SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 12, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Andrias, Saxe, Richter, Clark, JJ.

11332 The People of the State of New York, Dkt. 47217/09
Respondent,

-against-

Espasien Dauphin,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Michael R. Sonberg, J.), rendered August 29, 2011, convicting defendant, after a jury trial, of operating a motor vehicle while under the influence of alcohol, and sentencing him to a term of three years' probation and a $1000 fine, unanimously affirmed.

The court properly denied defendant's speedy trial motion. The motion turns on an adjournment that the court properly excluded because the People's statement on the morning of June 2 that "we are ready at 2:15" constituted a statement of present

readiness. Actual readiness does not require that the People be able to call their first witness to the stand at the very moment they represent that they are ready (*see People v Wilson*, 86 NY2d 753 [1995]; *People v Camillo*, 279 AD2d 326 [1st Dept 2001]; *People v Dushain*, 247 AD2d 234, 236 [1998], *lv denied* 91 NY2d 1007 [1998]). The People's representation that they would be prepared to proceed with trial that afternoon – which defendant does not contradict – showed that they had "done all that is required of them to bring the case to a point where it may be tried" (*People v England*, 84 NY2d 1, 4 [1994]). In any event, the adjournment was not chargeable to the People because defense counsel specifically requested an adjournment (*see* CPL 30.30[4][b]).

The court properly allowed the trained officer who operated an Intoxilyzer machine to testify to the meaning of an "insufficient sample" message, i.e., that the appearance of this message indicates that the blood alcohol content score generated by the machine represented the tested individual's lowest possible blood alcohol content. This testimony amounted to

reporting the results of the test, which, once a proper foundation had been laid, was permissible without expert testimony (*see People v Mertz*, 68 NY2d 136, 148 [1986]).

We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 12, 2013

CLERK

Gonzalez, P.J., Andrias, Saxe, Clark, JJ.

11334 Philip Seldon, Index 101656/12
Plaintiff-Appellant,

-against-

Cheyenne Crow, et al.,
Defendants-Respondents.

_____

Philip Seldon, appellant pro se.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered August 7, 2012, which, after a traverse hearing, granted defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

There exists no basis to disturb the hearing court's determination, based on an assessment of the witnesses' credibility, that service was not properly effected upon defendants by the process server (*cf. Pressley v Shneyer*, 56 AD3d 263 [1st Dept 2008]). Contrary to plaintiff's contention, defendant Crow did not admit at the traverse hearing to receiving proper service of the process in the instant action. Rather, the record shows that Crow, while admitting to being served (on a date plaintiff denies having served Crow), never said that the service was in any way related to the instant action, as opposed to the numerous other proceedings between these parties.

Furthermore, Crow's statement in a paper denominated "Answer to Summons with Notice for Default Judgment," that he was served, does not warrant a different conclusion. The document is unsigned and unsworn and does not constitute a formal, or even an informal judicial admission (*see generally People v Brown*, 98 NY2d 226, 232 n 2 [2002]).

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: DECEMBER 12, 2013

CLERK

Gonzalez, P.J., Andrias, Saxe, Richter, Clark, JJ.

11335 The People of the State of New York, Ind. 4466/10
Respondent,

-against-

Lorenzo Bailey,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Nancy E. Little of counsel), for appellant.

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Richard Carruthers, J.), rendered on or about September 23, 2011,

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

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

ENTERED: DECEMBER 12, 2013

CLERK

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

Gonzalez, P.J., Andrias, Saxe, Richter, Clark, JJ.

11336 David Rodriguez, et al., Index 303336/08
Plaintiffs-Appellants,

-against-

CMB Collision Inc., et al,
Defendants-Respondents,

Denilson E. Rodriguez,
Defendant.

_____

Law Office of Sandra M. Prowley and Associates, LLC, Bronx (Sandra M. Prowley of counsel), for appellants.

DeSena & Sweeney, LLP, Bohemia (Shawn P. O'Shaughnessy of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered October 10, 2012, which, insofar as appealed from as limited by the briefs, denied plaintiff's cross motion for summary judgment on the issue of liability against defendants CMB Collision Inc. and Joseph Falco s/h/a Falco Joseph, (collectively respondents), and granted respondents' motion for summary judgment dismissing the complaint as against them, unanimously modified, on the law, respondents' motion denied, and otherwise affirmed, without costs.

Respondents were not entitled to judgment as a matter of law in this action where plaintiffs were injured when the car in

which they were passengers was struck by a tow truck owned by respondent CMB Collision Inc. and driven by respondent Falco. The record shows that although the car in which plaintiffs were riding, which was being driven by defendant Rodriguez, was struck while Rodriguez was making an illegal U-turn across two lanes of traffic (*see* Vehicle and Traffic Law § 1160[e]), eyewitness testimony estimated Falco's speed at the time of the accident to be between 30 and 40 miles per hour, and Falco himself testified that he did not see defendant Rodriguez's vehicle until the time of impact. Accordingly, "triable issues of fact remain as to whether the motor vehicle accident resulted in part from any failure of [Falco] to exercise due care (by driving at an excessive speed or by failing to observe [Rodriguez's] vehicle) and, if so, in what proportion" (*Calcano v Rodriguez*, 91 AD3d 468, 468 [1st Dept 2012]; *see Thoma v Ronai*, 82 NY2d 736 [1993]; *Antaki v Mateo*, 100 AD3d 579 [2d Dept 2012]).

Plaintiffs, however, were not entitled to summary judgment

on the issue of liability as against respondents. Under the circumstances presented, a jury could reasonably conclude that the driving of defendant Rodriguez was the sole proximate cause of the accident.

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

ENTERED: DECEMBER 12, 2013

CLERK

Gonzalez, P.J., Andrias, Saxe, Richter, Clark, JJ.

11337 In re Richman Plaza Garage Corp., Index 260013/12
Petitioner-Appellant,

-against-

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

_____

Lazarus Lazarus & Winston, Bronx (Jason K. Fuhrman of counsel), for appellant.

Eric T. Schneiderman, Attorney General, New York (Patrick J. Walsh of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered on or about June 12, 2012, denying the petition to annul the determination of respondent, New York State Division of Housing and Community Renewal (DHCR), dated September 16, 2011, which approved an increase in the monthly parking rate for tenants of a Mitchell-Lama development, and, inter alia, to order DHCR to consider petitioner's request for higher rates, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The Mitchell-Lama Law (Private Housing Finance Law art II) provides financial incentives to landlords who develop low- and middle-income housing in exchange for their agreement to the

regulation of their rents and profits (*see id.* § 11; *see also Matter of Columbus Park Corp. v Department of Hous. Preserv. & Dev. of City of N.Y.*, 80 NY2d 19 [1992]). These regulations include the requirement that housing companies obtain DHCR's approval before leasing any part of their real property (Private Housing Finance Law § 27[4][c]), including facilities "incidental and appurtenant" to housing accommodations, such as parking garages (*id.* § 12[5]; *see also* Multiple Dwelling Law § 60[b]).

Petitioner, a commercial tenant that operates a garage located on a Mitchell-Lama development owned by a limited-profit housing company, concedes that DHCR is authorized to regulate the rates that the housing company may charge its residential tenants for parking (*see* 9 NYCRR 1727-6.1). Its argument is that DHCR's authority is limited to the circumstances in which the housing company itself operates the garage. There is no rational basis for so limiting DHCR's authority. Allowing housing companies to avoid DHCR's oversight by leasing their garages to others who could set their own rates would contravene the purpose of the statute and regulations, which is to serve low-income tenants by keeping their housing and ancillary expenses affordable.

DHCR's determination approving the nearly 80% increase in the monthly parking rate is rationally based and is not arbitrary

and capricious (*see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]; *see also Matter of Ansonia Residents Assn. v New York State Div. of Hous. & Community Renewal*, 75 NY2d 206 [1989]). Petitioner's dissatisfaction with the way in which the housing company has processed its requests for a parking rate increase is not a basis for altering DHCR's procedures set forth in its Management Bureau Memorandum #76-C-2.

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

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

ENTERED: DECEMBER 12, 2013

CLERK

Gonzalez, P.J., Andrias, Saxe, Richter, Clark, JJ.

11338 Frederick B. Whittemore, Index 600742/10
Plaintiff-Respondent,

-against-

Edwin H. Yeo, III, et al.,
Defendants,

Yeo Farms, L.L.C.,
Defendant-Appellant.

_____

Kasowitz Benson Torres & Friedman LLP, New York (Olga L. Fuentes-Skinner of counsel), for appellant.

Holm & O'Hara LLP, New York (William P. Holm of counsel), for respondent.

