SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

**JUNE 26, 2014**

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Moskowitz, J.P., Richter, Manzanet-Daniels, Clark, Kapnick, JJ.

12083-
12083A The Board of Managers of the 4260 Broadway Condominium, etc., Plaintiff-Appellant,

-against-

Elisette A. Caballero, et al., Defendants-Respondents,

Environmental Control Board, et al., Defendants.

- - - - -

The Board of Managers of the 4260 Broadway Condominium, etc., Plaintiff-Appellant,

-against-

Gregoria De La Cruz, et al., Defendants-Respondents,

Citimortgage, Inc., Defendant.

- - - - -

The Board of Managers of the 4260 Broadway Condominium, etc., Plaintiff-Appellant,

-against-

Gregoria De La Cruz, et al., Defendants-Respondents,

Index 116701/08
116705/08
116708/08
116710/08

Citimortgage, Inc.,
Defendant.
- - - - -
The Board of Managers of the
4260 Broadway Condominium, etc.,
Plaintiff-Appellant,

-against-

Luis Choing, et al.,
Defendants-Respondents,

Banco Popular NA,
Defendant.

_____

Rose & Rose, New York (Paul Coppe of counsel), for appellant.

Morrison & Foerster, LLP, New York (Natalie Fleming Nolen of counsel), for respondents.

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Orders, Supreme Court, New York County (Marcy S. Friedman, J.), entered July 24, 2012 and July 25, 2012, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for summary judgment to foreclose on its lien for unpaid common charges on defendants' condominium apartments and to strike defendants' affirmative defenses and counterclaims, unanimously affirmed, without costs.

The court properly determined that issues of fact remained as to whether plaintiff (the board) acted within the scope of its authority when it imposed various assessments without unit owner approval (*see generally Matter of Levandusky v One Fifth Ave.*

*Apt. Corp.*, 75 NY2d 530 [1990]). On its summary judgment motion, the board failed to meet its burden to demonstrate, inter alia, that the assessments were related to building repairs, for which unit owner approval is not required, as opposed to items such as building alterations, additions, or improvements, which do require unit owner approval under certain circumstances pursuant to bylaws §§ 2.5, 5.3 (*cf. Helmer v Comito*, 61 AD3d 635 [2d Dept 2009]).

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

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

ENTERED: JUNE 26, 2014

CLERK

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

12147N Peter C., Index 158162/12
Plaintiff-Appellant,

Rea C.,
Plaintiff-Intervenor-Respondent,

-against-

Lisa F.,
Defendant.

_____

Schwartz Levine & Kaplan, PLLC, New York (Jeffrey A. Kaplan of counsel), for appellant.

Bernfeld DeMatteo & Bernfeld, LLP, New York (Joseph R. DeMatteo of counsel), for respondent.

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Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered July 8, 2013, which, to the extent appealed from, granted proposed intervenor's motion to intervene in the breach of contract action, unanimously reversed, on the law, without costs, and the motion denied.

Proposed intervenor (respondent), plaintiff's ex-wife, seeks to intervene in this breach-of-contract action, alleging that plaintiff and his sister (defendant) fraudulently concealed plaintiff's ownership interest in a lucrative, closely-held corporation during plaintiff and respondent's divorce. Plaintiff commenced the divorce action against respondent in 2003. While

those proceedings were ongoing, plaintiff and defendant's ailing mother excised plaintiff from her will and made defendant the sole beneficiary, ostensibly because she sought to ensure that respondent not gain access to her assets through the divorce. Plaintiff and defendant subsequently testified before the matrimonial court that plaintiff held no ownership interest in the company, and the court entered a judgment of divorce in 2008 which excluded those assets from equitable distribution.

In the instant action, plaintiff alleges the existence and breach of an oral contract – entered into during the pendency of the divorce action – in which defendant allegedly agreed to transfer 50% of the company's shares to plaintiff following his divorce. Respondent's motion to intervene alleges that plaintiff's complaint constitutes an admission that he and defendant perpetrated a fraud on the matrimonial court by falsely testifying, under oath, that plaintiff held no ownership interest in the company despite the existence of his oral agreement with defendant. Defendant denies the existence of the oral agreement and does not oppose respondent's motion to intervene.

Although respondent's allegations shed light on a possible fraud on the matrimonial court, "[t]he remedy for fraud allegedly

committed during the course of a legal proceeding must be exercised in that lawsuit by moving to vacate the civil judgment (CPLR 5015[a][3]), and not by another plenary action collaterally attacking that judgment" (*Matter of New York Diet Drug Litig.*, 47 AD3d 586 [1st Dept 2008] [internal quotation marks omitted]). Respondent's motion to intervene essentially seeks to collaterally attack the divorce decree and, accordingly, the matrimonial court is the proper forum in which to address respondent's motion to vacate or modify that judgment on the basis of fraud or newly discovered evidence (*id.*; CPLR 5015[a][2], [3]). Likewise, the related causes of action raised in her proposed complaint arise from the alleged fraud in the divorce action and do not merit intervention.

Therefore, notwithstanding that the proposed pleading and the main action involve at least one common question of law or fact (*see* CPLR 1013), namely whether plaintiff and defendant entered into an oral contract that would have given plaintiff an ownership interest in the corporation at the time of the divorce,

respondent should not be permitted to intervene in this action.

