SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 24, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Renwick, Richter, Webber, JJ.,

4229 The People of the State of New York Ind. 4106/14
Respondent,

-against-

Troy Simmons,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Eunice C. Lee of counsel) and Fried, Frank, Harris, Shriver & Jacobson LLP, New York (Alejandra Ávila of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J. at suppression hearing; Neil E. Ross, J. at plea, sentencing and determination upon remand), rendered May 20, 2015, convicting defendant of criminal possession of a weapon in the third degree, and sentencing him to a term of 30 days, unanimously affirmed.

On his initial appeal (151 AD3d 628 [1st Dept 2017]), defendant argued that the hearing court improperly denied his suppression motion on the ground that the officer recovered a gravity knife from him based on a "search incident to arrest."

The People contended otherwise, and also argued, in the alternative, as they did at the suppression hearing, that the officer's act of taking the knife from defendant's pocket, where the handle of the knife and its clip were in plain view, was permissible as a self-protective minimal intrusion. We held that the court erred in denying the motion on the incident-to-arrest ground, but held the appeal in abeyance and remanded the matter for a determination on the People's alternative argument, as we could not reach it under CPL 470.15(1).

On remand, the court properly concluded that the officer's retrieval of the knife from defendant's pocket was permissible as a self-protective minimal intrusion under the principle articulated in *People v Miranda* (19 NY3d 912 [2012]). As this Court has already determined, the officer was conducting a lawful stop at the time he observed the knife. Based on his training, the officer could reasonably conclude that the clip and handle, which were protruding from defendant's pocket and plainly visible, signified the presence of some kind of knife. Given that a complainant, who had injuries on his face, had just informed the officer that defendant had recently assaulted him, the officer had a reasonable basis to fear for his safety. Accordingly, the officer's retrieval of the knife was proper (*see*

People v Randall, 143 AD3d 411 [1st Dept 2016], *lv denied* 28 NY3d 1149 [2017]; *People v Terrance*, 101 AD3d 624, 625 [1st Dept 2012], *lv denied* 29 NY3d 1065 [2013]).

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

ENTERED: APRIL 24, 2018

CLERK

Acosta, P.J., Tom, Oing, Moulton, JJ.

6216 Morgin Haug, Index 155693/14
Plaintiff-Respondent,

-against-

Lenny's Catering, LLC doing business
as Lenny's Group,
Defendant-Appellant,

66 West Associates LLC, et al.,
Defendants.

_____

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Manuel Mendez, J.), entered on or about June 15, 2016,

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 dated April 6, 2018,

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

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

ENTERED: APRIL 24, 2018

CLERK

Acosta, P.J., Friedman, Manzanet-Daniels, Kapnick, Kern, JJ.

6459 & M-1411 Anthony Barksdale, Plaintiff-Respondent, Index 154754/12

-against-

BP Elevator Co., Defendant,

The Lenox Condominium, et al., Defendants-Appellants,

Car Park Systems of New York, Inc., Defendant-Respondent.

_____

Wilson Elser Moskowitz Edelman & Dicker LLP, White Plains (Joseph A.H. McGovern of counsel), for appellants.

_____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered August 24, 2016, which, to the extent appealed from as limited by the brief, denied the cross motion of defendants the Lenox Condominium, Board of Managers of the Lenox Condominium, and Kyrous Realty Group, Inc. (collectively, the Lenox defendants) for summary judgment dismissing the complaint and all cross claims as against them, and granted defendant Car Park's motion for summary judgment insofar as it dismissed the Lenox defendants' cross claim against it, unanimously modified, on the law, the Lenox defendants' motion for summary judgment granted, and otherwise affirmed, without costs. The Clerk is directed to enter judgment accordingly.

Plaintiff, while working as a parking attendant employed by defendant Car Park, was injured by a defective gate on the vehicle elevator within the garage. The garage was located in the condominium building owned by defendant the Lenox Condominium, and within an area defined in the Condominium's declaration as a "Parking Unit." In support of their motion for summary judgment, the Lenox defendants demonstrated that, under the condominium declaration they were responsible only for maintenance of common elements, and therefore were not responsible for maintenance of any area within the Parking Unit and cannot be found liable to plaintiff (*see Guryev v Tomchinsky*, 20 NY3d 194 [2012]). They also demonstrated that they did not create or have notice of the defective condition of the elevator, which is necessary to impose liability (*see Tucci v Starrett City, Inc.*, 97 AD3d 811, 812 [2nd Dept 2012]; *Narvaez v New York City Hous. Auth.*, 62 AD3d 419 [1st Dept 2009]; *lv denied* 13 NY3d 703 [2009]). Plaintiff did not oppose the motion on the merits or appear in opposition to the appeal.

