendants made their motions to comply with the court's Part Rules, which required summary judgment motions to be filed within 30 days after the note of issue was filed. The Part Rules also provided that the timeliness of cross motions for summary judgment was determined

by their filing date, not the filing of the motion-in-chief. In support of their motion, 24 West and ATNY submitted substantially identical affidavits from 24 West's property manager, Carlos Telleria, and ATNY's International Manager, Simone DiLaura. Each witness explained the contractual relationships between the parties, and averred that 24 West and ATNY, respectively, did not control the means and methods of the work, did not provide any instructions for the work to be performed by plaintiff, and did not provide any equipment or materials to the contractors or subcontractors. In opposition to the motion, O'Kane argued that there was an issue of fact regarding who the owner of the premises was, since in its subcontract with R&R the owner was identified not as ATNY, but rather as "Ana Tzarev Management Limited." In a reply affidavit, DiLaura averred that Ana Tzarev Management Limited was a shareholder of ATNY and had no interest in the subject premises. She asserted that the reference to Ana Tzarev Management Limited in the subcontract, which she believed was drafted by R&R, was a mistake.

The court granted R&R's motion to strike the note of issue, and ordered discovery to be completed within 60 days and plaintiff to file a new note of issue. The day after it struck

the note of issue, the court issued an order denying 24 West's and ATNY's motion for summary judgment, finding that they had "not made out a prima facie showing of entitlement to summary judgment," since the submissions did not establish who the owner of the premises was. The court further stated that "summary judgment is also premature, as discovery is still outstanding.... It is clear to this Court that until such time as all discovery is complete, including all party deposition [sic], the dispositive motions must be denied." Additionally, the court stated that whether 24 West and ATNY had notice of the conditions that purportedly caused plaintiff's fall was disputed "and may be resolved by the completion of movant's depositions."

The parties subsequently conducted the depositions of 24 West, by Telleria, and of ATNY, by DiLaura, as well as that of Atlantic. Plaintiff filed a new note of issue, and within 30 days of the filing, 24 West and ATNY again moved for summary judgment dismissing plaintiff's negligence and Labor Law § 200 claims and all cross claims and counterclaims against them, and for summary judgment on their claims against R&R, Atlantic and O'Kane for common-law and contractual indemnification. They relied on the deposition of DiLaura, who testified that, while she did not believe anyone associated with ATNY was overseeing or performing

the work, she was not sure of that. Similarly, while she did not believe anyone from ATNY visited the premises during the renovation, she was not sure. DiLaura also testified that Ana Tzarev Management Limited is "just a name I've seen," but she did not know what it did, what its business was, or whether any of its representatives visited the premises during its renovation. Moreover, contrary to her identification in her affidavit of R&R's construction management agreement and O'Kane's subcontract, she testified that she had never seen those documents. 24 West and ATNY relied on the deposition of Telleria to the extent he testified that 24 West was not a party to any of the contracts related to the buildout of the space. Finally, 24 West and ATNY cited deposition testimony from R&R's superintendent on the project, and from O'Kane's foreman, which they claimed suggested that 24 West and ATNY exercised no control over the work of R&R or its subcontractors.

Approximately 60 days after filing the note of issue, and one month after 24 West and ATNY moved again for summary judgment, plaintiff cross-moved for partial summary judgment on liability on his Labor Law § 240(1) claim against 24 West, ATNY, and R&R. Plaintiff's moving affidavit acknowledged that the motion was made after the court's 30-day deadline from the filing

of the note of issue had passed, but requested leave of the court for consideration of the cross motion, asserting that the merits of the motion only became apparent to him upon receipt of 24 West's and ATNY's summary judgment motion, which centered on the same facts. In his reply affidavit, plaintiff further stated that his cross motion was based "in large part" on the deposition of Atlantic, which did not occur until December 30, 2013, days after the operative note of issue had been filed. Atlantic's witness, who was one of its foremen at the time of the accident but did not recall whether he worked on the job in question, testified that it was not appropriate for the nonslip nature of the staircase to have been compromised in the presence of falling sheetrock dust.

The court denied the motions. With regard to 24 West's and ATNY's motion, the court stated that "[t]his Court did not grant movants leave to interpose new dispositive motions upon completion of discovery. Movant's [sic] prior motion was denied for failure to set forth entitlement to summary judgment as a matter of law. Factual disputes were presented, in part, because discovery remained outstanding." With regard to plaintiff's cross motion, the court denied it as untimely, since it was filed more than 30 days after the note of issue was filed.

On appeal, 24 West and ATNY argue that plaintiff's premature note of issue compelled them to make their initial summary judgment motion before discovery was completed, and that the order denying that motion implicitly granted them leave to renew upon completion of discovery. As to the merits, they argue that they did not control the means or methods of the work or create or have notice of the allegedly dangerous condition. Thus, they argue, they are entitled to summary judgment dismissing plaintiff's negligence and Labor Law § 200 claims, and on their cross and third-party claims for common-law and contractual indemnification. Plaintiff argues that the court should have excused his tardiness in filing his cross motion, because the merits of it only became apparent after Atlantic was deposed, which followed the filing of the December 2013 note of issue, and the cross motion was on the same subject matter as 24 West's and ATNY's timely motion. On the merits, he argues that his fall from a scaffold staircase lacking anti-slip materials was a violation of Labor Law § 240(1).

"Successive motions for summary judgment should not be entertained without a showing of newly discovered evidence or other sufficient justification" (*Jones v 636 Holding Corp.*, 73 AD3d 409, 409 [1st Dept 2010]). Here, 24 West and ATNY cannot

credibly argue that their second motion was based on new evidence. The only substantial difference between the first and second motions was the manner in which they presented the testimony of Telleria and DiLaura. The first motion contained affidavits of each witness and the second appended the transcripts of their depositions. At bottom, however, the facts averred were the same, that is, that neither 24 West nor ATNY directed the manner of the work in a way that would invite liability.

Nevertheless, 24 West and ATNY were sufficiently justified in bringing the second motion because the court's original order could fairly be interpreted as authorizing it, without leave, at the close of discovery. After all, the court expressly stated that, "*until such time* as all discovery is complete, including all party deposition[s], the dispositive motions must be denied" (emphasis added). This statement implied that the court would entertain the motion again when depositions were complete (*see Fernandez v Elemam*, 25 AD3d 752, 753 [2d Dept 2006]). Indeed, it is consistent with the fact that, in making the initial motion when they did, 24 West and ATNY were merely attempting to comply with the 30-day deadline set forth in the court's Part Rules, since plaintiff had filed a premature note of issue.

An owner may be liable under the common law or under Labor Law § 200 for a dangerous condition arising from either the condition of the premises or the means and methods of the work (*see Cappabianca v Skanska USA Bldg., Inc.*, 99 AD3d 139, 143-144 [1st Dept 2012]). An owner's liability only attaches for an injury arising from the means and methods of the work if the owner exercised supervisory control over the work (*id.* at 144). Where a dangerous condition in the premises caused the accident, liability only arises if the owner created the condition or had actual or constructive notice of it (*id.*). DiLaura's and Telleria's depositions revealed that they had no firsthand knowledge of the renovation, and thus no factual basis exists for the assertions in their affidavits that neither 24 West nor ATNY exercised supervision or control over the project. However, plaintiff, R&R's superintendent, and O'Kane's foreman all testified that 24 West's and ATNY's representatives on site did not direct the workers or supervise their work. Accordingly, liability on the basis of means and methods does not attach.

Contrary to their assertions, however, the record does not establish that 24 West and ATNY lacked actual or constructive notice of the allegedly dangerous condition. Indeed, they failed to establish prima facie entitlement to summary judgment on the

issue, as, again, neither witness for the entities had personal knowledge about whether 24 West and ATNY had any personal involvement with the construction, nor did the testimony that they submitted from the various contractors establish that 24 West and ATNY could not have been on notice of this point. To the contrary, R&R's superintendent testified that Ana Tzarev walked through the construction site two or three times, and that a representative of the building owner attended weekly meetings, at which time she would walk through the site. O'Kane's foreman similarly testified that Ana Tzarev walked through the site. It is notable that the presence of sheetrock dust, the condition which substantially contributed to the accident, would have been observable to any representative of 24 West or ATNY visiting the premises. Accordingly, because questions of fact exist as to whether 24 West or ATNY had notice of the dangerous condition, they would not have been entitled to summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims against them.

Because we cannot conclude as a matter of law that 24 West and ATNY are not liable to plaintiff on his common-law negligence and Labor Law § 200 claims, we also cannot grant them summary judgment on their claims for common-law indemnification against

R&R and Atlantic (*see Tzic v Kasampas*, 93 AD3d 438, 440 [1st Dept 2012]). As to O'Kane, under no circumstances can 24 West and ATNY be entitled to common-law indemnification, since they have not alleged that plaintiff suffered a grave injury (*see Keita v City of New York*, 129 AD3d 409, 410 [1st Dept 2015]).

As to contractual indemnification, we first note that neither R&R's construction management agreement nor the subcontracts list 24 West as an "owner" upon whom the indemnification clause in each such agreement confers any right of indemnification. Therefore, 24 West is not entitled to contractual indemnification. ATNY did have the right to be indemnified per its contract with R&R, "[t]o the fullest extent permitted by law," so long as the claim giving rise to the claim arose out of the latter's negligent or intentional acts. Given the particular contractual language presented, ATNY, even if it were ultimately found to be partially responsible for the accident, would be entitled to indemnification for the percentage of any award arising not from its own negligence, but rather that of R&R (*see Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 210 [2008]). Since there is no basis on this record for determining whether ATNY and R&R were negligent, we are only able to award summary judgment on this claim to ATNY on a conditional basis

(*see DeSimone v City of New York*, 121 AD3d 420, 422-423 [1st Dept 2014]).

With respect to O'Kane and Atlantic, we note that their subcontracts identify the owner-indemnitee as Ana Tzarev Management Limited, not defendant ATNY. Contrary to 24 West's and ATNY's assertion that this was simply a mistake, a certificate of capital improvement for the project, signed by a representative of the tenant of the premises for tax purposes, identified the owner of the project as Ana Tzarev Management Limited, not ATNY. Since we are required to strictly construe an indemnification agreement (*see Goldwasser v Geller*, 279 AD2d 297 [1st Dept 2001]), we are unable to find as a matter of law that ATNY is the "owner" entitled to indemnification under the subcontracts.

Turning to plaintiff's cross motion, he argues that it should have been considered, because it brought up a nearly identical issue to that raised in 24 West's and ATNY's timely motion, and, alternatively, because the fact that the Atlantic deposition was only held one week after the note of issue was filed reasonably delayed him from filing the motion on time. He further argues that he is entitled to summary judgment on his Labor Law § 240(1) claim because the lack of slip protection on

the scaffold stairs constituted a violation of the statute.

This Court, in reviewing a summary judgment motion, may search the record and grant summary judgment to any nonmoving party without the necessity of a cross motion (*see Dunham v Hilco Constr. Co.*, 89 NY2d 425, 429-430 [1996]). Because of this power, this Court may even disregard the tardiness of a cross motion and grant the cross movant summary judgment, on the theory that the cross motion was not necessary in the first place (*see Matthews v 400 Fifth Realty LLC*, 111 AD3d 405, 406 [1st Dept 2013]). However, this power is not without limitation. As plaintiff recognizes, the issue or cause of action on which the nonmovant is awarded summary judgment must be "nearly identical" to that on which the movant sought relief (*see Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280, 281-282 [1st Dept 2006], *lv dismissed* 9 NY3d 862 [2007]). In *Filannino*, the main motion sought summary judgment dismissing certain Labor Law claims (section 200 and 241(6)), and the plaintiff's untimely cross motion sought summary judgment on his 240(1) claim. This Court held that the cross motion was not sufficiently related to the main motion, and refused to entertain it (*id.*). Here, the scenario is the same. Thus, even though plaintiff has presented facts and arguments in his cross motion suggesting that his

accident was caused by defendants' failure to provide him with an adequate safety device, we are constrained by our own precedent to conclude that the court properly declined to consider it.

We further note that plaintiff's alternative argument, that his tardiness should be excused, lacks merit. Even though Atlantic's deposition was conducted after plaintiff filed his note of issue, all of the testimony cited by plaintiff with regard to the allegedly improper construction of the scaffold was duplicative of plaintiff's own unrebutted testimony. Accordingly, the court properly denied his cross motion as untimely (*Brill v City of New York*, 2 NY3d 648, 651-652 [2004].