Because we are reversing the grant of the motion to intervene, we do not reach the parties' remaining arguments.

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

ENTERED: JUNE 26, 2014

CLERK

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

12368 Varlnise Wells, Index 21254/11E
Plaintiff-Appellant,

-against-

Continuum Health Partners, Inc., et al.,
Defendants-Respondents.

_____

Alexander J. Wulwick, New York, for appellant.

Schiavetti, Corgan, DiEdwards, Weinberg & Nicholson, LLP, New York (Thomas K. Wittig of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Alexander W. Hunter, Jr., J.), entered February 5, 2013, which, after a traverse hearing, granted defendants' motion to dismiss the complaint with prejudice, unanimously reversed, on the law, without costs, and the motion denied.

"In evaluating whether service is to be sustained, the circumstances of the particular case must be weighed" (*Fashion Page v Zurich Ins. Co.*, 50 NY2d 265, 273 [1980]). Further, CPLR 311, pursuant to which plaintiff purported to make service, is to be "liberally construed" in determining whether service was made on a corporation by delivering the summons to one of the persons delineated in that section (*id.* at 271). Here, the circumstances were that Nafeesa Greatheart, defendants' witness at the traverse

hearing, worked in an office at which the law firm representing plaintiff had previously served process without challenge. This was known to Joshua Reece, the process server, who was a lawyer at the firm. A substantial responsibility held by Greatheart was to accept service of subpoenas served on defendants. Reece testified that he handed the summons and complaint to Greatheart after having asked several people in defendants' office where he should go to serve the papers, and having been directed towards the area where her cubicle was located. Greatheart was unable to recall whether she ever had an encounter with Reece, which is not surprising considering that, again, one of her regular duties was to receive legal documents delivered to defendants. To be sure, she did not deny it.

"Objectively viewed," the circumstances delineated above compel the conclusion that service on defendants was "calculated to give [them] fair notice" of the claims against them (*id.* at 272). We note that the hearing court did not appear to base its conclusion on any credibility determinations. Rather, it found that both Reece and Greatheart were inexperienced with service of

process, leading to their "mutual confusion." We find this to have been an insufficient basis to dismiss the complaint. Accordingly, service should have been sustained.

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

ENTERED: JUNE 26, 2014

CLERK

Mazzarelli, J.P., Acosta, Andrias, Saxe, Clark, JJ.

12532 Stephanie Barnes, Index 151741/12
Plaintiff-Respondent,

-against-

Wayne F. Hodge,
Defendant,

United Parcel Service, Inc.,
Defendant-Appellant.

_____

Ansa Assuncao LLP, White Plains (Michael J. O'Neill of counsel), for appellant.

Pollack, Pollack, Isaac & De Cicco, LLP, New York (Brian J. Isaac of counsel), for respondent.

_____

Order, Supreme Court, New York County (George J. Silver, J.), entered March 6, 2013, which, insofar as appealed from, denied the motion of defendant United Parcel Service, Inc. (UPS) to dismiss plaintiff's claim for punitive damages, unanimously reversed, on the law, without costs, and the motion granted.

Plaintiff pedestrian alleges that she was struck by a vehicle owned by UPS, and operated by its driver, defendant Hodge, while she was in an crosswalk. At issue is plaintiff's demand for punitive damages.

To hold UPS vicariously liable for punitive damages, plaintiff must establish that UPS "authorized, participated in,

consented to or ratified the conduct giving rise to such damages" (*Melfi v Mount Sinai Hosp.*, 64 AD3d 26, 42 [1st Dept 2009]; *Ostroy v Six Sq. LLC*, 100 AD3d 493, 495 [1st Dept 2012]). We must consider whether the complaint contains the requisite allegations that "the wrongdoing is intentional or deliberate, presents circumstances of aggravation or outrage, evinces a fraudulent or evil motive, or is in such conscious disregard of the rights of another that it is deemed willful and wanton" (*Bishop v 59 W. 12th St. Condominium*, 66 AD3d 401, 402 [1st Dept 2009]; *see also Giblin v Murphy*, 73 NY2d 769, 772 [1988]).

"Although on a motion to dismiss plaintiffs' allegations are presumed to be true and accorded every favorable inference, conclusory allegations - claims consisting of bare legal conclusions with no factual specificity - are insufficient to survive a motion to dismiss" (*Godfrey v Spano*, 13 NY3d 358, 373 [2009]). Here, the complaint alleges in conclusory and conjectural fashion that "defendants were grossly, willfully and wantonly negligent and acted with reckless indifference to the health and safety of plaintiff." These legal conclusions are insufficient as the complaint does not allege any facts to demonstrate that UPS engaged in conduct which rose to the high level of moral culpability to support a claim for punitive

damages (*see Coville v Ryder Truck Rental, Inc.*, 30 AD3d 744, 745 [3d Dept 2006]). Plaintiff cannot maintain the punitive damages demand on the hope that discovery might someday provide a basis for it (*see Mandarin Trading Ltd. v Wildenstein*, 65 AD3d 448, 451 [1st Dept 2009], *affd* 16 NY3d 173 [2011]). "However, should discovery reveal facts supporting a claim for punitive damages, plaintiff could of course move for leave to replead the demand" (*see 87 Chambers, LLC v Reade, LLC*, 114 AD3d 525 [1st Dept 2014]).