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Judgment, Supreme Court, New York County (Richard F. Braun, J.), entered June 1, 2012, awarding plaintiff damages, and bringing up for review an order, same court and Justice, entered June 1, 2012, which, to the extent appealed from as limited by the briefs, severed plaintiff's unjust enrichment cause of action and directed that the Clerk enter a default judgment thereupon in favor of plaintiff as against defendant Yeo Farms, L.L.C. (Yeo Farms) in the amount of $1,182,546.00 together with interest from August 13, 2009, unanimously affirmed, with costs.

Documentary evidence in the form of, inter alia, letters of credit drawn on plaintiff's personal investment account to

guaranty a loan obligation undertaken by Yeo Farms, together with plaintiff's inquest testimony, established a prima facie claim that Yeo Farms was unjustly enriched, at plaintiff's expense, when Yeo Farms defaulted on its loan obligation and monies were drawn from plaintiff's personal account to cover the principal owing by Yeo Farms in accordance with the terms of the letters of credit, including attendant bank fees (*see generally Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511 [2012]). The fair import of the whole of plaintiff's inquest testimony, viewed in relation to the chronology of the parties' eventual partnership regarding an unrelated investment venture, made clear that plaintiff had made the guaranty as a favor to his then friend, defendant Edwin Yeo, who was the principal of Yeo Farms. The parties' arrangement as to the guaranty was not shown to be grounded in any contractual agreement as between them and, as such, plaintiff's unjust enrichment claim remained a viable cause of action (*see generally IIG Capital LLC v Archipelago, L.L.C.*, 36 AD3d 401 [1st Dept 2007]).

Yeo Farms's argument that plaintiff's unjust enrichment claim was untimely asserted is unavailing, as Yeo Farm's default in appearing in the action waived any affirmative defenses (*see Marine Midland Bank v Worldwide Indus. Corp.*, 307 AD2d 221 [1st

Dept 2003]). In any event, even assuming Yeo Farms had timely asserted a statute of limitations defense, plaintiff's obligations on the guaranty did not accrue until Yeo Farms defaulted on the loan in May 2009, and plaintiff commenced the instant action in March 2010, well within the applicable six-year "catchall" statute of limitations for bringing an unjust enrichment claim (*see generally* CPLR 213; *Maya NY, LLC v Hagler*, 106 AD3d 583 [1st Dept 2013]; *Parrish v Unidisc Music, Inc.*, 68 AD3d 566 [1st Dept 2009]).

To the extent Yeo Farms argues that plaintiff had a duty to mitigate damages in relation to its seventh cause of action, Yeo Farms has failed in its burden to demonstrate plaintiff's failure to mitigate, including the extent to which damages allegedly could have been litigated (*see generally Cornell v T.V. Development Corp.*, 17 NY2d 69 [1966]). In any event, the damages questioned were due pursuant to the terms of letters of credit whose sums were certain, together with attendant bank fees that were readily calculable pursuant to the participating bank's

letter of credit fee terms (*see generally* CPLR 3215[a]; *Reynolds Sec. v Underwriters Bank & Trust Co.*, 44 NY2d 568, 572 [1978]).

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

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

ENTERED: DECEMBER 12, 2013

CLERK

Gonzalez, P.J., Andrias, Saxe, Richter, Clark, JJ.

11341 The People of the State of New York, Ind. 1267/11
Respondent,

-against-

Lucy Yukhan,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Kristina Schwarz of counsel), for appellant.

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Patricia Nunez, J.), rendered on or about September 8, 2011,

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

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

ENTERED: DECEMBER 12, 2013

CLERK

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

Gonzalez, P.J., Andrias, Saxe, Richter, Clark, JJ.

11342- Index 117294/08
11342A-
11342B
11342C In re 91st Street
Crane Collapse Litigation

- - - - -

Donald R. Leo, etc.,
Plaintiff-Respondent,

-against-

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

New York Crane & Equipment Corp., et al.,
Defendants-Appellants.

- - - - -

Leon D. DeMatteis Construction Corp.,
Third-Party Plaintiff,

-against-

Sorbara Construction Corp.,
Third-Party Defendant-Appellant.

[And All Related Actions]

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Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Judy C. Selmeci of counsel), for New York Crane & Equipment Corp., James F. Lomma, James F. Lomma Inc. and TES Inc., appellants.

Nicoletti Hornig & Sweeney, New York (Scott D. Clausen of counsel), for 1765 First Associates, LLC, appellant.

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Marcia K. Raicus of counsel), for Leon D. DeMatteis Construction Corp., appellant.

Cartafalsa, Slattery, Turpin & Lenoff, New York (B. Jennifer Jaffee of counsel), for Sorbara Construction Corp., appellant.

Bernadette Panzella, P.C., New York (Bernadette Panzella of counsel), for respondent.

Orders, Supreme Court, New York County (Manuel J. Mendez, J.), entered April 10, 2013, which, inter alia, denied defendants-respondents' motions to strike plaintiff's demand for a jury trial, unanimously affirmed, without costs.

Plaintiff seeks money damages for the wrongful death of her decedent, and "a sum of money alone can provide full relief to [her] under the facts alleged" (*see Murphy v American Home Prods. Corp.*, 136 AD2d 229, 232 [1st Dept 1988]; CPLR 4101[1]). Contrary to defendants-respondents' contention, "plaintiff's ritualistic use in the prayer for relief of the language 'and such other and further relief as to this court seems just and proper', does not change the legal character of the relief demanded" (*id.* at 233).

Plaintiff's request for sanctions on appeal is denied.

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

ENTERED: DECEMBER 12, 2013

CLERK

Gonzalez, P.J., Andrias, Saxe, Richter, Clark, JJ.

11344 In re 91st Street Crane Collapse Litigation — Index 117469/08, 117294/08, 771000/10

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Xhevahire Sinanaj, as Co-Administrator of the Estate of Ramadan Kurtaj, Deceased,
Plaintiff-Respondent,

Selvi Sinanovic, as Co-Administrator of the Estate of Ramadan Kurtaj, Deceased, etc.,
Plaintiff,

-against-

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

Michael Carbone, et al.,
Defendants.

[And Third-Party Actions]

- - - - -

11343 In re 91st Street Crane Collapse Litigation

- - - - -

Maria Leo, etc.,
Plaintiff-Respondent,

-against-

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

Michael Carbone, et al.,
Defendants.

[And Third-Party Actions]

_____

Fabiani Cohen & Hall, LLP, New York (John V. Fabiani of counsel), for appellants.

Susan M. Karten & Associates, LLP, New York (Susan M. Karten of counsel), for Xhevahire Sinanaj, respondent.

Bernadette Panzella, P.C., New York (Bernadette Panzella of counsel), for Maria Leo, respondent.

Orders, Supreme Court, New York County (Manuel J. Mendez, J.), entered May 14, 2013, which denied the City defendants' motions for summary judgment dismissing the Labor Law § 240 claims as against them, unanimously reversed, on the law, without costs, and the motions granted.

The City defendants established prima facie that they were not owners under Labor Law § 240(1) (*see Scaparo v Village of Ilion*, 13 NY3d 864 [2009]). The City had transferred ownership of the construction site to the New York City Education Construction Fund, a State agency, nearly a year and a half before the May 2008 crane accident in which plaintiffs' decedents were killed, and had neither retained nor exercised any ownership rights with respect to the property or the construction project. In opposition, plaintiffs rely on *Vigliotti v Executive Land Corp.* (186 AD2d 646, 647 [2d Dept 1992]), in which the transfer

of a deed was found to be "nothing more than a financing mechanism, not a genuine transfer of ownership." However, nothing in the record before us casts doubt on the genuineness of the City's transfer of ownership in this case.

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

ENTERED: DECEMBER 12, 2013

CLERK

Gonzalez, P.J., Andrias, Saxe, Richter, Clark, JJ.

11345-
11345A The People of the State of New York,
Respondent,

-against-

Nelson Cruz,
Defendant-Appellant.

Ind. 877/07
3783/08

_____

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

Robert T. Johnson, District Attorney, Bronx (David P. Johnson of counsel), for respondent.

_____

Judgments, Supreme Court, Bronx County (Joseph Dawson, J.), rendered September 9, 2011, convicting defendant, upon his pleas of guilty, of criminal possession of a weapon in the second degree and two counts of criminal sale of a controlled substance in the third degree, and sentencing him to an aggregate term of 15 years, unanimously modified, on the law, to the extent of reducing the mandatory surcharge from $300 to $250 and reducing the crime victim assistance fee from $25 to $20, and otherwise affirmed.