The Lenox defendants' cross claim against Car Park is properly dismissed as moot.

M-1411 - *Barksdale v BP Elevator Co.*

Motion for stay denied as academic.

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

ENTERED: APRIL 24, 2018

CLERK

Sweeny, J.P., Richter, Webber, Gesmer, Moulton, JJ.

6348 Diana T. Mohyi, Index 157823/15
Plaintiff-Appellant,

-against-

Karen G. Brand P.C., et al.,
Defendants-Respondents.

_____

Diana T. Mohyi, appellant pro se.

Law Office of Mark E. Goidell, Garden City (Mark E. Goidell of counsel), for respondents.

_____

Order, Supreme Court, New York County (Debra A. James, J.), entered November 6, 2017, which, upon reargument, granted defendants' motion to dismiss the complaint in its entirety, unanimously affirmed, without costs.

The record demonstrates that the motion court providently exercised its discretion in granting reargument (*see generally William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992], *lv denied in part, dismissed in part* 80 NY2d 1005 [1992]; CPLR 2221[d]). Dismissal of the malicious prosecution cause of action was proper because the evidence, including the transcript of the Criminal Court proceedings in which the criminal charges underlying plaintiff's claim were dismissed, conclusively

establishes that those charges were not finally terminated in plaintiff's favor (*see MacFawn v Kresler*, 88 NY2d 859, 860 [1996]; *Slatkin v Lancer Litho Packaging Corp.*, 33 AD3d 421, 422 [1st Dept 2006]).

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

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

ENTERED: APRIL 24, 2018

CLERK

Sweeny, J.P., Richter, Webber, Gesmer, Moulton, JJ.

6349 In re Karina A.G.,

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

Jose G.,
Respondent-Appellant,

Catholic Guardian Services,
Petitioner-Respondent.

_____

Andrew J. Baer, New York, for appellant.

Magovern & Sclafani, Mineola (Joanna M. Roberson of counsel), for respondent.

Dawne A. Mitchell, Jr., The Legal Aid Society, New York (Diane Pazar of counsel), attorney for the child.

_____

Order of fact-finding and disposition, Family Court, Bronx County (Valerie Pels, J.), entered on or about May 12, 2017, to the extent it found that respondent father permanently neglected the subject child, unanimously affirmed, without costs.

The record supports the court's finding that, despite the agency's diligent efforts to encourage and strengthen the parental relationship, respondent failed to plan for the child's future (*see* Social Services Law § 384-b[7][a]; *Matter of Sheila G.*, 61 NY2d 368 [1984]). The agency referred respondent for drug treatment, parenting skills, and anger management classes, and scheduled and facilitated visitation with the child (*see id.*

§ 384-b[7][f]; *see e.g. Matter of Nekia C. [Kevin E.C.-Laurel S.McC.]*, 155 AD3d 431 [1st Dept 2017]; *Matter of Felicia Malon Rogue J. [Lena J.]*, 146 AD3d 725 [1st Dept 2017]). However, throughout this period, respondent repeatedly rejected the agency's efforts (*see Matter of Dante Alexander W. [Norman W.]*, 148 AD3d 492, 493 [1st Dept 2017]). He resisted the agency's attempts to contact him. He declined the agency's referrals. Although he found his own program, he refused to provide the agency with authorizations to obtain information or monitor his progress; he failed to provide any information about the services the program offered, the services he was participating in, or his level of compliance with the program.

The record shows further that respondent lacked insight into and failed to take responsibility for his actions, which resulted in the child's removal (*see Matter of Nephra P. [John Lee P.]*, 149 AD3d 642, 643 [1st Dept 2017]; *Matter of Yasmine F. [Junior F.]*, 145 AD3d 455 [1st Dept 2016], *lv denied* 29 NY3d 973 [2017]). Respondent repeatedly blamed the agency and the foster mother for sabotaging him and brainwashing the child to say that she did not

want to visit or communicate with him. When the child did visit him, he behaved in an intimidating manner toward her, and showed no empathy for her or understanding of her feelings.

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

ENTERED: APRIL 24, 2018

CLERK

Sweeny, J.P., Richter, Webber, Gesmer, Moulton, JJ.

