SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 30, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Renwick, J.P., Manzanet-Daniels, Andrias, Kern, Oing, JJ.

4964 Marie Bradley, etc., et al., Index 157576/12
Plaintiffs-Respondents,

-against-

HWA 1290 III LLC, et al.,
Defendants-Appellants.

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Kirkland & Ellis LLP, Washington, DC (H. Christopher Bartolomucci of the bar of the Commonwealth of Virginia and the District of Columbia, admitted pro hac vice, of counsel) for appellants.

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

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Order, Supreme Court, New York County (Lucy Billings, J.), entered March 29, 2017, which, insofar as appealed from as limited by the briefs, denied defendants' motion for summary judgment dismissing the Labor Law § 200 and common-law negligence claims, reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendants dismissing the complaint.

This personal injury action arises out of the death of Edward Bradley (decedent), an experienced elevator maintenance mechanic, who was electrocuted as a result of coming into contact

with a transformer while servicing a malfunction in one of the building's elevators. Decedent was working alone when he died; there is no evidence of how the accident occurred.

Defendant HWA 1290 III LLC (HWA) owns the building. Nonparty Schindler Elevator Corporation (Schindler), the building's elevator maintenance contractor, employed decedent as the building's resident or "stationary" elevator maintenance mechanic. Codefendant United Elevator Consultants Service, Inc. (United) is the elevator consultant retained by HWA to manage the building's elevator modernization project and its machine rooms and to monitor Schindler's performance under its elevator maintenance contract with HWA.

The accident occurred in the elevator motor room on the ninth floor where the elevator control cabinets and hoist motors are located. Decedent's body was discovered hours after his death in the motor room. He was found lying partially inside the bottom of the #3 elevator control cabinet with his body slumped over the metal plate covering the transformers. The medical examiner determined that he was the victim of an apparent accidental electrocution. Photographs of the control cabinet and the decedent, taken after his body was lifted out of the cabinet, depicted rags on top of the transformers. Additionally, screws and wire nuts were found on the floor beneath the transformers,

which are located at the bottom of the control cabinet.

FDNY Captain Jeffrey Facinelli responded to the 9-1-1 call. At the scene, Facinelli observed decedent "face down on the floor" with one of his arms "reaching into the cabinet" and his "right arm and right side of his chest were lying on top of a transformer inside of the control panel."

Chief Elevator Inspector Douglas Smith from the New York City Department of Buildings (DOB) conducted a postaccident investigation. He testified that decedent was electrocuted when his right arm came into contact with the middle of the three transformers. With regard to how the accident might have happened, Smith's report surmised that "[i]t appears [decedent] was working at the bottom of the controller where the transformer was mounted and may have been reaching over and below the transformer when his arm and body made contact." Smith testified that "maybe [decedent] dropped something, was reaching for something," that there were many "possibilities," but that all were "speculation." Smith's report further provided that "[decedent] appears to have been performing maintenance on the #3 elevator controller in the 9th floor motor room" based on the fact that the #3 elevator's "fault log revealed a brake fault occurred at 1:30pm on 3/28/12, which appears to be the reason for the [decedent] trouble shooting the elevator's controller."

Plaintiffs commenced this wrongful death action alleging common law negligence and violations of the Labor Law. With regard to the common law negligence and Labor Law § 200 claims, plaintiffs alleged that defendants were liable based on the claim that the lighting in the motor room was not adequate, and that the transformer on which decedent was electrocuted did not have a cover.

Defendants moved for summary judgment dismissing the complaint. The motion court, as is relevant on this appeal, denied in part defendants' motion and allowed plaintiffs to pursue their common law negligence and Labor Law § 200 claims insofar as such claims were based on the alleged inadequate lighting in the motor room and the alleged lack of a cover over the transformers because "[d]efendants fail[ed] to demonstrate that the uncovered transformers and the lighting did not create dangerous conditions readily observable to defendants." We reverse.

Labor Law § 200 "codifies landowners' and general contractors' common-law duty to maintain a safe workplace" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505 [1993]). "Claims for personal injury under the statute and the common law fall into two broad categories: those arising from an alleged defect or dangerous condition existing on the premises and those

arising from the manner in which the work was performed" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 [1st Dept 2012]). "Where ... the accident arises ... from a dangerous premises condition, a property owner is liable under Labor Law § 200 when the owner created the dangerous condition ... or when the owner failed to remedy a dangerous or defective condition of which he or she had actual or constructive notice" (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011] [internal quotation marks omitted]).

With regard to the claimed inadequate lighting in the motor room, the dissent takes the position that a factual issue exists because "decedent was using a flashlight at the time of death" given that a flashlight was found near his body. Further, plaintiffs and the dissent rely on the testimony of Juan Melendez, a Schindler employee who, at one point in time prior to the accident, worked as decedent's helper. He testified that the fluorescent lighting in the ninth floor motor room "wasn't that good at all." In addition, Dennis Olson, plaintiffs' certified elevator inspector expert, states that "[p]oor lighting conditions would have created a safety hazard for [decedent] by impairing his ability to see his work area -- including the uncovered transformers." We respectfully disagree with this position for the following reason.

Melendez's testimony is merely conclusory and fails to raise a factual issue as to whether the lighting in the motor room was up to code (*see Cahill v Triborough Bridge & Tunnel Auth.*, 31 AD3d 347 [1st Dept 2006] [plaintiff failed to provide sufficient evidence to create an inference that the amount of lighting fell below the specific statutory standard by relying on conclusory and nonspecific assertions of witnesses stating that the area was "dark" or "a little dark"]; *see also Carty v Port Auth. of N.Y. & N.J.*, 32 AD3d 732, 734 [1st Dept 2006], *lv denied* 8 NY3d 814 [2007] ["plaintiff's vague testimony that the lighting was 'poor' and the basement where he fell was 'dark' was 'insufficient to create an inference that the amount of lighting fell below the specific statutory standard'"]), particularly in view of the fact that Olson, other than merely stating the obvious, namely, that "poor" lighting "would" have created a safety hazard, critically, failed to opine that the lighting in the motor room was not code compliant. This failure is fatal to plaintiffs' claim given the testimony of Smith, who conducted the postaccident investigation, that the lighting in the motor room was up to code, and the absence from the record of any evidentiary proof of violations for inadequate lighting. Accordingly, defendants' motion for summary judgment dismissing the claims based on inadequate lighting should be granted.