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

ENTERED: DECEMBER 29, 2015

CLERK

Tom, J.P., Renwick, Andrias, Moskowitz, Manzanet-Daniels, JJ.

15969- Index 117303/08
15970-
15971 23 East 39th Street Management Corporation,
Plaintiff-Appellant-Respondent,

-against-

23 East 39th Street Developer, LLC,
Defendant-Respondent-Appellant,

Bruce Benjamin, etc., et al.,
Defendants.

- - - - -

23 East 39th Street Developer, LLC,
Counterclaim Plaintiff-Respondent-Appellant,

-against-

Allen Gutterman,
Counterclaim Defendant-Appellant-Respondent.

_____

Robert J. Kheel, New York, for appellants-respondents.

Robinson Brog Leinwand Greene Genovese & Gluck P.C., New York (Michael A. Leon and Jonathan W. Rich of counsel), for respondent-appellant.

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Judgment, Supreme Court, New York County (Doris Ling Cohan, J.), entered February 13, 2015, awarding defendant 23 East 39th Street Developer, LLC (defendant) the sum of $349,999.98, representing rent for the months May 2008 through October 2008, and bringing up for review an order, same court (Lancelot B. Hewitt, Special Referee), entered April 10, 2014, which, inter

alia, denied defendant unpaid rent for the months of November 2008 through January 2009; and denied plaintiff's request to set off its security deposit against unpaid rent and other charges, and an order, same court and Special Referee, entered February 3, 2015, which, inter alia, granted defendant's motion for reargument to the extent of awarding prejudgment interest at the statutory rate commencing on August 31, 2007, unanimously reversed, on the law, without costs, the judgment vacated, the matter remanded for further proceedings in accordance with this order. Appeals from the foregoing orders, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff (tenant) and defendant (landlord) entered into a lease dated August 31, 2007, which became effective October 9, 2007. In accordance with the terms of the lease, tenant paid landlord a $400,000 security deposit to be held in a segregated account. Counterclaim defendant Allen Gutterman executed a personal guaranty dated August 31, 2007, guaranteeing tenant's obligations under the lease.

Either party had the right to terminate the lease "[s]ubsequent to the first consecutive twelve month anniversary of the rent . . . by providing at least ninety (90) day written notice to the other. . ." On May 15, 2008, tenant informed

landlord of its intent to vacate the premises, and did vacate the premises on October 8, 2008, one year after the lease became effective.

Plaintiff tenant commenced this action seeking to recover $115,944.19, i.e., the balance of its $400,000 security that defendant landlord failed to maintain in a segregated account. (Plaintiff admitted that it failed to pay rent for the months of May 2008 through September 2008.) Defendant counterclaimed for $246,212.12 representing rent for the additional three months after plaintiff had vacated the premises.

The motion court (Doris Ling-Cohan, J.) granted plaintiff summary judgment on its claim for conversion of the security deposit, noting that defendant had conceded that the funds had never been placed in a separate account as required by Section 7-103 of the General Obligations Law. The motion court noted that landlord's conversion entitled plaintiff to an immediate recovery of its deposit (i.e., $400,000). The court accordingly granted plaintiff summary judgment in the amount of $115,944.19, i.e., the amount of the security, less monies plaintiff admitted owing defendant for rent and other charges, with interest at the statutory rate from the date the funds were converted (i.e., October 9, 2007, the date the lease went into effect).

The motion court denied plaintiff's motion for summary judgment dismissing defendant's counterclaims, finding that plaintiff could not vacate prior to three months after the one-year anniversary of the lease, i.e., January 2009. The motion court ruled that defendant was entitled to summary judgment in its favor on the counterclaim against plaintiff for rent and additional rents from May 2008 through January 15, 2009, together with interest, in an amount to be determined by a Special Referee.

In an order entered April 10, 2014, the Special Referee awarded landlord the total sum of $349,999.98, representing rent owed by tenant for the months May 2008 through October 2008. In an order entered February 3, 2015, the Special Referee denied in large part the parties' respective motions for reargument and/or renewal. The Special Referee granted the motions to reargue only to the limited extent of awarding interest on the judgment from the date of August 31, 2007, the date counterclaim defendant executed his personal guaranty.

The Special Referee exceeded the scope of the reference in denying landlord recovery for unpaid rents for November 2008 through January 2009 (*401 Hotel v MTI/Image Group*, 271 AD2d 228, 229 [1st Dept 2000]). The motion court found that tenant had

failed to terminate the lease in accordance with its terms, and therefore was liable for unpaid rents through January 2009. The court referred the matter to the Special Referee only to determine the amount of any such rents owed.

The Special Referee also exceeded the scope of the reference in determining that tenant was not entitled to an offset representing the amount the motion court found to be owing on account of landlord's conversion of the security deposit. Section 7-103 prohibits landlords from commingling security deposits with their own funds. Violation of the statute gives rise to an action in conversion and the right to immediate return of the funds (*see Tappan Golf Dr. Range, Inc. v Tappan Prop., Inc.*, 68 AD3d 440, 441 [1st Dept 2009]). A landlord who violates Section 7-103 of the General Obligations Law cannot use the security as an offset against unpaid rents. This is so because a landlord is considered to be a trustee with respect to those funds deposited as security. To allow the landlord to set off the rent against the deposit would be to treat the deposit as a debt and the landlord as a debtor, the situation the statute was enacted to change (*see Matter of Perfection Tech. Servs. Press [Cherno-Dalecar Realty Corp.]*, 22 AD2d 352, 356 [1st Dept 1965], *affd* 18 NY2d 644 [1966]).

The same logic does not pertain where a tenant seeks to apply the security deposit to reduce amounts found owing to the landlord. The motion court having already determined that the tenant was entitled to the full amount of the security as the result of the landlord's conversion of the funds, the Special Referee exceeded the scope of his reference in refusing to reduce amounts owed the landlord by a setoff representing the amount of the security deposit to which the tenant was entitled.

Interest on the past due rents should be calculated at the rate of 2%, not the statutory rate of 9% (*see* CPLR 5004). Here, the lease provides that tenant must pay a charge of 2% for each payment that is more than ten days late (*see Board of Mgrs. of the 25th Charles St. Condominium v Seligson*, 126 AD3d 547, 549 [1st Dept 2015]; CPLR 5004). Landlord is entitled to interest from the date in May 2008 when tenant's rent payment was due, not from the date that Gutterman executed the guaranty.

Tenant is entitled to interest on the full $400,000 security deposit from the date of its conversion, October 9, 2007, as determined by the motion court.

We remand the matter for further proceedings in accordance with this decision.

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

ENTERED: DECEMBER 29, 2015

CLERK

Mazzarelli, J.P., Moskowitz, Richter, Manzanet-Daniels, JJ.

16261 The People of the State of New York, Dkt. 28084C/08
Respondent,

-against-

Jason Murchison,
Defendant-appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (Katheryne M. Martone of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Marianne Stracquadanio of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Wilma Guzman, J.), rendered September 28, 2011, convicting defendant, after a jury trial, of driving while intoxicated, and sentencing him to a conditional discharge and a $650 fine, unanimously affirmed.

Defendant's challenges to the prosecutor's summation are entirely unpreserved because at trial, defendant failed to object to some of the comments and as to others, made only unspecified generalized objections (*see People v Romero*, 7 NY3d 911, 912 [2006]*; People v Coleman*, 117 AD3d 435, 436 [1st Dept 2014], *lv denied* 24 NY3d 1042 [2014]). Defendant's post summations mistrial motion was not sufficient to preserve the claims, which should have been raised at the time the remarks were made (*see Romero*, 7 NY3d at 912; *People v LaValle*, 3 NY3d 88, 116 [2004]).

We decline to review these claims in the interest of justice. As an alternative holding, we find that although some of the prosecutor's remarks were better left unsaid, the summation comments challenged on appeal do not warrant a new trial (*see People v Galloway*, 54 NY2d 396, 399 [1981]; *see also People v Emphram*, 179 AD2d 402, 403 [1st Dept 1992] *lv denied* 79 NY2d 947 [1992]; *People v Flores*, 162 AD2d 172, 173 [1st Dept 1990] lv denied 76 NY2d 856 [1990]).

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

ENTERED: DECEMBER 29, 2015

CLERK

Friedman, J.P., Renwick, Saxe, Kapnick, JJ.

16292-
16293 In re Joanairys M.,

A Person Alleged to
be a Juvenile Delinquent,
Appellant.
- - - - -
Presentment Agency

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Tamara A. Steckler, The Legal Aid Society, New York (Judith Stern of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Ellen Ravitch of counsel), for presentment agency.

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Order, Family Court, Bronx County (Gayle Roberts, J.), entered on or about January 8, 2014, which adjudicated appellant a juvenile delinquent upon her admission that she committed an act that, if committed by an adult, would constitute the crime of attempted assault in the third degree, and placed her on probation for a period of 12 months, unanimously affirmed, without costs. Order (same court and Judge), entered on or about April 22, 2014, which, upon appellant's admission that she violated probation, continued probation for an additional 12 months, unanimously affirmed, without costs.

The court providently exercised its discretion in adjudicating appellant a juvenile delinquent rather than a person

in need of supervision in light of her violent assaults on her mother, history of fighting with others, breaking curfew, truancy and general misbehavior (*see e.g. Matter of Jade Q.*, 41 AD3d 327 [1st Dept 2007]).

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

ENTERED: DECEMBER 29, 2015

CLERK

Tom, J.P., Renwick, Saxe, Kapnick, JJ.

16453 The People of the State of New York, Ind. 3866/11
Respondent,

-against-

Hollis Hosear,
Defendant-Appellant.

_____

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

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

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Order, Supreme Court, New York County (Thomas Farber, J.), entered on or about March 7, 2014, which adjudicated defendant a level two sexually violent predicate sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously modified, as a matter of discretion in the interest of justice, to the extent of remanding for a further hearing on defendant's request for a downward departure, and otherwise affirmed, without costs.

The court properly assessed defendant 10 points under the risk factor for forcible compulsion. Defendant, taking advantage of a crowded subway car, pressed up against a trapped victim, moved his penis against her buttocks, breathed heavily and made loud noises over the course of several minutes, in a manner that

caused her to be aware that she was being sexually assaulted and too scared to say anything. Although there was insufficient evidence of forcible compulsion by physical force (*see People v Mack*, 18 NY3d 929 [2012]), the evidence was sufficient to show forcible compulsion by an implied threat that placed the victim in fear of physical injury.

However, defendant proved, by a preponderance of the evidence, mitigating circumstances related to his debilitating medical condition (*see People v Stevens*, 55 AD3d 892 [2d Dept 2008]). We remand the matter for a further hearing with respect to his current medical condition and future prognosis, given the concern that defendant could recover his capability of reoffending.

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

ENTERED: DECEMBER 29, 2015

CLERK

Friedman, J.P., Acosta, Andrias, Richter, JJ.

16474 The People of the State of New York, Ind. 2025/12
Respondent,

-against-

Anthony Allen,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Sheila O'Shea of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Gregory Carro, J.), rendered on or about April 17, 2013,

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

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

ENTERED: DECEMBER 29, 2015

CLERK

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

Friedman, J.P., Acosta, Andrias, Richter, JJ.

16475 Labseou Rooney, Index 310482/09
Plaintiff-Respondent,

-against-

Mariam Madison, et al.,
Defendants,

George Abi-Nakad, et al.,
Defendants-Appellants.

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Law Office of Craig P. Curcio, Middletown (Ryan Bannon of counsel), for appellants.

Forde & Associates, Eastchester (James L. Forde of counsel), for respondent.

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Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about April 9, 2015, which, to the extent appealed from, denied the motion of defendants-appellants George Abi-Nakad and Daniel Abinakad for summary judgment dismissing the complaint as against them, unanimously reversed, on the law, without costs, the motion granted and the complaint dismissed as to these defendants. The Clerk is directed to enter judgment accordingly.

