SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 22, 2014

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Mazzarelli, J.P., Andrias, DeGrasse, Clark, JJ.

11772 Patricia Davis, as Administratrix of the Estate of Janice Campbell-Pegram, deceased,
Plaintiff-Appellant,

-against-

New York City Transit Authority, et al.,
Defendants-Respondents,

Roland Lewis,
Defendant.

Index 105532/07

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

Wallace D. Gossett, Brooklyn (Lawrence Heisler of counsel), for respondents.

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Order, Supreme Court, New York County (Peter H. Moulton, J.), entered April 18, 2012, which, upon defendants-respondents' posttrial motion, set aside the jury award in plaintiff's favor and dismissed the complaint, unanimously modified, on the law, to deny the motion to dismiss the complaint, remand the matter for a new trial, with proof confined to the theories set forth in the notice of claim, and otherwise affirmed, without costs.

Plaintiff alleges that her decedent was injured when her motorized wheelchair flipped over, causing her to be thrown onto the floor of the bus on which she and her husband were traveling. The decedent died of breast cancer about 14 months after the accident.

In her initial notice of claim, plaintiff alleged that the accident happened at or near 124th Street near Marcus Garvey Park and that the decedent was thrown out of her wheelchair because the bus driver, defendant Roland Lewis, was negligently driving at a high speed and had failed to properly secure her wheelchair to the interior of the bus. This was also alleged in the amended complaint and the bill of particulars. Plaintiff subsequently amended her notice of claim to allege that the accident occurred at 120th Street. However, at trial, the decedent's husband testified that the accident happened at the intersection of 124th Street and Mount Morris West, when Lewis failed to stop at a blinking red light and two stop signs, and continued through the intersection as the decedent fell over and into the stairwell of the bus. He also testified that, had Lewis stopped at the traffic signals, the accident would not have happened. The court instructed the jury, inter alia, that, if it determined that Lewis had failed to stop at an intersection marked by two stop signs and a blinking red light, then it could use that failure to

determine that he was driving negligently in the seconds preceding the accident.

The trial court correctly set aside the jury's verdict because the evidence presented at trial substantially altered the theory of liability set forth in the notice of claim. While the change of location of the accident was not itself substantive, we find the additional testimony, i.e., that the decedent's injuries were caused by Lewis' failure to stop at a stop sign or a blinking red light, was not alleged in the notice of claim, and thereby substantially altered the nature of the claim. Further, plaintiff's time to amend the notice of claim to assert that theory has expired (*see* General Municipal Law § 50-i[1]; *Mahase v Manhattan & Bronx Surface Tr. Operating Auth.*, 3 AD3d 410, 411 [1st Dept 2004]; *Barksdale v New York City Tr. Auth.*, 294 AD2d 210, 211 [1st Dept 2002]). Contrary to plaintiff's contention, defendants were not required to demonstrate that their investigation was prejudiced, because plaintiff never sought to amend her notice of claim pursuant to General Municipal Law § 50-e(6) (*see City of New York, Seise*, 212 AD2d 467 [1st Dept 1995]).

Notwithstanding that the jury verdict was correctly set aside, dismissal of the complaint is not warranted because the theories set forth in the amended notice of claim were supported by evidence at trial and could have resulted in a jury verdict of

liability. The jury could reasonably have concluded that Lewis's negligence in failing to properly secure the motorized wheelchair to the interior of the bus and driving too fast caused the decedent's injuries. Under the circumstances, a new trial is warranted excluding evidence of negligence not set forth in the notice of claim (*see Kane v Triborough Bridge & Tunnel Auth.*, 8 AD3d 239 [2d Dept 2004]; *Barksdale*, 294 AD2d at 211).

Since the evidence supporting plaintiff's new theory of liability could have affected the jury's award of damages for past pain and suffering, the damages issue must also be retried (*compare Soto v City of New York*, 276 AD2d 449 [1st Dept 2000]).

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

ENTERED: MAY 22, 2014

CLERK

Tom, J.P., Friedman, Sweeny, Saxe, Freedman, JJ.

12048 82 Retail LLC, Index 152956/12
Plaintiff-Respondent-Appellant,

-against-

Eighty Two Condominium, et al.,
Defendants-Appellants-Respondents.

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Braverman Greenspun, P.C., New York (Tracy Peterson of counsel), for appellants-respondents.

Coritsidis & Lambros, PLLC, New York (Jeffrey A. Gangemi of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered December 19, 2012, which granted so much of defendants' motion as sought to dismiss all claims as against the individual defendants and the seventh and eighth causes of action and the request for punitive damages as against defendants Eighty Two Condominium and Board of Managers of the Eighty Two Condominium, and denied so much of the motion as sought to dismiss the first through sixth causes of action as against the condominium and the board, unanimously modified, on the law, to declare, upon the second cause of action, that plaintiff may not use its commercial unit for every purpose permitted by the Zoning Regulation but is bound by the Condominium Documents (as defined in defendant Eighty Two Condominium's declaration), including, at a minimum, the fifth amendment to the offering plan, to grant the

motion to dismiss as to the fourth and sixth causes of action, and otherwise affirmed, without costs.

Plaintiff owns the sole commercial unit in defendant condominium, which also contains seven residential units. At the time plaintiff purchased its unit, the fifth amendment to the condominium's offering plan said, "The commercial space will not be used as a restaurant, bar or similar noise causing use," and its declaration stated, "[N]o Amendment to the Condominium Documents [which include the condominium's declaration and bylaws] shall be adopted which would . . . change the permitted use of any Unit . . ., unless the owner of such . . . Unit shall consent thereto."

On May 19, 2011, defendant board adopted an amendment to the condominium's bylaws, over the objection of plaintiff's representative on the board. The individual defendants are the other board members. On September 20, 2011, the residential unit owners outvoted plaintiff to adopt an amendment to the condominium's declaration. Plaintiff contends that the May and September amendments changed the permitted use of its unit; defendants contend that they merely clarified the permitted use.

As of November 16, 2011, plaintiff leased its unit to nonparty GSR Yogurt Union Square LLC. GSR had the right to terminate the lease if the May 2011 amendment was not rescinded

or annulled within 90 days. Plaintiff offered to pay the condominium $50,000 if the board rescinded the amendment on or before December 31, 2011, but the board did not do so. GSR eventually exercised its right to terminate the lease.

We cannot conclude, as a matter of law, that "a restaurant, bar or similar noise causing use" includes a frozen yogurt shop; the phrase is ambiguous (*see generally Whitebox Convertible Arbitrage Partners, L.P. v Fairfax Fin. Holdings, Ltd.*, 73 AD3d 448, 451 [1st Dept 2010]; *Blue Jeans U.S.A. v Basciano*, 286 AD2d 274, 275-276 [1st Dept 2001]). Similarly, we cannot conclude, as a matter of law, that the 2011 amendments constituted mere clarifications as opposed to changes in the permitted use of plaintiff's unit.

However, the fifth amendment to the offering plan clearly prohibits plaintiff from using its unit as an "[e]ating or drinking establishment[] with entertainment, but not dancing, with a capacity of 200 persons or fewer." Hence, plaintiff is not entitled to a declaration that, in effect, it may use its unit for any purpose permitted by the Zoning Regulation.

The motion court correctly declined to dismiss the first cause of action (for a declaration that the 2011 amendments were null and void) on the ground that plaintiff had an adequate

remedy at law (*see Matter of Morgenthau v Erlbaum*, 59 NY2d 143, 148 [1983], *cert denied* 464 US 993 [1983]). Furthermore, plaintiff contends that the existence of the amendments is a continuing breach, for which damages may not provide an adequate remedy (*see Bartley v Walentas*, 78 AD2d 310, 314 [1st Dept 1980]).

The fourth and sixth causes of action, for breach of fiduciary duty, are duplicative of the third and fifth causes of action, for breach of contract (*see Brasseur v Speranza*, 21 AD3d 297, 298 [1st Dept 2005]; *William Kaufman Org. v Graham & James*, 269 AD2d 171, 173 [1st Dept 2000]).

Since GSR did not breach the lease, the court correctly dismissed the seventh cause of action, for tortious interference with contract (*see e.g. NBT Bancorp v Fleet/Norstar Fin. Group*, 87 NY2d 614, 620-621 [1996]).