Plaintiffs' Labor Law § 200 and common law negligence claims are based on the alleged dangerous condition of a lack of a cover over the transformers on which the decedent was electrocuted. Indeed, Melendez testified that there was a threat that a person could touch one of the transformers and be electrocuted because none of the transformers had covers. Thus, the issue to be resolved is whether defendants demonstrated that they did not cause or create, or have actual or constructive notice of, the allegedly dangerous condition, so as to warrant summary judgment in their favor. For the reasons that follow, resolution of this issue is not dependent on how the accident occurred, and, as such, a proximate cause analysis is not warranted. Further, with regard to the alleged dangerous condition, the absence of any witnesses is of no moment (*see German v Morales*, 24 AD3d 246, 247 [1st Dept 2005] [plaintiff decedent's expert raised an issue of fact as to whether defendant deviated from industry standards]; *Detres v New York City Hous. Auth.*, 271 AD2d 309, 310 [1st Dept 2000] [plaintiff decedent proffered evidentiary and other materials to support the assertion that a dangerous condition existed]).

With regard to the issue of whether defendants caused or created a hazardous condition, there is no dispute that HWA and United did not design or manufacture the elevator control

cabinet, or any of its electrical components, including the transformers, which was installed some time in 1997. HWA purchased the elevator system from nonparty O. Thompson Company, who designed and manufactured it during or prior to 1997. Plaintiffs proffer no challenge.

As to whether defendants had notice of the alleged dangerous condition, Richard B. Wallace, the building's property manager, testified that he was never informed that there was any problem with the elevator control cabinet or that the transformers lacked a proper cover either by the DOB or by United despite the fact that both DOB and United conducted inspections of the ninth floor motor room. Philip A. Garcia, United's president, testified that a cover was not required on the transformers because the transformers were in an enclosed cabinet. Further, Smith testified that if a transformer is in a cabinet, such as these transformers, the cabinet itself operates as the cover for the transformer, and that such a transformer does not have a separate cover over them. Additionally, Jon B. Halpern, defendants' licensed professional engineer expert, inspected the accident site, and provided the following opinion:

> "Any suggestion that the building owners HWA 1290 and its elevator consultant United Elevator Consultants -- neither of which had any experience in elevator component design -- should have recognized the absence of a barrier over the transformers in the 1997 manufactured O'Thompson control cabinet as a hazard to the Schindler mechanic is unsupportable. ... It is the recognized custom in the elevator industry for the building owners and their elevator consultants to look to the New York City Department of Buildings ("NYCDOB") for concluding the safety of the design of elevator equipment in service in NYC. When this elevator was modernized in 1997 with the O'Thompson controller the NYCDOB approved the installation and found no problems with its design."

Indeed, Halpern noted that

> "[f]ollowing [the] accident, ... the inspector who investigated [the] accident for the City did not issue a violation for the design of this controller -- which would have carried a 'hazardous/cease use' directive -- but rather opined in deposition that this control cabinet was safe because it had a closeable cabinet to protect non-professionals from the electrical hazards inside."

Finally, Halpern stated that "[t]he 1997 O'Thompson controller met all the applicable codes and standards," that it "was safe," and that further barriers separating the transformers from the other components were "not required under any applicable standards back in 1997 when the subject control cabinet was designed and manufactured."

Plaintiffs have failed to raise an issue of fact concerning actual or constructive notice. They have not proffered any evidence that any complaints were made to defendants by the

decedent, Melendez, or anyone else that the lack of covers over the transformers was dangerous, or that defendants should have known that the absence of such a cover was dangerous and was in violation of a statute, ordinance or regulation. Nonetheless, plaintiffs and the dissent rely on Olson for the proposition that the lack of a cover over the transformer violated American National Standards Institute (ANSI) and is evidence that defendants had notice of the dangerous condition. For the following reasons, such reliance, respectfully, is misplaced.

Olson relies on ANSI A 17.5, Section 5.2, which states as follows:

> "Barriers shall be installed to prevent contact with live parts if inadvertent contact with bare live parts during normal service and adjustment operation is considered probable. Note: Troubleshooting or the replacement of fuses is not considered a normal service adjustment operation with respect to control equipment, but the resetting of overload devices, repeated adjustment of timers or switches, etc., are considered normal service operations."

Olson's reliance on ANSI is not proper. To begin, the Environmental Testing Labs, an independent tester/certifier of products in the elevator industry, certified the elevator control cabinet as complying with the ANSI requirements. Even if the elevator control cabinet did not comply with the above ANSI standard because the transformers did not have a cover, plaintiffs have failed to establish that defendants were required

by law to comply with the above ANSI standard. Indeed, the above ANSI standard has not been adopted by or incorporated into New York City's elevator code and ANSI itself is not a statute, ordinance or regulation. Thus, a violation thereof is not evidence of negligence (*see Gonzalez v City of New York*, 109 AD3d 510, 512 [2d Dept 2013] [ANSI standards do not constitute statutes, ordinances, or regulations and not proper evidentiarily in determining proper standard of care]).

The dissent also relies on Olson's statement that United "inspected the #3 control cabinet on numerous occasions in the 2 years prior to March 28, 2012 and thus knew, or should have known, that the transformers lacked this safety cover at that time" and his opinion that "with a reasonable degree of technical certainty, [] that if the transformer had a safety cover then [decedent] would not have been electrocuted."

Olson's statements are speculative and conclusory, and fail to raise an issue of fact as to defendants' actual or constructive notice of the alleged dangerous condition. Further, Olsen's opinion that had there been a cover on the transformer decedent would not have been electrocuted is pure speculation. Again, plaintiffs fail to point to any past complaints about the transformers, any time when the transformers or the cabinet did not pass inspection, or any industry-wide problems or issues with

this type of cabinet and transformers that would provide actual or constructive notice of a dangerous condition.

Accordingly, the motion court should have granted defendants' motion to dismiss the claims related to the lack of a cover over the transformers.

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

MANZANET-DANIELS, J. (dissenting in part)

Plaintiffs' decedent was electrocuted while working in an elevator machine room on the ninth floor of a building owned by defendants. Though the exact cause of the accident is unknown, it is undisputed that decedent died as a result of being electrocuted via contact of his right arm with live transformers in an electrical cabinet.

The HWA 1290 defendants owned the building located at 1290 Avenue of the Americas. Decedent was an employee of nonparty Schindler Elevator Corp., the building's maintenance contractor. He was the building's resident mechanic for over five years preceding the fatal incident.

Defendant United Elevator Consultants Service, Inc. was hired by the HWA defendants as an elevator consultant to monitor Schindler's performance under its contracts with the building. The contract between the HWA defendants and United required United to provide one dedicated mechanic and one helper onsite during normal working hours.

On the afternoon of March 28, 2012, decedent was working in an electrical control cabinet located in the motor room on the ninth floor of the building.[1] Later that day, decedent was found

[1]According to witnesses, the computer associated with the elevator registered a "fault," shutting down the elevator. At

dead from electrocution atop transformers that were located on the bottom right side of the cabinet. The medical examiner's report listed cause of death as "electrocution," and the manner of death as an "accident (right arm contacted electrical transformer)." He was not wearing safety gloves. Photos of the accident scene showed a handheld meter and handheld light next to decedent's body.

Douglas Smith, the chief inspector for the NYC Department of Buildings who conducted the post-accident investigation, concluded that decedent's accident occurred at 3:30 p.m., and that he was alone at the time of death.