6351 P360 Spaces LLC, Index 156534/15
Plaintiff-Appellant,

-against-

Patricia Orlando, et al.,
Defendants-Respondents,

John Doe, et al.,
Defendants.

_____

Brill & Meisel, New York (Allen H. Brill of counsel), for appellant.

Gallet Dreyer & Berkey, LLP, New York (Jerry A. Weiss of counsel), for respondents.

_____

Order, Supreme Court, New York County (Arthur F. Engoron, J.), entered April 13, 2017, which, in this dispute between condominium unit owners over basement space, denied plaintiff's motion for summary judgment on its causes of action and dismissing the counterclaims of defendants Patricia Orlando and Daren Orlando (Orlando defendants), unanimously modified, on the law, the motion granted with respect to plaintiff's claims for trespass, a warrant of eviction and a permanent injunction, and the Orlando defendants' counterclaim for unjust enrichment, and it is declared that the Orlando defendants are not the owners in fee of the basement space and do not have the exclusive right to use the basement space, and otherwise affirmed, without costs.

The Declaration and Offering Plan are unambiguous and clearly state that the disputed basement space was a Limited Common Element of the front unit owned by plaintiff. The deeds to both parties' units were silent on this issue, but provided that each buyer agreed that their ownership was subject to the Declaration. Paragraph Fifth of the Declaration provided that the use of the basement space was deemed conveyed with the conveyance of the front unit, even if the interest was not expressly described in the conveyance. In order to amend the Declaration, pursuant to paragraph Tenth(b), the board was required to execute an instrument upon the affirmative vote of 80% of the unit owners held at a duly called meeting. Moreover, paragraph Tenth(b)(I) provided that an amendment which altered the right to portions of the common elements required the consent of 100% of the affected unit owners.

Here, there was never a duly held meeting of the unit owners at which 80% voted to amend the Declaration to permit transfer of the right to use the basement space from the front unit to the rear unit. Thus, plaintiff retained the right to use the basement space. Parol evidence of the parties' contrary intent is irrelevant in the face of the unambiguous governing documents (*see W.W.W. Assoc. v Gianontieri*, 77 NY2d 157, 162 [1990]). Plaintiff's acknowledgment in the contract of sale that it was

not purchasing the right to use the basement storage space is not controlling because the deed contained a provision that the sale was subject to the provisions of the Declaration, which stated that the storage space was for the use of the front unit.

Accordingly, plaintiff was entitled to judgment as a matter of law on the trespass claim because defendants intentionally occupied the basement space, which was exclusively for the use of plaintiff's unit (*see Berenger v 261 W. LLC*, 93 AD3d 175, 181 [1st Dept 2012]). With respect to plaintiff's claims for a warrant of eviction and a permanent injunction, plaintiff demonstrated a probability of success on the merits, the danger of irreparable injury, and a balance of equities in its favor (*see Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]). The Orlando defendants were still occupying the space, other remedies were inadequate, and a balancing of the equities favored plaintiff, based on its legal right to use the space.

The court properly denied summary judgment on plaintiff's unjust enrichment claim in that there were issues of fact as to whether it was "against equity and good conscience" to permit defendants to retain the monies and benefits obtained from the use of the space (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011] [internal quotation marks omitted]). When plaintiff purchased the front unit, it signed a contract of sale

in which it agreed that the basement space was not being conveyed to it. The Orlando defendants shared the mistaken belief that they had the right to use the space, which appeared to be validated by the board's approval of their renovation plans that included incorporating the basement space into the rear unit.

The record further demonstrates that plaintiff is entitled to summary judgment on the Orlando defendants' counterclaim for a declaration that they are the owners in fee of the basement space and that they have the exclusive right to use the basement space. The issuance of a declaration rather than dismissal of the counterclaim is the proper course and thus, we declare to the extent indicated (*see Lanza v Wagner*, 11 NY2d 317, 334 [1962], *cert denied* 371 US 901 [1962]). Finally, the Orlando defendants' counterclaim for unjust enrichment based on their payment of a premium for the unit upon the belief that it included use of the basement space is dismissed because they paid the seller, not plaintiff.

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

ENTERED: APRIL 24, 2018

CLERK

Sweeny, J.P., Richter, Webber, Gesmer, Moulton, JJ.

6353-
6354 The People of the State of New York,
Respondent,

-against-

Kalonji Mahon,
Defendant-Appellant.