The eighth cause of action asserting a derivative cause of action was properly dismissed by the court because it is based solely on vindicating plaintiff's personal interests. Further, the eighth cause of action alleges, inter alia, that by refusing plaintiff's offer of $50,000 and a release of his right to seek damages in exchange for the board's rescission of the May 2011 amendment, the condominium was caused to incur unnecessary legal fees. CPLR 4547 and well-settled judicial policy preclude the

introduction of evidence of settlement negotiations "to prove either liability or the value of the claims" (*CIGNA Corp. v Lincoln Natl. Corp.*, 6 AD3d 298, 299 [1st Dept 2004]; *see also Jones Lang Wootton USA v LeBoeuf, Lamb, Green & MacRae*, 243 AD2d 168, 182-183 [1st Dept 1998], *lv dismissed* 92 NY2d 962 [1998]). Moreover, plaintiff's allegations do not support a claim for punitive damages.

Since the second, fourth, sixth, seventh and eighth causes of action are dismissed, the only causes of action on which the individual defendants might be held liable are the first (declaratory judgment), third (breach of contract, pleaded as an alternative to the first cause of action), and fifth (breach of contract). The court correctly dismissed those causes of action as against the individual defendants (*Hixon v 12-14 E. 64th Owners Corp.*, 107 AD3d 546, 547 [1st Dept 2013], *lv denied* 2014 NY Slip Op 64545 [2014]; *Fletcher v Dakota, Inc.*, 99 AD3d 43, 47 [1st Dept 2012]).

We have considered the appealing 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: MAY 22, 2014

CLERK

Tom, J.P., Renwick, Richter, Feinman, Gische, JJ.

12298-
12299 Accounting of Lawrence Kalik, et al. File 1121/86 Index 107856/98

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Accounting of Carl Wagman, etc.

- - - - -

Loretta Wagman,
Plaintiff-Appellant-Respondent,

-against-

Lawrence Kalik, etc., et al.,
Defendants-Respondents,

Chemical Bank, et al.,
Defendants,

Chase Manhattan Bank as successor-in-interest to Chemical Bank,
Defendant-Respondent-Appellant.

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Benjamin Z. Holczer P.C., West Hempstead (Benjamin Z. Holczer of counsel), for appellant-respondent.

Hahn & Hessen LLP, New York (Jonathan M. Proman of counsel), for respondent-appellant.

Katten Muchin Rosenman, New York (Jay W. Freiberg of counsel), for Lawrence Kalik, respondent.

Weil, Gotshal & Manges LLP, New York (Gregory Silbert of counsel), for Weil, Gotshal & Manges and Mildred Kalik, respondents.

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Order, Surrogate's Court, New York County (Renee Roth, S.), entered on or about January 2, 2009, which resubmitted this matter to a referee for further findings of fact, and order, same

court (Nora Anderson, S.), entered on or about March 6, 2012, which confirmed the referee's report, unanimously affirmed, without costs.

In this action, arising out of a trust created by Louis Wagman (Louis) in 1977, Carl Wagman, Louis' son, was substituted as plaintiff after Louis' widow (plaintiff's mother), Loretta Wagman, died. Although plaintiff contends the referee was biased, he did not seek the referee's recusal and may not raise this argument for the first time on appeal (*see People v Kirsh*, 176 AD2d 652, 653 [1st Dept 1991], *lv denied* 79 NY2d 949 [1992]; *see also Gottesman Bus. Brokers v Goldman Fire Prevention Corp.*, 238 AD2d 250 [1st Dept 1997]).

Plaintiff waived his argument that the Surrogate should not have sent the Supreme Court action (which Supreme Court had previously transferred to Surrogate's Court) to a referee by failing to appeal from the order of reference (*see 587 Dev., Inc. v Pizzuto*, 8 AD3d 5 [1st Dept 2004]; *Law Offs. of Sanford A. Rubenstein v Shapiro Baines & Saasto*, 269 AD2d 224, 225 [1st Dept 2000], *lv denied* 95 NY2d 757 [2000]).

Plaintiff lacks standing to object to the part of the accounting that covers the period when his father, the grantor,

was alive, i.e. the period when the trust was revocable (*see Matter of Malasky*, 290 AD2d 631, 632 [3d Dept 2002]; *see also Matter of Central Hanover Bank & Trust Co. [Momand]*, 176 Misc 183, 186 [Sup Ct, NY County 1941], *affd* 263 App Div 801 [1st Dept 1941], *affd* 288 NY 608 [1942]).

Although the referee found that plaintiff lacked standing to make objection 17, he nonetheless reached the merits by recommending that the Surrogate might wish to direct the amendment of the account sua sponte. This recommendation was to incorporate the defendant bank trustee's admitted inability to explain why approximately $600 in interest for the PBT Tax Exempt Bond Fund had not been credited for December 1977 and March 1978. Although the Surrogate did not abide by that recommendation, there was no reason for her to reach the merits of that objection since plaintiff lacked standing to raise it.

Plaintiff contends that the referee should have rejected the testimony of Lawrence Kalik, a trustee and executor of Louis' estate, that he was not actively involved in the management of Butterflake Bakery. However, the referee "was in the best position to weigh the evidence and make credibility determinations" (*Winopa Intl., Ltd v Woori A, Bank*, 59 AD3d 203, 204 [1st Dept. 2009] [internal quotation marks omitted]; *see also Anonymous v Anonymous*, 289 AD2d 106, 107 [1st Dept 2001]).

Plaintiff failed to preserve his argument that defendants should be surcharged for $61,000 because they cannot produce a cancelled check from Butterflake for the settlement amount and because their accounting states that the Butterflake obligation was retired as worthless. Similarly, plaintiff failed to preserve the portion of his spoliation argument that involves Butterflake. Although he preserved the portion of his spoliation argument that addresses documentation for the withdrawals that his father made during his lifetime, the argument is unavailing since, as noted above, plaintiff lacks standing to object to the part of the accounting that covers the period during which Louis was alive.

Plaintiff contends that the decree approving defendant Kalik's account as executor is not res judicata because "fiduciaries can find no shelter in prior decrees on judicial settlement where . . . disclosure of necessary facts is withheld" (*Matter of Van Deusen*, 24 Misc 2d 611, 614 [Sur Ct, Columbia County 1960]). However, the referee found that plaintiff's mother was aware of the tax audits. Therefore, defendant Kalik did not withhold necessary facts by failing to disclose the tax audits in his accounting for Louis's estate.

The referee addressed the arguments that plaintiff reiterates on appeal regarding the trust's repayment of a loan

made by plaintiff's mother and its treatment of tax refunds, the alleged distinction between mandatory and discretionary payments, and the decision to reserve for trust expenses from 1994 onward, and the Surrogate properly exercised her "broad power" to accept his report (*see Taveras v General Trading Co., Inc.*, 73 AD3d 659, 660 [1st Dept 2010] [internal quotation marks omitted]). We defer to the referee's conclusions since they turn on a determination of witness credibility (*see id.*).

Plaintiff contends that defendants should be surcharged because the Bank made no suggestions about diversifying the trust's assets between 1994 and 2001. Even if, arguendo, the trustees (including plaintiff himself) violated EPTL 11-2.3(b)(3)(c) and the Bank violated EPTL 11-2.3(b)(6), no surcharge is warranted because plaintiff failed to prove damages. He presented no evidence as to the date on which the Bank should have diversified the trust's assets or the value of the trust corpus on the date it should have been diversified (*see* Margaret Valentine Turano, Practice Commentaries, McKinney's Cons Laws of NY, Book 17B, EPTL 11-2.3).

In the alternative, plaintiff contends that the court should deny some or all of defendants' commissions due to their failure to diversify. He may make this argument before the Surrogate, whose 2012 order indicates that she will try the issue of

commissions.

Contrary to plaintiff's contention, the referee correctly found that he abandoned any objections as to which he presented no proof (*see Schulman v Levy, Sonet & Siegel*, 302 AD2d 321 [1st Dept 2003]).

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: MAY 22, 2014

CLERK

Sweeny, J.P., Acosta, Saxe, Manzanet-Daniels, Clark, JJ.

12314 Iris Wellington, Index 22827/05
Plaintiff-Respondent,

-against-

New York City Transit Authority,
et al.,
Defendants-Appellants,

Michelle F. Bhalerao,
Defendant.