The inspector testified that it appeared decedent had been reaching into the cabinet and that his right biceps made electrical contact with the transformer located on the lower right corner of the panel. The inspector agreed that a cover on the contact point would have prevented decedent from being electrocuted. He also agreed that a helper might be beneficial for tasks requiring an extra set of hands, including those where a helper might hold a drop light to better illuminate equipment. He also agreed that if a helper were present, he could have shut down the mainline switch in the motor room (located approximately

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the time of death, decedent was responding to the elevator.

12-15 feet away), stopping the current and preventing decedent from being electrocuted.

Juan Melendez was decedent's helper for five years. He characterized the lighting in the ninth floor machine room as "poor." He testified that sometimes they had to use a "little flashlight" to peer inside the cabinet. The transformers inside the cabinet did not have covers.

Melendez was reassigned to an elevator modernization project shortly before decedent's accident. No one replaced him as decedent's helper; if decedent required the assistance of a helper, one of the workers on the project would assist. Since the modernization team worked from 7 to 3:30 p.m., decedent was alone during the 3:30 to 5 p.m. time frame.

Plaintiffs commenced this wrongful death action on or about January 17, 2014. Defendants moved for summary judgment dismissing the complaint, asserting that plaintiff was not engaged in "construction work" so as to impose liability under Section 241(6), and that the negligence claim could not be sustained because the cause of the accident was unknown. Defendants relied on the expert affidavit of John Halpern, a licensed professional engineer. Halpern opined that the 1997 O'Thompson electrical cabinet complied with manufacturing standards. He acknowledged that new cabinets installed as part

of the modernization project had plexiglass barriers separating the transformers from the other components, but noted that "the components inside the new cabinet [we]re substantially closer to the transformers than in the 1997 O'Thompson cabinet." Halpern maintained that because decedent was engaged in "troubleshooting" at the time of his death, Section 5.2 of the Safety Code for Elevators did not apply.[2]

Plaintiffs opposed, asserting that defendants had failed to provide a helper for decedent though contractually obligated to do so, failed to provide adequate lighting, and created a hazardous condition by failing to provide a cover on the transformer which electrocuted the decedent. Plaintiffs relied on the affidavit of Dennis Olson, a certified elevator inspector. Mr. Olson opined that the photographs of the control cabinet where decedent was working at the time of death depicted exposed transformers with no safety covers. He opined that since United had inspected the control cabinet on numerous occasions in the two years prior to the accident, they knew, or should have known,

[2]Section 5.2, cited by plaintiffs as evidence of negligence, has a caveat concerning the types of normal services and adjustment to which the section is applicable, specifying that "troubleshooting of the replacement of fuses is not considered normal service adjustment operation with respect to control equipment, but the resetting of overload devices, adjustment of timers or switches, etc., are considered normal service operation."

that the transformers lacked a safety cover. He opined, in light of the findings of the medical examiner, and within a reasonable degree of technical certainty, that decedent would not have been electrocuted had the transformer had a safety cover. He noted that the Safety Code for Elevators (ASME/ANSI A 17.5, Section 5.2) required that "[b]arriers shall be installed to prevent contact with live parts if inadvertent contact with bare live parts during normal service and adjustment operation is considered probable." Mr. Olson further opined that while it was not possible to ascertain the exact task decedent was engaged in at the time of death, the absence of the helper placed him in danger if he were forced to perform a task alone that was generally reserved for two workers.

The motion court granted defendants' motion to the extent of dismissing the section 241(6) claim, and decedent's section 200 and common-law negligence claims to the extent predicated on the contractual duty to provide a helper, and otherwise denied the motion. I would affirm.

While "sheer speculation" as to the cause of an accident is not permissible (*see Teplitskaya v 3096 Owners Corp.*, 289 AD2d 477 [2d Dept 2001]), proximate cause may nonetheless be demonstrated in the absence of direct evidence of causation and may be inferred from the facts and circumstances underlying the

injury. To establish a prima facie case of negligence based on circumstantial evidence, "it is enough that plaintiff shows facts and conditions from which the negligence of the defendant and the causation of the accident by that negligence may be reasonably inferred" (*Schneider v Kings Hwy. Hosp. Ctr.*, 67 NY2d 743 [1986]). Plaintiffs need not eliminate every other possible cause of the accident but defendant's negligence, as defendants suggest; rather, plaintiffs' proof must render those other causes sufficiently remote as to enable the jury to arrive at a verdict based not on speculation, but on logical inferences to be drawn from the evidence (*id.* [plaintiff established a prima facie case via proof that the side rails on the decedent's bed had been lowered, in violation of a hospital rule requiring that they be maintained in a raised position, from which it might be deduced that a staff person had lowered the bed rails, a more likely possibility than that the frail and elderly decedent had lowered the rails herself, particularly given the effort to activate a spring latch at the foot of the bed]; *Maresca v Lake Motors*, 25 NY2d 716 [1969] [for jury to determine whether the defendant's car, traveling in a parallel lane to the decedent, collided with the decedent's truck because the defendant crossed into the lane or because the decedent's truck veered into the defendant's car]; *Davila v Sleepy's LLC*, 142 AD3d 851 [1st Dept 2016]

[circumstantial evidence in support of the plaintiffs' claim furnished a basis for jury to infer the defendants' liability for a bedbug infestation]; *Hernandez v Alstom Transp., Inc.*, 130 AD3d 681, 683 [2d Dept 2015] [plaintiffs raised triable issues of fact as to whether the circumstantial proof rendered it more likely that an employee of defendant software company that maintained train's communication systems had placed a shoe paddle in the train door to prop it open than an employee of NYCTA]).

Plaintiffs have established a prima facie case via proof that the cause of decedent's death was electrocution; that the manner of death was an "accident (right arm contacted electrical transformer)"; that decedent was discovered next to the uncovered transformers with burn marks on the right side of the body, indicating that he was reaching into the cabinet at the time of death; that the lighting was inadequate; and that decedent lacked a required helper to perform his work. This evidence rendered it more likely than not that decedent was electrocuted due to defendants' failures to shield decedent from the transformers, rather than the remote possibility that decedent was electrocuted because he passed out or lost his balance or even that he failed to wear safety gloves.[3] This latter surmise is undercut by the

[3]This term was nowhere defined and I will not speculate as to what hazards any such gloves might or might not have protected

fact that decedent was not found to have contact marks on his hands. Further, no evidence was offered that such "safety gloves" would have prevented decedent from being electrocuted.

On this record, plaintiffs raise issues of fact as to whether decedent died owing to the negligence of defendants. There is an issue of fact as to whether the lack of safety cover over the transformers constitutes negligence. Plaintiffs maintain that a cover was required as per ANSI § 5.2. However, the parties dispute whether decedent was engaged in "troubleshooting" at the time of death, such that the ANSI § 5.2 did not apply; and whether the ANSI standard required a "cover" other than the cabinet itself.