Defendant knowingly, intelligently and voluntarily pleaded guilty, and the court properly denied defendant's plea withdrawal motion. There is no evidence that defendant was under the

influence of any medication during the plea proceeding. On the contrary, the court thoroughly questioned him about this subject during the plea colloquy and established defendant's competence to plead guilty. In denying the plea withdrawal motion, the court also relied on its recollection of defendant's demeanor during the plea proceeding. This was entirely appropriate (*see People v Alexander*, 97 NY2d 482, 486 [2002]), and it did not constitute speculation about medical matters beyond the court's knowledge.

Defendant made a valid waiver of his right to appeal (*see People v Ramos*, 7 NY3d 737 [2006]; *People v Lopez*, 6 NY3d 248 [2006]; *compare People v Bradshaw*, 18 NY3d 257, 259 [2011]). The court did not conflate the right to appeal with the rights automatically forfeited by pleading guilty. Instead, it separately explained to defendant that as part of his plea bargain, he was agreeing to waive his right to appeal, and defendant confirmed that he understood this. The court also gave defendant sufficient information about the promised sentence, and defendant's argument to the contrary is without merit.

The valid waiver forecloses review of defendant's suppression and excessive sentence claims. As an alternative holding (*see People v Callahan*, 80 NY2d 273, 285 [1992]), we

find that the suppression motion was properly denied, and that the sentence was not excessive. However, as the People concede, since defendant committed the crime at issue before the effective date of the legislation increasing the mandatory surcharge and crime victim assistance fee, defendant's sentence is unlawful to the extent indicated (*see People v Reeves*, 6 AD3d 231 [1st Dept 2004]).

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

ENTERED: DECEMBER 12, 2013

CLERK

Gonzalez, P.J., Andrias, Saxe, Richter, Clark, JJ.

11346 In re Zakeima M.B.,
Petitioner-Respondent,

-against-

Wesley B.,
Respondent-Appellant.

_____

Anne Reiniger, New York, for appellant.

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Order, Family Court, New York County (Diane Costanzo, Referee), entered on or about March 5, 2013, which found, after a hearing, that respondent had committed the family offense of disorderly conduct, directed him to stay away from petitioner Zakeima B.'s home and place of employment for a period of one year, except for incidental contact between the parties to effectuate the Family Court's order of visitation with the parties' minor child, unanimously affirmed, without costs.

The determination that respondent committed the family offense of disorderly conduct was supported by a fair preponderance of the credible evidence (*see* Family Court Act § 832; Penal Law § 240.20). Respondent's intent to cause public inconvenience, annoyance or alarm, or recklessly create a risk thereof, could be readily inferred from the circumstances (*see People v Baker*, 20 NY3d 354, 360 [2013]). The credible evidence

established that the intoxicated respondent went to petitioner's building uninvited on a Sunday night, and, when refused entry into petitioner's apartment, used profanity as he yelled at her through her door from inside of the public hallway for fifteen minutes, and stepped on a bag of food that had been delivered to petitioner's apartment. Respondent's conduct was so disruptive that it prompted petitioner's neighbors to contact her to verify that she was safe, and drew respondent's friends to the scene to intervene after they heard the disturbance in the background when they called respondent on his cell phone. There is no basis for disturbing the credibility determinations made by the Referee (*see Matter of Marisela N. v Lacy M.S.*, 101 AD3d 425, 426 [1st Dept 2012]).

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

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

ENTERED: DECEMBER 12, 2013

CLERK

Gonzalez, P.J., Andrias, Saxe, Richter, Clark, JJ.

11347 Site Five Housing Development Fund Corporation,
Plaintiff-Respondent,

-against-

Estate of Eldon Bullock,
Defendant,

Nasser Abdo Alomari,
Defendant-Appellant.

Index 112515/07

Jeffrey H. Roth, New York, for appellant.

David P. Stich, New York, for respondent.

Order and judgment (one paper), Supreme Court, New York County (Shirley Werner Kornreich, J.), entered April 18, 2013, which, insofar as appealed from as limited by the briefs, awarded plaintiff damages as against defendant Nasser Abdo Alomari, declared a December 2001 amendment to a store lease null and void, and awarded plaintiff possession of premises located at 829 Tenth Avenue, unanimously affirmed, without costs.

Alomari failed to prove that former defendant Eldon Bullock (plaintiff's president) had authority as plaintiff's agent to enter into the December 2001 amendment (*see Sponge Rubber Prods. Co. v Purofied Down Prods. Corp.*, 281 App Div 380, 382 [1st Dept 1953], *affd* 306 NY 776 [1954]). It is undisputed that Bullock

did not have express actual authority to enter into the amendment. Nor did he have implied actual authority, since there is no credible evidence in the record that plaintiff performed verbal or other acts that gave Bullock the reasonable impression that he had authority to enter into the amendment (*see Greene v Hellman*, 51 NY2d 197, 204 [1980]).

Alomari relies on *Riverside Research Inst. v KMGA, Inc.* (108 AD2d 365, 370 [1st Dept 1985], *affd* 68 NY2d 689 [1986]) for the proposition that "an agency may be implied from the parties' words and conduct as construed in light of the surrounding circumstances." However, he fails to identify any words, conduct or circumstances from which an agency could be implied here. Moreover, although in the circumstances in *Riverside* the parties' words and conduct permitted an inference of agency, the case stands for the proposition that where an agent exceeds its authority, so that its principal is not bound, the agent is liable for any damage to the third party.

As for apparent authority, there is no credible evidence that plaintiff said anything to Alomari or did anything that would cause Alomari to believe that Bullock had authority to enter into the amendment (*see Hallock v State of New York*, 64 NY2d 224, 231 [1984]).

Alomari contends that plaintiff ratified the amendment because it did not seek to set it aside until September 2007. However, plaintiff did not know about the amendment until months after May 2006.

Alomari argues that plaintiff's sole remedy for nonpayment of rent was to commence a summary nonpayment proceeding in Civil Court after service of a statutory rent demand. However, Article 17(2) of Alomari's February 1996 lease with plaintiff provides that, upon Alomari's default in payment of rent, plaintiff "may *without notice* ... dispossess [Alomari] by summary proceedings *or otherwise*" (emphasis added).

Alomari contends that plaintiff is not entitled to a judgment of possession because it failed to plead a cause of action for ejectment. However, plaintiff's prayer for relief requested "judgment dispossessing Alomari ... as the tenant of the Deli Premises."

Alomari argues that equity abhors the forfeiture of a lease. However, one who seeks equity must do equity and must come with clean hands (*see* 55 NY Jur 2d, Equity §§ 93-112), and Alomari does not satisfy these criteria.

Alomari contends that, by accepting payments that were less than the amounts specified in the lease, plaintiff ratified his

actual payments. In light of Article 24 of the lease, this argument is without merit (*see Jefpaul Garage Corp. v Presbyterian Hosp. in City of N.Y.*, 61 NY2d 442, 445-446 [1984]).

Relying on Administrative Code of City of NY § 24-335, *Pabst Brewing Co. v Oakley* (115 App Div 215 [1st Dept 1906]), and *Healy v City of New York* (90 App Div 170 [1st Dept 1904]), Alomari argues that the portion of the damages award that compensates for water charges cannot stand because it was not based on actual meter readings. The authorities cited by Alomari all deal with charges imposed by the City on landowners; they do not involve disputes between landlords and tenants over water charges. In any event, "[a] person violating his contract should not be permitted entirely to escape liability because the amount of the damages which he has caused is uncertain" (*Wakeman v Wheeler & Wilson Mfg. Co.*, 101 NY 205, 209 [1886]). The reason that there are no actual meter readings is that Alomari, in violation of his

lease, failed to install a water meter for his deli.

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

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

ENTERED: DECEMBER 12, 2013

CLERK

Gonzalez, P.J., Andrias, Saxe, Richter, Clark, JJ.

11349 The People of the State of New York, Ind. 58816C/04
Respondent,

-against-

Ajene Moore,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Ravi Kantha of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Alvin M. Yearwood, J.), entered April 30, 2012, which denied defendant's CPL 440.46 motion for resentencing, unanimously affirmed.

The court properly exercised its discretion in determining that substantial justice dictated denial of the motion (*see generally People v Gonzalez*, 29 AD3d 400 [2006], *lv denied* 7 NY3d 867 [2006]). Defendant's history of recidivism, while enrolled in the drug treatment program he attended as part of his plea agreement, and while on parole, outweighed the modest positive

factors cited by defendant in support of his motion (*see e.g. People v Spann*, 88 AD3d 597 [1st Dept 2011], *lv denied* 18 NY3d 886 [2012]).

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

ENTERED: DECEMBER 12, 2013

CLERK

Gonzalez, P.J., Andrias, Saxe, Richter, Clark, JJ.

11350 Schindler Elevator Corporation, Index 108729/11
Plaintiff-Appellant,

-against-

New York City Housing Authority,
Defendant-Respondent.

_____

Law Offices of Edward Weissman, New York (Edward Weissman of counsel), for appellant.