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Jeffrey Samel & Partners, New York (Robert G. Spevack of counsel), for appellants.

Budin Reisman Kupferberg & Bernstein, New York (Gregory C. McMahon of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Julia Rodriguez, J.), entered November 5, 2012, in plaintiff's favor as against defendants New York City Transit Authority and Kirk B. Seung (defendants), unanimously affirmed, without costs.

The court correctly denied defendants' motion to set aside the verdict. A jury verdict is properly set aside as against the weight of the evidence when "the jury could not have reached its verdict on any fair interpretation of the evidence" (*McDermott v Coffee Beanery, Ltd.*, 9 AD3d 195, 206 [1st Dept 2004]). Here, the evidence presented at the retrial of this action allowed the jurors to rationally conclude that defendant Seung, the bus driver, was 100% responsible for the collision while the driver

of the minivan was 0% liable. Plaintiff's unrefuted expert testimony provided a reconstruction of the accident [explaining to the jury how the photographs in evidence indicate that the NYCTA bus driver was primarily at fault for the accident]. Thus, we find that there is a valid interpretation of the evidence supporting the jury verdict.

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: MAY 22, 2014

CLERK

Corrected Order - May 22, 2014

Tom, J.P., Friedman, Andrias, Saxe, DeGrasse, JJ.

12349 Jose Orlando Campos,
Plaintiff-Respondent,

Index No. 105776/08
590715/09
590448/10

-against-

68 East 86th Street Owners Corp.,
Defendant-Appellant.

- - - - -

68 East 86th Street Owners Corp.,
Third-Party Plaintiff-Appellant,

-against-

Jeffrey Rosen,
Third-Party Defendant-Respondent.

[And a Second Third-Party Action]

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

Gorayeb & Associates, P.C., New York (John M. Shaw of counsel), for Jose Orlando Campos, respondent.

Hoey, King, Epstein, Prezioso & Marquez, New York (John R. Marquez of counsel), for Jeffrey Rosen, respondent.

Order, Supreme Court, **New York County** (Saliann Scarpulla, J.), entered July 16, 2013, which denied defendant's motion for summary judgment dismissing the complaint, granted plaintiff's cross motion for summary judgment on the issue of defendant's liability pursuant to Labor Law § 240(1), and granted third-party defendant's motion for summary judgment dismissing the third-party complaint, unanimously modified, on the law, to grant defendant's motion as to the Labor Law § 241(6) claim, and to

deny plaintiff's motion, and otherwise affirmed, without costs.

Plaintiff, an employee of second third-party defendant Primacy Contracting Inc. (Primacy), was injured when he fell off an A-frame ladder while sanding the ceiling of a closet in a cooperative apartment. Defendant/third-party plaintiff is the cooperative corporation. Third-party defendant, Jeffrey Rosen, a shareholder of the corporation and the proprietary lessee, hired Primacy to paint the apartment. Primacy provided the ladder and directed plaintiff's work.

To establish liability under Labor Law § 240(1), a plaintiff must prove a violation of the statute that was the proximate cause of his injury (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]). A fall from a ladder does not in and of itself establish that the ladder did not provide appropriate protection (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 288-289 [2003]; *Ellerbe v Port Auth. of N.Y. & N.J.*, 91 AD3d 441 [1st Dept 2012]; *Buckley v J.A. Jones/GMO*, 38 AD3d 461 [1st Dept 2007]).

The record before us demonstrates the existence of triable issues of fact as to how plaintiff's accident occurred, and it cannot be concluded, as a matter of law, that the alleged failure to provide him with proper protection proximately caused his injuries (*see Degen v Uniondale Union Free Sch. Dist.*, 114 AD3d 822 [2d Dept 2014]; *Esteves-Rivas v W2001Z/15CPW Realty, LLC*, 104

AD3d 802 [2d Dept 2014]; *Ellerbe*, 91 AD3d 442; *Delahaye v Saint Anns School*, 40 AD3d 679 [2d Dept 2007]). Plaintiff testified that he "fell backwards and the ladder forward," and submitted an affidavit in which he stated that the ladder suddenly went forward and he simultaneously fell backwards, and that he did not become dizzy or lose his balance. However, plaintiff also testified that he opened the ladder, locked it and checked that it was sturdy, that he was not experiencing any problems with the ladder while he was on it, that he did not remember how he fell off the ladder or know why he fell off, and that he did not feel the ladder move before he fell. When asked if remembered or knew if the ladder shook or wobbled, plaintiff responded, "No." Furthermore, plaintiff's employer testified that he situated the ladder immediately before plaintiff's fall, locked the braces and climbed it himself, and that when he went back into the room after plaintiff fell, the ladder was in the same place as before the accident and was not on the ground, and that plaintiff did not say that there was anything wrong with the ladder that caused him to fall. These contradictions raise credibility issues which cannot be resolved on a motion for summary judgment.

Plaintiff's claim under Labor Law § 241(6), based on violations of Industrial Code (12 NYCRR) § 23-1.21(b)(1), 23-1.21(b)(3) (iv), and 23-1.21(b)(4)(ii), should be dismissed. There is no evidence that the ladder was unable to sustain

plaintiff's weight, or was not in good condition, or that the floor underneath it was slippery. Plaintiff testified that he had used the ladder in question without incident before the accident (*see e.g. Croussett v Chen*, 102 AD3d 448 [1st Dept 2013]).

Rosen, who was not negligent, may not be held liable under Labor Law § 240(1) because he falls under the exception contained in the statute for the "owners of one and two-family dwellings who contract for but do not direct or control the work" (*see Maciejewski v 975 Park Ave. Corp.*, 37 AD3d 773 [2d Dept 2007], *lv denied* 8 NY3d 815 [2007]). Defendant did not raise an issue of fact as to whether the indemnity provisions of paragraph 11 of the proprietary lease, which apply to "liability . . . arising from injury to person . . . due wholly or in part to any act, default or omission of the Lessee or of any person dwelling or visiting in the apartment, or by the Lessor, its agents, servants or contractors, when acting as agent for the Lessee as in this lease provided," were triggered.

"A party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances" (*see Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987] [internal quotation marks omitted]). When a party is under no legal duty

to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty that the parties did not intend to be assumed (*see e.g. Hooper Assoc. v AGS Computers*, 74 NY2d 487 [1989]). Where there is an ambiguity as to the meaning of a lease prepared by the landlord, the ambiguity should be resolved in favor of the lessee (*see 151 W. Assoc. v Printsiples Fabric Corp.*, 61 NY2d 732 [1984]).

Here, the term "visitor" is not defined in the proprietary lease, and a reasonable interpretation of "any person . . . visiting in the apartment," as used in paragraph 11, would distinguish plaintiff, a worker or "servant," employed by "contractor" Primacy, from a visitor (*see Agrispin v 31 E. 12th St. Owners, Inc.*, 77 AD3d 562, 563 [1st Dept 2010] ["defendants' contention that they raised an issue of fact whether paragraph 11 was triggered by plaintiff's 'visiting' in Duff's apartment, as that paragraph provided, is unsupported by any evidence that plaintiff was doing anything other than cleaning Duff's windows"]). Rosen testified at his deposition that he did not know plaintiff and that he only learned of the incident 1½ years after it occurred. In this regard, we note that in describing the circumstances under which the indemnity would be triggered by the act or omission of the Lessor, when acting as the agent for the Lessee, paragraph 11 specifically includes the Lessor's "agents, servants or contractors," terms that are not included in

the part of the provision that addresses the acts that would trigger the Lessee's indemnity obligations.

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

ENTERED: MAY 22, 2014

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Feinman, Gische, JJ.

12551 The People of the State of New York, Respondent, Ind. 3041/10

-against-

William Robbins, Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered June 21, 2012, convicting defendant, upon his plea of guilty, of robbery in the first degree, and sentencing him to a term of 15 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence to a term of 10 years, and otherwise affirmed.

The court properly declined to sentence defendant as a youthful offender. Because defendant was convicted of an armed felony, he was not eligible for youthful offender treatment without a showing of specified mitigating factors (CPL 720.10[2][a][ii];[3]), and the record does not establish such mitigation. Defendant played an important role in a series of violent crimes, and the fact that his codefendant's conduct was even more heinous did not render defendant's participation so

"minor" (CPL 720.10[3][ii]) as to render him eligible for youthful offender treatment, which was not warranted in any event. However, we find the sentence excessive to the extent indicated.