There is also an issue of fact regarding the adequacy of the lighting in the machine room. While the City inspector testified that the lighting in the machine room was up to code, he could not recall the minimum requirements for lighting under the code, and had no independent recollection of having performed a lighting test. The fact that decedent was using a flashlight at the time of death supports plaintiffs' assertion that the lighting was inadequate. Melendez was decedent's helper for five years and had occasion to observe the conditions in the motor

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against.

room on a regular basis. He testified that they had to use "a little flashlight to look . . . inside the cabinet" because they could not "see otherwise." Both Melendez and Smith concurred that uncovered transformers could kill on contact, as happened here.

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

ENTERED: JANUARY 30, 2018

CLERK

Friedman, J.P., Gische, Kapnick, Kahn, Moulton, JJ.

5025 In re Rachel D., and Another,

Children Under the Age of Eighteen Years, etc.,

Administration for Children's Services,
Petitioner-Appellant,

Sandy D.,
Respondent-Respondent,

Luis N.,
Respondent.

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Zachary W. Carter, Corporation Counsel, New York (Tahirih M. Sadrieh of counsel), for appellant.

Law Office of Randall S. Carmel, Jericho (Randall S. Carmel of counsel), for respondent.

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

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Order, Family Court, Bronx County (Alma M. Gomez, J.), entered on or about July 15, 2016, which granted respondent mother's motion to modify a prior dispositional order suspending visitation, by ordering a supervised therapeutic visit with the subject children, unanimously reversed, on the law and the facts, without costs, and the motion denied.

The court's determination lacks a sound and substantial basis in the record, which shows that visitation with the mother would not be in the children's best interests (*see Matter of*

Tristram K., 25 AD3d 222, 228 [1st Dept 2005]). The court erroneously found that no visitation had occurred since 2012, overlooking a supervised therapeutic visit that took place in December 2013, which, in particular, caused the older child to suffer from a resurgence of stress and anxiety-related symptoms. Further, the court failed to address the numerous professional evaluations consistently recommending that visitation with the mother would be detrimental to the children (*see Young v Young*, 212 AD2d 114, 118 [2d Dept 1995]). Neither did the court explain the basis for its conclusion that the agency was lax in its reunification efforts. Given the finding of neglect and abuse against the mother, and the documented history of stress and trauma triggered by previous visits with her, including a brief, unplanned encounter with the mother at the agency during the hearing, it was an improvident exercise of discretion for the Family Court to order a supervised therapeutic visit at this

juncture (*see Matter of Justine N. [Patricia M.]*, 136 AD3d 452 [1st Dept 2016], *lv denied* 27 NY3d 906 [2016]), especially after having precluded argument on the issue at the permanency hearing.

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

ENTERED: JANUARY 30, 2018

CLERK

Acosta, P.J., Sweeny, Gische, Andrias, Gesmer, JJ.

5480-
5481 403 East 76th Street Corp., Index 600144/06
Plaintiff-Appellant,

-against-

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

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Cyruli Shanks Hart & Zizmor, LLP, New York (James E. Schwartz of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Scott Shorr of counsel), for respondents.

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Order, Supreme Court, New York County (James E. d'Auguste, J.), entered March 13, 2017, which granted defendants' motion for partial summary judgment dismissing plaintiff's claims for reimbursement of financing costs, for compensation in connection with certain masonry and duct work, and for unjust enrichment, unanimously modified, on the law, to the extent of denying the motion as to the claims for payment for work performed in the kitchen and for reimbursement of financing costs, and otherwise affirmed, without costs. Order, same court and Justice, entered August 9, 2017, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for leave to renew, unanimously affirmed, without costs.

Plaintiff is the owner of 411 East 76th Street in Manhattan.

In June 2002, plaintiff agreed to lease the building to defendant City of New York so that it could be used as a public high school. Pursuant to the lease, plaintiff agreed to perform certain alterations and improvements to convert the building into a school.

The motion court correctly dismissed plaintiff's claim for payment for "extra work" to replace drywall interior vault room walls with concrete block walls, since the drawings made part of the lease called for those walls to be constructed of concrete, and plaintiff failed to provide proof that the parties agreed, either orally or in writing, to modify this lease term (*see Van Dorn Realty Corp. v Sundec Intl. Corp.*, 190 AD2d 516, 518 [1st Dept 1993]). Defendants' failure to respond to plaintiff's architect's letter regarding interior wall construction does not modify the agreed-upon term, since the lease requires that specifications prepared by plaintiff's architect be approved by defendants in writing.

Plaintiff's claims for payment for "additional work" in the kitchen and for reimbursement in connection with certain financing costs should not have been dismissed, as plaintiff met its burden to submit proof sufficient to raise a question of fact requiring a trial on those issues (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 82 [1st Dept 2013]).

Plaintiff submitted an affidavit by its officer, saying that, at a meeting on October 30, 2002, the parties agreed that instead of installing a full "cooking kitchen," as called for in the lease, the school would have only an electric warming pantry, to be installed by plaintiff. This affidavit was supported by, inter alia, a schematic for the kitchen marked "meeting of 10/30/02 changes to Kitchen design," and signed by the five attendees, including a representative of defendants. In reply, defendants failed to submit an affidavit by anyone with knowledge of the relevant facts to dispute plaintiff's account of the changes indicated by the schematic or deny that defendants had agreed to them, even though one of the October meeting attendees who signed the schematic, Michael Cona, defendant New York City Department of Education's lease manager, had previously submitted an affidavit in support of defendants' moving papers.[1]

The lease provides at paragraph 6.19 that the tenant shall reimburse the landlord for costs incurred in obtaining financing to pay startup costs for the alterations or to pay contractors and subcontractors when the tenant's reimbursement for alteration costs are not received within 30 days. In opposition to defendants' motion, plaintiff produced an affidavit by its

[1]Mr. Cona's affidavit does not discuss the October 30, 2002 meeting at all.

officer, saying that a credit line was secured to pay alteration start up costs and contractor and subcontractor payments that plaintiff would incur, and saying "unequivocally" that plaintiff paid all of the sums sought in connection with the financing, which totaled $121,591. In support of the affidavit, plaintiff submitted a copy of a mortgage that it had taken out on the subject premises, which provided for an $850,000 term loan and a $2,100,000 line of credit, recorded on November 7, 2002, an invoice from the title company, invoices from the attorneys who represented plaintiff and the bank at the mortgage closing, correspondence from plaintiff's mortgage attorneys listing disbursements of the mortgage proceeds, including attorneys' fees, title company fees, and an appraisal fee, and correspondence between the parties regarding the financing costs. There are discrepancies between some of the supporting documents as to the amount of some costs. Defendants also question whether any or all of the loan costs sought were attributable to reimbursable expenditures under the lease, and argue that plaintiff failed to submit sufficient documentation of the financing costs for which it sought reimbursement in 2003 and 2005. However, defendants are in a poor position to make the latter argument, since they admit that the lease does not set forth any particular type of documentation required as a

condition precedent to reimbursement. Indeed, the record before us indicates that defendants did not respond in writing at all to plaintiff's requests for reimbursement in 2003, and responded to the 2005 request only by claiming they were "looking into" it. Although a principal attorney for the City's School Construction Authority submitted an affidavit dated October 7, 2016 in which he claims he sought additional documentation from plaintiff, his claim is not supported by any correspondence or other documentation, and gives no time frame for the alleged request. Furthermore, this claim is contradicted by the affidavit by plaintiff's officer, who says that defendants never rejected or objected to the demands. On this record, plaintiff has raised a question of fact as to whether and in what amount it is entitled to reimbursement for financing costs consistent with the terms of the lease.