Kelly D. MacNeal, New York (Paul A. Marchisotto of counsel), for respondent.

_____

Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered January 9, 2013, which granted defendant's motion to dismiss the complaint, unanimously affirmed, without costs.

As plaintiff does not contest on appeal, it failed to comply with the contractual requirement that a notice of claim be submitted within 20 days after the claim arose. Even under plaintiff's theory that its claim arose when its request for payment was denied by defendant on November 30, 2010, the notice of claim allegedly filed on July 12, 2011 is untimely. The failure to meet this express "condition precedent to commencing an action pursuant to section 23 of the parties' contract" warrants dismissal of the complaint (*see Everest Gen. Contrs. v New York City Hous. Auth.*, 99 AD3d 479, 479 [1st Dept 2012]).

Plaintiff's argument that the contractual provision which shortened the applicable statute of limitations to one year is ambiguous, although not previously raised, may be reached on appeal since "it poses a question of law that could not have been avoided if raised before the motion court" (*Delgado v New York City Bd. of Educ.*, 272 AD2d 207 [1st Dept 2000], *lv denied* 95 NY2d 768 [2000], *cert denied* 532 US 982 [2001]). The provision, although perhaps inartfully drafted, is not ambiguous. Plaintiff's claim is barred by the statute of limitations, which pursuant to the contract, began to run on June 15, 2011, the date of termination of the contract (*see* CPLR 201). Thus, the statue expired prior to plaintiff's commencement of this action, more than one year later, on July 28, 2011.

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

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

ENTERED: DECEMBER 12, 2013

CLERK

Gonzalez, P.J., Andrias, Saxe, Richter, Clark, JJ.

11351N Interboro Insurance Company, Index 303562/12
Plaintiff-Appellant,

-against-

Dahiana Perez, et al.,
Defendants,

KHL Acupuncture, P.C., et al.,
Defendants-Respondents.

_____

The Law Office of Jason Tenenbaum, P.C., Garden City (Jason Tenenbaum of counsel), for appellant.

Law Offices of Melissa Betancourt, P.C., Brooklyn (Melissa Betancourt of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered April 12, 2013, which denied plaintiff's motion for leave to enter a default judgment against all defendants and granted the cross motion of defendants-respondents KHL Acupuncture, P.C. and South Shore Osteopathic Medicine, P.C., to compel acceptance of their answers, unanimously affirmed, without costs.

In this action for a declaration that no-fault insurance coverage does not exist, based solely on defendant Perez's failure to appear for an examination under oath (EUO), the motion court providently exercised its discretion in granting defendants-respondents' cross motion to compel plaintiff to

accept their belated answers (*see* CPLR 3012[d]). The affirmation from respondents' attorney sufficiently explained that the minimal delay was due to a computer inputting error in her office (*Smoke v Windermere Owners*, LLC, 109 AD3d 742 [1st Dept 2013]; *Goldman v Cotter*, 10 AD3d 289, 291 [1st Dept 2004]). We note that respondents' counsel acted promptly upon discovering the error, there is no history of willful neglect, and plaintiff suffered no prejudice.

Contrary to plaintiff's contention, a meritorious defense is not required to obtain relief under CPLR 3012(d) (*see Smoke*, 109 AD3d at 289). In any event, respondents made such a showing by demonstrating that there is insufficient evidence that defendant Perez was properly notified of the EUOs. The affidavit of service submitted in support of plaintiff's motion for a default judgment was insufficient to satisfy its burden of establishing that the EUO scheduling letters were mailed in accordance with the No-Fault implementing regulations (*see Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 AD3d 559, 560 [1st Dept 2011], *lv denied* 17 NY3d 705 [2011]). Plaintiff also failed to provide objective proof of mailing establishing that the letters were mailed to Perez (*see Szaro v New York State Div. of Hous. & Community Renewal*, 13 AD3d 93, 94 [1st Dept 2004]). Accordingly,

the motion court also properly denied plaintiff's motion for a default judgment (*see* CPLR 3215[f]).

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

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

ENTERED: DECEMBER 12, 2013

CLERK

Gonzalez, P.J., Andrias, Saxe, Richter, Clark, JJ.

11352N Avi Dishi, et al., Index 650380/12
Plaintiffs-Respondents,

-against-

Federal Insurance Company,
Defendant,

Goodhart National Gorman
Agency, Inc., et al.,
Defendants-Appellants.

_____

Keidel, Weldon & Cunningham, LLP, White Plains (Robert W. Lewis of counsel), for appellants.

Newman Myers Kreines Gross Harris, P.C., New York (Adrienne Yaron of counsel), for respondents.

_____

Order, Supreme Court, New York County (Ellen M. Coin, J.), entered May 22, 2013, which, insofar as appealed from as limited by the briefs, denied defendants Goodhart National Gorman Agency, Inc. and Michael Berr's cross motion to disqualify plaintiff's counsel without prejudice to renew at the close of discovery, unanimously affirmed, without costs.

On a motion for disqualification, "[t]he challenging party carries a heavy burden of identifying the projected testimony of the advocate-witness and demonstrating how it would be so adverse to the factual assertions or account of events offered on behalf of the client as to warrant his [or her] disqualification"

(*Broadwhite Assoc. v Truong*, 237 AD2d 162, 163 [1st Dept 1997] [internal quotation marks omitted]). "Disqualification [under the advocate-witness rule] may be required only when it is likely that the testimony to be given by the witness is necessary. Testimony may be relevant and even highly useful but still not strictly necessary. A finding of necessity takes into account such factors as the significance of the matters, weight of the testimony, and availability of other evidence" (*S & S Hotel Ventures Ltd. Partnership v* 777 *S. H. Corp.*, 69 NY2d 437, 445-446 [1987] [internal citation omitted]).

Here, while discovery may establish the substance and necessity of the testimony of plaintiffs' attorney so as to permit disqualification under rule 3.7 of the Rules of Professional Conduct (22 NYCRR 1200.0), the motion court exercised its discretion in a provident manner in denying defendants' cross motion on the ground that it was premature at this stage of the proceedings (*see Harris v Sculco*, 86 AD3d 481 [1st Dept 2011]). Defendants have not adequately demonstrated "what the testimony of the advocate witness is expected to be" (*Phoenix Assur. Co. Of N.Y. v Shea & Co.*, 237 AD2d 157, 157 [1st Dept 1997]), and while the documentary evidence is not conclusive, it is also not complete. At a minimum, the check

purportedly representing the premium payment for the disputed insurance coverage has not been produced.

Although it may be determined at the close of discovery that disqualification is warranted, this should not prevent counsel from pursuing pretrial activities (*see Norman Norell, Inc. v Federated Dept. Stores, Inc.*, 450 F Supp 127, 131 [SD NY 1978]).

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

ENTERED: DECEMBER 12, 2013

CLERK

Friedman, J.P., Sweeny, Acosta, Manzanet-Daniels, JJ.

10920N Joel A. Cook, Index 103397/09
Plaintiff-Appellant,

-against-

HMC Times Square Hotel, LLC, et al.,
Defendants-Respondents.

_____

Caesar & Napoli, New York (Erica B. Tannenbaum of counsel), for appellant.

Wade Clarke Mulcahy, New York (Paul F. Clark of counsel), for respondents.

_____

Order, Supreme Court, New York County (Richard F. Braun, J.), entered May 24, 2012, which, insofar as appealed from as limited by the briefs, denied plaintiff's motion to compel defendants to provide five years of past repair and incident records and one year of subsequent remedial measure and incident records, unanimously modified, on the law and the facts, to permit plaintiff discovery of repair and incident records for a three-year period preceding the accident, through and including records of the subsequent incident on November 15, 2005, and otherwise affirmed, without costs.

"Supreme Court is vested with broad discretion to supervise disclosure and [] its orders in this regard should not be disturbed absent an abuse of that discretion" (*Daniels v City of*

New York, 291 AD2d 260, 260 [1st Dept 2002]). However, limiting disclosure of materials on the issue of prior notice to one year unduly restricts a plaintiff's right to discovery (*id.*). Generally, three years is an appropriate time frame concerning the exchange of past notice evidence (*see Freeman v Hertzoff*, 179 AD2d 363 [1st Dept 1992]); *Matos v City of New York*, 78 AD2d 834 [1st Dept 1980]).

The motion court here improvidently exercised its discretion in limiting plaintiff's discovery of defendants' records for one year prior to the accident, and plaintiff is entitled to Engineer on Duty Reports, Manager on Duty Reports, and Incident Reports involving rooms 1002 or 1012 for a three-year period preceding the accident through and including records of the post-accident incident on November 15, 2005, to the extent those documents are still available. Defendants submitted sufficient evidence that the other documents sought were previously destroyed in the ordinary course of business.