Although the testimony of defendant Daniel Abinakad, the driver of one of the vehicles in this three car collision, and that of his passenger, nonparty Timothy Braig, both deposed almost seven years after the accident, differ as to whether

Abinakad's vehicle was first struck from the left or the right, as a vehicle suddenly merged into Abinakad's center lane, causing Abinakad to be propelled into the vehicle in which plaintiff was a passenger, under neither version is there evidence of Abinakad's negligence, and plaintiff has offered no evidence from which such negligence may be reasonably inferred (*see Freeman v Johnston*, 84 NY2d 52, 57 [1994] ["There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. . . If the evidence is merely colorable . . . or is not significantly probative . . ., summary judgment may be granted"] [internal quotations and citation omitted], *cert denied* 513 US 1016 [1994]; *Caban v Vega*, 226 AD2d 109, 111 [1st Dept 1996]).

Conclusory allegations by plaintiff's counsel that Abinakad was speeding are insufficient to defeat summary judgment (*see Perez v Brux Cab Corp.*, 251 AD2d 157, 160 [1998]; *Sanchez v Lonero Tr., Inc.*, 100 AD3d 417 [1st Dept 2012]). Moreover, "[s]peculation regarding evasive action that a defendant driver should have taken to avoid a collision, especially when the driver had, at most, a few seconds to react, does not raise a triable issue of fact" (*Dearden v Tompkins County*, 6 AD3d 783, 785 [3d Dept 2004]; *see also Edwards v Gaines Serv. Leasing*

*Corp.*, 244 AD2d 279, 280 [1st Dept 1997]).

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: DECEMBER 29, 2015

CLERK

Friedman, J.P., Acosta, Andrias, Richter, JJ.

16476 Daniel Costa, et al., Index 158127/12
Plaintiffs-Respondents,

-against-

Merrill Lynch/WFC/L, Inc., et al.,
Defendants-Respondents,

Nomura Holding America, Inc., et al.,
Defendants-Appellants.

_____

Strongin Rothman & Abrams, LLP, New York (Howard F. Strongin of counsel), for appellants.

Arye, Lustig & Sassower, P.C., New York (Jay A. Wechsler of counsel), for Daniel Costa and Karen Costa, respondents.

Jeffrey Samel & Partners, New York (Robert G. Spevack of counsel), for Merrill Lynch/WFC/L, Inc., Bank of America Corporation and ABM Janitorial Services, Inc., respondents.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered September 10, 2014, which, insofar as appealed from as limited by the briefs, denied that part of the motion of defendants' Nomura Holding American, Inc., Nomura Securities International, Inc., and Nomura Securities North America, LLC. (collectively Nomura) for summary judgment dismissing the complaint and all cross claims as against them, unanimously affirmed, without costs.

Nomura's motion was properly denied, in this action where

plaintiff Daniel Costa alleges that he was injured when he slipped on brown liquid in the freight elevator lobby of a floor leased by Nomura. The record presents triable issues of fact as to which floor that Nomura leased was the accident location, which entity was responsible for cleaning that part of the premises, and when, prior to plaintiff's accident, those premises were last inspected (*see e.g. Nugent v 1235 Concourse Tenants Corp.*, 83 AD3d 532 [1st Dept 2011]).

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

ENTERED: DECEMBER 29, 2015

CLERK

Friedman, J.P., Acosta, Andrias, Richter, JJ.

16478 The People of the State of New York, Ind. 630/01
Respondent,

-against-

Anthony Correnti,
Defendant-Appellant.

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

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

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Order, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), entered on or about June 24, 2013, which adjudicated defendant a level three sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly assessed 10 points for unsatisfactory conduct while confined, particularly since one of defendant's tier III infractions suggested a specific risk of reoffense.

The court properly exercised its discretion in declining to

grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). The cited mitigating factors were adequately taken into account by the guidelines, or were outweighed by the seriousness and extent of defendant's sex crimes against children.

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

ENTERED: DECEMBER 29, 2015

CLERK

Friedman, J.P., Acosta, Andrias, Richter, JJ.

16479-
16480 In re Seth Jacob S.,

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

Vincent S.,
Respondent-Appellant,

Ohel Children's Home and
Family Services,
Petitioner-Respondent.

_____

Kenneth M. Tuccillo, Hastings on Hudson, for appellant.

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

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

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Order of disposition, Family Court, New York County (Susan K. Knipps, J.), entered on or about June 3, 2014, to the extent it brings up for review an order, same court and Judge, entered on or about March 31, 2011, finding, after a hearing, that respondent father's consent to the subject child's adoption was not required, unanimously affirmed, without costs.

There is no basis for disturbing the court's determination that respondent's consent to the adoption of the child was not required. The record supports the findings that respondent had

not paid "a fair and reasonable sum" toward the child's support and that he did not visit the child at least monthly or, if visitation was not possible, communicate regularly with the child or the child's custodians (*see* Domestic Relations Law §111[1][d]).

Respondent's constitutional challenges to the statutes providing for notice and consent of an unwed father are unpreserved, and we decline to reach them.

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

ENTERED: DECEMBER 29, 2015

CLERK

Friedman, J.P., Acosta, Andrias, Richter, JJ.

16481 Barbara Fortgang, et al., Index 652311/13
Plaintiffs-Appellants,

-against-

Jeffrey Katz,
Defendant-Respondent,

American Funds Service Company, et al.,
Defendants.

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

Jack Dashosh, Sea Cliff, for respondent.

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Order, Supreme Court, New York County (Joan M. Kenney, J.), entered September 11, 2014, which denied plaintiffs' motion for summary judgment directing the division of certain assets, unanimously modified, on the law, to grant that part of the motion directing defendants Putnam Investor Services Inc. and Computershare Shareowner Services LLC to divide all accounts of Reva Katz, now deceased, into two equal shares, with one share titled solely in the name of plaintiff Barbara Fortgang, and the other titled solely in the name of defendant Jeffrey Katz, and otherwise affirmed, without costs.

In order for an account to be established to be a joint account, "survivorship language" must appear on the signature

card of the account (*Matter of Klecar*, 207 AD2d 732, 732 [1st Dept 1994]). Here, the only proof in the record as to the account held at defendant American Funds Service Company is a letter from American Funds stating that the account is registered as "Reva Katz & Jeffrey Katz & Barbara Fortgang Ten Com," which is insufficient to demonstrate whether it is a joint tenancy, as Jeffrey Katz contends (which would entitle him to a one-half interest), or a tenancy in common, as Barbara Fortgang contends (which would entitle her to a two-third interest) (see *Sumitomo Mitsui Banking Corp. v Credit Suisse*, 89 AD3d 561, 563 [1st Dept 2011]).

There is no dispute that the accounts held at Computershare and Putnam are joint tenancies in which Jeffrey Katz and Barbara Fortgang hold equal interests. Since "a joint tenant is entitled to an immediate one-half interest in the joint property" (*Matter of Covert*, 97 NY2d 68, 75 [2001]; *see Lopez v Fenn*, 90 AD3d 569,

572 [1st Dept 2011], *lv dismissed* 19 NY3d 1022 [2012]), the order is modified to the extent indicated.

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

ENTERED: DECEMBER 29, 2015

CLERK

Friedman, J.P., Acosta, Andrias, Richter, JJ.

16482 The People of the State of New York, Ind. 2892/12
Respondent,

-against-

Christian Guzman,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Steven R. Berko of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Charles Solomon, J.), rendered October 16, 2012, convicting defendant, upon his plea of guilty, of grand larceny in the fourth degree, and sentencing him to a term of one year, unanimously affirmed.

Defendant's claim that his guilty plea was invalid because the court gave an incomplete explanation of defendant's rights under *Boykin v Alabama* (395 US 238 [1969]) is a claim requiring preservation (*see People v Jackson*, 123 AD3d 634 [1st Dept 2014], *lv denied* 25 NY3d 1201 [2015]), and we decline to review this unpreserved claim in the interest of justice. Unlike the situation in *People v Tyrell* (22 NY3d 359, 364 [2013]), defendant had the opportunity to move to withdraw his plea or otherwise raise the issue, and the deficiency did not rise to the level of

a mode of proceedings error. As an alternative holding, we find that the record as a whole establishes the voluntariness of the plea (*see Tyrell*, 22 NY3d at 365; *see also People v Harris*, 61 NY2d 9, 16-19 [1983]).

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

ENTERED: DECEMBER 29, 2015

CLERK

Friedman, J.P., Acosta, Andrias, Richter, JJ.

16484 The People of the State of New York, Ind. 4214/12
Respondent,

-against-

Raymond Brown,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered July 17, 2013, convicting defendant, upon his plea of guilty, of one Count of attempted criminal possession of a weapon int the second degree, and sentencing him to an aggregate term of two years and three years post-release supervision, unanimously affirmed.

Although we do not find that defendant made a valid waiver of the right to appeal, we perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 29, 2015

CLERK

Friedman, J.P., Acosta, Andrias, Richter, JJ.

16485-
16485A-
16486 In re Jayden R., and Another,

Children Under the Age
of Eighteen Years, etc.,

Jacqueline C.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent,

Raymond M.,
Respondent.

_____

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

Zachary W. Carter, Corporation Counsel, New York (Ellen Ravitch of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Susan Clement of counsel), attorney for the children.

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Orders of disposition, Family Court, Bronx County (Valerie A. Pels, J.), entered on or about July 22, 2013, to the extent they bring up for review an order of fact-finding, same court (Jane Pearl, J.), entered on or about March 28, 2013, which, to the extent appealed from as limited by the briefs, found that respondent mother had neglected the older subject child and had derivatively neglected the younger subject child, unanimously

affirmed, without costs. Appeal from fact-finding order unanimously dismissed, without costs, as subsumed in the appeal from the orders of disposition.

A preponderance of the evidence supports the Family Court's finding that the mother had neglected the older child by inflicting excessive corporal punishment on him (*see* Family Ct Act §§ 1012[f][i][B]; 1046[b][i]; *Matter of Genesis F.* [*Xiomaris S.*], 121 AD3d 526, 526 [1st Dept 2014]). The older son's out-of-court statements that the mother had a history of hitting him with a belt, causing bruises to his body, were properly admitted into evidence. His statements were corroborated by an agency caseworker's observation of bruises on the child, photographs depicting the injuries, medical records, and the mother's own admission that she had beaten the child with a belt (*Genesis*, 121 AD3d at 526; *Matter of Aniya C.* [*Michelle C.*], 99 AD3d 478, 479 [1st Dept 2012]).

The mother failed to preserve her argument that there was insufficient evidence of impairment of her older child's physical, mental or emotional condition (*see Matter of Star Leslie W.*, 63 NY2d 136, 145 [1984]). In any event, we reject it on the merits. There is also no merit to the mother's argument that the case involved a single or isolated incident of

reasonable discipline. The child told the caseworker and his grandmother about prior incidents in which the mother hit the child with a belt and her hands, and the mother acknowledged threatening the child with a belt and claimed that he "bruises easily." In any event, a single incident of excessive corporal punishment may be sufficient to sustain a finding of neglect (*see Matter of Cevon W.* [*Talisha W.*], 110 AD3d 542, 542 [1st Dept 2013]).

The finding of neglect was also supported by the evidence that the mother's boyfriend, corespondent Raymond, had inflicted excessive corporal punishment against the older child, and that the mother knew or should have known about the corporal punishment but failed to take any steps to protect the child (*see Matter of Gabriel J.* [*O'Neill H.*], 99 AD3d 543, 544 [1st Dept 2012], *lv dismissed* 20 NY3d 999 [2013]).

The evidence of the mother's neglect of the older child supports the finding that she derivatively neglected the younger

child (*see Matter of Kaiyeem C.* [*Ndaka C.*], 126 AD3d 528, 529 [1st Dept 2015]; *Matter of Syed I.*, 61 AD3d 580, 580 [1st Dept 2009]).

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

ENTERED: DECEMBER 29, 2015

CLERK

Friedman, J.P., Acosta, Andrias, Richter, JJ.

16487 The People of the State of New York, Ind. 5268/12
Respondent,

-against-

Kaseem Williams,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Juan M. Merchan, J.), rendered October 3, 2013, convicting defendant, after a jury trial, of assault in the second degree and resisting arrest, and sentencing him, as a second violent felony offender, to an aggregate term of six years, unanimously affirmed.