Finally, as Supreme Court stated, because the dispute here falls squarely within the scope of the parties' lease, the unjust enrichment claim cannot stand (*see Clark-Fitzpatrick, Inc. v Long*

Is. R.R. Co., 70 NY2d 382, 388 [1987]).

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: JANUARY 30, 2018

CLERK

Friedman, J.P., Gische, Mazzarelli, Kern, Singh, JJ.

5551 The People of the State of New York, Respondent, Ind. 4457/10

-against-

Chris Miles,
Defendant-Appellant.

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Rosemary Herbert, Office of the Appellate Defender, New York (Joseph M. Nursey of counsel), and Weil, Gotshal & Manges LLP, New York (David Fitzmaurice of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Cynthia A. Carlson of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (George R. Villegas, J.), rendered October 29, 2014, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 25 years to life, unanimously affirmed.

By failing to object, making general objections or failing to request any further relief after the court sustained an objection, defendant failed to preserve his present challenges to the prosecutor's summation (*see People v Romero*, 7 NY3d 911, 912 [2006]). "The word 'objection' alone [is] insufficient to preserve [an] issue" for review as a question of law *(People v Tevaha*, 84 NY2d 879, 881 [1994]), and defendant's assertion to the contrary is unavailing. We decline to review these challenges in the interest of justice. As an alternative

holding, we conclude that while some of the challenged remarks should have been avoided, they were not so egregious or pervasive as to have deprived defendant of a fair trial (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1992]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]). In particular, when viewed in context, the prosecutor's brief, ill-conceived reference to an appeal following a conviction was not unduly prejudicial.

We also conclude that defendant was not deprived of a fair trial by the prosecutor's reference in his opening statement to a witness who ultimately did not testify. Defendant has not established either bad faith on the People's part or undue prejudice (*see People v De Tore*, 34 NY2d 199, 207 [1974], *cert denied sub nom. Wedra v New York*, 419 US 1025 [1974]). Furthermore, defendant abandoned his request for a curative instruction, and only requested the drastic remedy of a mistrial.

The court properly excluded the testimony of defendant's toxicologist, because he could not provide any competent evidence bearing on the credibility of a People's witness whom the defense claimed to have been intoxicated at the time of the incident

(*see generally People v Davis*, 43 NY2d 17, 27 [1977], *cert denied* 438 US 914 [1978]). Defendant's theory of admissibility was excessively speculative and tenuous.

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

ENTERED: JANUARY 30, 2018

CLERK

Friedman, J.P., Gische, Mazzarelli, Kern, Singh, JJ.

5552 Leonicia Vargas, et al., Index 20201/12E
Plaintiffs-Appellants,

-against-

Riverbay Corp.,
Defendant-Respondent.

_____

Ronemus & Vilensky LLP, Garden City (Lisa M. Comeau of counsel), for appellants.

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Louise Cherkis of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Lizbeth Gonzalez, J.), entered June 13, 2016, which granted defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

In this slip and fall action, defendant sought to demonstrate its entitlement to summary judgment by merely pointing to perceived gaps in plaintiffs' case (*see e.g. Colt v Great Atl. & Pac. Tea Co.*, 209 AD2d 294, 295 [1st Dept 1994]). Defendant failed to establish its prima facie entitlement to judgment as a matter of law by demonstrating when the area in question was last cleaned or inspected relative to the time when plaintiff fell (*see Cater v Double Down Realty Corp.*, 101 AD3d 506 [1st Dept 2012]).

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

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

ENTERED: JANUARY 30, 2018

CLERK

Friedman, J.P., Gische, Mazzarelli, Kern, Singh, JJ.

5553-
5553A In re Lakisha Janee C.,
Petitioner-Appellant,

-against-

Abraham N.,
Respondent-Respondent.

_____

Larry S. Bachner, New York, for appellant.

Law Offices of Randall S. Carmel, Jericho (Randall S. Carmel of counsel), for respondent.

Karen P. Simmons, The Children's Law Center, Brooklyn (Barbara H. Dildine of counsel), attorney for the children.

_____

Order, Family Court, Bronx County (Tracey A. Bing, J.), entered on or about March 16, 2017, which, after a fact-finding hearing, dismissed petitioner mother's petition seeking modification of a visitation order and directed that no further custody or visitation petitions be filed without leave of the court; and order, same court and Judge, entered on or about February 28, 2017, which dismissed the mother's petition seeking to suspend respondent father's visitation, unanimously affirmed, without costs.

Family Court properly dismissed the petition seeking modification of the order of visitation, since the mother did not credibly allege a material change of circumstances (*see Skidelsky*

v Skidelsky, 279 AD2d 356, 356 [1st Dept 2001]), nor did she demonstrate that reducing the father's visitation time with the children would be in their best interests (*see St. Clement v Casale*, 29 AD3d 367, 368 [1st Dept 2006]).

Family Court, which had presided over the parties' long and contentious litigation history, properly directed the parties to seek leave prior to filing further petitions pertaining to custody and visitation (*see e.g. Melnitzky v Uribe*, 33 AD3d 373 [1st Dept 2006]).

Moreover, Family Court properly dismissed the mother's subsequent petition seeking to suspend the father's visitation based on his alleged violation of the visitation order. The court acted within its discretion in finding that the claimed new violations were generally of the same nature as the violations that were rejected in the recently adjudicated modification petition. Under these circumstances, the court properly dismissed the violation petition without further consideration.

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

ENTERED: JANUARY 30, 2018

CLERK

Friedman, J.P., Gische, Mazzarelli, Kern, Singh, JJ.

5554 In re Correction Officers' Benevolent Association, et al., Petitioners-Appellants, Index 100697/15

-against-

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

Koehler & Isaacs LLP, New York (Howard Wien of counsel), for appellants.

Zachary W. Carter, Corporation Counsel, New York (Ingrid R. Gustafson of counsel), for respondents.