However, the court correctly found that records of defendants' alleged post-accident remedial measures do not fall within any of the recognized exceptions to the general rule that evidence of post-accident repairs is generally inadmissible and may never be admitted to prove an admission of negligence

(*Stolowski v 234 E. 178th St. LLC*, 89 AD3d 549 [1st Dept 2011]). Thus, they are not discoverable.

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

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

ENTERED: DECEMBER 12, 2013

CLERK

Mazzarelli, J.P., Renwick, DeGrasse, Feinman, Gische, JJ.

10938 The Laurel Hill Advisory Group, LLC, Index 651832/11
Plaintiff,

-against-

American Stock Transfer &
Trust Company, LLC, et al.,
Defendants.
- - - - -
John Siemann,
Counterclaim Plaintiff-Appellant,

-against-

The Laurel Hill Advisory Group, LLC, et al.,
Counterclaim Defendants-Respondents.

_____

Skadden, Arps, Slate, Meagher & Flom LLP, New York (David E. Schwartz of counsel), for appellant.

Kramer Levin Naftalis & Frankel LLP, New York (Robert N. Holtzman of counsel), for respondents.

_____

Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered August 27, 2012, which granted the motion brought by counterclaim defendants The Laurel Hill Advisory Group LLC (Laurel Hill), Dr. William Catacosinos, James Catacosinos, and William Catacosinos to dismiss the counterclaims for a declaratory judgment entitling counterclaim plaintiff John Siemann to a membership interest in Laurel Hill, breach of contract, breach of fiduciary duty, promissory estoppel, and

fraud, unanimously modified, on the law, the claims for declaratory judgment, breach of contract, and breach of fiduciary duty reinstated, and otherwise affirmed, without costs.

According counterclaim plaintiff Siemann the benefit of every favorable inference on the allegations (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), we find that he has not conceded that the written operating agreement establishing that he is not a member of Laurel Hill was executed before the alleged oral agreement pursuant to which he maintains he is entitled to a 10% membership interest in the company. Rather, he contests the validity of the document, argues that the counterclaim defendants failed to produce it despite his numerous requests for a written agreement, both prior to the commencement of this litigation as well as in his discovery requests in the main action, and only produced it in support of their motion to dismiss his counterclaims. The dispute over the validity of the written agreement and the inconsistent terms between that agreement and the alleged oral agreement raise factual issues that cannot be resolved at this juncture (*see Parekh v Cain*, 96 AD3d 812, 815 [2d Dept 2012]; *Cottone v Selective Surfaces, Inc.*, 68 AD3d 1038, 1039 [2d Dept 2009]).

Siemann, however, failed to properly plead a claim for

promissory estoppel. He has not shown that it would be unconscionable to deny enforcement of the oral promise that resulted in his resigning from his previous employment to work for Laurel Hill (*see Dalton v Union Bank of Switzerland*, 134 AD2d 174, 176-177 [1st Dept 1987]; *Cunnison v Richardson Greenshields Sec.*, 107 AD2d 50, 53 [1st Dept 1985]), since he alleges that the only contribution he made to obtain a membership interest was his services and he was compensated for those services with a salary.

The fraud claim was also properly dismissed. Siemann argues that this claim is based on the fact that he repeatedly asked for a written agreement and that Dr. Catacosinos represented that he was working on a draft agreement but, as noted above, failed to produce one until after this action was commenced and then produced a document failing to provide for Siemann's 10% interest in the company. Although this shows a misrepresentation regarding the agreement, Siemann fails to argue reasonable reliance on this misrepresentation. To the extent he contends that he reasonably relied on counterclaim defendants' representations that he would have a 10% ownership interest in Laurel Hill, the fraud claim is duplicative of the breach of contract claim (*Manas v VMS Assoc., LLC*, 53 AD3d 451, 453-454 [1st Dept 2008]). The fraud alleged is based on the same facts

that underlie the contract counterclaim, is not collateral to the contract and does not call for damages that would not be recoverable under a contract theory (*see J.E. Morgan Knitting Mills v Reeves Bros.*, 243 AD2d 422 [1st Dept 1997]).

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

ENTERED: DECEMBER 12, 2013

CLERK

Tom, J.P., Mazzarelli, Freedman, Richter, Feinman, JJ.

11066 Kenneth Landfield, Index 105149/11
Plaintiff-Appellant,

-against-

Tamares Real Estate Holdings, Inc., et al.,
Defendants-Respondents.

_____

Kaiser Saurborn & Mair, P.C., New York (Daniel J. Kaiser of counsel), for appellant.

Blank Rome, LLP, New York (Jerry D. Bernstein of counsel), for respondents.

_____

Appeal from order, Supreme Court, New York County (Joan A. Madden, J.), entered July 27, 2012, which granted defendants' motion to dismiss the complaint, deemed appeal from judgment, same court and Justice, entered August 6, 2012, dismissing the complaint (CPLR 5520[c]), and, so considered, judgment unanimously affirmed, without costs.

Plaintiff alleges that he was terminated from his employment in retaliation for voicing complaints and objections to the CEO and sole beneficial owner concerning that officer's use of company funds to evade payment of state and federal taxes. Plaintiff maintains that such retaliation violates New York's False Claims Act, which prohibits employers from retaliating against employees for whistleblowing (State Finance Law §

191[1]).

To state a claim for retaliation under a false claims statute, a plaintiff must show that "(1) the employee engaged in conduct protected under the [statute]; (2) the employer knew that the employee was engaged in such conduct; and (3) the employer discharged, discriminated against or otherwise retaliated against the employee because of the protected conduct" (*McAllan v Von Essen*, 517 F Supp 2d 672, 685 [SD NY 2007] [internal quotation marks omitted]).

Although internal complaints alone may constitute efforts to stop the violation of a false claims statute and thus rise to the level of protected conduct (*see Manfield v Alutiiq Intl. Solutions, Inc.*, 851 F Supp 2d 196, 202 [D Maine 2012]; *Guerrero v Total Renal Care, Inc.*, 2012 WL 899228, *4-5, 2012 US Dist LEXIS 32615, *14 [WD Tex 2012]), the allegations here show that plaintiff's job responsibilities as Chief Financial Officer and Chief Operating Officer included managing the financial affairs of the company. Thus, plaintiff was required to show that his complaints of noncompliance with the tax laws went beyond the performance of his normal job responsibilities so as to overcome the presumption that he was merely acting in accordance with his employment obligations (*see U.S. ex rel. Schweizer v Oce N.V.*,

677 F3d 1228, 1238-1239 [DC Cir 2012]). Plaintiff has not done so, and accordingly, the complaint was properly dismissed.

We have considered plaintiff's remaining contentions, including the argument that his objections to the owner's personal fraud gave rise to protected conduct, and find them unavailing.

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

ENTERED: DECEMBER 12, 2013

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Manzanet-Daniels, Feinman, JJ.

11311 The People of the State of New York, Ind. 5455/07
Respondent,

-against-

Sergio Rodriguez,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Eleanor J. Ostrow of counsel), for respondent.

_____

Judgment of resentence, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered May 23, 2012, resentencing defendant to consecutive terms of 25 years on his conviction of robbery in the first degree and 15 years on his conviction of assault in the first degree, unanimously affirmed.

On a prior appeal (79 AD3d 644 [1st Dept 2010], *affd* 18 NY3d 667 [2012]), this Court determined that certain sentences that the trial court had imposed consecutively should have been imposed concurrently. We remanded the matter in order to permit the trial court, if so inclined, to restructure the sentences to arrive at the same aggregate term it had previously imposed.

On remand, the resentencing court lawfully imposed consecutive sentences for a conviction of first-degree robbery

(based on display of a firearm [Penal Law § 160.15[4]) and a conviction of first-degree assault. As we have previously determined (79 AD3d at 645-646), the fact that those sentences had originally been imposed concurrently did not result in a violation of CPL 430.10, even though defendant's sentences had already commenced. Furthermore, the consecutive terms did not violate Penal Law § 70.25(2), because the robbery conviction was based on defendant's display of something appearing to be a firearm (which proved to be an actual firearm), and the assault count was based on defendant's separate act of shooting the victim (79 AD3d at 645; *see also People v Ramirez*, 89 NY2d 444 [1996]).

As did the Court of Appeals on the prior appeal, we reject defendant's argument that CPL 430.10 "would bar an appellate court from directing resentencing on all counts where the sentence on fewer than all of the counts was flawed" (*see* 18 NY3d at 671). The sentence now under appeal was therefore authorized by law.