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

ENTERED: JUNE 26, 2014

CLERK

Tom, J.P., Moskowitz, DeGrasse, Kapnick, JJ.

12593 In re The Cambridge Owners Corp., Index 100727/13
Petitioner-Appellant,

-against-

The New York City Department
of Transportation, et al.,
Respondents-Respondents.

_____

Ganfer & Shore, LLP, New York (Steven J. Shore of counsel), for appellant.

Zachary Carter, Corporation Counsel, New York (Elizabeth S. Natrella of counsel), for The New York City Department of Transportation and Polly Trottenberg, respondents.

Winget, Spadafora & Schwartzberg, LLP, New York (Dan Szajngarten of counsel), for Citibank, N.A. and NYC Bike Share, LLC, respondents.

_____

Judgment, Supreme Court, New York County (Cynthia S. Kern, J.), entered October 30, 2013, denying the petition for, among other things, a declaration that respondent Department of Transportation's determination to install a City Bike Share station in front of petitioner's building was arbitrary and capricious and in violation of respondent's legal duties under the City Environmental Quality Review Act, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The motion court correctly found that respondent's

determination to install a bike share station in front of petitioner's building was issued after a sufficient environmental review of the bike share program, was consistent with the siting guidelines identified by respondent, and had a rational basis and was not arbitrary and capricious (*see Matter of Gernatt Asphalt Prods. v Town of Sardinia*, 87 NY2d 668, 688 [1996]; *Matter of Chinese Staff & Workers' Assn. v Burden*, 88 AD3d 425 [1st Dept 2011], *affd* 19 NY3d 922 [2012]).

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

ENTERED: JUNE 26, 2014

CLERK

Mazzarelli, J.P., Moskowitz, DeGrasse, Manzanet-Daniels, Kapnick, JJ.

12668 Russell Chanice, Index 106872/10
Plaintiff-Appellant, 591160/10
590570/11

-against-

Federal Express Corporation,
Defendant-Respondent,

Empire State Building
Company, LLC, et al.,
Defendants.

[And Other Third-Party Actions]

_____

Forde & Associates, New York (James L. Forde of counsel), for appellant.

Kaplan Massamillo & Andrews, New York (Jeanine C. Driscoll of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan A. Madden, J.), entered April 15, 2013, which granted defendant Federal Express Corporation's (FedEx) motion to dismiss the amended complaint as asserted against it pursuant to CPLR 3211(a)(7), unanimously reversed, on the law, without costs, and the motion denied.

The complaint alleges that the top portion of a bi-folding industrial elevator door struck plaintiff in the head as he was entering the elevator when a FedEx employee, who had boarded the elevator before plaintiff, pushed the button to close the door while his back was to the door. As a preliminary matter, we

reject plaintiff's argument that the instant motion was precluded under the doctrine of law of the case by virtue of a prior order granting plaintiff leave to amend the complaint so as to add FedEx as a defendant. The doctrine of law of the case contemplates that the parties had a full and fair opportunity to litigate when the initial determination was made (*People v Evans*, 94 NY2d 499, 502 [2000]). When applied, the doctrine precludes parties or their privies from relitigating an issue that has already been decided (*see Carmona v Mathisson*, 92 AD3d 492, 493 [1st Dept 2012]). The motion court did not consider FedEx's opposition to plaintiff's motion to amend the complaint, since it was not a party to the case at the time, and thus FedEx was not precluded from moving to dismiss the claims subsequently asserted against it in the amended complaint.

The complaint is viable insofar as it alleges that the FedEx courier was negligent in pressing the button to close the door while facing away from the doorway without allowing himself to verify that no one was entering the elevator. Given the unique nature of this bi-folding industrial elevator door, the FedEx courier had a duty to use reasonable care under the circumstances to avoid closing the door in a manner that would cause injury to

persons entering the elevator (*see Basso v Miller*, 40 NY2d 233, 240-241 [1976]; *Aiosa v Mercy Med. Ctr.*, 32 AD3d 405 [2nd Dept 2006]).

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

ENTERED: JUNE 26, 2014

CLERK

Mazzarelli, J.P., Acosta, Freedman, Richter, Clark, JJ.

12890 The People of the State of New York, Dkt. 71986C/07
Respondent,

-against-

Anthony Jackson,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Diane A. Shearer of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Ann Donnelly, J.), rendered July 19, 2010, convicting defendant, after a nonjury trial, of trespass, and sentencing him to a conditional discharge for a period of 1 year, and 10 days of community service, unanimously affirmed.

The verdict was supported by legally sufficient evidence and was not against the weight of the evidence (*see People v. Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's credibility determinations. A lack of license or privilege to enter premises may be established by circumstantial evidence, including evidence of consciousness of guilt (*Matter of Lonique M.*, 93 AD3d 203, 205-506 [1st Dept 2012]). Defendant entered a New York City Housing Authority

building by means of neither a key nor a buzzer, but by taking advantage of the door being opened when someone exited. Defendant initially lied to the police about being a resident of the building, and then admitted that he was not a resident. His false statement evinced a consciousness of guilt (*see People v Ficarrota*, 91 NY2d 244, 250 [1997]; *Lonique M.*, 93 AD3d at 206) that, when coupled with his means of entry, supported the inference that he entered unlawfully.