The court properly exercised its discretion in ejecting defendant from the courtroom, and thus precluding him from continuing to represent himself. By engaging, after proper admonitions from the court, in persistently obstreperous and disruptive conduct that warranted removal (*see Illinois v Allen*, 397 US 337 [1970]), defendant necessarily rendered continued self-representation impossible. Moreover, disruptive conduct itself disqualifies a defendant from self-representation, and the

record supports the court's implicit finding that defendant's conduct "would prevent the fair and orderly exposition of the issues" (*People v McIntyre*, 36 NY2d 10, 17 [1974]). We note that shortly after this incident, defendant was returned to the courtroom after agreeing to behave properly, and that he requested that his standby counsel resume representation. We have considered and rejected defendant's remaining arguments on this subject, including those relating to the court's denial of defendant's requests for an adjournment, and for the removal or replacement of standby counsel.

The evidence at a *Hinton* hearing established an overriding interest that warranted a limited closure of the courtroom (*see Waller v Georgia*, 467 US 39 [1984]). The undercover officers' testimony, including testimony that they expected to continue working undercover in the vicinity of defendant's arrest, established a substantial probability that their undercover status and safety would be jeopardized by testifying in an open courtroom (*see People v Echevarria*, 21 NY3d 1, 12-14 [2013]). Contrary to defendant's argument, the People were not required to show a specific link between defendant and any potential courtroom spectators who might endanger the undercover officer.

The verdict was not against the weight of the evidence (*see*

*People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The evidence amply supports the conclusions that defendant knew his victim was a police officer who was attempting to arrest defendant for selling what later proved to be imitation drugs, that the officer sustained physical injury, and that defendant caused the injury.

We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 29, 2015

CLERK

Friedman, J.P., Acosta, Andrias, Richter, JJ.

16488- Ind. 3318/12
16489- 3316/12
16490- 3315/12
16491 The People of the State of New York, 3314/12
Respondent,

-against-

Tiwane Paul,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Mark W. Zeno of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Joshua L. Haber of counsel), for respondent.

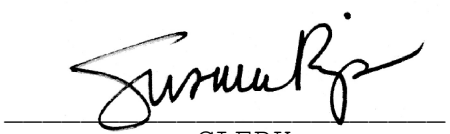
_____

Appeals having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Marcy Kahn, J.), rendered on or about December 19, 2012,

Said appeals 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 judgments so appealed from be and the same are hereby affirmed.

ENTERED: DECEMBER 29, 2015



CLERK

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

Friedman, J.P., Acosta, Andrias, Richter, JJ.

16492 Adam Balducci, Index 150882/12
Plaintiff-Appellant,

-against-

Diogenes Carrasco, et al.,
Defendants-Respondents.

_____

Law Office of Arnold E. DiJoseph, P.C., New York (Arnold E. DiJoseph, III of counsel), for appellant.

Baker, McEvoy, Morrissey & Moskovits, P.C., Brooklyn (Colin F. Morrissey of counsel), for respondents.

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Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered September 3, 2014, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing the claims of serious injury to the lumbar spine and a 90/180-day injury under Insurance Law § 5102(d), unanimously modified, on the law, to deny the motion as to the claims of "permanent consequential" and "significant" limitations in the use of the lumbar spine, and otherwise affirmed, without costs.

Whether or not defendants met their prima facie burden, in opposition, plaintiff raised a triable issue of fact. Among other things, he submitted an affirmed report by a physician who, upon examination not long after the accident and recently, found

limitations in range of motion and positive results on straight leg raising tests (*see Osborne v Diaz*, 104 AD3d 486, 487 [1st Dept 2013]). In sum, plaintiff's evidence is sufficient to raise a triable issue of fact with respect to his lumbar spine injury (*see Bonilla v Abdullah*, 90 AD3d 466 [1st Dept 2011], *lv dismissed* 19 NY3d 885 [2012]).

Defendants satisfied their burden with respect to the claim of a 90/180-day injury by relying on plaintiff's own admissions showing that he was not prevented from completing substantially all of the acts making up his usual and customary daily activities (*see Komina v Gil*, 107 AD3d 596 [1st Dept 2013]). Plaintiff admitted that he only missed about two weeks of work and was in bed for approximately 10 non-consecutive days. In opposition, plaintiff failed to present medical evidence sufficient to raise an issue of fact as to this claimed injury.

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

ENTERED: DECEMBER 29, 2015

CLERK

Friedman, J.P., Acosta, Andrias, Richter, JJ.

16493 The People of the State of New York, Ind. 1421/12
Respondent,

-against-

Kaestnor Muir,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Harold V. Ferguson, Jr. of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Natalia Bedoya-McGinn of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Juan M. Merchan, J.), rendered June 27, 2014, convicting defendant, upon his plea of guilty, of attempted petit larceny, and sentencing him to a conditional discharge for a period of one year, unanimously affirmed.

The record amply establishes that defendant's plea was knowing, intelligent, and voluntary. Defendant entered into a plea agreement that contemplated that he would initially plead guilty to attempted robbery in the third degree but would ultimately have that conviction reduced to attempted petit larceny if he completed the requisite mental health program.

At the first plea proceeding, where defendant pleaded guilty to attempted robbery, the court fully explained the terms of the

agreement and advised defendant of the rights he was waiving (*see Boykin v Alabama*, 395 US 238 [1969]). Having already waived his rights, a "rigorous and detailed" colloquy at defendant's replea to a lesser charge, carrying with it a lesser sentence, would have been an "unnecessary formalism" *(People v Harris*, 61 NY2d 9, 16 [1983]). Under the circumstances presented, the initial plea allocution sufficiently established defendant's understanding of his *Boykin* rights for purposes of the later plea, and we reject defendant's argument that the replacement of one plea with another rendered the first plea a "nullity" with regard to the waivers of rights (*see People v Conceicao*, __ NY3d __, NY Slip Op 08615 [2015]). In this case, the second plea was essentially an extension of the first plea, but with the conviction reduced to a misdemeanor for defendant's benefit.

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

ENTERED: DECEMBER 29, 2015

CLERK

Friedman, J.P., Acosta, Andrias, Richter, JJ.

16495 The People of the State of New York, Ind. 2230/12
Respondent,

-against-

Kitty Rotolo,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Rena K. Uviller, J.), rendered on or about March 3, 2015,

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

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

ENTERED: DECEMBER 29, 2015

CLERK

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

Friedman, J.P., Acosta, Andrias, Richter, JJ.

16496N Katherine Priestley, Index 114874/10
Plaintiff-Respondent-Appellant,

-against-

Panmedix Inc., et al.,
Defendants,

Ballon, Stoll, Bader &
Nadler, PC, et al.,
Defendants-Appellants-Respondents.

_____

Ballon, Stoll, Bader & Nadler, PC, New York (Marshall B. Bellovin of counsel), for Ballon, Stoll, Bader & Nadler, PC, appellant-respondent.

Traub Lieberman Straus & Shrewsberry LLP, Hawthorne (Lisa Shrewsberry of counsel), for Halket Weitz and Theodore Weitz, appellants-respondents.

Russ & Russ, P.C., Massapequa (Jay Edmond Russ of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Anil C. Singh, J.), entered January 28, 2015, which, to the extent appealed from as limited by the briefs, granted plaintiff leave to amend the complaint to add Theodore Weitz and Ballon, Stoll, Bader & Nadler, P.C. as defendants and to assert a claim for aiding and abetting a fraudulent conveyance, and denied plaintiff leave to amend the complaint to assert a cause of action for tortious interference with the collection and enforcement of a money

judgment, unanimously modified, on the law, to grant plaintiff leave to assert the tortious interference with the collection and enforcement of a money judgment claim, and otherwise affirmed, without costs.

While defendants argue that plaintiff's motion was not timely, they do not indicate that they suffered "prejudice or surprise" as a result (*360 W. 11th LLC v ACG Credit Co. II, LLC*, 90 AD3d 552, 553 [1st Dept 2011]). In any event, the record supports a finding that plaintiff moved to amend the complaint shortly after the judgment became final.

Plaintiff is entitled to amend the complaint to assert a claim for aiding and abetting fraud, since her allegations are not "palpably insufficient or clearly devoid of merit" (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010]). Moreover, the proposed allegations are sufficient under CPLR 3016(b), since they support an inference of defendants' actual intent to defraud (*cf. Wildman & Bernhardt Constr. v BPM Assoc.*, 273 AD2d 38, 38-39 [1st Dept 2000]; *Rabouin v Metropolitan Life Ins. Co.*, 307 AD2d 843, 844 [1st Dept 2003]; *National Westminster Bank USA v Weksel*, 124 AD2d 144, 147 [1st Dept 1987], *appeal denied* 70 NY2d 604 [1987]).

Under New York law, there exists a common law cause of

action for tortious interference with enforcement of a judgment *Quinby v Strauss*, 90 NY 664 [1882]; *James v Powell*, 25 AD2d 1, 2 [1st Dept 1966], *revd on other grounds* 19 NY2d 249 [1967]; *Strachman v Palestinian Auth.*, 73 AD3d 124 [1st Dept 2010], *appeal withdrawn* 16 NY3d 796 [2011]). We find further that, because plaintiff possessed a valid judgment at the time of the fraudulent conveyance, she was not required to also have a lien on the property to enforce this claim (*James* at 2). Nor is the tortious interference claim preempted by the Debtor and Creditor Law, since the allegations extend beyond the defendants' fraudulent conveyance of the security interest, and plaintiff seeks affirmative relief for defendants' fraudulent conduct, not merely the setting aside of the conveyance.

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

ENTERED: DECEMBER 29, 2015

CLERK

Friedman, J.P., Acosta, Andrias, Richter, JJ.

16497 In re Derrick Harris, Index 40/15
[M-4809] Petitioner, Ind. 4541/11
4876/11

-against-

Hon. Richard Carruthers,
Respondent.

_____

Derrick Harris, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Michael A. Berg of counsel), for respondent.

_____

The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

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

ENTERED: DECEMBER 29, 2015

CLERK

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

16498 The People of the State of New York, Ind. 1121/13
Respondent,

-against-

Jesus Agosto,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Eric C. Washer of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Martin Marcus, J.), rendered October 17, 2013, convicting defendant, upon his plea of guilty, of Burglary in the Third Degree (Penal Law § 140.20), and sentencing him to an aggregate term of from one to three years, unanimously affirmed.

Although we do not find that defendant made a valid waiver of the right to appeal, we perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 29, 2015

CLERK

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

16499N Tower Insurance Company of New York, Index 160273/13
Plaintiff-Appellant,

-against-

Mohammed J. Hossain,
Defendant,

Ruther Singletary,
Defendant-Respondent.

_____

Mound Cotton Wollan & Greengrass LLP, New York (Labe C. Feldman of counsel), for appellant.

Antoinette L. Williams, P.C., Pelham (Antoinette L. Williams of counsel), for respondent.

_____

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered December 22, 2014, which denied as premature plaintiff's motion for a default judgment against defendant Hossain and for summary judgment declaring that it has no duty to defend or indemnify Hossain in the underlying personal injury action, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment declaring that plaintiff has no duty to defend or indemnify Hossain in the underlying personal injury action.

The motion court correctly found that plaintiff established prima facie that it had no obligation to defend or indemnify

defendant Hossain in the underlying personal injury action by showing, pursuant to an exclusion in his homeowners policy, that Hossain did not reside at the premises when the accident happened. As the court recognized, the affidavit by plaintiff's insurance investigator stating that Hossain admitted that he had not resided at the premises since November 2008, nearly a year and a half before the accident occurred, is admissible for the purpose of showing his non-residence when the accident occurred, and, by defaulting in this action, Hossain is deemed to have admitted the allegation in the complaint that he did not reside at the premises at the relevant time. The court erred in finding that defendant Singletary, a tenant in the premises and the plaintiff in the underlying action, established that discovery might lead to evidence that would defeat plaintiff's motion (*see Atomergic Chemetals Corp. v Hartford Acc. & Indem. Co.*, 193 AD2d 551 [1st Dept 1993]).

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

ENTERED: DECEMBER 29, 2015

CLERK

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

16500 Tower Insurance Company of New York, Index 113603/10
Plaintiff-Respondent,

-against-

J&J Grocery & Deli Corp., et al.,
Defendants,

Yuying Qiu,
Defendant-Appellant.

_____

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Manuel J. Mendez, J.), entered on or about January 12, 2015,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto entered December 1, 2015,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: DECEMBER 29, 2015

CLERK

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

16501-
16502 The People of the State of New York, Respondent,

-against-

Alfred Stewart,
Defendant-Appellant.

Ind. 3745/12
279/13

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

Robert T. Johnson, District Attorney, Bronx (Lori Ann Farrington of counsel), for respondent.