Defendant's argument that the consecutive terms violated Penal Law § 70.30(1)(a) is also without merit. That statute "was not intended to restrict the number or length of the sentences that may be imposed, but merely to direct how the aggregate

length of those sentences should be calculated" (*Roballo v Smith*, 63 NY2d 485, 489 [1984]). Accordingly, sentences may run consecutively to each other even though each of those sentences is required to run concurrently with the same third sentence (*Matter of Lopez v Goord*, 51 AD3d 1231 [3d Dept 2008], *lv denied* 11 NY3d 708 [2008]; *People v Lopez*, 15 AD3d 232 [1st Dept 2005], *lv denied* 4 NY3d 888 [2005]).

The imposition of consecutive sentences was an appropriate exercise of discretion. Although the resentencing court was not required to consider defendant's alleged rehabilitative progress while incarcerated (*see People v Kuey*, 83 NY2d 278, 282-283 [1994]), it did, in fact, remark on such progress, but reasonably concluded that it was outweighed by the extreme heinousness of defendant's crime (the circumstances of which are set forth in the concurring memorandum on the prior appeal [79 AD3d at 646]).

We have considered and rejected each of defendant's constitutional arguments.

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

ENTERED: DECEMBER 12, 2013

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Manzanet-Daniels, Feinman, JJ.

11312 Steven Munro Elkman, Index 102291/12
Plaintiff-Respondent,

-against-

Barry Cord,
Defendant-Appellant.

_____

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

Robert E. Michael & Associates, PLLC, New York (Robert E. Michael of counsel), for respondent.

_____

Order, Supreme Court, New York County (Anil C. Singh, J.), entered October 18, 2012, which, to the extent appealed from as limited by the briefs, denied defendant's cross motion to dismiss the action pursuant to CPLR 3211(a)(2), unanimously affirmed, with costs.

As the record shows that plaintiff timely filed a summons and complaint commencing the action, and paid the applicable filing fee, Supreme Court properly determined that the purported error in the method of the initial filing could be corrected or disregarded pursuant to CPLR 2001 (*see Goldenberg v Westchester County Health Care Corp.*, 16 NY3d 323 [2011]).

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

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

ENTERED: DECEMBER 12, 2013

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Manzanet-Daniels, Feinman, JJ.

11315-
11316 The People of the State of New York,
Respondent,

-against-

Michael Nieves,
Defendant-Appellant.

Ind. 2537/95

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

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

Order, Supreme Court, New York County (Melissa C. Jackson, J.), entered on or about April 17, 2013, which denied defendant's CPL 440.46 motion for resentencing, unanimously affirmed. Appeal from order, same court and Justice, entered on or about June 3, 2013, which granted reargument but adhered to its prior determination, unanimously dismissed as academic.

The court properly exercised its discretion in determining that substantial justice dictated the denial of the motion (*see generally People v Gonzalez*, 29 AD3d 400 [1st Dept 2006], *lv denied* 7 NY3d 867 [2006]). The court properly considered the totality of the circumstances, including defendant's history of recidivism, absconding, and failing to profit from rehabilitation

opportunities. These factors outweighed the positive factors cited by defendant (*see e.g. People v Hurst*, 83 AD3d 499 [1st Dept 2011] *lv denied* 17 NY3d 796 [2011]).

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

ENTERED: DECEMBER 12, 2013

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Manzanet-Daniels, Feinman, JJ.

11318 The People of the State of New York, Ind. 1730/11
Respondent,

-against-

Michael Padilla,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Eve Kessler of counsel), for appellant.

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Michael J. Obus, J.), rendered on or about January 26, 2012,

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

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

ENTERED: DECEMBER 12, 2013

CLERK

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

Mazzarelli, J.P., Sweeny, DeGrasse, Manzanet-Daniels, Feinman, JJ.

11319 Atalaya Special Opportunities Fund IV LP, et al., Plaintiffs-Respondents, Index 650914/13

-against

James Crystal, Inc., et al., Defendants-Appellants.

_____

Hinckley & Heisenberg LLP, New York (Christoph C. Heisenberg of counsel), for appellants.

Perkins Coie LLP, New York (Gary F. Eisenberg of counsel), for respondents.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered July 30, 2013, which, to the extent appealed from, granted plaintiffs' motion for summary judgment on the first and third causes of action, unanimously affirmed, with costs.

In opposition to plaintiffs' prima facie showing of their entitlement to enforce the loan, defendants failed to raise a triable issue of fact as to the existence of a binding proposal that compromised the debt. Following the expiration of the terms of a 2011 letter agreement between defendants and Wells Fargo Foothill, Inc., plaintiffs' predecessor in interest, Wells Fargo issued defendants a proposal for further compromising the balance owed under the loan. The proposal letter specifically identified

itself as a "proposal, to be used as a basis for continued discussions," and stated that, upon acceptance, a letter agreement would be prepared. The anticipation of a written agreement was consistent with the terms of the loan, which required that modifications be in writing and signed by the parties. No such formal writing was entered into (*see* General Obligation Law § 15-301[1]; *Kowalchuk v Stroup*, 61 AD3d 118, 121 [1st Dept 2009]).

The parties' subsequent communications also reflect the absence of an intent to be bound by the proposal. Defendants' conduct in proceeding with the sale of a radio station and plaintiffs' conduct in directing defendants to proceed with the sale and accepting a portion of the proceeds thereof are equally consistent with the parties' respective rights and obligations under the loan documents (*see Richardson & Lucas, Inc. v New York Athletic Club of City of N.Y.*, 304 AD2d 462 [1st Dept 2003];

Tierney v Capricorn Invs., 189 AD2d 629, 631 [1st Dept 1993], *lv denied* 81 NY2d 710 [1993]).

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

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

ENTERED: DECEMBER 12, 2013

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Manzanet-Daniels, Feinman, JJ.

11320 Nicole M. Singleton, Index 302079/10
Plaintiff-Appellant,

-against-

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

_____

Hoberman & Trepp, P.C., Bronx (Adam F. Raclaw of counsel), for appellant.

Carole A. Borstein, New York (Stephen T. Brewi of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered April 16, 2012, which, to the extent appealed from as limited by the briefs, granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant met its prima facie burden by submitting evidence showing that it did not own, control or create the utility cap that caused plaintiff to fall (*see Lopez v Allied Amusement Shows, Inc.*, 83 AD3d 519, 519 [1st Dept 2011]). In opposition, plaintiff failed to raise an issue of fact. Plaintiff offered no evidence disputing defendant's claim that the allegedly defective utility cap was for a water valve and not a gas valve owned or

controlled by defendant. Moreover, the fact that defendant performed some excavation and installation work in front of a neighboring building almost three months before plaintiff's accident does not raise an issue of fact as to whether such work resulted in the defective cap that caused plaintiff to fall.

The court did not err in considering the affidavit of defendant's employee in connection with defendant's motion for summary judgment. Although the employee's identity had not previously been disclosed, the employee was not a notice witness to the extent that he stated that defendant's valve caps were square and not round (*cf. Dunson v Riverbay Corp.*, 103 AD3d 578, 579 [1st Dept 2013]) and that he performed an inspection three months after the accident. Furthermore, even if defendant's disclosure was untimely, plaintiff has not made a showing of prejudice since the employee's statement regarding the shape of defendant's valve caps was consistent with the deposition testimony of defendant's designated deponent, which plaintiff herself submitted in opposition to defendant's motion (*see Palomo*

v 175th St. Realty Corp., 101 AD3d 579, 580 [1st Dept 2012]).

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

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

ENTERED: DECEMBER 12, 2013

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Manzanet-Daniels, Feinman, JJ.

11321 The People of the State of New York, Ind. 3236/09
Respondent,

-against-

Simon Wright,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (David Crow of counsel), and Davis Polk & Wardwell LLP, New York (Sallie S. Kim of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Ravi Kantha of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Colleen D. Duffy, J.), rendered November 8, 2010, convicting defendant, after a jury trial, of attempted arson in the second degree, and sentencing him to a term of five years, unanimously affirmed.

The verdict was not against the weight of the evidence (*People v Danielson*, 9 NY3d 342 [2007]). The evidence supports the inference that defendant intended to start a fire when, in an

effort to collect back pay, he poured gasoline on the floor of his former place of employment, went outside, lit a match and threw it inside the store, knowing that an employee was still inside.

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

ENTERED: DECEMBER 12, 2013

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Manzanet-Daniels, Feinman, JJ.

11322 In re Omari M.,
Petitioner-Appellant,

-against-

Amanda M.,
Respondent-Respondent.

_____

Steven N. Feinman, White Plains, for appellant.

Leslie S. Lowenstein, Woodmere, for respondent.

_____

Order, Family Court, New York County (Tamara Schwartz, Referee), entered on or about January 9, 2013, which, to the extent appealed from as limited by the briefs, declined to grant the father's petition for annual visitation with his children, unanimously affirmed, without costs.