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

ENTERED: MAY 22, 2014

CLERK

Renwick, J.P., Manzanet-Daniels, Feinman, Gische, JJ.

12553 Theatre District Realty Corp., Index 653614/12
Plaintiff-Respondent,

-against-

Ilana Appleby,
Defendant-Appellant.

_____

Sargent, Sargent & Jacobs, LLC, New York (Hale C. Sargent of counsel), for appellant.

Markewich and Rosenstock, New York (Lawrence M. Rosenstock of counsel), for respondent.

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Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered on or about August 22, 2013, which granted plaintiff's motion for summary judgment declaring that the sale of its building does not require the consent of a super-majority of its shareholders pursuant to Business Corporation Law (BCL) § 909(a), and so declared, unanimously reversed, on the law, with costs, the motion denied, and it is declared that the sale of the building requires the consent of a super-majority of the shareholders pursuant to BCL § 909(a).

BCL § 909(a) governs the disposition of all or substantially all of a corporation's assets, "if not made in the usual or regular course of the business actually conducted by such corporation." Since plaintiff has never been engaged in the business of selling real estate, the sale of its building would

not be made in the regular course of the business it "actually conduct[s]" (*see Matter of McKay v Teleprompter* Corp., 19 AD2d 815 [1st Dept 1963], *appeal dismissed* 13 NY2d 1058 [1963]; *Vig v Deka Realty Corp.*, 143 AD2d 185 [2d Dept 1988], *lv denied* 73 NY2d 708 [1989]).

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

ENTERED: MAY 22, 2014

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Feinman, Gische, JJ.

12554 In re William Mallay, Petitioner-Appellant, Index 400554/12

-against-

New York City Housing Authority, Respondent-Respondent.

_____

William Mallay, appellant pro se.

Kelly D. MacNeal, New York (Marisa Shemi of counsel), for respondent.

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Judgment, Supreme Court, New York County (Carol E. Huff, J.), entered November 30, 2012, which denied the petition brought pursuant to CPLR article 78, seeking to annul respondent's determination dated November 30, 2011, denying petitioner succession rights, as a remaining family member to the subject apartment, and dismissed the proceeding, unanimously affirmed, without costs.

Petitioner did not sustain his burden of establishing entitlement to succession rights as a remaining family member to the apartment held by his deceased fiancé. The record demonstrates that his occupancy was not pursuant to respondent Housing Authority's written permission, nor was it reflected in the affidavits of income submitted to respondent by the deceased

tenant (*see Matter of Adler v New York City Hous. Auth.*, 95 AD3d 694, 695 [1st Dept 2012], *lv dismissed* 20 NY3d 1053 [2013]). In any event, although petitioner testified that he and the tenant, who died on January 1, 2010, were domestic partners, he proffered no evidence that they registered the partnership, and hence, their relationship "is not within the Housing Authority's category of immediate relatives who are able to obtain permanent permission to occupy an apartment and succeed to a deceased tenant's lease" (*Matter of Hawthorne v New York City Hous. Auth.*, 81 AD3d 420, 421 [1st Dept 2011], citing NYCHA Management Manual, ch IV).

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: MAY 22, 2014

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Feinman, Gische, JJ.

12555 In re Kevin Dunn, et al., Index 152349/12
Petitioners-Appellants,

-against-

Matt Goldman, et al.,
Respondents-Respondents.

_____

Damon Morey LLP, Buffalo (Charles von Simson of counsel), for Kevin Dunn, appellant.

Reed Smith LLP, New York (Peter D. Raymond of counsel), for Makoto Deguchi and BMGT, LP, appellants.

Paul, Weiss, Rifkind, Wharton & Garrison, LLP, New York (Gerard E. Harper of counsel), for respondents.

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Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered on or about April 12, 2013, which denied the petition to vacate an arbitration award, and granted respondents' cross motion to dismiss the petition, unanimously affirmed, without costs.

The arbitration panel's orders did not exceed a specifically enumerated limitation on its power (*see generally Matter of New York City Tr. Auth. v Transport Workers' Union of Am., Local 100, AFL-CIO*, 6 NY3d 332, 336 [2005]; CPLR 7511[b][1][iii]). The arbitration clause set forth in the parties' 1997 Agreement contemplated that all disputes arising out of the agreement would be arbitrated. To infer a limitation to this broad power from a

separate provision in the 1997 Agreement would be inappropriate, as it would improperly involve the courts in the merits of the dispute (*see Matter of Silverman [Benmor Coats]*, 61 NY2d 299, 307 [1994]).

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

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

ENTERED: MAY 22, 2014

CLERK

CORRECTED ORDER - MAY 23, 2014

Renwick, J.P., Richter, Manzanet-Daniels, Feinman, Gische, JJ.

12556-
12557 — Ind. 6384/09

The People of the State of New York,
Respondent,

-against-

Carlos Negron,
Defendant-Appellant.

- - - - -

The People of the State of New York,
Respondent,

-against-

Jorge Jiminez,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Rahul Sharma of counsel), for Carlos Negron, appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Bruce D. Austern of counsel), for Jorge Jiminez, appellant.

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

Judgments, Supreme Court, New York County (Renee A. White, J.), rendered November 9, 2010, convicting both defendants, after a jury trial, of robbery in the second degree (four counts) and burglary in the second degree, and sentencing defendant Negron, as a second violent felony offender, to concurrent terms of 15 years, and sentencing defendant Jiminez, as a persistent violent felony offender, to concurrent terms of 20 years to life, unanimously affirmed.

The court properly exercised its discretion in precluding defendants from introducing a portion of the prosecutor's paralegal's notes of an interview with a nontestifying victim. These notes were inadmissible under any hearsay exception, even if defendants had called the paralegal as a witness. Since defendants did not assert any constitutional right to introduce the precluded evidence, they did not preserve their constitutional claim (*see People v Lane*, 7 NY3d 888, 889 [2006]; *see also Smith v Duncan*, 411 F3d 340, 348-349 [2d Cir 2005]), and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. Defendants did not make an adequate showing that this evidence was reliable, or that it was critically exculpatory (*see Chambers v Mississippi*, 410 US 284 [1973]; *People v Robinson*, 89 NY2d 648, 654 [1997]; *People v Burns*, 18 AD3d 397 [2005], *affd* 6 NY3d 793 [2006]). There was nothing directly exculpatory about the excluded comment, which, at most, tended to contradict a minor aspect of the People's case. Similarly, any error in the exclusion of this evidence was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

The court properly declined defendants' request to charge petit larceny as a lesser included offense of a particular robbery count. There was no reasonable view of the evidence, viewed most favorably to defendants, that they took property, but

did so without using force. Nothing in either the prosecution or defense cases supported such a theory (*see People v Negron*, 91 NY2d 788 [1998]; *People v Ruiz*, 216 AD2d 63 [1995], *affd* 87 NY2d 1027 [1996]). Since defendants clearly limited their request to only one robbery count, the claim is unpreserved with respect to the other robbery counts, and we decline to review it in the interest of justice. As an alternative holding, we reject it for the same reasons.

The loss of a relatively small portion of the stenographic record does not require reversal of defendants' convictions (*see People v Harrison*, 85 NY2d 794 [1995]). The court conducted a reconstruction hearing at which various participants in the trial presented their recollections, to the extent possible, of the brief portions of the trial for which minutes are not available. When viewed in light of the presumption of regularity (*id.* at 796), the facts adduced at the reconstruction hearing regarding the missing pages support an inference that the missing minutes would **not** have revealed any significant appellate issues.

Defendant Jiminez did not preserve his claim that the admission at trial of the conditional examinations of two witnesses, without proof of the witnesses' unavailability, violated his right of confrontation and the requirements of CPL 670.10(1), and we decline to review it in the interest of justice. It was Jiminez's counsel who initially proposed the

taking of the conditional examinations of the two California residents, and he made no objection when they were received at trial. Thus, Jiminez effectively stipulated to the use of the examinations, thereby relieving the People of their burden of showing unavailability.

We perceive no basis for reducing the sentences.

Defendant Jiminez's pro se ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Accordingly, since Jiminez has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. We have considered and rejected Jiminez's remaining pro se claims.