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Judgments, Supreme Court, Bronx County (Martin Marcus, J.), rendered May 30, 2013, as amended July 16, 2013, convicting defendant, upon his pleas of guilty, of two counts of auto stripping in the second degree, and sentencing him to concurrent terms of 1⅓ to 4 years, unanimously affirmed.

The record supports the conclusion that defendant made a valid waiver, conveyed through counsel, of his right to be

present at a proceeding where the court amended the sentence by reducing it to conform with the maximum sentence permitted by law for a class E felony. We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 29, 2015

CLERK

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

16503N Fairpoint Companies, LLC, Index 102016/12
Plaintiff, 590538/12
150611/12

-against-

Nancy McCormick Vella, et al.,
Defendants.

- - - - -

Mid-Atlantic Waterproofing of NY, Inc.,
Third-Party Plaintiff,

-against-

Marlboro Group International, LLC,
Third-Party Defendant.

- - - - -

Nancy McCormick Vella,
Plaintiff-Appellant,

-against-

Fairpoint Companies, LLC,
Defendant-Respondent.

_____

Wasserman Grubin & Rogers, LLP, New York (Brian H. Fischkin of counsel), for appellant.

Zisholtz & Zisholtz LLP, Mineola (Joseph McMahon of counsel), for respondent.

_____

Order, Supreme Court, New York County (Debra A. James, J.), entered March 20, 2015, which, to the extent appealed from, denied plaintiff Nancy McCormick Vella's motion to amend her complaint to add Marlboro Group International, LLC (Marlboro) as a defendant under an alter ego theory, unanimously affirmed,

without costs.

Leave to amend a pleading "'shall be freely given' absent prejudice or surprise resulting directly from the delay" (*McCaskey, Davies & Assoc. v New York City Health & Hosp. Corp.*, 59 NY2d 755, 757 [1983]; *see also* CPLR 3025[b]). The movant need not establish the merit of her proposed new allegations, but only that "the proffered amendment is not palpably insufficient or clearly devoid of merit" (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010]).

To state a veil piercing claim, the plaintiff is required to show that "(1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury" (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]). Here, although plaintiff has sufficiently alleged that Marlboro dominated Fairpoint Companies, LLC (Fairpoint) with respect to the work that Fairpoint performed on her property, she

failed to allege that Marlboro abused the corporate form of Fairpoint for the purpose of committing wrongdoing against or to avoid obligations to her (*see TNS Holdings v MKI Sec. Corp.*, 92 NY2d 335, 339-340 [1998]).

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

ENTERED: DECEMBER 29, 2015

CLERK

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

16504N Shane McMahon, et al., Index 151136/14
Plaintiffs-Appellants,

-against-

The Cobblestone Lofts Condominium, et al.,
Defendants-Respondents,

Nova Restoration of NY, Inc., et al.,
Defendants.

- - - - -

[And A Third-Party Action]

_____

Manatt, Phelps & Phillips, LLP, New York (Michael R. Gordon of counsel), for appellants.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (I. Elie Herman of counsel), for respondents.

_____

Order, Supreme Court, New York County (Geoffrey D.S. Wright, J.), entered July 30, 2015, which denied plaintiffs' motion to strike the answer of defendants-respondents (defendants), and limited plaintiffs' interrogatories and demands for the production of documents, unanimously modified, on the facts, to reinstate demand 22 and strike demand 17, and otherwise affirmed, without costs.

The motion court properly denied plaintiffs' motion to strike defendants' answer, since plaintiffs did not show that defendants' discovery violations, including their failure to

fully comply with the court's preliminary conference order, were willful, contumacious, or in bad faith (*see Pezhman v Department of Educ. of the City of N.Y.*, 95 AD3d 625, 625-626 [1st Dept 2012]). Nor have plaintiffs shown that defendants refused to allow them to inspect the condominium's crawl space. Although defendants did not timely respond to plaintiffs' discovery demands and interrogatories, there was no showing of a "repeated failure" to comply with court orders directing disclosure (*Herrera v City of New York*, 238 AD2d 475 [2d Dept 1997]).

The motion court properly struck or limited some of plaintiffs' discovery demands and interrogatories, even though defendants did not timely object to those requests (*Jagopat v City of New York*, 110 AD3d 507, 507 [1st Dept 2013]). Interrogatories 3, 4, 6, 7 and 8, and demands 7, 12, 15, 20, 21, 24-28, and 31-35 are "palpably improper" (*id.*), because they are either overly broad, unduly burdensome, irrelevant, or vague (*see Haller v North Riverside Partners*, 189 AD2d 615, 616 [1st Dept 1993]; *Accent Collections, Inc. v Cappelli Enters., Inc.*, 84 AD3d 1283, 1284 [2d Dept 2011]). The motion court properly limited demand 8 to communications concerning the mold condition at issue (*see Engel v Hagedorn*, 170 AD2d 301, 301 [1st Dept 1991]). However, the motion court improperly struck demand 22, finding it

duplicative of demand 17. Demand 22 seeks the production of documents concerning the condition of the unit, including the condition of the decking. Demand 17 seeks documents concerning construction, maintenance, and/or repair work on, under, around or affecting the decking. Because demand 22 encompasses demand 17, demand 17 should be stricken and demand 22 reinstated.

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

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

ENTERED: DECEMBER 29, 2015

CLERK

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

16505 The People of the State of New York, Ind. 1453/13
Respondent,

-against-

Davon Powell,
Defendant-Appellant.

_____

Marianne Karas, Thornwood, for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (David P. Stromes of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered July 2, 2013, as amended September 30, 2013, convicting defendant, upon his plea of guilty, of conspiracy in the second degree, and sentencing him to a term of 6 to 18 years, unanimously affirmed.

The record does not reflect that defendant knowingly and voluntarily waived his appellate rights (*see People v Bradshaw*, 18 NY3d 257, 264 [2011]; *see People v Seaberg*, 74 NY2d 1, 111 [1989]). Notwithstanding, we do not reach defendant's claim that his guilty plea was invalid because it was unpreserved. Defendant did not make a postallocution motion to either withdraw his plea or to set aside the judgment of conviction pursuant to CPL 440.10, (*see People v Conceicao*, 2015 NY Slip Op 08615; *see*

*People v Jackson*, 123 AD3d 634 [1st Dept 2014], *lv denied* 25 NY3d 1201 [2015]), and we decline to review it in the interest of justice. Unlike the situation in *People v Tyrell* (22 NY3d 359, 364 [2013]), defendant had the opportunity to move to withdraw his plea or otherwise raise the issue, and the alleged deficiency did not rise to the level of a mode of proceedings error. As an alternative holding, we find that the record as a whole establishes the voluntariness of the plea (*see Conceicao, 2015 NY Slip Op 08615, 11/21*, 22 NY3d at 365; *see also People v Harris*, 61 NY2d 9, 16-19 [1983]).

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters outside the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state

and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *People v Ford*, 86 NY2d 397, 404 [1995]) *Strickland v Washington*, 466 US 668 [1984]).

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

ENTERED: DECEMBER 29, 2015

CLERK

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

16506- Index 306511/09
16507- 83726/10
16508 Linares Bonaerge,
Plaintiff-Respondent-Appellant,

-against-

Leighton House Condominium, et al.,
Defendants-Respondents-Appellants,

1695 First Avenue Associates, L.P.,
et al.,
Defendants,

Integrated Construction Services, Inc.,
Defendant-Respondent.

- - - - - -

Integrated Construction Services, Inc.,
Third-Party Plaintiff-Respondent,

-against-

Rockledge Scaffold Corp.,
Third-Party Defendant-Appellant-Respondent.

_____

Catalano, Gallardo & Petropoulos, LLP, Jericho (William L. Schleifer of counsel), for appellant-respondent.

Peña & Kahn, PLLC, Bronx (Diane Welch Bando of counsel), for Linares Bonaerge, respondent-appellant.

Gallo Vitucci Klar LLP, New York (Kimberly A. Ricciardi of counsel), for Leighton House Condominium and Cooper Square Realty, Inc., respondents-appellants.

Cascone & Kluepfel, LLP, Garden City (Howard B. Altman of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Lucindo Suarez, J.), entered March 19, 2015, which to the extent appealed from, granted judgment on the contractual indemnification claims asserted by Leighton House Condominium (Leighton) and Cooper Square Realty s/h/a Cooper Square Realty Inc. (Cooper) as against Integrated Construction Services, Inc. (Integrated), and by Integrated as against Rockledge Scaffold Corp. (Rockledge), unanimously affirmed, without costs. Order, same court and Justice, entered on or about March 12, 2015, which, to the extent appealed from as limited by the briefs, granted plaintiff's cross motion for partial summary judgment as to his Labor Law § 240(1) claim, and denied Rockledge's cross motion for summary judgment dismissing the contractual indemnification claims of Leighton and Cooper against Integrated, and of Integrated against Rockledge, unanimously affirmed, without costs. Appeals from aforementioned order otherwise unanimously dismissed, without costs, as subsumed in the appeal from the judgment. Appeal from order, same court and Justice, entered on or about July 17, 2014, deemed appeal from the judgment.

We do not reach plaintiff's unpreserved contention that the court erred in finding that Cooper could not be held liable under Labor Law §§ 240(1) and 241(6) since it was not a statutory

agent, which "is not a purely legal issue apparent on the face of the record but requires for resolution facts not brought to [defendant's] attention on the motion" (*Rodriguez v Coalition for Father Duffy, LLC*, 112 AD3d 407, 408 [1st Dept 2013] [internal quotation marks and citation omitted]). As an alternative holding, we reject it on the merits (*see Saaverda v East Fordham Rd. Real Estate Corp.*, 233 AD2d 125, 126 [1st Dept 1996]; *see generally Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]).

The court properly granted plaintiff's cross motion for partial summary judgment on his Labor Law § 240(1) claim as against Leighton and Integrated. According to plaintiff's testimony, which was abundantly corroborated by a coworker who observed the entire incident, a structure composed of three steel beams in the shape of an upside-down letter "U," which had been removed from a sidewalk bridge, was being lowered toward plaintiff by two other workers. Those workers each held one of the two vertical components while walking backwards, as plaintiff stood in front of the horizontal beam in the middle with the intention of grabbing it and assisting in lowering the structure to the ground. Although the two workers holding the structure initially lowered it very slowly, they eventually lost control of

it, causing it to descend toward plaintiff so quickly that it immediately slipped out of his hand once he contacted it with his hand in an attempt to catch it. The horizontal beam struck him on the chest, then struck his left leg and knee, as the structure fell to the ground.

The court properly found a "causal connection between the object's inadequately regulated descent and plaintiff's injury" (*Runner v New York Stock Exch.*, Inc., 13 NY3d 599, 605 [2009]). By submitting an expert affidavit, plaintiff met his initial burden of showing that the beam "required securing for the purposes of the undertaking" (*Outar v City of New York*, 5 NY3d 731, 732 [2005]), and that statutorily enumerated safety devices could have prevented the accident (*see Aramburu v Midtown W. B, LLC*, 126 AD3d 498, 499-500 [1st Dept 2015]). It is undisputed that no enumerated safety devices were provided, and the testimony and expert opinion that such devices were neither necessary nor customary is insufficient to establish the absence of a Labor Law § 240(1) violation (*see Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 523 [1985]). The "height differential cannot be described as de minimis given the amount of force [the beam was] able to generate over [its] descent" (*Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 10

[2011] [citation and internal quotation marks omitted]; *see Marrero v 2075 Holding Co. LLC*, 106 AD3d 408, 409 [1st Dept 2013]). Plaintiff was not the sole proximate cause of his injuries, which were caused at least in part by the lack of safety devices to check the beam's descent as well as the manner in which the other two workers lowered the beam; comparative negligence is no defense to the Labor Law § 240(1) claim (*see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 289-290 [2003]).

In light of the grant of partial summary judgment on the Labor Law § 240(1) claim as against Leighton and Integrated, plaintiff's arguments regarding his Labor Law § 241(6) claim against those defendants are academic (*see Fanning v Rockefeller Univ.*, 106 AD3d 484, 485 [1st Dept 2013]).