Family Court providently exercised its discretion in declining to order once yearly visits to the father, who is incarcerated at a correctional facility in Washington State. The Family Court properly concluded that visitation was not in the best interests of the children at the present time, due primarily to the parties' inability to identify or agree upon an appropriate person who was willing to accompany the children, currently four and five years of age, on the lengthy trip to Washington State (*Matter of Granger v Miserola*, 21 NY3d 86, 90-91

[2013]; *Matter of Miller v Fedorka*, 88 AD3d 1185-1186 [3d Dept 2011]).

Contrary to the father's assertions, the Family Court properly concluded that his testimony did not establish that the paternal grandmother was a suitable guardian, as she had lived with the children only briefly when they were very young and had not spent time with them recently. An appropriate guardian is especially important where the visit would require days and not merely hours of travel (*compare Matter of Telfer v Pickard*, 100 AD3d 1050, 1051 [3d Dept 2012]).

In allowing written correspondence with the children and requiring photos of the children to be sent to the father, the Family Court acknowledged that it was in the best interests of the children to maintain contact with him and was apparently open to allowing visitation should the parties be able to agree upon a suitable person to accompany the children.

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

ENTERED: DECEMBER 12, 2013

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Manzanet-Daniels, Feinman, JJ.

11324 Camila Nouel, etc., et al., Index 116438/06
Plaintiffs-Appellants,

-against-

325 Wadsworth Realty LLC, et al.,
Defendants-Respondents,

Inwood Assets LLC, et al.,
Defendants.

_____

Peña & Kahn, PLLC, Bronx (Diane Welch Bando of counsel), for appellants.

Lester Schwab Katz & Dwyer, LLP, New York (Harry Steinberg of counsel), for respondents.

_____

Order, Supreme Court, New York County (Paul Wooten, J.), entered October 2, 2012, which, insofar as appealed from, granted the motion of defendants 325 Wadsworth Realty LLC (325) and Solar Realty Management Corp. (Solar) for summary judgment dismissing the complaint and all cross claims as against them, unanimously affirmed, without costs.

Dismissal of the negligent hiring, retention, and supervision claims was proper in this action for injuries sustained as a result of defendant Jose Rivera's sexual assault upon the infant plaintiff. Rivera was the porter for the building owned by 325 and managed by Solar, and was hired based

upon a recommendation made by the building's former superintendent. Plaintiffs' reliance upon the fact that Rivera was a registered sex offender is unavailing, since "[a]n employer is under no duty to inquire as to whether an employee has been convicted of crimes in the past" (*Yeboah v Snapple, Inc.*, 286 AD2d 204, 205 [1st Dept 2001]), and the record is devoid of an indication that defendants had knowledge of Rivera's propensity for such conduct (*see Detone v Bullit Courier Serv.*, 140 AD2d 278 [1st Dept 1988], *lv denied* 73 NY2d 702 [1988]).

Contrary to plaintiffs' contention, constructive notice that Rivera harbored dangerous sexual proclivities may not be imputed upon 325 and Solar on the basis that Rivera had set up a playroom in the building's basement, particularly since Rivera worked in the building and had young children of his own (*see Ostroy v Six Sq. LLC*, 100 AD3d 493, 494 [1st Dept 2012]). Nor is plaintiffs' reliance upon Rivera's termination from his former employer availing, because even if 325 and Solar knew that Rivera was fired for insubordination based upon his reckless driving, this does not constitute notice of his tendency for sexual assault (*see McCann v Varrick Group LLC*, 84 AD3d 591 [1st Dept 2011]).

Given defendants' lack of notice, plaintiffs' negligence claim was also properly dismissed insofar as it was based upon

premises liability. Furthermore, this claim, although couched as a premises liability claim, is merely duplicative of the negligent hiring, retention, and supervision claims (*see generally Vermont Mut. Ins. Co. v McCabe & Mack, LLP*, 105 AD3d 837, 838-839 [2d Dept 2013].

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

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

ENTERED: DECEMBER 12, 2013

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Manzanet-Daniels, Feinman, JJ.

11325 The People of the State of New York, Ind. 4130/10
Respondent,

-against-

Dennis Sharma,
Defendant-Appellant.

_____

Edelstein & Grossman, New York (Jonathan I. Edelstein of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Arlene D. Goldberg, J.), rendered December 22, 2011, convicting defendant, after a jury trial, of robbery in the first degree, and sentencing him to a term of 5 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence warranted the conclusion that when defendant displayed a knife to a store employee who was attempting to stop him from stealing merchandise, defendant threatened the immediate use of a dangerous instrument for the purpose of preventing or overcoming resistance to his retention of the property (*see e.g. People v Boisseau*, 33 AD3d 568 [2006], *lv denied* 8 NY3d 844 [2007]; *People v Young*, 16 AD3d 196 [1st

Dept 2009], *lv denied* 4 NY3d 858 [2005]; *People v Thompson*, 273 AD2d 153 [1st Dept 2000], *lv denied* 95 NY2d 908 [2000]). Even if, in the abstract, the display of an instrument does not necessarily constitute a threat to use it, here, given the circumstances, there was no reasonable explanation of defendant's conduct other than an implied threat to use the knife against the employee. Accordingly, the display, coupled with the surrounding circumstances, satisfied the "threatened use" element of Penal Law § 160.15(3), and defendant's statutory interpretation argument is unavailing.

The court appropriately exercised its discretion under *People v Molineux* (168 NY 264 [1901]) in admitting testimony with respect to the employee's prior encounters with defendant in the store. This evidence was relevant as background information to explain the reaction of the store employee upon seeing defendant carrying the merchandise, and any prejudicial effect of its admission was mitigated by the court's extensive limiting instructions. We find that, under the circumstances here, the court did not abuse its discretion by failing to employ other less prejudicial means of filling the narrative gap (*see People v Morris*, __ NY3d __, 2013 NY Slip Op 06633 [2013]). Defendant did not preserve his challenge to a detective's testimony about

the circumstances under which defendant became a suspect in this case, and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits.

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

ENTERED: DECEMBER 12, 2013

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Manzanet-Daniels, Feinman, JJ.

11326 The People of the State of New York, Ind. 5492/10
Respondent,

-against-

Stefan Ross,
Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Michael J. Obus, J.), rendered on or about September 8, 2011,

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

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

ENTERED: DECEMBER 12, 2013

CLERK

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

Mazzarelli, J.P., Sweeny, DeGrasse, Manzanet-Daniels, Feinman, JJ.

11328 Julio Guerrero, Index 308503/09
Plaintiff-Appellant,

-against-

Duane Reade, Inc.,
Defendant-Respondent.

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The Sullivan Law Firm, New York (James A. Domini of counsel), for appellant.

Chesney & Nicholas, LLP, Baldwin (Harry T. Brew of counsel), for respondent.

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Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered November 23, 2012, which granted defendant Duane Reade, Inc.'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 failed to establish as a matter of law that it did not create or have actual or constructive notice of a hazardous condition, since it failed to offer specific evidence as to its activities on the day of the accident, including, but not limited to, when the area where plaintiff fell was last inspected (*see e.g. Cater v Double Down Realty Corp.*, 101 AD3d 506 [1st Dept 2012]). In addition, plaintiff testified it had been raining or drizzling continuously

prior to his accident and that he had seen mats rolled up in front of the store, but not placed down where he fell, giving rise to a question of fact as to whether defendant knew or should have known of the dangerous condition (*Signorelli v Great Atl. & Pac. Tea Co., Inc.*, 70 AD3d 439, 440 [1st Dept 2010]).

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

ENTERED: DECEMBER 12, 2013

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Manzanet-Daniels, Feinman, JJ.

11329N Alexander Kudinov, et al., Index 114646/05
Plaintiffs,

-against-

Kel-Tech Construction Inc.,
Defendant-Appellant,

Iannelli Construction Co., Inc., et al.,
Defendants.
- - - -
Virginia & Ambinder, LLP,
Nonparty Respondent.

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Massoud & Pashkoff, LLP, New York (Ahmed A. Massoud of counsel), for appellant.

Virginia & Ambinder, LLP, New York (Jack Newhouse of counsel), for respondent.

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Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered August 1, 2012, which, after a hearing, granted the application of nonparty respondent Virginia & Ambinder, LLP (class counsel) for attorneys' fees in the amount of $200,000, unanimously affirmed, with costs.

The evidence adduced at the hearing established that class counsel was qualified to represent the class claimants, that the billable rates charged by class counsel were reasonable and customary, and that the class actions had asserted non-frivolous claims which, overall, achieved favorable results. In arriving

at its determination, the hearing court properly considered the adequacy of class counsel's proof of billable time expended, the nature and extent of the legal work attested to, the necessity of the work claimed to have been performed, and the value of such work expended (*see Nager v Teachers' Retirement Sys. of City of N.Y.*, 57 AD3d 389 [1st Dept 2008], *lv denied* 13 NY3d 702 [2009]; *see also Goldberger v Integrated Resources, Inc.*, 209 F3d 43 [2d Cir 2000]).