The accusatory instrument was legally sufficient to establish the element of entry without license or privilege, and it was not required to negate the possibility that one of the numerous residents of the building invited defendant to enter (*see People v Davis*, 13 NY3d 17, 31-32 [2009]; *see also Lonique M.*, 93 AD3d at 207).

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

ENTERED: JUNE 26, 2014

CLERK

Mazzarelli, J.P., Acosta, Freedman, Richter, Clark, JJ.

12891 In re Najuma King, Index 400608/12
Petitioner,

-against-

New York City Housing Authority,
Respondent.

_____

Najuma King, petitioner pro se.

Kelly D. MacNeal, New York (Maria Termini of counsel), for respondent.

_____

Determination of respondent New York City Housing Authority (NYCHA), dated February 22, 2012, which denied petitioner's grievance seeking succession rights as a remaining family member to the tenancy of her late mother, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Cynthia Kern, J.], entered June 19, 2012), dismissed, without costs.

Substantial evidence supports respondent's determination that petitioner is not entitled to succession rights as a remaining family member (RFM) (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-182 [1978]). Petitioner's occupancy was not pursuant to NYCHA's

written authority and was not reflected in the affidavits of income (*see Matter of Adler v New York City Hous. Auth.*, 95 AD3d 694, 695 [1st Dept 2012], *lv dismissed* 20 NY3d 1053 [2013]; *Matter of Weisman v New York City Hous. Auth.*, 91 AD3d 543, 544 [1st Dept 2012], *lv dismissed* 19 NY3d 921 [2012]).

Petitioner's mitigating circumstances, including the hardship to her and her family, do not provide a basis for annulling NYCHA's determination (*see Matter of Firpi v New York City Hous. Auth.*, 107 AD3d 523, 524 [1st Dept 2013]; *Matter of Guzman v New York City Hous. Auth.*, 85 AD3d 514 [1st Dept 2011]). Petitioner's argument that she qualifies as a "Tenant" under federal law is unpreserved for judicial review, having not been raised at the administrative hearing (*see Matter of Moore v Rhea*, 111 AD3d 445 [1st Dept 2013]; *Matter of Torres v New York City Hous. Auth.*, 40 AD3d 328, 330 [1st Dept 2007]). As an alternate holding, we find it unavailing (*see Matter of Abdil v Martinez*, 307 AD2d 238, 242 [1st Dept 2003]; *Matter of Faison v New York City Hous. Auth.*, 283 AD2d 353, 356 [1st Dept 2001]). Additionally, petitioner may not invoke estoppel against a

governmental agency such as respondent (*see Matter of Parkview Assoc. v City of New York*, 71 NY2d 274, 282 [1988], *cert denied, app dism*, 488 US 801 [1988]; *Matter of Hutcherson v New York City Hous. Auth.*, 19 AD3d 246 [1st Dept 2005]).

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

ENTERED: JUNE 26, 2014

CLERK

Mazzarelli, J.P., Acosta, Freedman, Richter, Clark, JJ.

12894-
12894A-
12895 In re Daniela R., and Others,

Children Under the Age Of
Eighteen Years, etc.,

Daniel R.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Ronald E. Sternberg of counsel), for respondent.

Karen Freedman, Lawyers for Children, Inc., New York (Shirim Nothenberg of counsel), attorney for the child Daniela R.

Tamara A. Steckler, The Legal Aid Society, New York (Diane Pazar of counsel), attorney for the children Adonis R., Danieda R. and Esniel R.

_____

Orders of disposition, Family Court, New York County (Clark V. Richardson, J.), entered on or about June 11, 2013, which, to the extent appealed from as limited by the briefs, brings up for review a fact-finding determination that respondent father sexually abused his daughters Danieda R. and Daniela R., unanimously affirmed, without costs. Appeal from order of fact-finding, same court and Judge, entered on or about May 4, 2013,

unanimously dismissed, without costs, as superceded by the appeal taken from the orders of disposition.

The finding that respondent sexually abused his two daughters was supported by a preponderance of the evidence, including the sworn testimony of the daughters (*see* Family Ct Act §§ 1012[e][iii]; 1046 [b][I]; *Matter of Christina G. [Vladimir G.]*, 100 AD3d 454 [1st Dept 2012], *lv denied* 20 NY3d 859 [2013]). There exists no basis to disturb the court's credibility determinations (*see generally Matter of Irene O.*, 38 NY2d 776 [1975]). Furthermore, the record shows that respondent presented no credible evidence to explain his conduct except to claim that he was never alone with his daughters. However, this testimony was contradicted by his own testimony and that of his wife (*see Matter of Elizabeth S. [Dona M.]*, 70 AD3d 453 [1st Dept 2010]).

The record also demonstrates by a preponderance of the evidence that respondent inappropriately touched his daughters for the purpose of gratifying his sexual desire. In this regard, the court properly drew a negative inference against him as to

that issue, because gratification may be inferred from the totality of the circumstances and respondent failed to offer an innocent explanation for his actions (*see Matter of Jani Faith B. [Craig S.]*, 104 AD3d 508, 509 [1st Dept 2013]).

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

ENTERED: JUNE 26, 2014

CLERK

Mazzarelli, J.P., Acosta, Freedman, Richter, Clark, JJ.