The court properly granted summary judgment on Leighton and Cooper's contractual indemnification claim against Integrated, pursuant to a provision of the agreement between Leighton and Integrated broadly obligating the latter to indemnify Leighton and Cooper for claims arising from the performance of the work, given that Integrated subcontracted the work to Rockledge, which employed plaintiff and the other workers involved in the accident (*see Amante v Pavarini McGovern, Inc.*, 127 AD3d 516, 517 [1st

Dept 2015]; *Guzman v 170 W. End Ave. Assoc.*, 115 AD3d 462 [1st Dept 2014]). The court also properly granted Integrated's contractual indemnification claim against Rockledge, pursuant to a provision of the agreement between them obligating the latter to indemnify the former for claims, damages, and expenses, among other things, "caused directly and solely by" Rockledge among others.

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

ENTERED: DECEMBER 29, 2015

CLERK

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

16509N B.D. Estate Planning Corp., Index 651006/11
Plaintiff-Respondent,

-against-

Marcy Trachtenberg, as Trustee
of the Ellis Limquee Family
Insurance Trust,
Defendant,

Carolyn Limquee,
Defendant-Appellant.

_____

Eaton & Van Winkle LLP, New York (Adam J. Rader of counsel), for appellant.

Strassberg & Strassberg, P.C., New York (Robert Strassberg of counsel), for respondent.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered March 16, 2015, which denied defendant Carolyn Limquee's motion to amend her answer to plead five additional affirmative defenses, unanimously modified, on the law and the facts, to grant leave to amend the answer to plead the proposed fourth, seventh, and eighth affirmative defenses, and otherwise affirmed, without costs.

The record reflects that plaintiff's sole owner, principal and employee was convicted, after a jury trial, of conspiracy to commit mail and wire fraud, and substantive mail fraud and

substantive wire fraud in connection with a scheme to defraud insurance companies. Nevertheless, plaintiff seeks to enforce the provisions of a promissory note providing that it receive 50% of the death benefits payable under a policy on the life of Limquee's late husband. The record indicates that this policy may have been part of the scheme to defraud that resulted in the criminal conviction of plaintiff's principal.

As the Court of Appeals stated in *McConnell v Commonwealth Pictures Corp.* (7 NY2d 465, 469 [1960]), "[P]ublic policy closes the doors of our courts to those who sue to collect the rewards of corruption." The court improperly denied Limquee leave to amend her answer to assert the affirmative defenses of "bribery and corruption" and recovery of fruits of crimes barred. Although the promissory note at issue is not illegal on its face, Limquee demonstrated prima facie that there was a direct connection between the scheme to defraud of plaintiff's principal and the promissory note plaintiff seeks to enforce, and that the scheme was more than a "small illegality" (*see McConnell*, 7 NY2d at 471). Although it appears that Limquee may have benefitted from the scheme, the court should not intervene to enable the wrongdoer to obtain additional fruits of its crime.

The proposed eighth affirmative defense of in pari delicto

was also permissible as an alternative or hypothetical pleading (*see* CPLR 3014; *Finkelstein v Warner Music Group Inc.*, 14 AD3d 415 [1st Dept 2005]).

The remaining proposed affirmative defenses were defective in that Limquee was unable to demonstrate that she was damaged by the conduct alleged, as the court noted.

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

ENTERED: DECEMBER 29, 2015

CLERK

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

16510 The People of the State of New York, SCI 1405/12
Respondent,

-against-

Lance Terrell,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, Bronx County (Seth L. Marvin, J.), rendered March 25, 2013, convicting defendant, upon his plea of guilty, of attempted assault in the second degree, and sentencing him, as a second felony offender, to a term of 1½ to 3 years, unanimously affirmed.

Defendant's challenges to the factual basis for his plea and to the court's discussion of defendant's rights under *Boykin v Alabama* (395 US 238 [1969]) are unpreserved, and they do not come within the narrow exception to the preservation requirement (*see People v Conceicao*, __ NY3d __, NY Slip Op 08615, *2 [2015]). We decline to review these claims in the interest of justice.

As an alternate holding, we find no basis for reversal. The plea was knowing, intelligent and voluntary. At the plea

proceeding, defendant clarified that he was admitting to the requisite element of intent, and his factual recitations did not cast significant doubt on his guilt (see *People v Toxey*, 86 NY2d 725 [1995]). We also find that the court sufficiently advised defendant of the rights he was giving up by pleading guilty, notwithstanding that it omitted the word "jury" from its reference to giving up the right to a trial (*see Tyrell*, 22 NY3d at 365; *People v Harris*, 61 NY2d 9, 16-19 [1983]). Finally, the court had no obligation to make a sua sponte inquiry at sentencing when defendant alluded, for the first time, to his possible intoxication at the time of the crime (*see e.g. People v Praileau*, 110 AD3d 415 [1st Dept 2013], *lv denied* 22 NY3d 1202 [2014]).

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

ENTERED: DECEMBER 29, 2015

CLERK

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

16511 In re Victoria Wofford, Index 100284/14
Petitioner-Appellant,

-against-

New York State Department of
Corrections and Community Supervision,
Respondent-Respondent.

_____

Victoria Wofford, appellant pro se.

Eric T. Schneiderman, Attorney General, New York (Mark H. Shawhan of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Eileen A. Rakower, J.), entered November 28, 2014, dismissing the petition seeking, inter alia, to annul the determination to deny petitioner's release to parol supervision, unanimously affirmed, without costs.

The petition was properly dismissed as moot, because while the instant proceeding was pending, petitioner was granted her release to parole supervision (*see e.g. Matter of Beltran v New York State Bd. of Parole*, 105 AD3d 1224 [3d Dept 2013]; *Matter of*

*Wingate v New York State Div. of Parole*, 50 AD3d 1336 [3d Dept 2008]). We have considered petitioner's contentions that the matter is not moot, and find them unavailing.

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

ENTERED: DECEMBER 29, 2015

CLERK

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

16512N In re The Arbitration of Certain Controversies Between Gramercy Advisors LLC, et al., Petitioners-Respondents, Index 650166/14

-against-

J.A. Green Development Corp., et al., Respondents-Appellants.

_____

Neal M. Sher, New York, for appellants.

O'Shea Partners LLP, New York (Michael E. Petrella of counsel), for respondents.

_____

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered April 13, 2015, which, to the extent appealed from, granted the petition to compel arbitration, enjoined respondents from litigating their non-arbitrable claims in a related action pending in Texas (the Texas action) until the arbitration is resolved, and denied respondents' cross motion to stay the arbitration pending resolution of the Texas action, unanimously affirmed, with costs.

Supreme Court correctly declined to address respondents' arbitrability defenses. The arbitration provision at issue applies to "[a]ny controversy or claim arising out of or relating to any interpretation, breach or dispute concerning" the

contract, and explicitly incorporates the rules of the American Arbitration Association, which provide for the arbitrator to determine arbitrability (*see Life Receivables Trust v Goshawk Syndicate 102 at Lloyd's*, 66 AD3d 495, 496 [1st Dept 2009], *affd* 14 NY3d 850 [2010], *cert denied* 562 US 962 [2010]).

The court also correctly determined that petitioners did not waive their right to arbitration (*see Thyssen, Inc. v Calypso Shipping Corp., S.A., A.M.*, 310 F3d 102, 105 [2d Cir 2002], *cert denied* 538 US 922 [2003]). A review of the record shows that, while the Texas action was filed in 2009, it was stayed for almost the entire period from its inception until shortly before the filing of the instant petition and that petitioners' sole involvement in the case was to file defensive actions by special appearance to contest personal jurisdiction. These actions, absent a showing of prejudice to respondents, are not sufficient to support a finding of waiver of petitioners' right to arbitrate (*compare Thyssen*, 310 F3d 102 at 105-106 [no waiver despite filing answer]; *Rush v Oppenheimer & Co.*, 779 F2d 885, 887 [2d Cir 1985] [no waiver despite bringing a motion to dismiss and participating in "extensive discovery"]; *In re Crysen/Montenay Energy Co. v Shell Oil Co.*, 226 F3d 160, 162-163 [2d Cir 2000] [no waiver despite eight-year delay in taking interlocutory

appeal from denial of motion to stay], *cert denied* 532 US 920 [2001]).

The court properly enjoined the Texas action, which involves claims that are "'inextricably interwoven'" with the issues to be determined in the arbitration (*see PromoFone, Inc. v PCC Mgt.*, 224 AD2d 259, 260 [1st Dept 1996]; *see also County Glass & Metal Installers, Inc. v Pavarini McGovern, LLC*, 65 AD3d 940 [1st Dept 2009]). Contrary to respondents' contention based on the principles of comity, this Court has enjoined litigation in other states pending New York actions under CPLR 7503 (*see e.g. PromoFone*, 224 AD2d 259; *Matter of PricewaterhouseCoopers v Rutlen*, 284 AD2d 200 [1st Dept 2001]).

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

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

ENTERED: DECEMBER 29, 2015

CLERK

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

16514 The People of the State of New York, Ind. 2772/11
Respondent,

-against-

Julius Smith,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Julia L. Chariott 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 (Miriam Best, J.), rendered on or about July 10, 2013,

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

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

ENTERED: DECEMBER 29, 2015

CLERK

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

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

16515 Pedro Hernandez, et al., Index 15916/12
Plaintiffs-Appellants,

-against-

Robinson Callen, etc., et al.,
Defendants-Respondents.

_____

Sim & Record, LLP, Bayside (Sang J. Sim of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered July 25, 2014, which granted defendants' motion for summary judgment dismissing the complaint, and denied plaintiffs' cross motion to amend and/or supplement the bill of particulars, unanimously affirmed, without costs.

Dismissal of the complaint was warranted in this action where plaintiff Pedro Hernandez alleges that he was injured when he fell while ascending a two-step configuration that led from a corridor to restrooms in premises owned or operated by the various defendants. The code provisions relied upon by plaintiff do not require handrails or uniform riser heights on the stairs on which plaintiff fell, as they are not part of an "interior stair" (*see* Administrative Code of City of NY § 27-232; *Remes v*

*513 W. 26th Realty, LLC*, 73 AD3d 665 [1st Dept 2010]). Furthermore, the assertion of plaintiffs' expert, that good and commonly accepted safe industry practice required handrails and uniform riser heights on the subject steps, is conclusory, as it was not supported by reference to specific, applicable safety standards or practices (*see Jones v City of New York*, 32 AD3d 706, 707 [1st Dept 2006]; *Contreras v Zabar's*, 293 AD2d 362 [1st Dept 2002]).

Plaintiffs' cross motion to amend and/or supplement the bill of particulars was properly denied since the code provisions plaintiffs sought to assert are inapplicable (*see e.g. Kittay v Moskowitz*, 95 AD3d 451 [1st Dept 2012], *lv denied* 20 NY3d 859 [2013]).

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

ENTERED: DECEMBER 29, 2015

CLERK

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

16516 In re Teanna P.,
Petitioner-Appellant,

-against-

David M.,
Respondent-Respondent.

_____

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

Building Service 32BJ Legal Services Fund, New York (Alan M. Snyder of counsel), for respondent.

_____

Order, Family Court, Bronx County (David Gilman, J.H.O.), entered on or about December 16, 2014, which, after a fact-finding hearing, dismissed the petition for an order of protection and vacated a temporary order of protection, unanimously affirmed, without costs.

Family Court properly determined that petitioner failed to prove by a fair preponderance of the evidence that respondent's alleged conduct established a family offense (*see Matter of Rafael F. v Pedro Pablo N.*, 106 AD3d 635 [1st Dept 2013]). Petitioner alleged that respondent walked by her apartment building when she was in the front yard and stared at her in a way that made her feel scared and intimidated. She also asserted that respondent came to a store where she was, walked up to

within two feet of her and called her a derogatory name. Even accepting these allegations as true, they do not support a determination that respondent's conduct constituted either harassment in the second degree or disorderly conduct (*see Matter of Christine P. v Machiste Q.*, 124 AD3d 531 [1st Dept 2015]; Penal Law § 240.26; § 240.20).

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

ENTERED: DECEMBER 29, 2015

CLERK

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

16517 The People of the State of New York, Ind. 6769/99
Respondent,

-against-

Roberto Estremera,
Defendant-appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered November 19, 2010, which, to the extent appealable as a judgment of resentence, reimposed defendant's original prison sentence pursuant to Penal Law § 70.85 without imposing a period of postrelease supervision, unanimously affirmed.

