SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 19, 2015

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

13399 Macdelinne F., an Infant Under the Age of Fourteen Years (14), by her Mother and Natural Guardian, Inmaculada Z., et al., Plaintiffs-Appellants,

-against-

Yolanda Jimenez, et al., Defendants-Respondents.

Index 112609/10

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

Picciano & Scahill, P.C., Westbury (Andrea E. Ferrucci of counsel), for Jiminez respondents.

Russo, Apoznanski & Tambasco, Melville (Yamile Al-Sullami of counsel), for Regine Brutus, respondent.

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered July 15, 2013, which, to the extent appealed from as limited by the briefs, granted defendants' motions for summary judgment dismissing the complaint on the threshold issue of serious injury within the meaning of Insurance Law § 5102(d),

unanimously modified, on the law, to deny the motions as to plaintiff Macdelinne F.'s (Macdelinne) claims of "permanent consequential" and "significant" limitations of use of her left knee, and otherwise affirmed, without costs.

Defendants established prima facie that Macdelinne did not suffer a serious injury by submitting an orthopedist's report finding full range of motion and negative clinical test results upon examination of the left knee and a radiologist's report finding that the MRI performed on that knee was normal (*see Harrigan v Kemmaj*, 85 AD3d 559 [1st Dept 2011]; *Gibbs v Hee Hong*, 63 AD3d 559, 559 [1st Dept 2009]).

In opposition, plaintiffs raised a triable issue of fact as to the existence of a "significant" or "permanent consequential" limitation of use by submitting affirmations by a radiologist who found that the MRI showed evidence of a tear in the posterior horn of the medial meniscus and Macdelinne's treating physicians, who found limitations in range of motion at a recent examination and opined that the knee injury was caused by the accident (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]). Unaffirmed medical reports prepared by her physicians during the period following the accident were properly considered because defendants' orthopedist relied on them in forming his opinion

(*see Pantojas v Lajara Auto Corp.*, 117 AD3d 577 [1st Dept 2014]; *Thompson v Abbasi*, 15 AD3d 95, 97 [1st Dept 2005]).

If Macdelinne establishes a serious injury to her left knee at trial, she will be entitled to recover damages for all injuries incurred as a result of the accident, even those that do not meet the serious injury threshold (*Rubin v SMS Taxi Corp.*, 71 AD3d 548 [1st Dept 2010]).

Defendants met their initial burden as to Macdelinne's 90/180-day claim through Macdelinne's testimony that she was confined to bed and home for only one or two weeks after the accident (*Mitrotti v Elia*, 91 AD3d 449 [1st Dept 2012]; *Jean v Kabaya*, 63 AD3d 509 [1st Dept 2009]). The evidence that her doctors directed her to refrain from participating in gym class, taking stairs, running, or jumping is insufficient to raise an issue of fact whether she was prevented from performing "substantially all of the material acts which constitute [her] usual and customary daily activities" during the relevant period (Insurance Law § 5102[d]; *see Ceruti v Abernathy*, 285 AD2d 386, 387 [1st Dept 2001]).

Defendants established prima facie that plaintiff Carmen Zapata suffered no "permanent consequential" or "significant" limitation of use through their radiologist's opinion that the

MRIs performed on her cervical spine, lumbar spine, and shoulders showed changes, including disc desiccation, osteophytes, and tendinosis, that were degenerative in nature, with no evidence of traumatic injury (*see Kamara v Ajlan*, 107 AD3d 575, 575 [1st Dept 2013]; *Thomas v NYLL Mgt. Ltd.*, 110 AD3d 613, 614 [1st Dept 2013]). They also submitted the report of an orthopedist who found full range of motion in the cervical spine and voluntary or exaggerated limitations in the lumbar spine and shoulders that did not correlate with objective evidence of injury.

In opposition, Zapata submitted medical evidence of persisting limitations in range of motion in all parts, but she failed to raise a triable issue of fact as to causation, since she did not submit any medical evidence addressing the cause of her injuries (*see Rosa v Mejia*, 95 AD3d 402, 404-405 [1st Dept 2012]). Notably, Zapata's own medical evidence acknowledged degenerative changes in the cervical spine.