12897-
12897A & M-2943 Arthur E. Rondeau, Index 650198/11
Plaintiff-Appellant,

-against-

Allan Houston, et al.,
Defendants-Respondents.

- - - - -

Arthur E. Rondeau, Index 151202/12
Plaintiff-Appellant,

-against-

New York Knickerbockers, etc., et al.,
Defendants-Respondents.

_____

The Law Offices of Neal Brickman, P.C., New York (Neal Brickman and William Pickel of counsel), for appellant.

Shapiro, Arato & Isserles LLP, New York (Cynthia S. Arato of counsel), for respondents.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered April 18, 2013, to the extent it granted the motion of defendants Allan Houston and New York Knickerbockers, A Division of Madison Square Garden, L.P. (the Knicks) to dismiss the complaint bearing index No. 650198/2011 (Action One), and denied plaintiff's motions for reargument and renewal and for sanctions, unanimously affirmed, with costs, and appeal therefrom otherwise deemed appeal from judgment, same court and Justice,

entered May 10, 2013, dismissing the complaint bearing index No. 151202/2012 (Action Two) (CPLR 5520[c]), and, so considered, the judgment is unanimously affirmed, with costs.

In Action One, the court properly dismissed plaintiff's breach of contract claim, and his duplicative fraud claim, asserting that Houston failed to fulfill an alleged promise to assist plaintiff in finding professional coaching work if such an opportunity were to arise, for lack of specificity and definiteness (*see Manas v VMS Assoc., LLC,* 53 AD3d 451 [1st Dept 2008]; *see also Cobble Hill Nursing Home v Henry & Warren Corp.*, 74 NY2d 475, 482 [1989], *cert denied* 498 US 816 [1990]). The court also properly determined that Houston's alleged remark to a sportswriter that plaintiff "was trying to blackmail him" was not actionable as slander, since, it was a fair characterization of plaintiff's letter, and did not convey that Houston was accusing plaintiff of a serious crime (*see Dillon v City of New York*, 261 AD2d 34, 39 [1st Dept 1999]). As for his claim of tortious interference with prospective business advantage, plaintiff failed to allege any specific business relationship he was prevented from entering into by reason of the purported tortious interference or that defendants acted with the sole purpose of harming him or employed wrongful means (*Schoettle v Taylor*, 282

AD2d 411, 412 [1st Dept 2001] [internal quotation marks omitted]). Nor was there any basis to impose vicarious liability on the Knicks for the claims against Houston.

Action Two against Houston, the Knicks and their attorneys for, inter alia, defamation, based on their characterization of plaintiff in court papers in Action One, was properly dismissed, since statements made in the course of judicial proceedings are privileged (*see Pomerance v McTiernan*, 51 AD3d 526 [1st Dept 2008]).

We have reviewed plaintiff's remaining contentions, including that his motions in Action One for sanctions and for reargument and renewal were improperly denied, and find them unavailing.

**M-2943 - *Rondeau v Houston, et al.,***

Motion for costs and sanctions granted to the extent of awarding costs on the appeal, and otherwise denied.

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

ENTERED: JUNE 26, 2014

CLERK

Mazzarelli, J.P., Acosta, Freedman, Richter, Clark, JJ.

12898 Peter Davey, Index 114275/11
Plaintiff-Appellant,

-against-

Goodrich & Bendish, et al.,
Defendants-Respondents.

_____

Peter F. Davey, appellant pro se.

John A. Raimondo, P.C., Elmsford (John A. Raimondo of counsel), for Goodrich & Bendish and Bruce Bendish, respondents.

Kelly & Knaplund, White Plains (Mary F. Kelly of counsel), for Kelly & Knaplund and Mary F. Kelly, respondents.

_____

Order, Supreme Court, New York County (Debra A. James, J.), entered April 4, 2013, which granted defendants' motion to dismiss the complaint on the ground that plaintiff failed to comply with two standing orders of Supreme Court, New York County, requiring him to obtain judicial permission prior to commencing any litigation relating to matters herein, and on the ground of res judicata, and scheduled a hearing to determine why plaintiff should not be held in civil and/or criminal contempt for violating said standing orders, and the amount of costs, attorneys' fees, and sanctions to be assessed against plaintiff, unanimously affirmed, without costs.

The instant action was properly dismissed based on

plaintiff's admitted violation of the two prior court orders requiring him to obtain judicial permission before commencing any litigation relating to his divorce action (*see Davey v Kelly*, 57 AD3d 230, 230 [1st Dept 2008]; see also *Matter of Davey*, 111 AD3d 207, 213 [1st Dept 2013]). Given his numerous unsuccessful attempts to relitigate the matters raised in this action, the doctrines of res judicata and collateral estoppel also bar plaintiff's claims (*see Matter of Hunter*, 4 NY3d 260, 269 [2005]; *Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 455 [1985]).

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

ENTERED: JUNE 26, 2014

CLERK

Mazzarelli, J.P., Acosta, Freedman, Richter, Clark, JJ.

12900-
12901 The People of the State of New York,
Respondent,

-against-

Steven Smith,
Defendant-Appellant.

Ind. 8941/93

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Yuval Simchi-Levi of counsel), for respondent.