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

ENTERED: MAY 22, 2014

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Gische, JJ.

12558 In re Serenity A.,

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

Katrina A.,
Respondent-Appellant,

Edwin Gould Services for
Children and Families,
Petitioner-Respondent,

Administration for Children's
Services,
Petitioner.

_____

Carol Kahn, New York, for appellant.

John R. Eyerman, New York, for respondent.

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

_____

Order, Family Court, New York County (Susan K. Knipps, J.), entered on or about February 19, 2013, which granted petitioner agency's motion to revoke the suspended judgment entered on or about April 14, 2011, and terminated respondent's parental rights, unanimously affirmed, without costs.

A preponderance of the evidence supports the court's finding that respondent violated the terms of the suspended judgment (*see* Family Court Act § 633[f]; *Matter of Aliyah Careema D. [Sophia Seku D.]*, 88 AD3d 529 [1st Dept 2011]). While respondent made

efforts to comply with some of the terms of the suspended judgment, she failed to visit the child regularly for several months and failed to obtain suitable housing (*see Matter of Dayjore Isaiah M. [Dominique Shaniqua M.]*, 109 AD3d 745 [1st Dept 2013]; *Matter of Gianna W. [Jessica S.]*, 96 AD3d 545 [1st Dept 2012]). She also failed to submit to therapy and random drug testing (*see Matter of Tony H. [Gwendolyn H.]*, 68 AD3d 439 [1st Dept 2009]).

A preponderance of the evidence supports the finding that it was in the child's best interest to be freed for adoption by the foster mother, who has cared for her and her siblings for years (*see Matter of Sjuqwan Anthony Zion Perry M. [Charnise Antonia M.]*, 111 AD3d 473, 474 [1st Dept 2013], *lv denied* __ NY3d __, 2014 NY Slip Op 68068 [2014]).

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

ENTERED: MAY 22, 2014

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Feinman, Gische, JJ.

12559-
12560 Samantha R., et al.,
Plaintiffs-Respondents,

-against-

The New York City Housing Authority,
et al.,
Defendants-Appellants.

Index 104940/09

_____

Congdon, Flaherty, O'Callaghan, Reid, Donlon, Travis & Fishlinger, Uniondale (Christine Gasser of counsel), for New York City Housing Authority, appellant.

Jeffrey S. Shein & Associates, P.C., Syosset (Frank A. Polacco of counsel), for GKC Industries, Inc., appellant.

Gregory E. Green, P.C., Callicoon (Gregory Green of counsel), for respondents.

_____

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered December 17, 2013, which denied defendants' motions for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motions granted. The Clerk is directed to enter judgment accordingly.

Infant plaintiff was injured when, after kicking a soccer ball into a planting area on the premises of defendant New York City Housing Authority (NYCHA), she tripped over a decorative wicket fence that surrounded the planting area and fell onto the pavement. Defendant GKC Industries, Inc. was the general contractor hired by NYCHA to renovate the grounds of the subject

premises several years earlier.

The record, including testimonial and photographic evidence, demonstrates that dismissal of the complaint as against both defendants is warranted since the alleged defective condition, namely the wicket fence, was open and obvious, and not inherently dangerous (*see Matthews v Vlad Restoration Ltd.*, 74 AD3d 692 [1st Dept 2010]; *Goldban v 56th Realty*, 304 AD2d 408 [1st Dept 2003]). Plaintiff's expert failed to support his opinion that the planting area was defectively designed, and the provision of the Building Code alleged to have been violated is inapplicable to the planting area (*see e.g. Etheridge v Marion A. Daniels & Sons, Inc.*, 96 AD3d 436 [1st Dept 2012]).

In view of the finding that the defect is not actionable, we need not address the remaining arguments in favor of dismissal of the complaint.

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

ENTERED: MAY 22, 2014

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Feinman, Gische, JJ.

12561 Gisel Corporan, Index 305790/10
Plaintiff-Appellant,

-against-

Gifty Dennis,
Defendant-Respondent.

_____

Burns & Harris, New York (Alexis Diaz of counsel), for appellant.

Law Offices of James J. Toomey, New York (Eric P. Tosca of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Lizbeth Gonzalez, J.), entered April 16, 2013, which, to the extent appealable, granted defendant's motion to renew and/or reargue so much of his motion for summary judgment as sought to dismiss the claim of serious injury to the right knee, and, thereupon, granted the motion for summary judgment in its entirety, unanimously affirmed, without costs, and the appeal therefrom otherwise dismissed, without costs, as taken from a nonappealable paper.

No appeal lies from the denial of plaintiff's motion for reargument (*see Mejia-Ortiz v Inoa*, 89 AD3d 514 [1st Dept 2011]).

The court granted defendant's motion to renew and/or reargue (CPLR 2221[d], [e]) because its conclusion on the summary judgment motion was based on an admitted misapprehension of defendant's evidence as to limitations of range of motion in

plaintiff's right knee, and the supplemental affirmation by defendant's neurological expert provided clarification, which resulted in a change in the prior determination. Whether the motion is treated as a motion to renew or a motion to reargue (*see* CPLR 2221[f], the court soundly exercised its discretion in granting it, since "even if the vigorous requirements for renewal are not met, such relief may be properly granted so as not to defeat substantive fairness" (*Tishman Constr. Corp. of N.Y. v City of New York*, 280 AD2d 374, 377 [1st Dept 2001] [internal quotation marks omitted]).

On his motion for summary judgment, defendant established prima facie that plaintiff did not sustain serious injuries to her right knee as a result of the accident by submitting the neurologist's report finding full range of motion, as well as a radiologist's report finding that the MRI showed no evidence of the alleged meniscal tear. In opposition, plaintiff failed to

raise an issue of fact because the evidence she submitted does not support a conclusion that her knee injury was significant or permanent.

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

ENTERED: MAY 22, 2014

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Feinman, Gische, JJ.

12562 The People of the State of New York, Ind. 4063/11
Respondent,

-against-

Julissa Valle,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Karinna M. Rossi 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 February 23, 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: MAY 22, 2014

CLERK

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

Renwick, J.P., Richter, Manzanet-Daniels, Feinman, Gische, JJ.

12563 Dane E. Clayton, Index 402470/12
Plaintiff-Appellant,

-against-

New York City Taxi & Limousine Commission, et al.,
Defendants-Respondents.

_____

Dane E. Clayton, appellant pro se.

Michael A. Cardozo, Corporation Counsel, New York (Jonathan A. Popolow of counsel), for respondents.

_____

Order, Supreme Court, New York County (Margaret A. Chan, J.), entered August 6, 2013, which granted defendants' motion to dismiss the complaint, and denied plaintiff's requests for leave to file a late notice of claim and to add additional defendants, unanimously affirmed, without costs.

The motion court correctly determined that the Court of Appeals' decision in *Greater N.Y. Taxi Assn. v State of New York* (21 NY3d 289 [2013]), which declared the "HAIL Act" (chapter 602 of the Laws of 2011, as amended by Chapter 9 of the Laws of 2012), to be constitutional, was dispositive of plaintiff's claims relating to allegedly illegal livery vehicle pick ups in the boroughs of New York City other than Manhattan, and required their dismissal.

To the extent plaintiff sought mandamus relief compelling

defendants, inter alia, to install taxi stands at various locations in the outer boroughs and to remove certain "NO PARKING ANYTIME" signs, his claims were properly dismissed because such matters involve discretionary governmental function, and plaintiff failed to demonstrate that defendants owed him a special duty distinct and separate from the general public (*see Valdez v City of New York*, 18 NY3d 69, 76-77 [2011]).

Plaintiff's claims for monetary damages were also properly dismissed based on his failure to file a notice of claim. His request for leave to file a late notice of claim was properly denied, since he did not demonstrate a reasonable excuse for his delay, that defendants would not be prejudiced by his delay, or that defendants had actual knowledge of his claim (*see Ifejika-Obukwelu v New York City Dept. of Educ.*, 47 AD3d 447 [1st Dept 2008]).

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: MAY 22, 2014

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Feinman, Gische, JJ.

12564 & File 3427/12
M-1872 In re Milton S. Rattner,
Deceased.

- - - - -

Dawn Rattner, et al.,
Petitioners-Appellants,

-against-

Ruth Koppel Rattner,
Cross-Petitioner-Respondent.