Given her failure to raise a triable issue of fact as to

causation, Zapata's 90/180-day injury claim was correctly dismissed (*see Rampersaud v Eljamali*, 100 AD3d 508, 509 [1st Dept 2012]). We note in addition that Zapata testified that she was not confined to bed or home after the accident.

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

ENTERED: MARCH 19, 2015

CLERK

Friedman, J.P., Andrias, Moskowitz, DeGrasse, Richter, JJ.

14288 Arthur Batsidis, Index 603606/07
Plaintiff-Appellant,

-against-

Wallack Management Company, Inc.,
et al.,
Defendants-Respondents.

_____

Warren S. Hecht, Forest Hills, for appellant.

Axelrod, Fingerhut & Dennis, New York (Osman Dennis of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Paul Wooten, J.), entered January 21, 2014, awarding defendants $136,365.86 in legal fees and disbursements, and bringing up for review an order, same court and Justice, entered October 29, 2010, which denied plaintiff's motion to amend the complaint, an order, same court and Justice, entered May 21, 2013, which, among other things, granted defendants' motion for summary judgment, and an order, same court (Jeremy R. Feinberg, Special Referee), entered on or about December 10, 2013, which determined the amount of legal fees to be awarded to defendants, unanimously modified, on the law, to delete the award of fees for time spent preparing for the attorney's fee hearing, and to reduce the attorney's fee award accordingly, and otherwise affirmed, without costs.

Plaintiff's motion to amend the complaint to add a cause of action for breach of contract was properly denied, since the proposed cause of action lacks merit (*see 360 11th LLC v ACG Credit Co. II, LLC*, 90 AD3d 552, 553 [1st Dept 2011]). Pursuant to paragraph 4 of the parties' alteration agreement, plaintiff released defendants from "any liability for claims [he] may now or hereafter have against the [defendants] for interruption, suspension or delays of the performance of the work." Contrary to plaintiff's assertion, this Court has already held that the parties' subsequent "so-ordered stipulation neither superseded the parties' obligations under the alteration agreement nor waived their rights" (*Batsidis v Wallack Mgt. Co., Inc.*, 65 AD3d 332, 337 [1st Dept 2009]). Accordingly, the proposed cause of action is barred by the release.

We have considered plaintiff's legal argument, raised for the first time on appeal (*see Facie Libre Assoc. I, LLC v SecondMarket Holdings, Inc.*, 103 AD3d 565 [1st Dept 2013], *lv denied*, 21 NY3d 866 [2013]), that his proposed cause of action is for "gross negligence and intentional tort" rather than breach of contract and find that he cannot establish this tort-based cause of action because he has failed to identify a legal duty

independent of defendants' contractual obligations (*see Assured Guar. (UK) Ltd. v J.P. Morgan Inv. Mgt. Inc.*, 80 AD3d 293, 306 [1st Dept 2010], *affd* 18 NY3d 331 [2011]).

Defendants' motion for summary judgment was properly granted. Plaintiff does not deny that during the renovation work, his workers cut into a structural column, which was outside the scope of work permitted by the alteration agreement. Rather, plaintiff argues that his alleged breach of the alteration agreement was "superficial" and "de minimis," and that section 30 of the alteration agreement, which gives defendants the right to suspend work upon plaintiff's breach of that agreement, was "not intended to apply to such de minimis violations." The explicit terms of the alteration agreement do not support plaintiff's contention that something more than a "de minimis" breach of the agreement is required to trigger defendants' right to stop work. Moreover, plaintiff does not allege that the agreement is ambiguous, incomplete or unclear.

The cause of action for discrimination was properly dismissed. Plaintiff's conclusory allegations of discriminatory treatment are not supported by sufficient evidence.