_____

Order, Supreme Court, New York County (Daniel P. FitzGerald, J.), entered on or about April 27, 2012, which denied defendant's CPL 440.46 motion for resentencing, unanimously affirmed. Appeal from order, same court and Justice, entered on or about July 16, 2010, unanimously dismissed as academic.

The court properly exercised its discretion in determining that substantial justice dictated the denial of defendant's motion for resentencing. Resentencing is discretionary (*People v Sosa*, 18 NY3d 436, 442-443 [2012]), and courts may deny the applications of persons who "have shown by their conduct that they do not deserve relief from their sentences" (*People v Paulin*, 17 NY3d 238, 244 [2011]). Accordingly, the court

properly considered defendant's entire background, and not merely the circumstances of the underlying drug conviction. Before that conviction, defendant already had five felony convictions, which included crimes of violence. Defendant's prison disciplinary record was extremely poor. Furthermore, he committed numerous crimes while on parole, and even while his resentencing motion was pending (*see e.g. People v Neely*, 99 AD3d 578 [1st Dept 2012], *lv denied* 20 NY3d 1013 [2013]). Thus, defendant has "demonstrated a complete inability to control his behavior" (*People v Arce*, 83 AD3d 590, 591 [1st Dept 2011]).

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

ENTERED: JUNE 26, 2014

CLERK

Mazzarelli, J.P., Acosta, Freedman, Richter, Clark, JJ.

12902 In re Robert J. Troeller, Index 101423/11
Petitioner-Respondent,

-against-

Department of Education of the City School District of the City of New York, et al.,
Respondents-Appellants.

_____

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

Spivak Lipton LLP, New York (Gillian Costello of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Alexander W. Hunter, Jr., J.), entered January 7, 2013, confirming the arbitration award, dated August 20, 2010, which, upon a finding of improper suspension, awarded the grievant wages and applicable benefit contributions for the period from 30 days after his suspension through the date of the first arbitration hearing, unanimously modified, on the law, to define the period as from 30 days after the suspension through the date of the grievant's retirement, and otherwise affirmed, without costs.

The grievant was suspended indefinitely pursuant to Article III(9) of the collective bargaining agreement (CBA) based on his failure to provide a proper accounting of funds allocated to him

in connection with his employment as a custodian engineer. He remained suspended until he retired on November 30, 2004.

Petitioners filed a grievance contending that suspension without pay is limited to 30 days by Civil Service Law § 75(3), which is incorporated into the CBA under Article XVII(4)(B). After a hearing, the arbitration panel found that the grievant had been improperly suspended for more than 30 days, in violation of the CBA, and awarded him wages and benefit contributions for the period from 30 days after his suspension through the date of the first arbitration hearing, which was held September 29, 2005.

Respondents are correct that, since the CBA and Civil Service Law § 75(3) permit back-pay awards only for periods of improper suspension, even if the grievant was suspended improperly, the arbitrators exceeded their power (CPLR 7511[b][iii]) by awarding him back pay for a period of time following his voluntary retirement.

However, we reject respondents' argument that the arbitrators exceeded their power by deciding the grievance under the Civil Service Law, based on their contention that this impermissibly interfered with their exercise of discretion pursuant to CBA Article III(9), which imposes a penalty that is not disciplinary in nature. "*[E]ven in circumstances where an*

*arbitrator makes errors of law or fact*, courts will not assume the role of overseers to conform the award to their sense of justice" (*Matter of United Fedn. of Teachers, Local 2, AFT, AFL-CIO v Bd of Educ. of City School Dist. of City of N.Y.*, 1 NY3d 72, 83 [2003]).

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

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

ENTERED: JUNE 26, 2014

CLERK

Mazzarelli, J.P., Acosta, Freedman, Richter, Clark, JJ.

12903 The People of the State of New York, Ind. 4849/10
Respondent,

-against-

Anthony Bennett,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered April 19, 2011, convicting defendant, after a nonjury trial, of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the seventh degree, and sentencing him, as a second felony drug offender, to an aggregate term of two 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]). There is no basis for disturbing the court's determinations concerning identification and credibility.

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

ENTERED: JUNE 26, 2014

CLERK

Mazzarelli, J.P., Acosta, Freedman, Richter, Clark, JJ.

12904- Ind. 3601/10
12904A The People of the State of New York, 5270/10
Respondent,

-against-

Rajeev Kumar,
Defendant-Appellant.

_____

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

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

_____

Appeals having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Renee A. White, J.), rendered on or about June 28, 2011,

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

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

ENTERED: JUNE 26, 2014

CLERK

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

Mazzarelli, J.P., Acosta, Freedman, Richter, Clark, JJ.

12905 Magaly Rojas, Index 21532/12E
Plaintiff,

-against-

New York Elevator & Electric
Corporation, et al.,
Defendants.
- - - - -
New York Elevator & Electric
Corporation, et al.,
Third-Party Plaintiffs-Appellants,

-against-

Greater New York Insurance Company,
Third Party Defendant-Respondent.

_____

Babchik & Young LLP, White Plains (James E. Romer of counsel), for appellants.

Thomas D Hughes, Greater New York Mutual Insurance Company, New York (David D. Hess of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Alexander W. Hunter, Jr., J.), entered April 25, 2013, which granted third-party defendant's (GNY) motion to dismiss the third-party complaint, unanimously reversed, on the law, with costs, and the motion denied.