_____

Edwards Wildman Palmer LLP, New York (Anthony J. Viola of counsel), for appellants.

McCoyd, Parkas & Ronan LLP, Garden City (Bill P. Parkas of counsel), for respondent.

_____

Order, Surrogate's Court, New York County (Nora S. Anderson, S.), entered on or about December 10, 2013, which, to the extent appealed from, denied petitioners' motion for summary judgment seeking a declaration that cross-petitioner wife waived and forfeited any inheritance under the will of decedent by reason of her violation of a pre-nuptial agreement, unanimously affirmed, without costs.

Standing is a preliminary matter that should be determined prior to a will contest (*see Matter of Cook*, 244 NY 63, 72 [1926]). Here, the wife has standing to challenge the transfer of the apartment and personalty bequeathed to her subsequent to

the execution of the pre-nuptial agreement (see SCPA §§ 702[8][9], 1410). Moreover, the pre-nuptial agreement expressly provides that the parties could confer later benefits on each other. Thus, the court properly decided not to adjudicate the issues regarding the pre-nuptial agreement.

M-1872 - *In re Milton S. Rattner*

Motion seeking to supplement record on appeal denied.

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

ENTERED: MAY 22, 2014

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Feinman, Gische, JJ.

12565 Barbara Kosarin-Ritter, Index 102521/12
Plaintiff-Appellant,

-against-

Mrs. John L. Strong, LLC, et al.,
Defendants-Respondents.

_____

Phillips & Associates, New York (Casey Wolnowski of counsel), for appellant.

Baker Botts L.L.P., New York (Richard B. Harper of counsel), for respondents.

_____

Order, Supreme Court, New York County (Donna M. Mills, J.), entered March 5, 2013, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing the discrimination claims under the New York City Human Rights Law (City HRL), unanimously affirmed, without costs.

Defendants established "that there is no evidentiary route that could allow a jury to believe that discrimination played a role in the [termination of plaintiff's employment]" (*Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 40 [1st Dept 2011], *lv denied* 18 NY3d 811 [2012]). Their evidence showed that they terminated plaintiff because of her poor work performance and hostile behavior. In opposition to defendants' motion, plaintiff failed to submit evidence tending to show that age discrimination was

the real reason, or one of the reasons, for her termination (*see id.* at 40). Plaintiff complains about a comment about her hair, a provision about hair style in the company dress code, a comment about the company's "going young," and a video about senior citizens that she was sent by defendant's COO. However, she identifies no evidence from which it could be inferred that any of these remarks and incidents were discriminatory. The comment about her hair was made during a conversation about women's hair styles. She submitted no evidence that the dress code with respect to hair style was not applied equally to all employees. In view of defendant's uncontroverted evidence supporting the nondiscriminatory reasons it proffered for terminating plaintiff, the evidence that defendant subsequently hired younger employees is not sufficient to establish age discrimination (*see Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 123-124 [1st Dept 2012]). Moreover, as plaintiff concedes, defendant also hired older employees after she was terminated. Plaintiff's questioning of defendants' business judgment is also insufficient to give rise to an inference of discrimination (*id.* at 121).

The aforementioned comments and incidents are insufficient

to support plaintiff's hostile work environment claim. They are merely isolated remarks and incidents that a reasonable trier of fact would find nothing more than "petty slights and trivial inconveniences" (*see Williams v New York City Hous. Auth.*, 61 AD3d 62, 79-80 [1st Dept 2009], *lv denied* 13 NY3d 702 [2009]).

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

ENTERED: MAY 22, 2014

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Feinman, Gische, JJ.

12568 The People of the State of New York, Respondent, Ind. 3292/09

-against-

Michael Curry, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered on or about June 30, 2010, unanimously affirmed.

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

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

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

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

ENTERED: MAY 22, 2014

CLERK

Friedman, J.P., Acosta, Saxe, Gische, JJ.

12680-		Index 771000/10
12681-		117469/08
12682-		590694/10
12683	In re 91st Street Crane Collapse Litigation	590952/10
		591073/10

- - - - -

Xhevahire Sinanaj, et al.,
Plaintiffs-Respondents,

-against-

The City of New York, et al.
Defendants,

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

[And Other Third-Party Actions]

_____

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

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

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

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

Michael G. O'Neill, New York, for respondents.

_____

Orders, Supreme Court, New York County (Manuel J. Mendez, J.), entered on or about January 21, 22, and 23, 2014, which, to the extent appealed from as limited by the briefs, denied

defendants-appellants' motions to dismiss plaintiff Selvi Sinanovic's claim for pecuniary loss, pursuant to EPTL 5-1.2, unanimously affirmed, without costs.

Defendants lack standing to challenge plaintiff's status as a surviving spouse, since they are neither "personal representative[s]" nor "distributee[s]" of the decedent (*see* EPTL 5-4.4[a][1]), and damages have not yet been recovered in the wrongful death action for the benefit of the decedent's distributees.

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

ENTERED: MAY 22, 2014

CLERK

Tom, J.P., Friedman, Renwick, Gische, Clark, JJ.

12717 In re Mark Escoffery-Bey, Index 260308/14
Petitioner-Appellant,

-against-

The Board of Elections in
The City of New York,
Respondent-Respondent.

_____

Mark Escoffery-Bey, appellant pro se.

Zachary W. Carter, Corporation Counsel, New York (Stephen Kitzinger of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (John W. Carter, J.), entered on or about May 2, 2014, unanimously affirmed for the reasons stated by Carter, J., without costs or disbursements.

No opinion.

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

ENTERED: MAY 22, 2014

CLERK

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

10616- Index 650417/09
10616A Stanley Lerner, etc.,
Plaintiff-Appellant,

-against-

Charles O. Prince, III, et al.,
Defendants-Respondents,

Citigroup Inc.,
Nominal Defendant-Respondent.

_____

Greenfield & Goodman LLC, New York (Richard D. Greenfield of counsel), for appellant.

Cravath, Swaine & Moore LLP, New York (Richard W. Clary of counsel), for respondents.

_____

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered May 5, 2011, affirmed, without costs. Appeal from order, same court and Justice, entered May 17, 2012, deemed an appeal from the judgment, same court and Justice, entered June 5, 2012, and so considered, said judgment affirmed, without costs.

Opinion by Moskowitz, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Karla Moskowitz, J.P.
Rosalyn H. Richter
Sallie Manzanet-Daniels
Judith J. Gische, JJ.

10616
Index 650417/09

_____x

Stanley Lerner, etc.,
Plaintiff-Appellant,

-against-

Charles O. Prince, III, et al.,
Defendants-Respondents,

Citigroup Inc.,
Nominal Defendant-Respondent.

_____x

Plaintiff appeals from the order of the Supreme Court, New York County (Bernard J. Fried, J.), entered May 5, 2011, which denied his motion to compel discovery and convert defendants' motions to dismiss into motions for summary judgment, and from the order, same court and Justice, entered May 17, 2012, which granted defendants' motions to dismiss the amended complaint.

Greenfield & Goodman LLC, New York (Richard D. Greenfield of counsel), for appellant.

Cravath, Swaine & Moore LLP, New York (Richard W. Clary and Rory A. Leraris of counsel), for respondents.

Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (Brad S. Karp, Richard A. Rosen and Susanna M. Buergel of counsel), for Charles O. Price, Robert Druskin, Sallie L. Krawcheck, Robert E. Rubin, Gary Crittenden, John C. Gerspach, Lewis B. Kaden, David C. Bushnell, Thomas G. Maheras, Michael Klein, Geoffrey O. Coley, Randolph H. Barker, Michael Raynes, Nestor Dominguez, and Janice L. Warne, respondents.

Wachtell, Lipton, Rosen & Katz, New York (Lawrence B. Pedowitz and Bradley R. Wilson of counsel), for Citigroup Inc., respondent.

MOSKOWITZ, J.

This purported shareholder derivative action arose out of the subprime mortgage crisis meltdown and the financial crisis that followed. Plaintiff Stanley Lerner is a shareholder of nominal defendant Citigroup Inc. (Citigroup), a Delaware corporation with its principal place of business in New York. At the end of the third quarter of 2007, Citigroup reported multi-billion dollar asset write-downs stemming from its holdings in mortgage-related securities. In late 2007, plaintiff made a formal pre-suit demand (the demand) on Citigroup's board of directors (the Board), asking that the Board sue senior management, including present and former Citigroup officers and directors, for alleged mismanagement of the company's subprime assets.