Finally, the parties' agreement does not support plaintiff's argument that defendants are only entitled to fees up to the date

of the so-ordered stipulation. This Court has already construed the applicable cost-shifting provision and found it to be "proper, clear, unambiguous and enforceable as written" (65 AD3d at 333). We found that "the so-ordered stipulation neither superseded the parties' obligations under the alteration agreement nor waived their rights" (*id.* at 337). However, the court below erred in awarding defendants $17,275 in fees on fees (*see Sage Realty Corp. v Proskauer Rose*, 288 AD2d 14, 15 [1st Dept 2001], *lv denied* 97 NY2d 608 [2002] ["(A)n award of fees on fees must be based on a statute or on an agreement."]). The alteration agreement does not contain unambiguous language providing for the recovery of fees on fees. Because it is not "unmistakably clear" from the parties' agreement that fees on fees were contemplated, such an award is not allowed (*see 546-552 W. 146th St. LLC v Arfa*, 99 AD3d 117, 122 [1st Dept 2012] [internal quotation marks omitted]). We reject the theory that an award of fees on fees is necessitated by our earlier holding that the alteration agreement was intended to protect defendant co-op and its shareholders from expenses relating to plaintiff's work (*see Batsidis*, 65 AD3d at 336). If the parties had intended

for the alteration agreement to cover defendants' attorney's fees for time spent preparing for the fee hearing, they were free to put that in the agreement.

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

ENTERED: MARCH 19, 2015

CLERK

Friedman, J.P., Sweeny, Saxe, Feinman, Clark, JJ.

14335 Nisha Buckingham, Index 314297/11
Plaintiff-Appellant,

-against-

Simon Buckingham,
Defendant-Respondent.

_____

David Bolton, P.C., Garden City (David Bolton of counsel), for appellant.

Beldock Levine & Hoffman LLP, New York (Marjory D. Fields and Jonathan K. Pollack of counsel), for respondent.

_____

Order, Supreme Court, New York County (Lori S. Sattler, J.), entered April 29, 2014, which denied plaintiff's postjudgment motion for distribution of 20% of the net proceeds defendant received from his sales of outstanding stock in Mobile Streams PLC (MS), and denied her request for an award of counsel fees in the amount of $25,000, affirmed, without costs.

The plain and unambiguous language of the parties' modification agreement makes clear that defendant shall make a distribution to plaintiff only if, among other things, MS or one of its subsidiaries or related companies is sold. Plaintiff does not claim, and there is no evidence, that this condition precedent was met. Accordingly, plaintiff is not entitled to a

distribution (*see Klewin Bldg. Co., Inc. v Heritage Plumbing & Heating, Inc.*, 42 AD3d 559, 560 [2d Dept 2007]). Contrary to plaintiff's contention, she was not entitled, under the terms of the modification agreement, to a distribution merely because defendant sold outstanding stock of MS.

The Supreme Court providently exercised its discretion in declining to award counsel fees to plaintiff (*see* Domestic Relations Law § 238; *Hoffman v Hoffman*, 81 AD3d 600, 600 [2d Dept 2011]).

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

All concur except Saxe, J. who concurs in a separate memorandum as follows:

SAXE, J. (concurring)

It is not uncommon for clauses of marital agreements to sometimes fail to achieve their intended purpose. This appeal provides us with the opportunity to examine one such clause. My colleagues point to one phrase in the contractual provision at issue that they term "plain and unambiguous," which they rely on as controlling the outcome of this appeal. While I agree that plaintiff wife failed to establish that she was entitled to any payment under the parties' agreement, I write separately because I believe that the contractual provision as written does not comport with either party's understanding of it, and, in fact, under other scenarios, could cause unintended mischief.

Defendant husband is the founder and CEO of a company called Mobile Streams PLC, a publicly traded global mobile media company. This postjudgment litigation concerns defendant's ownership interest in the company. Approximately eight days before their marriage, the parties entered into a prenuptial agreement that included the following provision:

> "Simon owns approximately 55.83% of the issued and outstanding shares of [Mobile Streams] ['MS']. If MS or any of its subsidiaries or related companies are sold, and the sale takes place after the occurrence of an Operative Event, and the proceeds of sale are not otherwise invested or reinvested in another business enterprise, but rather Simon retains the proceeds for

himself and provided the parties are married for five (5) years or more, Simon, will place the following percentages of the net proceeds less the value of the MS shares on the date of marriage, in an account established in Nisha's sole name which shall be deemed Nisha's Separate Property: [¶] (i) if the parties are married for 5 or more years - 20%; or [¶] (ii) if the parties are married for 10 or more years - 25%; or [¶] (iii) if the parties are married 15 or more years - 30%; or [¶] (iv) if the parties are married for 20 or more years - 40%; or [¶] (v) if the parties are married for 25 or more years - 50%."