Judgment (denominated an order), Supreme Court, New York County (Margaret A. Chan, J.), entered April 29, 2016, denying the petition to compel respondents, pursuant to the Freedom of Information Law (FOIL), to produce all information pertaining to respondent New York City Department of Correction's (DOC) decision not to promote the individual petitioners from Correction Officer to Correction Captain, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Petitioners have abandoned any challenge to Supreme Court's determination that the claims of three of the individual petitioners have been mooted by their intervening promotion to Correction Captain, as petitioners failed to discuss the issue in

their appellate briefs (*see Hardwick v Auriemma*, 116 AD3d 465, 468 [1st Dept 2014], *lv denied* 23 NY3d 908 [2014]; *McHale v Anthony*, 41 AD3d 265, 266-267 [1st Dept 2007]).

Respondents met their burden of "articulating a particularized and specific justification for denying access" to the requested documents (*Matter of Data Tree, LLC v Romaine*, 9 NY3d 454, 462-463 [2007] [internal quotation marks omitted]) on the grounds that they are exempt from disclosure as nonfinal intra-agency materials that "are entirely advisory in nature and rendered only to aid the actual decision-maker[s]" (*Rothenberg v City Univ. of N.Y.*, 191 AD2d 195, 196 [1st Dept 1993], *lv denied* 81 NY2d 710 [1993]; *see* Public Officers Law § 87[2][g][iii]; *Matter of Thomas v New York City Dept. of Educ.*, 137 AD3d 698, 698 [1st Dept 2016]).

Petitioners' argument that the requested documents are effectively the final documents because there are no later documents providing reasons for the failures to promote, other than the conclusory notification letters that the candidates were passed over, is unavailing. Respondents explain that, while the decision makers, including the Chief of Department who was the primary orchestrator, considered the requested documents in determining whom to promote, no documents exist encapsulating the final decision, other than the notice to petitioners. There is

no statutory basis to look beyond respondents' representation. Nor does FOIL require agencies "to formulate a final determination where none exists" (*Kheel v Ravitch*, 93 AD2d 422, 430 [1st Dept 1983], *affd* 62 NY2d 1 [1984]).

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

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

ENTERED: JANUARY 30, 2018

CLERK

Friedman, J.P., Gische, Mazzarelli, Kern, Singh, JJ.

5555 Hal Sokoloff, Index 652531/16
Plaintiff-Appellant,

-against-

Joshua Manton,
Defendant-Respondent.

_____

Shaw & Associates, New York (Martin Shaw of counsel), for appellant.

Borstein Turkel, P.C., New York (Avram S. Turkel of counsel), for respondent.

_____

Order, Supreme Court, New York County (David Benjamin Cohen, J.), entered October 6, 2017, which stayed the action in light of a pending matrimonial action, and denied plaintiff's motion for summary judgment without prejudice and with leave to refile, unanimously reversed, on the law, without costs, and the matter remanded to the Supreme Court to determine the underlying motion for summary judgment.

Under the circumstances of this case, the stay was not warranted. Although there are some interrelated issues in the pending divorce action between plaintiff's daughter and defendant, they are not the same issues. Most importantly, plaintiff is not a party to the divorce action and cannot adjudicate his claim in that action. Although certain monies were ordered to be placed in escrow in the divorce action, there

is no proof about the terms of the escrow, nor is there any indication that the monies are to used to benefit plaintiff, if he is ultimately found to be a legitimate creditor of defendant. Upon issuing the stay, the motion court denied the motion for summary judgment without prejudice to refile "if the issue raised in this motion is not resolved in the context of the matrimonial action." We believe, however, that the motion court should have reached the merits of the motion for summary judgment and, therefore, we remand the matter to Supreme Court.

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

ENTERED: JANUARY 30, 2018

CLERK

Friedman, J.P., Gische, Mazzarelli, Kern, Singh, JJ.

5556 The People of the State of New York, Ind. 2577/96
Respondent,

-against-

Keith Fair,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Laura Lieberman Cohen of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Courtney M. Wen of counsel), for respondent.

_____

Order, Supreme Court, New York County (Charles H. Solomon, J.), entered on or about December 10, 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 record supports the court's discretionary upward departure, based on clear and convincing evidence establishing the existence of aggravating factors not adequately accounted for by the risk assessment instrument (*see People v Gillotti*, 23 NY3d 841, 861-862 [2014]). The underlying sex crime against a child was particularly heinous and violent, and after that conviction, defendant continued to commit sex crimes against other children. Moreover, he was adjudicated a level three offender on two of his subsequent convictions (*People v Fair*, 129 AD3d 617 [1st Dept

2015], *lv denied* 26 NY3d 967 [2015]). Defendant's completion of a sexual offender treatment program does not warrant a different result, given his criminal history. Defendant's remaining arguments are unpreserved and unavailing.

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

ENTERED: JANUARY 30, 2018

CLERK

Friedman, J.P., Gische, Mazzarelli, Kern, Singh, JJ.

5557 Springut Law PC, Index 156233/14
Plaintiff-Appellant,

-against-

Rates Technology Inc., et al.,
Defendants-Respondents.

_____

Springut Law PC, New York (Tal S. Benschar of counsel), for appellant.

Clarick Gueron Reisbaum LLP, New York (Isaac B. Zaur of counsel), for respondents.

_____

Order, Supreme Court, New York County (Debra A. James, J.), entered May 2, 2017, which, to the extent appealed from as limited by the briefs, granted defendants' motion to dismiss the fraud and piercing the corporate veil claims, unanimously affirmed, with costs.

Plaintiff law firm brings this action against its former clients for failure to pay its legal fees. Plaintiff contends that defendant Gerald Weinberger, now deceased — the president of the corporate defendants — intentionally kept one of his entities judgment proof in a fraudulent effort to obtain legal representation without paying for it.

The IAS court correctly dismissed the veil-piercing claim (fourth cause of action) because the allegations supporting it were wholly conclusory (*American Media, Inc. v Bainbridge &*

Knight Labs., LLC, 135 AD3d 477, 477 [1st Dept 2016]). The nonspecific allegations that Weinberger ignored corporate formalities, "completely dominated and controlled" the corporate defendants, and made the business decisions for the entities were not sufficient to pierce the corporate veil (*id.*; *Sheridan Broadcasting Corp. v Small*, 19 AD3d 331, 332 [1st Dept 2005]).

Plaintiff's fraud and fraud-related claims in the third cause of action were also insufficient. A cause of action for fraud is not sufficiently stated where, as here, the only fraud charged relates to a breach of contract (*Cole, Schotz, Meisel, Forman & Leonard, P.A. v Brown*, 109 AD3d 764, 765 [1st Dept 2013]). Plaintiff's allegations asserting defendants' general promises to meet their payment obligations were duplicative of its breach of contract claim (*id.*). Nor has plaintiff alleged any specific misrepresentations of "present fact" that were collateral to the contract (*American Media, Inc.*, 135 AD3d at 478). Defendants' subsequent assurances of performance and alleged misrepresentations were not sufficiently collateral to the parties' contract to render the fraud claim nonduplicative

(*see e.g. Metropolitan Transp. Auth. v Triumph Adv. Prods.*, 116 AD2d 526, 527-528 [1st Dept 1986]).