In early 2008, the Board informed plaintiff that it would consider the demand at a future meeting, and gave him opportunities to make further submissions in support of the demand. However, plaintiff made no such submissions. In March 2008, the Board informed plaintiff that it had formed a committee (the demand committee) to investigate and analyze the allegations in the demand. The Board appointed defendant Franklin A. Thomas as the sole member of the demand committee and retained nonparty Potter Anderson & Corroon LLP (Potter Anderson) as its

independent counsel. After Thomas retired from the Board in April 2009, the Board replaced him with defendant Michael E. O'Neill, who had recently joined Citigroup as a director, as the sole member of the demand committee.

Plaintiff commenced this action in July 2009. Potter Anderson offered to meet in person with plaintiff, his counsel, and O'Neill; that meeting occurred on September 16, 2009. On May 27, 2010, the Demand Committee met with the Board and recommended that the Board refuse the demand — a recommendation that the Board unanimously accepted.

By amended complaint dated June 22, 2010, plaintiff alleged that the single-member demand committee was a "sham in its inception" and that the Board's more than two-year delay in responding to the demand constituted constructive and wrongful refusal. Accordingly, plaintiff asserted causes of action including breach of fiduciary duty and aiding and abetting breaches of fiduciary duty. Plaintiff also alleged that defendants had wasted corporate assets by causing Citigroup to expend millions of dollars in an investigation that was allegedly a sham.

By letter dated June 25, 2010 (the refusal letter), three days after the date of the amended complaint, the Board's counsel informed plaintiff that on May 27, 2010, it had unanimously

adopted the demand committee's recommendation to reject plaintiff's demand. Defendants invited plaintiff on more than one occasion to amend his pleadings further to take the refusal letter into account; however, plaintiff declined to do so, insisting that a further amendment was unnecessary because the amended complaint already anticipated the Board's refusal of the demand.

In October 2010, defendants moved to dismiss the amended complaint, asserting that the Board's refusal of the demand, undertaken after a thorough investigation, was protected under the business judgment rule.[1] Further, defendants argued, plaintiff had failed adequately to plead facts creating a reasonable doubt as to the good faith or reasonableness of the Board's investigation and its refusal of the demand. The outside director defendants submitted the June 25, 2010 refusal letter as an exhibit to their motion.

On November 9, 2010, before the IAS court had decided defendants' motion to dismiss, plaintiff served document requests on defendants. On or about December 1, 2010, defendants refused

[1] While plaintiff requested leave to replead in opposition to defendants' motions, the motion court denied his request, noting that plaintiff "fail[ed] to provide an evidentiary basis for a further amendment of his already amended complaint" (36 Misc 3d 297, 313 [Sup Ct, New York County 2012] [Fried, J.]).

to produce any documents, objecting to the document requests on the ground, among others, that plaintiff was not entitled to discovery under either Delaware or New York law on a pre-answer motion to dismiss.

In January 2011, plaintiff moved to compel the requested discovery and to convert defendants' dismissal motions to summary judgment motions. In May 2011, the IAS court denied the motion to compel and convert, finding that there was no basis to permit discovery. Further, the court found, there appeared to be no reason for the court to exercise its discretion and convert the pre-answer motion to a motion for summary judgment.

Next, by order entered May 17, 2012, the IAS court granted defendants' motions to dismiss the amended complaint without leave to replead. In so doing, the court first found that under New York State's choice-of-law rules, the substantive law of the state of incorporation governs compliance with the demand requirement. Thus, because Citigroup was incorporated in Delaware, Delaware law governed the action. The court also found that even though the refusal letter postdated the amended complaint, defendants had been obliged to submit the refusal letter on their motions because it established that the action was a "demand refused" action, requiring a heightened pleading

standard.[2] Moreover, the IAS court, citing *Scattered Corp. v Chicago Stock Exchange, Inc.* (701 A2d 70, 73-74 [Del 1997], *revd in part on other grounds by Brehm v Eisner*, 746 A2d 244, 253 [Del 2000]), noted that, in resolving motions to dismiss in demand-refused cases, "courts routinely reference[d] the substance of the demand refusal letters." Accordingly, the IAS court stated, it would consider the refusal letter, and would consider the claims in the amended complaint under the "wrongful refusal of demand" standard.

With respect to the merits, the court found that the amended complaint failed to allege particularized facts creating a reasonable doubt about the Board's reasonableness and good faith in investigating plaintiff's demand. Indeed, the court found, the refusal letter included facts regarding the steps that the demand committee took in investigating plaintiff's demand. Additionally, the court determined, the facts that plaintiff had alleged — for example, that the demand committee had only one member — were insufficient to raise doubt about the good faith of

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[2] Under Delaware law, different pleading requirements apply depending on whether a shareholder (1) makes a demand on a corporation before bringing suit and the corporation refuses the demand ("demand refused" cases) or (2) does not make a demand before bringing suit, claiming that the demand would be futile ("demand excused" or "demand futile" cases) (*see Levine v Smith*, 591 A2d 194, 197, 212 (Del 1991), *revd in part on other grounds by Brehm v Eisner*, 746 A2d 244, 253 [Del 2000]).

the committee's investigation. The court therefore concluded that the business judgment rule shielded the Board from further inquiry, and that, as a result, plaintiff lacked standing to pursue the derivative claims arising out of the demand.

To begin, the IAS court properly denied plaintiff's motion to compel discovery. The parties disagree on whether New York or Delaware law governs discovery. Plaintiff argues that the availability of discovery is procedural, not substantive, and therefore is governed by the law of the forum. Thus, plaintiff argues, New York law governs, and the law in New York provides that discovery is available concerning a decision of a board of directors not to pursue a claim on behalf of a corporation (citing *Parkoff v General Tel. & Elecs. Corp.*, 53 NY2d 412 [1981]). Defendants argue, on the other hand, that Delaware's discovery rules are part of its substantive law, and thus, that Delaware law applies to foreclose plaintiff's discovery request. At any rate, defendants argue, no matter which law applies, the result would be the same, as plaintiff was not entitled to discovery under the law of either New York or Delaware.

Because New York is the forum state, New York's choice-of-law principles determine whether a particular issue — in this case, the availability of discovery — is substantive or

procedural (*see Tanges v Heidelberg N. Am.*, 93 NY2d 48, 54 [1999]). Under New York choice-of-law rules, matters of procedure are governed by the law of the forum (*id.* at 53; *Marine Midland Bank v United Mo. Bank*, 223 AD2d 119, 122 [1st Dept 1996], *lv dismissed* 88 NY2d 1017 [1996]). On the other hand, New York choice-of-law rules provide that substantive issues such as issues of corporate governance, including the threshold demand issue, are governed by the law of the state in which the corporation is chartered — here, Delaware (*Hart v General Motors Corp.*, 129 AD2d 179, 182 [1st Dept 1987], *lv denied*, 70 NY2d 608 [1987]).

We find that plaintiff's right to discovery in this demand-refused case is a substantive question, rather than a procedural one, and therefore is governed by Delaware law. Although New York courts have applied the law of the forum when deciding matters, such as discovery, affecting the conduct of the litigation (*see e.g. People v Greenberg*, 50 AD3d 195, 198 [1st Dept 2008], *lv dismissed* 10 NY3d 894 [2008]; *see also Paris v Waterman S.S. Corp.*, 218 AD2d 561, 564 [1st Dept 1995], *lv dismissed* 96 NY2d 937 [2001]), that this case is a purported derivative action places it into a different context. The demand requirement is based on the "'bedrock principle'" of Delaware law that a corporation's directors, and not its shareholders, manage

the corporation's business (*Levner v Saud*, 903 F Supp 452, 456 [SD NY 1994], *affd sub nom Levner v Prince Alwaleed*, 61 F3d 8 [2d Cir 1995] [quoting *Levine v Smith*, 591 A2d 194, 200 [Del 1991], *revd in part on other grounds by Brehm v Eisner*, 746 A2d 244 [Del 2000]). Thus, the Delaware law on discovery is an integral part of the legal framework governing derivative proceedings; indeed, it is inextricably intertwined with the decision to act or decline to act on a shareholder demand. Were Delaware law to permit discovery in a demand-refused derivative action, it would essentially obviate the directors' authority to decide, under the business judgment rule, whether litigation was in the corporation's best interests — the very reason underlying the demand requirement. The decision whether to permit discovery once directors have refused a demand is therefore a substantive question, going directly to the basis of the purported derivative suit (*see In re Boston Scientific Corp.*, 2007 WL 1696995 at *5, 2007 US Dist LEXIS 42540 at *14-*15 [SD NY June 13, 2007]; *Levine*, 591 A2d at 208-210).