Ind. 4569/10

_____

Robert S. Dean, Center for Appellate Litigation, New York (Megan D. Byrne of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Joshua P. Weiss of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Michael A. Gross, J.), rendered September 24, 2012, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender previously convicted of a violent felony, to concurrent terms of eight years, and order (same court and Justice), entered on or about January 5, 2016, which denied defendant's CPL 440.10 motion to vacate the judgment, unanimously affirmed.

Regardless of whether there was a reasonable view of the evidence supporting an agency defense, it would have been inappropriate for the court to instruct the jury regarding that defense after defendant's attorney expressly opposed such a

charge. A sua sponte agency charge would have improperly interfered with counsel's strategy, as discussed herein (*see People v DeGina*, 72 NY2d 768, 776 [1988]). In any event, there was no reasonable view of the evidence to support such a charge. The totality of the evidence, including, among other things, defendant's statements during the transaction, made clear that he was not assisting the buyer in making a purchase, but was instead a participant in the sale as part of a drug trafficking operation.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Although defendant claims that the evidence failed to disprove an agency defense, as that instruction was not given to the jury, we are required to review the weight of the evidence in light of the court's charge (*see id.*; *People v Noble*, 86 NY2d 814, 815 [1995]). Moreover, as we have already stated, there was not even a reasonable view supporting that defense. In any event, even assuming such a reasonable view, there was ample evidence to refute any claim of agency.

Defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown that any of counsel's alleged deficiencies fell

below an objective standard of reasonableness, or that, viewed individually or collectively, they deprived defendant of a fair trial or affected the outcome of the case. Counsel explained that an agency defense would be difficult to establish without testimony from defendant, which would be undermined by defendant's contradictory grand jury testimony. Counsel also explained that an agency defense would open the door to evidence of defendant's considerable history of drug crimes (*see People v Valentin*, 29 NY3d 150, 155-56 [2017]). Instead, counsel pursued an objectively reasonable, although unsuccessful, strategy in which he indirectly presented an agency defense and argued defendant lacked the intention to make a drug sale because his true purpose was to flirt and spend time with the undercover officer. Defendant has also failed to establish that a true agency defense had any greater chance of success, or that counsel's choice of strategy caused him any prejudice.

We have considered and rejected defendant's remaining challenges to his attorney's performance, and his arguments regarding his CPL 440.10 motion.

We perceive no basis for reducing the sentence.

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

ENTERED: APRIL 24, 2018

CLERK

Sweeny, J.P., Richter, Webber, Gesmer, Moulton, JJ.

6355 Justin Rivera, Index 300994/14
Plaintiff-Appellant,

-against-

New York City Housing Authority,
Defendant-Respondent.

_____

Burns & Harris, New York (Judith F. Stempler of counsel), for appellant.

Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, New York (Patrick J. Lawless of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Barry Salman, J.), entered December 6, 2016, which granted defendant's motion for dismissal of the complaint, and denied plaintiff's cross motion for leave to serve an amended notice of claim and an amended complaint and bill of particulars, unanimously affirmed, without costs.

The action was properly dismissed, because plaintiff's inconsistency as to the accident location and failure to timely move to correct the amended notice of claim prejudiced defendant's ability to investigate the incident while the surrounding facts were still fresh (*see Cruz v City of New York*, 138 AD3d 634 [1st Dept 2016]; *Alvarez v City of New York*, 155 AD2d 373, 374 [1st Dept 1989]). Plaintiff provides no explanation why he waited over one year after receiving

defendant's response to his combined demand stating that the accident location as set forth in the notice of claim and the amended notice did not exist (*see Rivera v New York City Hous. Auth.*, 235 AD2d 296 [1st Dept 1997]).

Defendant established that it had been prejudiced by submitting evidence that its investigators attempted to locate the accident location from the description provided in the notice of claim and amended notice and were unable to do so (*see Centeno v City of New York*, 224 AD2d 268 [1st Dept 1996], *lv denied* 88 NY2d 804 [1996]; *Konsker v City of New York*, 172 AD2d 361, 362 [1st Dept 1991], *lv denied* 78 NY2d 858 [1991]). Plaintiff failed to preserve the issue as to whether the motion court erred in considering the correspondence between defendant's counsel and its investigators, and we decline to review it (*see Van Dina v City of New York*, 292 AD2d 267, 267 [1st Dept 2002]). The facts that plaintiff correctly provided the block and lot number for the property and consistently alleged that he fell on stairway F not require a different result, because that information is insufficient to dispel the confusion caused by the specification

of an address that does not have the stairway as designated in the notice of claim and the amended notice (*see Rivera v City of New York*, 303 AD2d 318 [1st Dept 2003]).