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: JANUARY 30, 2018

CLERK

Friedman, J.P., Gische, Mazzarelli, Kern, Singh, JJ.

5558 Bernarda Almanzar, Index 22436/13
Plaintiff-Appellant,

-against-

Carmen Rijos, D.D.S., et al.,
Defendants-Respondents.

_____

William Schwitzer & Associates, P.C., New York (Matthew R. Jaeger of counsel), for appellant.

Mauro Lilling Naparty LLP, Woodbury (Anthony F. DeStefano of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Stanley Green, J.), entered September 16, 2016, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants met their prima facie burden through their experts' opinions that defendant dentist properly performed a mandibular block injection before filling plaintiff's cavities and that the injection could not have injured the nerves plaintiff claimed to have been injured (*see Fernandez v Moskowitz*, 85 AD3d 566, 567-568 [1st Dept 2011]).

In opposition, plaintiff's experts failed to address how the procedure could have caused the claimed injuries or any other injuries (*see id.*). Further, neither expert opined as to how, or in what manner, the procedure was improperly performed. Thus,

the opinions were too conclusory to raise an issue of fact on the question of malpractice (*see Rodriguez v Montefiore Med. Ctr.*, 28 AD3d 357, 357 [1st Dept 2006]). In light of that finding, we need not reach the question of whether plaintiff impermissibly raised new claims of injury in opposition to defendants' motion.

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

ENTERED: JANUARY 30, 2018

CLERK

Friedman, J.P., Gische, Mazzarelli, Kern, Singh, JJ.

5559 The People of the State of New York, Ind. 601/15
Respondent,

-against-

Christopher Coe,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Kristian D. Amundsen 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 (Marc Whiten, J.), rendered December 15, 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.

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

ENTERED: JANUARY 30, 2018

CLERK

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

Friedman, J.P., Gische, Mazzarelli, Kern, Singh, JJ.

5560-
5561 Index 157797/13
595402/14

Michael P. Schulhof, as Executor of the Estate of Hannelore B. Schulhof,
Plaintiff-Respondent-Appellant,

-against-

Lisa Jacobs, individually and doing business as Lisa Jacobs Fine Art,
Defendant-Appellant-Respondent.

- - - - -

[And A Third-Party Action]

_____

Nicholas Goodman & Associates, PLLC, New York (H. Nicholas Goodman of counsel), for appellant-respondent.

Warshaw Burstein, LLP, New York (Robert Fryd of counsel), for respondent-appellant.

_____

Judgment, Supreme Court, New York County (Charles E. Ramos, J.), entered March 17, 2017, against defendant and in plaintiff's favor in the amount of $1,555,185.21, unanimously affirmed, without costs. Appeals from order, same court and Justice, entered March 1, 2017, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

CPLR 4519 does not preclude, on summary judgment, defendant's testimony about her conversations with decedent Hannelore Schulhof (*see Phillips v Kantor & Co.*, 31 NY2d 307 [1972]). However, the parol evidence rule, coupled with the October 25, 2011 written agreement between the parties, bars

defendant's testimony that she reached an oral agreement with decedent that precedes and varies from the written agreement (*see SAA-A, Inc. v Morgan Stanley Dean Witter & Co.*, 281 AD2d 201, 203 [1st Dept 2001]; *see also Laskey v Rubel Corp.*, 303 NY 69, 71 [1951]).

The motion court correctly found, as a matter of law, that defendant had a fiduciary relationship with decedent. The contract between defendant and the eventual purchaser of the artwork at issue states that defendant is acting as *agent* for an undisclosed principal — i.e., for decedent. The relationship between principal and agent is a fiduciary one (*see TPL Assoc. v Helmsley-Spear, Inc.*, 146 AD2d 468, 470 [1st Dept 1989]; *see also Murray v Beard*, 102 NY 505, 508 [1886]).

The motion court also correctly granted summary judgment to plaintiff on his fraud claim. The issue of reasonable reliance can be resolved on a summary judgment motion (*see Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 99 [1st Dept 2006], *lv denied* 8 NY3d 804 [2007]). Further, plaintiff's success as a businessman does not preclude a finding of reliance (*see Whittemore v Yeo*, 117 AD3d 544, 545 [1st Dept 2014]; *see also Frame v Maynard*, 83 AD3d 599, 603 [1st Dept 2011]). Defendant told plaintiff that the buyer of the art wished to remain anonymous, which prevented plaintiff from conducting due diligence by, for example,

contacting the buyer (*see SS&J Morris v Mahoney Cohen & Co.*, 264 AD2d 343, 343 [1st Dept 1999]). Since defendant had a fiduciary relationship with decedent, plaintiff was not required to obtain the kinds of representations and warranties that defendant suggests in her reply brief (*see TPL*, 146 AD2d at 470-471).

Given the existence of a fiduciary relationship, the faithless servant doctrine applies, and the motion court correctly granted plaintiff summary judgment on that claim (*see e.g. Feiger v Iral Jewelry*, 41 NY2d 928 [1977]).

Given the foregoing, the issue of whether the motion court should have dismissed plaintiff's contract claim is academic.

The motion court providently exercised its discretion in declining to award plaintiff punitive damages and sanctions (*see Matter of Birnbaum v Birnbaum*, 157 AD2d 177, 192-193 [4th Dept 1990][punitive damages]; *Matter of Flanigan v Smyth*, 148 AD3d 1249, 1251 [3d Dept 2017] [sanctions], *lv dismissed in part and denied in part* 29 NY3d 1046 [2017]).

Plaintiff is not entitled to attorneys' fees (*see Schneidman v Tollman*, 261 AD2d 289, 290 [1st Dept 1999], *lv denied* 94 NY2d 756 [1999]).

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

ENTERED: JANUARY 30, 2018

CLERK

Friedman, J.P., Gische, Mazzarelli, Kern, Singh, JJ.

5562-
5562A The People of the State of New York,
Respondent,

Ind. 2050/10
642/11

-against-

Joseph Belle,
Defendant-Appellant.

_____

Christina Swarns, Office of The Appellate Defender, New York (William Kendall of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Diana J. Lewis of counsel), for respondent.

_____

Judgments, Supreme Court, Bronx County (Peter J. Benitez, J.), rendered November 30, 2012, unanimously affirmed.

Although we find that defendant did not make 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: JANUARY 30, 2018

CLERK

Friedman, J.P., Gische, Mazzarelli, Kern, Singh, JJ.

5563 The People of the State of New York, Respondent, Ind. 1052N/14

-against-

Kevin Jones, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Michael R. Sonberg, J.), rendered September 29, 2015, 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: JANUARY 30, 2018

CLERK

Friedman, J.P., Gische, Mazzarelli, Kern, Singh, JJ.

5565-
5566 The People of the State of New York,
Appellant,

-against-

Omar Deleon,
Defendant-Respondent.