The overall extent of the litigation, including four appeals, 14 motions, lengthy discovery, and many court conferences and settlement discussions, involved appreciable time expended by class counsel that was necessary for accomplishing the goals of the class action, and warranted fees in the "capped" amount of $200,000. Indeed, as observed by the hearing court, the evidence showed that absent the parties' settlement agreement to, inter alia, cap legal fees, class counsel's proof actually established entitlement to fees well in excess of $200,000.

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

ENTERED: DECEMBER 12, 2013

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Manzanet-Daniels, Feinman, JJ.

11330N Hoskie Co., Inc., et al., Index 653456/11
Plaintiffs-Appellants,

-against-

Jeffrey Wu, et al.,
Defendants-Respondents.

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Mann Mann & Schatz P.C., New York (Brett M. Schatz of counsel), for appellants.

The Law Firm of Hugh H. Mo, P.C., New York (Hugh H. Mo of counsel), for respondents.

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Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered December 10, 2012, which, insofar as appealed from, in this action alleging, inter alia, breach of contract, granted defendants' motion to renew, and, upon renewal, vacated a default judgment previously entered against defendants, unanimously affirmed, without costs.

Plaintiffs' complaint overlapped a prior pending action in which some defendants were involved, and which was being defended actively by an entity that plaintiffs contend is the alter ego of defendants. Thus, a default against defendants should not have been granted by the original motion court here, particularly where the error was compounded by the lack of any party affidavit as to the alter-ego allegations. Accordingly, in light of the

strong policy in favor of the resolution of disputes on the merits, the court did not abuse its discretion in finding this to be one of the instances in which the interest of justice was served by the grant of renewal and the vacatur of the default despite defendants' failure to timely respond to the original motion (*see Tishman Constr. Corp. of N.Y. v City of New York*, 280 AD2d 374, 376-377 [1st Dept 2001]).

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

ENTERED: DECEMBER 12, 2013

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Manzanet-Daniels, Feinman, JJ.

11331 [M-5174] In re Louise Neathway, Petitioner,

-against-

Hon. Daniel FitzGerald, et al., Respondents.

Ind. 1260/12

Lawrence P. LaBrew, New York, for petitioner.

Eric T. Schneiderman, Attorney General, New York (Anthony J. Tomari of counsel), for state respondents.

Cyrus R. Vance, Jr., District Attorney, New York (Kenn Kern of counsel), for municipal 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.

ENTERED: DECEMBER 12, 2013

CLERK

Tom, J.P., Acosta, Saxe, Freedman, JJ.

10422N In re Richard J. Condon, etc., Index 401175/12
Petitioner-Appellant,

-against-

Patricia Sabater,
Respondent-Respondent.

_____

Gerald P. Conroy, New York, for appellant.

Bruce K. Bryant, New York, for respondent.

_____

Judgment, Supreme Court, New York County (Carol E. Huff, J.), entered January 3, 2013, affirmed, without costs.

Opinion by Freedman, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Rolando T. Acosta
David B. Saxe
Helen E. Freedman, JJ.

10422N
Index 401175/12

_____x

In re Richard J. Condon, etc.,
Petitioner-Appellant,

-against-

Patricia Sabater,
Respondent-Respondent.

_____x

Petitioner appeals from the judgment of the Supreme Court, New York County (Carol E. Huff, J.), entered January 3, 2013, which, insofar as appealed from, denied the petition to compel respondent to comply with a subpoena ad testificandum and dismissed the proceeding brought pursuant to CPLR 2308 and CPLR article 4.

Gerald P. Conroy, New York (Leonard Koerner and Valerie A. Batista of counsel), for appellant.

Bruce K. Bryant, New York (David N. Grandwetter and Charity M. Guerra of counsel), for respondent.

FREEDMAN, J.

By requiring respondent to testify at a hearing, petitioner-appellant seeks to eviscerate the provisions of Education Law 3020(1) and 3020-a, which, under state law, govern the discipline of tenured teachers and establish procedures specifically designed to protect them at disciplinary proceedings.

New York City's Special Commissioner of Investigation for the New York City School District (SCI) was established in 1990, as an arm of the City Department of Investigation. It has investigatory and subpoena power and reports the results of its investigations to the Department of Education (DOE), which has the power to take disciplinary actions against employees.

In this case, two elementary school students, ages 10 and 11, complained that they were sexually harassed by other students. One of the mothers complained and was told that the offending students had received in-school suspensions, but no documentation of the suspensions was provided. The mother then complained to the police, which ultimately led to a report to and an investigation by the SCI into whether respondent and other DOE employees failed to act on the complaints. The Special Commissioner subpoenaed respondent, a tenured assistant principal in the school. Respondent appeared in compliance with the subpoena and gave pedigree information, but invoked her rights

under Education Law §§ 3020(1) and 3020-a(3)(c)(i) not to testify further.

Education Law § 3020(1) provides that no tenured employee shall be disciplined except in accordance with Education Law § 3020-a. Education Law § 3020-a(3)(c)(i)(c) specifically provides that the tenured employee shall not be required to testify at any disciplinary hearing.

Based on the above cited Education Law provisions, the Third Department has held that requiring testimony of a tenured teacher in an SCI proceeding conflicted with Education Law § 3020-a because testimony or evidence obtained at such a hearing would be admissible in a DOE disciplinary hearing. That court said, "no local legislative body is empowered to enact laws or regulations which supersede State statutes, particularly with regard to the 'maintenance, support or administration of the educational system'" (*Matter of Board of Educ. of City School District of City of N.Y. v Mills*, 250 AD2d 122, 126 [3d Dept 1998], *lv denied* 93 NY2d 803 [1999]). According to respondent, the privilege not to testify has been invoked on a number of occasions and the *Mills* decision has not been up to now challenged by the SCI.

Contrary to petitioner's position, neither our decision in *Board of Educ. of City of N.Y. v Hershkowitz* (308 AD2d 334 [1st Dept 2003], *lv dismissed* 2 NY3d 759 [2004]) nor *Matter of*

Rosenblum v New York City Conflicts of Interest Bd. (18 NY3d 422 [2012]) compels a different result from the Third Department holding in *Mills*. In *Hershkowitz*, this Court held that information, including a written statement obtained from respondent by the SCI during an interview pursuant to a prehearing investigation, was admissible in a disciplinary hearing brought by DOE. The Court focused on the collective bargaining agreement, which provided that a union representative could be present whenever an employee faced disciplinary proceedings, and the SCI interview occurred without such a person. Testimony at an SCI hearing was not involved, and the court specifically distinguished the facts from those in *Mills* on that ground.

In *Rosenblum* (18 NY3d 422 [2012]), the Court of Appeals found that the Conflicts of Interest Board of the City of New York is authorized to enforce the Conflicts of Interest Law (NY City Charter §§ 2600-2607) against a teacher, in that case a probationary principal in a middle school, who was found to have requested favorable treatment for his son who was at risk of being fired by DOE. The Conflicts Board imposed a significant fine upon the respondent in that case. In reversing, the Court of Appeals disagreed with this Court's holding that the DOE was the only agency empowered to discipline such an employee. The

Court of Appeals, responding to a dissent by one of its members, noted that such an interpretation would "effectively convert the Board from an independent enforcement agency into an investigative and advisory arm of other City agencies," (*id*. at 432).

In *Rosenblum*, there was no issue of requiring testimony. Rather, the issue was whether an independent Board with penal power could impose a penalty upon a Board of Education employee for an improper action while employed. The Conflict of Interest Board's function is, however, quite distinct from that of the DOE and deals with specific issues that are only tangentially related to school performance or discipline. To the contrary, the SCI was established as an investigatory body to aid the DOE. There is no question, based on this court's holding in *Hershkowitz*, that any testimony given in an SCI proceeding would be admissible in a DOE disciplinary proceeding. Thus, forcing a tenured teacher or assistant principal to testify in an SCI proceeding is tantamount to forcing that employee to testify in a DOE disciplinary proceeding, which directly conflicts with state law, Education Law 3020(3)(c)(i).

Accordingly, the judgment of the Supreme Court, New York County (Carol E. Huff, J.), entered January 3, 2013, which, insofar as appealed from, denied the petition to compel

respondent to comply with a subpoena ad testificandum and dismissed the proceeding brought pursuant to CPLR 2308 and CPLR article 4, should be affirmed, without costs.

All concur.

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

ENTERED: DECEMBER 12, 2013

CLERK