Even assuming, without deciding, that this appeal is properly before us as an appeal from a judgment of resentence (*see People v Covington*, 88 AD3d 486, 486-487 [1st Dept 2011], *lv denied* 18 NY3d 858 [2011]), notwithstanding that the court's order expressly states: "No resentence. Original sentence with no PRS stands," we find no basis for a remand. Defendant was not adversely affected by any alleged procedural defect in the court's determination, including the fact that he was not present

when the court let stand his original sentence, "because the result, i.e., freedom from having to serve a term of PRS, was in his favor" (*id.* at 486; *see also People v Mills*, 117 AD3d 1555, 1556 [4th Dept 2014], *lv denied* 24 NY3d 1045 [2014]).

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

ENTERED: DECEMBER 29, 2015

CLERK

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

16518 The People of the State of New York, Ind. 5722/12
Respondent,

-against-

David Gillens,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Ellen Standfield Friedman of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered May 22, 2013, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree, and sentencing him to a term of five years' probation, unanimously affirmed.

Defendant's claim that his plea allocution was deficient because the court omitted the word "jury" from its reference to giving up the right to a trial is a claim requiring preservation (*see People v Jackson*, 123 AD3d 634 [1st Dept 2014], *lv denied* 25 NY3d 1201 [2015]), and we decline to review this unpreserved

claim in the interest of justice. As an alternative holding, we find that the record establishes the voluntariness of the plea (*see People v Tyrell*, 22 NY3d 359, 365 [2013]; *People v Harris*, 61 NY2d 9, 16-19 [1983]).

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

ENTERED: DECEMBER 29, 2015

CLERK

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

16519N Han Soo Lee, et al., Index 113585/03
Plaintiffs,

-against-

Riverhead Bay Motors, et al.,
Defendants.
- - - - -
Edward H. Suh and Associates, P.C.,
Nonparty Appellant,

Law Offices of Kenneth A. Wilhelm,
Nonparty Respondent.

_____

Edward H. Suh & Associates, P.C., New York (Edward H. Suh of counsel), for appellant.

Law Offices of Kenneth A. Wilhelm, New York (Susan R. Nudelman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered December 22, 2014, which, to the extent appealed from, denied nonparty former counsel Edward H. Suh and Associates, P.C.'s motion insofar as it sought interest to run from February 28, 2012 to the date of entry of a final judgment against nonparty current counsel, unanimously affirmed, without costs.

Supreme Court properly declined to compute interest under CPLR 5002, as that section allows for interest from the date a verdict is rendered, or a report or decision is made, to the date

of entry of a final judgment. Here, there was no verdict, report or decision; rather, by order entered October 18, 2011, Supreme Court (same court and Justice) awarded former counsel $50,000 upon its motion for a proportional distribution of the contingency fee in the underlying personal injury action. Thus, Supreme Court correctly calculated interest pursuant to CPLR 5003, which provides that "[e]very order directing the payment of money which has been docketed as a judgment shall bear interest from the date of such docketing." Because CPLR 2222 directs that upon request, "the clerk shall docket as a judgment an order directing the payment of money," Supreme Court correctly concluded that the Clerk erred by refusing to enter the October 18, 2011 order as a judgment when asked to do so on March 19, 2014, and that interest, therefore, should be calculated from the latter date pursuant to CPLR 5003.

We deny respondent's request for sanctions, as former counsel appeal is not precluded by law of the case, nor is it frivolous.

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

ENTERED: DECEMBER 29, 2015

CLERK

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

16520 The People of the State of New York, Ind. 5264/96
Respondent,

-against-

David Brown, etc.,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Christopher P. Marinelli of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Juan Merchan, J.), rendered on or about February 11, 2014,

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

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

ENTERED: DECEMBER 29, 2015

CLERK

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

Gonzalez, P.J., Friedman, Moskowitz, Kapnick, JJ.

12527 Basis Yield Alpha Fund Master, Index 652129/12
Plaintiff-Respondent,

-against-

Morgan Stanley, et al.,
Defendants-Appellants,

John Does 1-50,
Defendants.

_____

Davis Polk & Wardwell LLP, New York (James P. Rouhandeh of counsel), for appellants.

Scott, Douglass & McConnico, L.L.P., Austin TX (Jane M.N. Webre of the bar of the State of Texas, admitted pro hac vice, of counsel), for respondent.

_____

Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered March 11, 2013, affirmed, with costs.

Opinion by Friedman, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, P.J.
David Friedman
Karla Moskowitz
Barbara R. Kapnick, JJ.

12527
Index 652129/12

_____x

Basis Yield Alpha Fund Master,
Plaintiff-Respondent,

-against-

Morgan Stanley, et al.,
Defendants-Appellants,

John Does 1-50,
Defendants.

_____x

Defendants Morgan Stanley, Morgan Stanley & Co. LLC f/k/a Morgan Stanley & Co. Incorporated and Morgan Stanley & Co. International PLC f/k/a Morgan Stanley & Co. International Limited appeal from an order of the Supreme Court, New York County (Melvin L. Schweitzer, J.), entered March 11, 2013, which, to the extent appealed from, denied their motion to dismiss the fraud and fraudulent concealment causes of action as against them.

Davis Polk & Wardwell LLP, New York (James P. Rouhandeh, Paul S. Mishkin, Daniel J. Schwartz, Nicholas N. George and Scott A. Eisman of counsel), for appellants.

Scott, Douglass & McConnico, L.L.P., Austin TX (Jane M.N. Webre of the bar of the State of Texas, admitted pro hac vice, of counsel), and Guzov, LLC, New York (Debra J. Guzov and Anne W. Salisbury, for respondent.

FRIEDMAN, J.

This appeal presents the question of whether a sophisticated investor has sufficiently alleged that it justifiably relied on credit ratings of securities that defendants, the organizers of the offering, allegedly had manipulated and otherwise knew, from nonpublic information, to be inaccurate. We hold that the element of reasonable reliance has been sufficiently pleaded in support of plaintiff's fraud and fraudulent concealment causes of action, and therefore affirm the denial of defendants' motion to dismiss those claims.

The amended complaint alleges that, in 2006, defendants (collectively, Morgan Stanley) structured and marketed a collateralized debt obligation (CDO) known as STACK 2006-1 (STACK). STACK involved the issuance by a special-purpose entity of $500 million of notes to be sold to investors. The payments of interest and principal due on the notes were to be funded by cash flows from assets in a collateral portfolio. The collateral chiefly comprised residential mortgage-backed securities (RMBS), which are bonds funded by cash flows from large pools of home mortgage loans. The RMBS in the collateral portfolio were represented to have an average credit rating of BBB/Baa3, the lowest non-"junk" rating, although 5% of the collateral had "junk" ratings. Most of the RMBS in the STACK collateral portfolio were backed by mortgage loans that had been made to

borrowers with subprime credit. A significant portion of the RMBS in the STACK portfolio had been underwritten by Morgan Stanley.

The STACK notes were divided into eight classes, or tranches, of credit risk. The six senior tranches bore investment-grade credit ratings, ranging from Aaa/AAA (highest) to Baa2/BBB (lowest). The seventh tranche bore a "junk" rating (Ba1/BB+). These ratings were assigned by nonparty credit rating agencies Moody's and Standard & Poor's. Below the seven rated tranches was the most junior, and hence most risky, layer of the offering, an "equity" tranche of unrated subordinated notes. The subordinated notes would realize the highest rate of return in the event the RMBS in the STACK collateral portfolio performed well. In the event of substantial defaults in the portfolio, however, the subordinated notes would bear all of STACK's losses, until the holder's investment had been wiped out, before the higher tranches would suffer any loss.

Upon STACK's closing in July 2006, plaintiff Basis Yield Alpha Fund Master (Basis Yield), an entity serving as an investment vehicle for a Cayman Islands mutual fund, purchased all of the CDO's subordinated notes for $17 million. When the housing market subsequently collapsed, STACK experienced substantial losses, and Basis Yield, as holder of the junior tranche bearing 100% of the CDO's initial losses, lost all of its

investment in the subordinated notes.

In 2012, Basis Yield commenced this action against Morgan Stanley, asserting causes of action for fraud, fraudulent concealment and negligent misrepresentation. Morgan Stanley moved to dismiss the amended complaint pursuant to CPLR 3211(a)(1), CPLR 3211(a)(7) and CPLR 3016(b), arguing, as relevant to this appeal, that the fraud causes of action are legally insufficient because, based on the facts alleged, Basis Yield could not have justifiably relied on the misrepresentations Morgan Stanley allegedly made in selling the subordinated notes (which we more fully discuss below). Supreme Court granted the motion only to the extent of dismissing the negligent misrepresentation claim and otherwise denied the motion, leaving in place the fraud causes of action. Upon Morgan Stanley's appeal, we affirm.[1]

In brief, as presented to us on this appeal, Basis Yield bases its fraud claims on the contention that the allegations of the amended complaint, if true, would support a finding that Morgan Stanley had special knowledge of the unreliability of the credit ratings of the senior tranches of the STACK offering, which unreliability it allegedly misrepresented or concealed in

[1]Because Basis Yield has not appealed Supreme Court's dismissal of the negligent misrepresentation claim, that cause of action is not at issue on this appeal, and we do not further discuss it.

marketing the CDO to all investors, including Basis Yield. Although Basis Yield's subordinated notes were themselves unrated, Basis Yield claims to have relied, in purchasing the unrated junior tranche, on the credit ratings of the seven higher tranches — six of which had received investment-grade ratings — as indicative of the overall stability of the CDO. Further, as alleged in the amended complaint, Morgan Stanley obtained its knowledge of the unreliability of these ratings, not from information generally available in a given market (*cf. HSH Nordbank AG v UBS AG*, 95 AD3d 185 [1st Dept 2012]), but from its role in creating and marketing the relevant securities. Specifically, Morgan Stanley underwrote a significant portion of the RMBS that constituted a major part of the collateral of STACK, and allegedly knew, from the due diligence it conducted in that capacity, that many of the mortgage loans underlying the RMBS collateral did not meet the underwriting guidelines that prevailed in the industry at the time.[2] In addition, in putting together the STACK offering, Morgan Stanley allegedly prevailed

[2]Although the amended complaint apparently does not allege a representation specifically concerning the underwriting standards used by the originators of the loans underlying the RMBS collateral, the soundness of the underwriting standards was implied by Morgan Stanley's alleged representations to Basis Yield that STACK's RMBS collateral would be of "investment grade" quality. Drawing all inferences in favor of the pleader, the investment-grade ratings of six of the eight tranches of notes comprising the STACK 2006-1 CDO also implied the soundness of the underwriting standards under which the mortgage loans underlying the RMBS collateral were made.

upon nonparty credit ratings agencies to use an outdated, generally disused ratings model in rating the senior tranches of STACK, unbeknownst to Basis Yield and the other investors in the CDO.

Morgan Stanley argues that, even assuming the truth of the allegations of the amended complaint, Basis Yield has not pleaded that, in purchasing the subordinated notes, it justifiably relied on the accuracy of the credit ratings of the higher tranches of the STACK offering — justifiable reliance being, of course, an essential element of a cause of action for fraud (*see ACA Fin. Guar. Corp. v Goldman, Sachs & Co.*, 25 NY3d 1043, 1044 [2015]; *Danann Realty Corp. v Harris*, 5 NY2d 317, 322 [1959]). Morgan Stanley contends that the amended complaint fails to plead justifiable reliance, as a matter of law, for three reasons. First, Morgan Stanley argues, the offering materials disclosed in no uncertain terms that the subordinated notes that Basis Yield purchased — which, again, had received no credit rating at all and thus were less than "junk" — were a highly speculative and risky investment. Second, Morgan Stanley points out that Basis Yield has not alleged that it conducted, or even sought to conduct, any due diligence investigation into the matters allegedly misrepresented, namely, the methodology through which the higher tranches of the STACK offering had been rated and the underwriting standards used in the issuance of the RMBS

constituting most of the CDO's collateral portfolio. Third, Morgan Stanley contends that justifiable reliance is negated by the disclaimers of reliance that Basis Yield made upon purchasing the subordinated notes. We address each of these arguments below.