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

ENTERED: APRIL 24, 2018

CLERK

Sweeny, J.P., Richter, Webber, Gesmer, Moulton, JJ.

6356-
6357 Louis Bacon,
Plaintiff-Appellant,

-against-

Peter Nygard, et al.,
Defendants-Respondents,

Does 1-20,
Defendants.

Index 150400/15

Sidley Austin LLP, New York (Eamon P. Joyce of counsel), for appellant.

Kirkland & Ellis LLP, New York (Aaron H. Marks of counsel), for respondents.

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered August 10, 2016, which granted defendants-respondents' motion to dismiss the complaint pursuant to CPLR 327(a), unanimously reversed, on the law, the facts, and in the exercise of discretion, without costs, and the motion denied. Appeal from order, same court and Justice, entered December 8, 2016, which denied plaintiff's motion to renew, unanimously dismissed, without costs, as academic.

Defendants did not meet their "heavy burden" of establishing that the balance of the forum non conveniens factors points "strongly in [their] favor" (*Elmaliach v Bank of China Ltd.*, 110 AD3d 192, 208 [1st Dept 2013]; *see also Islamic Republic of Iran*

v Pahlavi, 62 NY2d 474, 478 [1984], *cert denied* 469 US 1108 [1985]).

It is true that the alleged defamation related to events occurring in the Bahamas, and that some of the nonparty witnesses and documents are likely to be located in the Bahamas. However, this is not dispositive (*see Mionis v Bank Julius Baer & Co., Ltd.*, 9 AD3d 280, 282 [1st Dept 2004]; *Amlon Metals, Inc. v Liu*, 292 AD2d 163, 164 [1st Dept 2002]).

Plaintiff is a New York resident. While also not dispositive, this is generally "the most significant factor in the equation" (*Sweeney v Hertz Corp.*, 250 AD2d 385, 386 [1st Dept 1998] [internal quotation marks omitted]).

In addition, only one of the defendants is a resident of the proposed alternative forum (the Bahamas), and all of the defendants have substantial connections to New York (*see Aon Risk Servs. v Cusack*, 34 Misc 3d 1234[A], *5-6 [Sup Ct, NY County 2012], *affd* 102 AD3d 461 [1st Dept 2013]). For example, Nygard owns an apartment here; Nygard, Inc. has its principal place of business here (*see Wittich v Wittich*, 210 AD2d 138, 139 [1st Dept 1994]); and although defendants claim that Nygard International Partnership's principal place of business is in Canada, its website identifies New York as its "World Headquarters."

Because defendants have a substantial presence in New York,

as well as "ample resources," it would not be a hardship for them to litigate here (*see Mionis*, 9 AD3d at 282).

The burden on the New York courts is also minimal. There is no need to translate documents or witness testimony from a foreign language. Plus, defendants effectively conceded that New York law applies by relying on it in their prior motion to dismiss and in their counterclaims (*see AIG Trading Corp. v Valero Gas Mktg., L.P.*, 254 AD2d 117, 118 [1st Dept 1998]).

By contrast, plaintiff would suffer hardship if required to litigate in the Bahamas, which has no jury trial right and no mechanism to obtain pre-trial deposition testimony from Bahamian witnesses (*see Wilson v Dantas*, 128 AD3d 176, 187-188 [1st Dept 2015], *affd* 29 NY3d 1051 [2017]; *Gyenes v Zionist Org. of Am.*, 169 AD2d 451, 452 [1st Dept 1991]; *Republic of Lebanon v Sotheby's*, 167 AD2d 142, 145 [1st Dept 1990]).

The fact that defendants waited fourteen months before bringing the instant motion, until after discovery began, their prior motion to partially dismiss the complaint was granted and affirmed on appeal, and plaintiff's motion to dismiss their counterclaims was granted, also counsels against dismissal (*see Creditanstalt Inv. Bank AG v Chadbourne & Parke LLP*, 14 AD3d 414, 415 [1st Dept 2005]; *Bock v Rockwell Mfg. Co.*, 151 AD2d 629, 631 [2d Dept 1989]; *Corines v Dobson*, 135 AD2d 390, 392-393 [1st Dept

1987]; *Confeccoes Wolens, S.A. v Shutzer Indus.*, 65 AD2d 710, 711 [1st Dept 1978]). The parties have since exchanged several thousand pages of documents and completed five depositions.