Ind. 676/16

_____

Darcel D. Clark, District Attorney, Bronx (Catherine M. Reno of counsel), for appellant.

Seymour W. James, Jr., The Legal Aid Society, New York (Kalle Condliffe of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Denis J. Boyle, J.), entered on or about November 16, 2016, which, upon granting reargument, adhered to an order (same court and Justice), entered on or about July 8, 2016, which dismissed a count of the indictment charging attempted grand larceny in the third degree, and reduced a count charging attempted grand larceny in the fourth degree to attempted petit larceny, unanimously reversed, on the law, defendant's motion to dismiss or reduce the indictment denied, and the matter remanded for further proceedings. Appeal from the order entered on or about July 8, 2016 unanimously dismissed as superseded by the appeal taken from the order entered on or about November 16, 2016.

The evidence before the grand jury indicated that defendant

was apprehended before he extracted a "fishing" device – a water bottle coated in a sticky substance so that envelopes would adhere to it – from a mail collection box. Unbeknownst to defendant, a joint police-postal service task force had inserted slightly more than $3000 in money orders into this mailbox, and had it under surveillance. It is undisputed that no evidence was presented as to whether any of the envelopes found stuck to the device when defendant was arrested contained any of the planted money orders.

The court erred in dismissing one count of the indictment, and reducing another, on the ground that the People were required to present proof of intent with regard to the property value elements of attempted grand larceny in the third and fourth degrees. These elements are strict liability aggravating factors when the completed crimes are charged. While the Penal Law definitions of attempt (Penal Law § 110.00) and intentionally (Penal Law § 15.05[1]) may be susceptible to the interpretation accorded them by the motion court, any ambiguity has been resolved by the Court of Appeals' holding in *People v Miller* (87 NY2d 211 [1995]), that a strict liability aggravating factor of a completed crime is not a "result" to which an intent requirement attaches when an attempt to commit the completed crime is charged. Accordingly, the mental culpability requirements for an

attempt and a completed crime are identical (*see People v Lamont*, 25 NY3d 315 [2015]), and the court erred in finding that the attempted grand larceny charges required evidence of intent to steal property of a certain value.

We also reject defendant's argument that, independent of intent or knowledge as to value, the grand jury evidence failed to show that he intended to steal all the mail in the mailbox, and therefore failed to even support strict liability for intent to steal property that, in fact, exceeded the value thresholds. Under the relatively permissive standard for sufficiency of grand jury evidence (*see People v Jennings*, 69 NY2d 103, 114 [1986]), the evidence, including defendant's admission that he was being paid one hundred dollars per mailbox for his fishing expedition, established a prima facie case that it was defendant's object to remove as much mail as possible from the mailbox.

We decline to revisit this Court's prior order, which denied defendant's motion for disclosure of grand jury minutes.

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

ENTERED: JANUARY 30, 2018

CLERK

Friedman, J.P., Gische, Mazzarelli, Kern, Singh, JJ.

5567 The People of the State of New York, Respondent, SCI 1751/15

-against-

Terry Cicio,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Samuel E. Steinbock-Pratt of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Jennifer L. Watson of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Marc J. Whiten, J.), rendered January 4, 2016, convicting defendant, upon his plea of guilty, of robbery in the second degree, and sentencing him, as a second violent felony offender, to a term of eight years, unanimously affirmed.

The record sufficiently establishes that defendant's waiver of indictment and prosecution by superior court information satisfied the requirement that a "criminal court has held the defendant for the action of a grand jury" (CPL 195.10). The record demonstrates that upon defendant's waiver of the case to the grand jury (*see* CPL 180.30[1]), the court, sitting as a hybrid part, transferred the case from its Criminal Court capacity to its Supreme Court capacity, thereby effectively ordering defendant held for grand jury action (*see People v*

Yunga, 122 AD3d 951 [2d Dept 2014], *lv denied* 25 NY3d 993 [2015]; *People v Davenport*, 106 AD3d 1197 [3d 2013], *lv denied* 21 NY3d 1073 [2013]).

The court properly exercised its discretion in summarily denying defendant's motion to withdraw his plea made pro se while represented by counsel (*see People v Frederick*, 45 NY2d 520 [1978]). "[T]he nature and extent of the fact-finding procedures on such motions rest largely in the discretion of the court" (*People v Fiumefreddo*, 82 NY2d 536, 544 [1993]). Defendant submitted only a generalized standard form motion without inserting any specific allegations, and there was nothing to cast doubt on the voluntariness of the plea.

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

ENTERED: JANUARY 30, 2018

CLERK

Friedman, J.P., Gische, Mazzarelli, Kern, Singh, JJ.

5568N Cecil R.A. Newyear, Index 303495/16
Plaintiff-Appellant,

-against-

Beth Abraham Nursing Home,
Defendant-Respondent.

_____

Law Office of Roger M. Newyear, Bronx (Roger M. Newyear of counsel), for appellant.

Vaslas Lepowsky Hauss & Danke LLP, Staten Island (Kenneth M. Dalton of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered January 13, 2017, which denied plaintiff's motion for a default judgment, and granted defendant's cross motion to compel plaintiff to accept its answer, unanimously affirmed, without costs.

The motion court providently exercised its discretion in denying plaintiff resident's motion and granting defendant nursing home's cross motion to compel plaintiff to accept its answer (CPLR 3012[d]), which was served eight days late and before plaintiff moved for entry of a default judgment. In support of its cross motion, defendant explained that the brief delay resulted from its attempts to obtain a complete copy of the complaint before answering. This excuse was sufficient under the circumstances (*see id.; see also Yea Soon Chung v Mid Queens*

LP, 139 AD3d 490 [1st Dept 2016]).

Defendant also submitted an affidavit of its vice-president, who asserted that defendant had appropriate procedures in place to prevent plaintiff's fall, which was sufficient at this stage of the proceedings to set forth a potentially meritorious defense (*see* 139 AD3d at 490).

The shortness of the delay and absence of evidence of willfulness or prejudice to plaintiff, as well as the State's policy of resolving disputes on the merits, warranted denial of the motion and grant of the cross motion (*see id.*; *see also Marine v Montefiore Health Sys., Inc.*, 129 AD3d 428 [1st Dept 2015]).

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

ENTERED: JANUARY 30, 2018

CLERK

Friedman, J.P., Gische, Mazzarelli, Kern, Singh, JJ.

5569 In re Kai Watkins, Ind. 2233/13
[M-6416] Petitioner, OP 133/17

-against-

The Division of Criminal
Justice Services, et al.,
Respondents.

_____

Kai Watkins, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Angel M. Guardiolla II of counsel), for the Division of Criminal Justice Services and Hon. Lester B. Adler, respondents.

Darcel D. Clark, District Attorney, Bronx (Noah B. Adler of counsel), for Hon. Darcel D. Clark, 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: JANUARY 30, 2018

CLERK