Third-party plaintiffs, New York Elevator & Electric Corporation (NYE) and ThyssenKrupp Elevator Corporation (TKE), established that, as a result of a scrivener's error, a principal

of defendant 45 West Hotel Limited Partnership signed an elevator maintenance contract for the premises owned by 45 West "on behalf of" defendant Rockrose Development Corporation, and that the true parties to the contract are 45 West and the elevator maintenance company, NYE, now succeeded by TKE (*see Harris v Uhlendorf*, 24 NY2d 463, 467 [1969]; *Ebasco Constructors v Aetna Ins. Co.*, 260 AD2d 287 [1st Dept 1999]).

GNY failed to demonstrate conclusively that NYE and TKE are not additional insureds under the policy it issued to 45 West. Under the policy, the elevator maintenance agreement between NYE and TKE and 45 West is an insured contract. It requires 45 West to procure insurance for and indemnify NYE and TKE (*see Kassis v Ohio Cas. Ins. Co.*, 12 NY3d 595, 600 [2009]). Moreover, the "Supplementary Payments - Coverages A and B" section of the policy provides that if GNY defends its insured in a suit in which the insured's indemnitee is also named as a party, then GNY will defend the indemnitee if certain conditions are met. Whether or not NYE and TKE have, as they contend, satisfied the

conditions, they have stated a claim for a declaration that, under the policy at issue, GNY is obligated to provide them with a defense and indemnification (*see Hunt v Ciminelli-Cowper Co., Inc.*, 93 AD3d 1152, 1156 [4th Dept 2012]).

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

ENTERED: JUNE 26, 2014

CLERK

Mazzarelli, J.P., Acosta, Freedman, Richter, Clark, JJ.

12907 Thomas Thoma, Index 151723/12
Plaintiff-Respondent,

-against-

The Port Authority of New York
and New Jersey, et al.,
Defendants-Appellants.

_____

London Fischer LLP, New York (Brian A. Kalman of counsel), for appellants.

The Perecman Firm, PLLC, New York (Peter D. Rigelhaupt of counsel), for respondent.

_____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered April 18, 2013, which denied defendants' motion to vacate plaintiff's notice of voluntary discontinuance as against defendant Port Authority of New York and New Jersey (Port Authority) as untimely, unanimously affirmed, without costs, insofar as appealed from by the Port Authority. Appeal from the same order by defendants Tishman Construction Corporation of New York and Tishman Construction Corporation (Tishman), unanimously dismissed, without costs.

Plaintiff commenced this action by filing the summons and complaint with the New York County Clerk on April 11, 2012, and serving them on the Port Authority on April 13, 2012 and on

Tishman on April 19, 2012. The complaint caption incorrectly named plaintiff, resulting in the parties entering into a stipulation to correct the caption on May 2, 2012. The stipulation further provided that plaintiff would file an amended complaint with the proper caption, that defendants were not required to respond to the original complaint, and that the time for defendants to answer or otherwise act with respect to either the complaint or the amended complaint was extended.

Thereafter, on May 12, 2012 – 26 days after the summons and complaint were served on Port Authority and 20 days after they were served on Tishman -- plaintiff served and filed a notice of discontinuance without prejudice pursuant to CPLR 3217(a)(1) as against all defendants, without amending the complaint. Two days later, plaintiff commenced an action against the same defendants in Supreme Court, Bronx County, and asserted the same claims.

Defendants moved to vacate the notice of discontinuance as against Port Authority alleging that, because no responsive pleading to the complaint was required by the stipulation, plaintiff had to serve any notice of discontinuance within 20 days of service of the complaint pursuant to CPLR 3217.

The motions were properly denied. At this stage of the action, plaintiff has an "absolute and unconditional right" to

discontinue without prejudice pursuant to CPLR 3217(a)(1) (*Giambrone v Giambrone*, 140 AD2d 206 [1st Dept 1988]).

The Tishman entities are not aggrieved by the motion court's denial of the motion to vacate the notice of discontinuance as against the Port Authority. Accordingly, we nostra sponte dismissed their appeal.

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

ENTERED: JUNE 26, 2014

CLERK

Mazzarelli, J.P., Acosta, Freedman, Richter, Clark, JJ.

12908- Ind. 813/11
12909 The People of the State of New York, 1221N/12
Respondent,

-against-

Jonathan Watson,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Naomi C. Reed of counsel), for respondent.

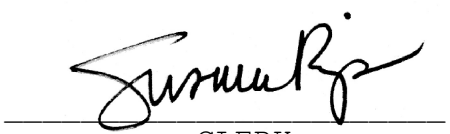
_____

Appeals having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (A. Kirke Bartley, Jr. J. at plea; Rena K. Uviller, J. at sentencing), rendered on or about October 17, 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 judgments so appealed from be and the same are hereby affirmed.

ENTERED: JUNE 26, 2014



CLERK

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

Mazzarelli, J.P., Acosta, Freedman, Richter, Clark, JJ.

12910N Ambac Assurance Corporation, et al., Plaintiffs-Respondents, Index 651612/10

-against-

Countrywide Home Loans, Inc., et al., Defendants-Appellants,

Bank of America Corp., Defendant.