The fact that there are currently twelve related actions pending in the Bahamas cuts the other way (*see Citigroup Global Mkts., Inc. v Metals Holding Corp.*, 45 AD3d 361, 362 [1st Dept 2007]; *Millicom Intl. Cellular S.A. v Simon*, 247 AD2d 223 [1st Dept 1998]). However, only one of these involves any of the instant defendants, and it is not for defamation and was instituted *after* the instant action.

Because we reverse the grant of defendants' motion to dismiss, we need not reach plaintiff's motion to renew.

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

ENTERED: APRIL 24, 2018

CLERK

Sweeny, J.P., Richter, Webber, Gesmer, Moulton, JJ.

6358 Joseph Kosakowski, et al., Index 104778/10
Plaintiffs-Respondents,

-against-

1372 Broadway Associates, LLC, et al.,
Defendants-Appellants,

Hi Built Construction, et al.,
Defendants.

_____

Law Office of James J. Toomey, New York (Evy Kazansky of counsel), for 1372 Broadway Associates, LLC, SL Green Realty Corp., the Millwood Trading Co. Ltd. and Li & Fung USA, appellants.

Conway, Farrell, Curtin & Kelly P.C., New York (Jonathan T. Uejio of counsel), for Lehr Construction Corp., appellant.

O'Connor, O'Connor, Hintz & Deveney, LLP, Melville (Ira E. Goldstein of counsel), for South Bay Air Systems, Inc., appellant.

Marder, Eskesen & Nass, New York (Joseph B. Parise of counsel), for respondents.

_____

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered May 11, 2017, which denied the motion of defendants 1372 Broadway Associates, SL Green Realty Corp., the Millwood Trading Co., and Li & Fung USA (collectively the Broadway defendants) for summary judgment dismissing the complaint and all cross claims as against them, and denied the motions of defendant Lehr Construction (Lehr) and defendant South Bay Air Systems (South

Bay) for summary judgment dismissing the complaint and all cross claims as against them, unanimously modified, on the law, to grant the motions of Lehr and South Bay, and otherwise affirmed, without costs. The Clerk is directed to enter judgment accordingly.

Plaintiff Joseph Kosakowski was a pedestrian on the sidewalk adjacent to a building owned and occupied by the Broadway defendants, which was undergoing construction, when he was struck by a piece of sheet metal that fell from above. Under the circumstances presented, issues of fact exist as to whether the Broadway defendants can be held liable for plaintiff's injuries based upon the nondelegable duty not to cause harm to those traveling on the nearby public sidewalk (*see Porteous v J-Tek Group, Inc.*, 125 AD3d 411 [1st Dept 2015]; *Emmons v City of New York*, 283 AD2d 244 [1st Dept 2001]).

Regarding Lehr and South Bay, however, those entities made a showing, which plaintiff failed to rebut, that the piece of metal did not come from their work, as opposed to work being performed on the floor above them. Furthermore, plaintiffs cannot rely

upon the doctrine of res ipsa loquitur, because it has not been established that the piece of metal was within defendants' exclusive control (*see e.g. Sacca v 41 Bleecker St. Owners Corp.*, 51 AD3d 586 [1st Dept 2008]).

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

ENTERED: APRIL 24, 2018

CLERK

Sweeny, J.P., Richter, Webber, Gesmer, Moulton, JJ.

6359 The People of the State of New York, Ind. 324/12
Respondent,

-against-

Albert Rivera,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Kyle R. Silverstein 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 (Tandra Dawson, J. at plea; Alvin Yearwood, J. at sentencing), rendered September 26, 2016,

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

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

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

ENTERED: APRIL 24, 2018

CLERK

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

Sweeny, J.P., Richter, Webber, Gesmer, Moulton, JJ.

6360 Michael Tuzzolino, Index 156755/13
Plaintiff-Respondent-Appellant,

-against-

Consolidated Edison Company of New York,
Defendant-Appellant-Respondent.

_____

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

Sacks & Sacks, LLP, New York (Scott N. Singer of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered January 27, 2017, which, insofar as appealed from, denied plaintiff's motion for partial summary judgment as to liability on the Labor Law § 240(1) claim, and denied defendant's motion for summary judgment dismissing the Labor Law § 240(1) claim and the Labor Law § 241(6) claim predicated on Industrial Code (12 NYCRR) § 23-1.21(b)(4)(ii), unanimously modified, on the law, to grant plaintiff's motion, and otherwise affirmed, without costs.