During the marriage, the parties executed a modification agreement that modified certain terms of the prenuptial agreement, including the foregoing provision. The modified provision reads:

"Simon has heretofore placed in a revocable trust, The Simon David Buckingham Living Trust (Trust), his [MS shares] on the 3rd day of November, 2008. Simon is the Grantor and Trustee. Nisha is the Successor Trustee. Upon Simon's death, the Trust shall terminate and all of the principal and accrued and accumulated income shall be paid to Nisha. After the parties have been married for a period of three (3) years, *if MS or any of its subsidiaries or related companies are sold, and the proceeds of sale are not otherwise invested or reinvested in another business enterprise, the following percentage of the proceeds (after payment of any taxes and transactional costs due upon such sale,) shall be paid to Nisha in accordance with the length of the marriage* and shall constitute her separate property: [¶] three or more years – twenty (20%) percent; or [¶] eight or more years - twenty-five (25%) percent; or [¶] thirteen or more years - thirty (30%) percent; or [¶] eighteen or more years - forty (40%) percent; or [¶] twenty-three or more years- fifty (50%) percent" (emphasis added).

The parties were divorced on November 14, 2011.

Between May 15, 2013 and October 17, 2013, defendant sold approximately 7,875,000 MS shares (in four installments over the course of a seven-month period) for $7,279,117.62. After the sales, defendant's ownership interest in Mobile Streams was reduced from 55.83% to 28.34%.

Plaintiff demanded a 20% share of the net proceeds from defendant's sales of his MS shares, based on the foregoing provision of the modification agreement. Defendant's initial response to that demand was that the agreement allowed him to reinvest the proceeds from the sale of his MS shares "within a reasonable time period" and that this was an "an ongoing process." He did not then take the position that plaintiff's entitlement only arose if the entire company were sold.

Plaintiff then made the underlying postjudgment motion for distribution of 20% of the net proceeds defendant received from the sales of his MS shares, along with an award of counsel fees in the amount of $25,000. In opposition, defendant took the position that plaintiff's entitlement to the 20% was intended to be limited to the event that "MS or any of its subsidiaries or related companies are sold," which did not encompass his sale of MS shares. He further argued that he had already invested some

of the proceeds of the sale in JP Morgan Chase investment and brokerage accounts, and planned to use more of it to purchase an apartment in Beijing for $2.33 million, and that both of those investments satisfied the provision that plaintiff's entitlement only arose if defendant failed to invest the net proceeds of the sale -- i.e., that it was not necessary that he reinvest in another business enterprise, as plaintiff had argued. Defendant also asserted that plaintiff's entitlement to share in the net proceeds of any sale of MS was extinguished upon the divorce.

The motion court denied plaintiff's motion, finding that plaintiff failed to demonstrate the occurrence of a condition precedent to her participation in defendant's profit, namely, a sale of the company or a subsidiary of it. However, the court rejected defendant's contention that plaintiff's right to participate in the proceeds of a sale of MS shares was extinguished upon the parties' divorce. The court declined to address defendant's contention that investing the proceeds in a brokerage account satisfied the reinvestment requirement, insulating him from plaintiff's claim.

The majority affirms the dismissal of plaintiff's claim on the ground that the plain and unambiguous language of the parties' agreement makes clear that a distribution to plaintiff

is not required unless MS or one of its subsidiaries or related companies is sold. I agree with that.

"[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). The operative language of the parties' modification agreement clearly says that plaintiff shall be paid the applicable percentage "*if MS or any of its subsidiaries or related companies are sold, and the proceeds of sale are not otherwise invested or reinvested in another business enterprise*" (emphasis added).

However, despite the clarity of the words, "if MS or any of its subsidiaries or related companies are sold," plaintiff's expectation that she would be entitled to a share of the proceeds from a sale of defendant's *shares*, rather than from a sale of the company itself, was not unreasonable. Indeed, her understanding comports with the focus of the provision as a whole, which begins by discussing defendant's transfer of his MS shares to a trust. Logically, the only reason to segue in one contract provision from the information about defendant's MS shares directly into a discussion of plaintiff's entitlement to a percentage of the sale proceeds is that the sale contemplated by the provision is a sale

of defendant's shares.