_____

Simpson Thacher & Bartlett LLP, New York (Barry R. Ostrager and Shannon McGovern of counsel), for appellants.

Patterson Belknap Webb & Tyler LLP, New York (Robert P. LoBue of counsel), for respondents.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered December 17, 2013, which denied defendants-appellants' (collectively, Countrywide) motion to compel plaintiffs (collectively, Ambac) to produce certain documents relating to Ambac's self-assessment of its shortcomings in underwriting residential mortgage-backed securities (RMBS), unanimously affirmed, with costs.

The court providently exercised its discretion in denying Countrywide's motion to compel (*see Cook v HMC Times Sq. Hotel, LLC*, 112 AD3d 485 [1st Dept 2013]). The court's order limiting disclosure of a subset of documents addressing Ambac's recognized

shortcomings and deficiencies in its RMBS underwriting, referred to as "self-analysis documents," did not deprive Countrywide of a full and fair opportunity to litigate their defenses. Ambac has already agreed to produce self-analysis documents that specifically identify Countrywide or one of the RMBS transactions at issue. The burden that would be imposed upon Ambac to search for additional documents falling under this category would outweigh Countrywide's need for them (*see Kavanagh v Ogden Allied Maintenance Corp.*, 92 NY2d 952, 954 [1998]). Further, Countrywide has not demonstrated that the documents are material and necessary in the defense of this action (*see* CPLR 3101[a]). Indeed, as the court found, evidence of hindsight analysis would not tend to reveal Ambac's knowledge at the time it entered into the transactions at issue (*see DDJ Mgt., LLC v Rhone Group L.L.C.*, 15 NY3d 147, 154 [2010]).

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

ENTERED: JUNE 26, 2014

CLERK

Mazzarelli, J.P., Acosta, Freedman, Richter, Clark, JJ.

12911-
12912N Index 108168/11

Lupe Development Partners, LLC, et al.,
Plaintiffs-Appellants-Respondents,

-against-

Pacific Flats I, LLC, et al.,
Defendants,

Penny Drue Baird,
Nonparty Respondent-Appellant.

_____

The Scher Law Firm, LLP, Carle Place (Austin Graff of counsel), for appellants-respondents.

Zuckerman Gore Brandeis & Crossman, LLP, New York (Frank C. Welzer of counsel), for respondent-appellant.

_____

Orders, Supreme Court, New York County (Debra A. James, J.), entered August 14, 2013, which, to the extent appealed from, granted nonparty Baird's motion to quash three subpoenas duces tecum, denied plaintiffs' cross motion to compel compliance with the subpoenas, and denied Baird's motion to disqualify the Scher Law Firm as plaintiffs' attorneys, unanimously affirmed, with costs.

Baird established that the materials sought by plaintiff judgment creditors from her and the two mortgage lenders on her individually owned properties are "utterly irrelevant to any

proper inquiry" (*Velez v Hunts Point Multi-Serv. Ctr., Inc.*, 29 AD3d 104, 112 [1st Dept 2006]). Beyond seeking information relevant to the judgment debtors' assets, the subpoenas improperly sought examination of the individual assets of Baird, who is not a judgment debtor (*see Rossini v Republic of Argentina*, 453 Fed Appx 22 [2d Cir 2011]; CPLR 5223). In addition, the subpoenas sought material relating to assets that Baird acquired significantly before the transaction that gave rise to the underlying action (*see e.g. Robbins v National Dev. Corp.*, 100 AD2d 619 [2d Dept 1984], *appeal dismissed* 62 NY2d 940 [1984]).

Plaintiffs' failed to substantiate their allegations of judicial bias by "point[ing] to an actual ruling which demonstrates bias" (*Yannitelli v Yannitelli & Sons Constr. Corp.*, 247 AD2d 271 [1st Dept 1998] [internal quotation marks omitted], *lv denied* 92 NY2d 875 [1998]).

Baird, who is not a party to this action, failed to show an attorney-client relationship between herself and the law firm (*see Pellegrino v Oppenheimer & Co. Inc.*, 49 AD3d 94, 99 [1st Dept 2008]). She failed to show that the firm's attorneys violated ethical rules of conduct (*see e.g. Matter of Beiny [Weinberg]*, 129 AD2d 126, 141 [1st Dept 1987], *lv dismissed* 71

NY2d 994 [1988]). She failed to establish that the testimony of any of the attorneys was necessary (*see Campbell v McKeon*, 75 AD3d 479, 481 [1st Dept 2010]).

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

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

ENTERED: JUNE 26, 2014

CLERK

Mazzarelli, J.P., Acosta, Freedman, Richter, Clark, JJ.

12913 In re Nathan F. Marshall, Ind. 5534/12
[M-2572] Petitioner,

-against-

Hon. Roger S. Hayes, etc, et al.,
Respondents.

_____

Nathan F. Marshall, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Michelle R. Lambert of counsel), for Hon. Roger S. Hayes, respondent.

Cyrus R. Vance, Jr., District Attorney, New York (Ryan Gee of counsel), for municipal respondent.

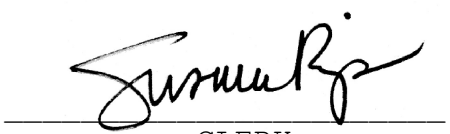
_____

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: JUNE 26, 2014



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