Plaintiff established prima facie a violation of Labor Law § 240(1) through his testimony that he was caused to fall when the unsecured ladder on which he was standing suddenly slipped out from under him (*see Faver v Midtown Trackage Ventures, LLC*, 150 AD3d 580 [1st Dept 2017]; *see also Kebe v Greenpoint-Goldman*

Corp., 150 AD3d 453 [1st Dept 2017]).

In opposition, defendant failed to raise an issue of fact as to whether plaintiff was the sole proximate cause of the accident. There is no evidence in the record that there were other readily available safety devices that would have been adequate for plaintiff's work (*see Messina v City of New York*, 148 AD3d 493 [1st Dept 2017]). In addition, defendant's expert's opinion that the accident was caused by plaintiff's misuse of the ladder was entirely speculative, since it was based on his visit to the accident site almost two years after the accident occurred (*see Serrano v TED Gen. Contr.*, 157 AD3d 474 [1st Dept 2018]; *Strojek v 33 E. 70th St. Corp.*, 128 AD3d 490 [1st Dept 2015]).

Defendant also failed to show that plaintiff disregarded specific instructions not to use the ladder or do the work he was performing at the time of the accident (*see Dwyer v Central Park Studios, Inc.*, 98 AD3d 882, 884 [1st Dept 2012]). Plaintiff's coworker's deposition testimony establishes that plaintiff was not given any such instructions before he ascended the ladder. The coworker's subsequent affidavit, which conflicts with his deposition testimony on this issue, creates only a feigned issue of fact (*see Saavedra v 89 AD3d Park Ave. LLC*, 143 AD3d 615 [1st Dept 2016]; *Madtes v Bovis Lend Lease LMB, Inc.*, 54 AD3d 630 [1st Dept 2008]).

Summary dismissal of the Labor Law § 241(6) claim predicated on an alleged violation of Industrial Code (12 NYCRR) § 23-1.21(b)(4)(ii) is precluded by an issue of fact as to whether the accident was caused by a wet condition of the floor at the time that the ladder slipped out from underneath plaintiff (*see Campos v 68 E. 86th St. Owners Corp.*, 117 AD3d 593, 594 [1st Dept 2014]).

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

ENTERED: APRIL 24, 2018

CLERK

Sweeny, J.P., Richter, Webber, Gesmer, Moulton, JJ.

6361-
6362 The People of the State of New York,
Respondent,

-against-

Marcus Tittle,
Defendant-Appellant.

Ind. 1140/14

Robert S. Dean, Center for Appellate Litigation, New York (Megan D. Byrne of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Joshua P. Weiss of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Nicholas Iacovetta, J.), rendered February 25, 2015, as amended July 13, 2017, convicting defendant, upon his plea of guilty, of assault in the first degree, and sentencing him to a term of 14 years, unanimously affirmed.

The record establishes the voluntariness of defendant's plea. Defendant expressly admitted all the elements of first-degree assault under a theory of depraved indifference to human life. He then acknowledged the truth of the account of the incident that he had given to the police. That statement described a gross misuse of a loaded firearm that would support, at least by inference (*see People v McGowen*, 42 NY2d 905 [1977]), the element of depraved indifference (*see People v Roe*, 74 NY2d

20, 22-23 [1989]). The issue of whether the facts contained in defendant's statement constituted legally sufficient evidence to support a trial conviction is not before us. In any event, defendant's statement cannot be said to have *negated* depraved indifference so as to require further inquiry by the court.

Regardless of whether defendant made a valid waiver of his 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: APRIL 24, 2018

CLERK

Sweeny, J.P., Richter, Webber, Moulton, JJ.

6363 Randy Cohen, Index 155458/16
Plaintiff-Respondent,

-against-

Broad Green Pictures LLC,
et al.,
Defendants-Appellants.

_____

Davis Wright Tremaine LLP, New York (Katherine M. Bolger of counsel), for appellants.

Law Office of Richard A. Altman, New York (Richard A. Altman of counsel), and Giskan Solotaroff, New York (David Feige of counsel), for respondent.

_____

Order, Supreme Court, New York County (Lucy Billings, J.), entered October 29, 2017, which denied defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

Plaintiff Randy Cohen is the former husband of Katha Pollitt, a New York writer and author. Ms. Pollitt published a non-fiction essay, titled "Learning to Drive," in the July 22, 2002 issue of The New Yorker Magazine (the article). The article wove together Ms. Pollitt's story of learning to drive, at the age of 52, with the demise of her relationship with a man identified only as her lover. Ms. Pollitt described her lover, inter alia, as "a dedicated philanderer," and "a womanizer, a liar, a cheat, a manipulator, a maniac, a psychopath. In contrast, Ms. Pollitt described her ex-husband as someone with

whom she "g[o]t on very well," and "an excellent father."