Turning first to the disclosure of the nature of the subordinated notes, it is certainly true that the STACK offering materials set forth, in no uncertain terms, that these unrated securities were highly speculative and risky, subject to large swings in value, and would bear all losses of the CDO until the purchaser's investment had been entirely wiped out. The premise of Basis Yield's claim, however, is not that it was led to believe that the subordinated notes were an objectively "safe" investment.[3] Rather, Basis Yield alleges that the ratings of the more senior tranches, and the relative thinness of the first-loss "equity" tranche represented by the subordinated notes, understated the overall risk of the entire CDO structure and, perforce, of the subordinated notes, as well. The warnings of the subordinated notes' risky nature, important though they were, did not give Morgan Stanley a license to misrepresent to the

[3]Thus, Morgan Stanley misplaces reliance on our dismissal of the complaint in *HSH*. The *HSH* plaintiff alleged that it had relied on representations — contradicted by the disclosures of the offering circular and the operative contractual documents — that the notes in question were "low-risk investments consistent with [HSH's] conservative investment objectives" (95 AD3d at 199 n 10 [internal quotation marks omitted]).

purchaser of the subordinated notes other material aspects of the CDO. Thus, it cannot be said that the risk disclosures in the offering materials negate the element of justifiable reliance.

As noted, Morgan Stanley next argues that the fraud claims are legally insufficient because Basis Yield does not allege that it conducted, or sought to conduct, a due diligence investigation into the allegedly misrepresented matters.[4] This argument relies on the well-established principle that a plaintiff suing for fraud (and particularly a sophisticated plaintiff, such as Basis Yield) must establish that it "has taken reasonable steps to protect itself against deception" (*DDJ Mgt., LLC v Rhone Group L.L.C.*, 15 NY3d 147, 154 [2010]; *see also Schumaker v Mather*, 133 NY 590, 596 [1892] [noting a party's obligation to make use of "the means available to [it] of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation," failing which the party "will not be heard to complain that [it] was induced to enter into the

[4]Contrary to Basis Yield's contention, Morgan Stanley's failure to raise the due diligence issue in support of its motion in Supreme Court does not bar it from raising the issue on appeal. Whether the amended complaint pleads a necessary element of Basis Yield's claim is a pure issue of law appearing on the face of the record that may be considered for the first time on appeal "[because] the issue is determinative and the record on appeal is sufficient to permit our review" (*Vanship Holdings Ltd. v Energy Infrastructure Acquisition Corp.*, 65 AD3d 405, 408 [1st Dept 2009] [allowing a party to raise for the first time on appeal an argument concerning the interpretation of a written agreement]).

transaction by misrepresentations"]).

Typically, the principle that a party to a transaction must "take[] reasonable steps to protect itself against deception" (*DDJ Mgt.*, 15 NY3d at 154) requires a plaintiff claiming to have been fraudulently induced to purchase a business, or to lend to a business, to allege that, before entering into the transaction, it availed itself of the opportunity to verify the seller's or borrower's representations through an examination of the business's books and records (*see Rodas v Manitaras*, 159 AD2d 341, 342-343 [1st Dept 1990]; *see also Mosaic Caribe, Ltd. v AllSettled Group, Inc.*, 117 AD3d 421, 422 [1st Dept 2014]; *Graham Packaging Co., L.P. v Owens-Illinois, Inc.*, 67 AD3d 465 [1st Dept 2009]; *Jana L. v West 129th St. Realty Corp.*, 22 AD3d 274, 278 [1st Dept 2005]; *Permasteelisa, S.p.A. v Lincolnshire Mgt., Inc.*, 16 AD3d 352 [1st Dept 2005]; *UST Private Equity Invs. Fund v Salomon Smith Barney*, 288 AD2d 87, 88-89 [1st Dept 2001]; *Lampert v Mahoney, Cohen & Co.*, 218 AD2d 580, 582-583 [1st Dept 1995]).[5] As Morgan Stanley would have it, the principle operates to bar the fraud claims in this case because Basis Yield fails to allege that it asked Morgan Stanley any questions, or that it asked to review any documents or files in Morgan Stanley's possession,

[5]Alternatively, a buyer or lender may protect itself by obtaining a contractual warranty of the representation relied upon (*see DDJ Mgt.*, 15 NY3d at 154-156). The matters allegedly misrepresented in this case are not alleged to have been the subject of any contractual warranty.

relating either to (1) the underwriting standards that were used in originating the loans backing the RMBS in the STACK collateral portfolio or (2) the models the ratings agencies used in assigning credit ratings to the STACK notes senior to Basis Yield's subordinated notes. We disagree.

In this case, the matters allegedly misrepresented — the standards used in underwriting the loans underlying the RMBS collateral and the methodology used in rating the senior tranches of the STACK CDO — both ultimately relate to the reliability of the credit ratings of the STACK notes. In essence, Morgan Stanley takes the position that, as a matter of law, Basis Yield failed to "take[] reasonable steps to protect itself from deception" (*DDJ Mgt.*, 15 NY3d at 154) because it did not seek to look behind the credit ratings of the STACK notes (or the credit ratings of the underlying RMBS collateral) to verify that the securities actually deserved those ratings by examining the rating agencies' methodologies or the records of the underwriting of the RMBS in the collateral portfolio. This amounts to an argument that the purchaser of a credit instrument is not entitled to rely on the accuracy of the credit rating assigned to that instrument by an accredited rating agency but, rather, must check that rating against the records of the underwriter's due diligence and, further, must inquire into the methodology by which the rating was generated. It appears to be Morgan

Stanley's view that, if the investor fails to investigate such nonpublic information, it will have no claim against the underwriter or marketer of the instrument for having sold it with the undisclosed knowledge that the instrument's credit rating was based on an outdated methodology or on inaccurate information about the underlying assets.

If accepted, Morgan Stanley's position would require the prospective purchaser of a credit instrument to assume that the instrument's credit rating is fraudulent until the rating has been verified through a detailed retracing of the steps of the underwriter and credit rating agency. This would largely negate the utility of the credit ratings of negotiable bonds and notes that are published by accredited rating agencies. Morgan Stanley does not draw our attention to any New York decision holding that the due diligence obligation of even a sophisticated investor extends so far as to require it to seek to verify the accuracy of an accredited agency's credit rating of a note or bond through an investigation of nonpublic information. We decline to hold that, based on the facts alleged, Basis Yield was obligated as a matter of law to seek to investigate the basis for the credit ratings of the STACK notes or of the RMBS in the collateral portfolio. Consistent with our decision sustaining the fraud claims asserted by the purchaser of the highest tranche of the STACK offering (*China Dev. Indus. Bank v Morgan Stanley & Co. Inc.*, 86 AD3d 435

[1st Dept 2011]), we hold that Basis Yield's failure to allege that it sought to conduct such an investigation does not, at the pleading stage, negate the element of justifiable reliance for its fraud claims (*see King County, Washington v IKB Deutsche Industriebank AG*, 751 F Supp 2d 652, 661 [SD NY 2010] [complaint sufficiently pleaded, in support of common-law fraud claims governed by New York law, that "plaintiffs' reliance on credit ratings was reasonable despite liability disclaimers and due diligence requirements contained in the Information Memorandum"]; *Abu Dhabi Commercial Bank v Morgan Stanley & Co. Inc.*, 651 F Supp 2d 155, 181 [SD NY 2009] [plaintiffs adequately pleaded reasonable reliance on credit ratings in support of their common-law fraud claims governed by New York law in light of the reliance of "the market at large, including sophisticated investors, . . . on the accuracy of credit ratings and the independence of rating agencies because of their . . . (federal regulatory) status and . . . (their) access to non-public information"]; *see also id.*, 651 F Supp 2d at 164-165 [describing role and accreditation of credit rating agencies, including Moody's and Standard & Poor's]).[6]

[6]Our attention has not been drawn to any disclosure in the STACK offering materials, or any facts alleged in the amended complaint, that would have put Basis Yield on notice, as a matter of law, of the possible unreliability of the ratings of the specific securities in question, or of the lax underwriting practices of the originators of the loans backing the RMBS in the CDO collateral. Contrary to Morgan Stanley's argument, it cannot

It bears emphasis that the amended complaint contains no allegations that, if true, would establish that the unreliability of the credit ratings on which Basis Yield relied, or the lax underwriting standards of the originators of the loans backing the RMBS in the CDO collateral, "could have been ascertained from reviewing market data or other publicly available information" (*HSH*, 95 AD3d at 195). This serves to distinguish *HSH*, in which a bank's fraud claim was based on the contention that the defendant knew that the credit ratings used to define the eligibility of securities for inclusion in a CDO reference pool were unreliable. We found that the sophisticated *HSH* plaintiff's allegations could not support the element of justifiable reliance, as a matter of law, because the allegations of the complaint itself, if true, established that

> "the potential for a discrepancy between a security's credit rating and its actual risk was understood in the relevant marketplace at the time. In other words, the unreliability of credit ratings was sufficiently well known that securities often traded at a discount to the price their credit rating (if accurate) would have warranted" (*id.* at 193).

In contrast to the *HSH* complaint, the amended complaint in

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be said as a matter of law that such notice was provided by the disclosure in the offering memorandum that "[n]umerous class action lawsuits" had been filed alleging that unidentified mortgage lenders had violated consumer protection laws. Of course, in defending this action, Morgan Stanley may attempt to prove that Basis Yield, as a highly sophisticated financial entity, reasonably should have realized that the ratings in question were not reliable.

this case does not allege that Morgan Stanley's knowledge of the true risk profile of STACK notes "derived from publicly available market information" (*HSH*, 95 AD3d at 196). Rather, assuming the truth of Basis Yield's allegations and drawing all inferences in its favor (as we must upon a motion to dismiss), we hold that the complaint sufficiently pleads that the relevant matters were peculiarly, even if not exclusively, within Morgan Stanley's knowledge.[7] Morgan Stanley is alleged to have known of the "toxic" nature of the mortgage loans underlying the CDO's RMBS collateral from the due diligence it conducted in underwriting those instruments. In addition, Morgan Stanley is alleged to have known of the credit rating agencies' use of outdated models to rate STACK's senior tranches because Morgan Stanley itself induced the agencies — surreptitiously — to use the outdated rating models. Nothing alleged in the amended complaint, and none of the disclosures in the offering materials referenced therein, would have given Basis Yield reason to suspect these problems — and, therefore, a jury could reasonably conclude that

[7]"[T]he peculiar knowledge exception applies 'not only where the facts allegedly misrepresented literally were within the exclusive knowledge of the defendant, but also where the truth theoretically might have been discovered, though only with extraordinary effort or great difficulty'" (*Harbinger Capital Partners Master Fund I, Ltd. v Wachovia Capital Mkts., LLC*, 27 Misc 3d 1236(A), 2010 NY Slip Op 51046(U), *9 [Sup Ct, NY County May 10, 2010] [Kapnick, J.], *appeal withdrawn* 90 AD3d 544 [1st Dept 2011], quoting *DIMON Inc. v Folium, Inc.*, 48 F Supp 2d 359, 368 [SD NY 1999]).

Basis Yield would have had no reason to ask the questions concerning underwriting standards and ratings models that Morgan Stanley now argues that Basis Yield should have asked when considering this investment.[8]

Finally, Basis Yield's contractual disclaimers of reliance on Morgan Stanley do not negate justifiable reliance as a matter of law, given the particular allegations of the amended complaint. Specifically, Basis Yield alleges that Morgan Stanley — through its role as underwriter of the RMBS used as collateral for the CDO and through its allegedly secret manipulation of the rating of the CDO's more senior tranches — had peculiar knowledge of the allegedly misrepresented or concealed matters. Taking the allegations of the amended complaint as true, and drawing all inferences in favor of the pleader, we hold that the complaint sufficiently pleads that Basis Yield had no reason to inquire into these matters, and could not readily have investigated them independently, as more fully discussed in connection with the due diligence issue. The disclaimers of reliance therefore do not bar this action at the pleading stage (*see China Dev. Indus. Bank*, 86 AD3d at 436).

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[8]Again, in defending this action, Morgan Stanley, if it has supporting evidence, may seek to prove that information generally known to financial professionals at the time of the offering (July 2006) should have alerted Basis Yield to the possible existence of the allegedly misrepresented or concealed weaknesses of the offering.

Accordingly, the order of the Supreme Court, New York County (Melvin L. Schweitzer, J.), entered March 11, 2013, which, to the extent appealed from, denied the motion by defendants Morgan Stanley, Morgan Stanley & Co. LLC f/k/a Morgan Stanley & Co. Incorporated and Morgan Stanley & Co. International PLC f/k/a Morgan Stanley & Co. International Limited to dismiss the fraud and fraudulent concealment causes of action as against them, should be affirmed, with costs.

All concur.

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

ENTERED: DECEMBER 29, 2015

CLERK