Under Delaware law, "plaintiffs in a derivative suit are not entitled to discovery to assist their compliance with the particularized pleading requirement of [Delaware Chancery Court] Rule 23.1 in a case of demand refusal" (*Scattered Corp.*, 701 A2d

at 77; *Levine*, 591 A2d at 208-210 [Del 1991]).[3] Indeed, plaintiff concedes this point, arguing instead that the case law does not appear to address the scenario here, in which a board delegates review to a committee. However, plaintiff cites no Delaware authority for this position; what is more, the case law actually suggests that Delaware law provides otherwise (*Scattered Corp.*, 701 A2d at 71 [refusing discovery even where a committee, rather than the entire board of directors, reviewed the plaintiff's demand]).[4]

Despite plaintiff's argument otherwise, it is of no moment that Delaware has not codified its discovery rule in demand-refused cases. On the contrary, as we have noted above, allowing plaintiff to proceed with discovery would thwart the purposes underlying Delaware's law on demand refusal — specifically, its recognition that deciding whether to pursue litigation is a decision entitled to deference under the business judgment rule

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[3] Rule 23.1(a) states, "The complaint shall . . . allege with particularity the efforts, if any, by the plaintiff to obtain the action the plaintiff desires from the directors . . . and the reasons for the plaintiff's failure to obtain the action or for not making the effort."

[4] Instead of using discovery as a litigation device in a demand-refused case, plaintiff may proceed under a Delaware statute – specifically, 8 Del. C. § 220 – to inspect minutes, reports, and other books and records of the corporation related to the process and findings of the demand committee and the board (*Scattered Corp.*, 701 A2d at 78, 79).

(*see Spiegel v Buntrock*, 571 A2d 767, 775-776 [Del 1990]). Indeed, even *Fagin v Gilmartin* (432 F3d 276 [3d Cir 2005]), upon which plaintiff relies for the proposition that codification is a dispositive issue, specifically states, "Of course, judge-made state common law is just as binding as state statutes or state constitutions" (*id.* at 285 n 2, citing 28 USC § 1652). Moreover, the *Fagin* court based its decision largely on the fact that the "use of federal discovery law would probably not lead to forum shopping" because New Jersey law, containing a mandatory discovery rule, was not per se outcome determinative (*Fagin*, 432 F3d at 285 n 2). Here, by contrast, allowing discovery under New York law, as opposed to federal law, would almost certainly lead future plaintiffs to forum shop in an effort to circumvent the Delaware prohibition against discovery.

We also note that, even assuming for the sake of argument that New York law applies, plaintiff would not be entitled to discovery in this demand-refused case. Courts applying New York law in demand-refused cases presume that a board of directors' decision was the exercise of valid business judgment (*Stoner v Walsh*, 772 F Supp 790, 800, 806-807 [SD NY 1991] [applying New York law]). Therefore, where, as here, a complaint fails to set forth allegations overcoming the presumption that the board's decision resulted from that valid judgment, courts will properly

deny a plaintiff's discovery request (*id.* at 800). Indeed, "the purpose of discovery is to find out additional facts about a well-pleaded claim, not to find out whether such a claim exists" (*id.* at 800).

Because we have decided that plaintiff is not entitled to discovery, we turn to deciding whether the amended complaint is sufficient to withstand the motion to dismiss, and find that the allegations in the amended complaint are insufficient to support plaintiff's contention that defendants' investigation was unreasonable, uninformed or conducted in bad faith.[5] In particular, plaintiff alleges that nonparty Potter Anderson was conflicted because it had previously represented a Citigroup subsidiary. Plaintiff, however, does not allege that Potter Anderson represented defendants in a prior proceeding involving the same subject matter and plaintiff provides no details in the complaint about the subject matter of the prior representation. Thus, *Stepak v Addison* (20 F3d 398, 403-404 [11th Cir 1994]), upon which plaintiff relies, does not compel the result that plaintiff seeks (*see Sterling v Stewart*, 158 F3d 1199, 1203 [11th Cir 1998]).

Further, plaintiff alleges various structural biases —

[5] Plaintiff does not dispute that Delaware substantive law applies to the underlying claims asserted in this action.

namely, that the demand committee selected Potter Anderson based, in part, on the recommendation of Citigroup's former general counsel, and the likelihood that the successive members of the single-member demand committee would not recommend that Citigroup sue their fellow directors. However, "[t]he majority view recognizes that independent directors are capable of rendering an unbiased decision even though they were appointed by the defendant directors and share a common experience with defendants" (*Peller v The Southern Co.*, 707 F Supp 525, 527-528 [ND Ga 1988] [applying Delaware law], *affd* 911 F2d 1532 [11th Cir 1990]; *see also Auerbach*, 47 NY2d at 633).

Plaintiff notes that Citigroup paid the successive members of the demand committee substantial sums to be directors. However, a director is not interested with respect to all board decisions merely because he or she is paid to be a director (*see e.g. In re J.P. Morgan Chase & Co. Shareholder Litig.*, 906 A2d 808, 821-824 and n 48 [Del Ch 2005]; *see also Grobow v Perot*, 539 A2d 180, 188 [Del 1988], *revd in part on other grounds by Brehm*, 746 A2d at 253). To be sure, by plaintiff's logic, no paid director could ever properly vote to reject a demand (*see In re E.F. Hutton Banking Practices Litig.*, 634 F Supp 265, 271 [SD NY 1986] [applying Delaware law]; *see also White v Panic*, 793 A2d 356, 366-367 [Del Ch 2000], *affd* 783 A2d 543 [Del 2001]).

Plaintiff also criticizes the demand committee's procedures, including that it consisted of only one member. These allegations are insufficient, however, as "there is . . . no prescribed procedure that a board must follow" in responding to a shareholder's demand (*Levine*, 591 A2d at 214). Further, by Delaware law (8 Del C § 141[c][1]), a board may delegate matters to a committee, and the committee may consist of "one or more" directors (*id.*; *see Scattered*, 701 A2d at 75 n 20). The amended complaint also alleges that the demand committee retained counsel and that Potter Anderson gathered as many as 15 million documents and billed at least $2 million. Thus, given Delaware precedent, we find that defendants' investigation was sufficient (*see Levine*, 591 A2d at 214).

Finally, we find that the IAS court providently exercised its discretion in refusing to convert the dismissal motions into summary judgment motions (*see* CPLR 3211[c]), as the record "does not establish that the parties deliberately chart[ed] a summary judgment course" (*Wadiak v Pond Mgt., LLC*, 101 AD3d 474, 475 [1st Dept 2012] [internal quotation marks omitted]). Indeed, defendants stated, both on the motions and on appeal, that they do not consider the refusal letter to be documentary evidence. Instead, they offered the letter to show that the instant action was a demand-refused case rather than a demand-excused case, and

to the extent that the IAS court considered the refusal letter for that limited purpose, its consideration was proper (*see generally Levine*, 591 A2d at 212).

To the extent that the IAS court, in rendering its decision on defendants' motions to dismiss, relied on facts found only in the refusal letter, the court's action does not require reversal. The amended complaint did not surmount the pleading standard for demand-refused cases, and the IAS court's dismissal of the complaint properly rests on that basis.

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

Accordingly, the order of the Supreme Court, New York County (Bernard J. Fried, J.), entered May 5, 2011, which denied plaintiff's motion to compel discovery and convert defendants' motions to dismiss into motions for summary judgment, should be affirmed, without costs. The appeal from the order, same court and Justice, entered May 17, 2012, which granted defendants' motions to dismiss the amended complaint, should be deemed an

appeal from the judgment, same court and Justice, entered June 5, 2012, and, so considered, the judgment should be affirmed, without costs.

All concur.

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

ENTERED: MAY 22, 2014

CLERK