In 2015, defendants Broad Green Pictures LLC and Learning to Drive Movie LLC produced and distributed a motion picture, titled "Learning to Drive," which was based upon the article, but modified the story. The trailer for the movie portrays a middle-aged woman Wendy Shields, identified as a book critic, learning to drive in Manhattan, while discussing her personal relationships. The trailer depicts or makes references to Wendy's ex-husband, Ted, five times. This libel action arises from two allegedly defamatory statements made about "Ted," in a trailer, describing him as an adulterer and philanderer.

Plaintiff sufficiently pleads that defamatory statements made about Wendy's ex-husband, in the trailer, are "of and concerning" him (*see Three Amigos SJL Rest., Inc. v CBS News Inc.*, 28 NY3d 82, 86 [2016]; *Geisler v Petrocelli*, 616 F2d 636 639-640 [2d Cir 1980]). The trailer, which proclaims itself to be "Based on a True Story," is based upon, and shares a title with the article, linking the main character, Wendy, to Ms. Pollitt, and by extension, Wendy's ex-husband Ted to plaintiff. Wendy and Pollitt are middle-aged, female writers learning to drive in Manhattan, who formerly relied on an ex-husband to drive them and have a daughter. As relates to the story, plaintiff's salient characteristic is that he is the only ex-husband of the

article's author, which distinctive trait links him indelibly to Ted, the only former spouse depicted in the trailer (*see Greene v Paramount Pictures Corp.*, 138 F Supp3d 226 [ED NY 2015]).

At this early stage of the litigation, defendants failed to establish that plaintiff was a public figure or that this was a matter of public concern, to which the "actual malice" standard applies (*see New York Times Co. v Sullivan*, 376 US 254, 279-280 [1964]; *Kipper v NYP Holdings Co., Inc.*, 12 NY3d 348, 354 [2009]), or that the subject matter of the trailer is within the sphere of legitimate public concern (*see Huggins v Moore*, 94 NY2d 296, 301 [1999]; *Chapadeau v Utica Observer-Dispatch*, 38 NY2d 196, 199 [1975]; *Krauss v Globe Intl.*, 251 AD2d 191, 193-194 [1st Dept 1998]).

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

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

ENTERED: APRIL 24, 2018

CLERK

Sweeny, J.P., Richter, Webber, Gesmer, Moulton, JJ.

6364 The People of the State of New York, Respondent, Ind. 4556/12

-against-

Christopher Glover, Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Mitchell J. Briskey of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Jill Konvisor, J.), rendered June 10, 2013, unanimously affirmed.

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

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: APRIL 24, 2018

CLERK

Sweeny, J.P., Richter, Webber, Gesmer, Moulton, JJ.

6366N Adam Leitman Bailey, P.C., Index 157193/15
Plaintiff-Respondent,

-against-

Jamal Alokasheh,
Defendant-Appellant.

_____

Alter & Barbaro, Brooklyn (Do K. Lee of cousel), for appellant.

Adam Leitman Bailey, P.C., New York (Jeffrey R. Metz of counsel), for respondent.

_____

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered October 11, 2016, which denied defendant's motion to vacate a default and to dismiss the complaint for lack of in personam jurisdiction or to permit the defendant to answer the complaint, unanimously reversed, on the law, without costs, to the extent of granting the motion to the extent of permitting defendant to submit an answer on the merits.

Since no default has been entered, we consider this motion pursuant to CPLR 3012. Taking into account the strong public preference for the resolution of disputes on the merits, the lack of prejudice to plaintiff, defendant's assertion of a potentially

meritorious defense, and plaintiff's submission of contradictory affidavits of service, we grant the motion to the extent of permitting defendant to submit an answer on the merits.

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

ENTERED: APRIL 24, 2018

CLERK

Sweeny, J.P., Richter, Webber, Gesmer, Moulton, JJ.

6367	In re Jose Joaquin Ramirez,	Ind. 1699/17
[M-911 &	Petitioner,	1812/17
M-1473]		O.P. 140/18

-against-

Hon. George Grasso, etc.,
Respondent.

_____

Jose Joaquin Ramirez, Petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Angel M. Guardiola II 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,

And respondent having cross-moved to dismiss the proceeding,

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, the cross motion granted, and the petition dismissed, without costs or disbursements.

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

ENTERED: APRIL 24, 2018

CLERK