The provision makes more sense if it is read as if the words "Simon's shares in" appear between the word "if" and the words "MS or any of its subsidiaries," so that it would read "if *Simon's shares in* MS or any of its subsidiaries or related companies are sold, and the proceeds of sale are not otherwise invested or reinvested in another business enterprise, the following percentage of the proceeds . . . shall be paid to Nisha." Nevertheless, Nisha cannot prevail here because that is not what the paragraph's language actually provides. "A court may not, in the guise of interpreting a contract, add or excise terms or distort the meaning of those used" (*Riverside S. Planning Corp. v CRP/Extell Riverside, L.P.*, 60 AD3d 61, 66 [1st Dept 2008], *affd* 13 NY3d 398 [2009]).

Defendant, too, seems to have made an assumption about the same provision that is not warranted by the provision's wording. While he correctly contends that the language of the agreement only entitles plaintiff to claim a payment in the event of a sale of the company, he also seems to presume that her entitlement is limited to her percentage of *his receipts from the sale of his shares* in the event of a sale of the company. This presumption, like plaintiff's, is logical; after all, why would defendant

provide for plaintiff to be entitled to a percentage of the proceeds of sale of the entire company, when he would receive only a share proportionate to his ownership interest? Yet, nowhere does the provision state that plaintiff's percentage share is to be based on what defendant earned from the sale of his shares in the context of the sale of the company. Rather, it merely says that "if MS or any of its subsidiaries or related companies are sold, and the proceeds of sale are not otherwise invested or reinvested in another business enterprise," plaintiff shall be paid the applicable percentage of *the proceeds* (after payment of any taxes and transactional costs due upon such sale) -- *not* defendant's share of the proceeds.

It is counterintuitive that defendant would agree to plaintiff's being entitled to a share of the proceeds of a sale of the *company*, rather than a share of the proceeds of a sale of defendant's *shares* in the company. Nevertheless, that is what the paragraph actually says.

Plaintiff wants the modification agreement to say that she is entitled to a percentage of the proceeds paid to defendant for his shares in the company; defendant wants it to say that plaintiff is entitled to a percentage of the proceeds from the sale of his shares only if he receives those proceeds in the

context of a sale of the company as a whole (or a subsidiary). The agreement actually says neither of those things. But, since the modification agreement is not ambiguous, it must be enforced according to its terms (*see Greenfield*, 98 NY2d at 569). Therefore, despite the incongruity, I agree that the contract, as written, does not entitle plaintiff to a distribution.

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

ENTERED: MARCH 19, 2015

CLERK

Acosta, J.P., Andrias, Saxe, DeGrasse, Richter, JJ.

14409 Julio Becerra, Index 304708/10
Plaintiff-Appellant,

-against-

Promenade Apartments Inc.,
etc., et al.,
Defendants-Respondents.

_____

Ginarte O'Dwyer Gonzalez Gallardo & Winograd, LLP, New York (Steven R. Payne of counsel), for appellant.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Richard Reiter of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Julia Rodriguez, J.), entered March 5, 2014, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing the Labor Law § 241(6) claim predicated upon a violation of Industrial Code (12 NYCRR) § 23-1.5(c)(3), reversed, on the law, without costs, and the motion denied.

Plaintiff testified that on the day of the accident, a foreman provided him with an angle grinder that did not have a safety guard, and instructed him to perform certain work despite the absence of such a guard. He contends that because other grinders at the site had guards, the instruction that he use the tile grinder without its guard, and the failure to remove the

unguarded grinder from the work site, constituted violations of the "specific and concrete requirements" of 12 NYCRR 23-1.5(c)(3).

The motion court erred in finding that section 23-1.5(c)(3) was too general to support plaintiff's Labor Law § 241(6) claim. Industrial Code (12 NYCRR) § 23-1.5(c)(3) provides, "All safety devices, safeguards and equipment in use shall be kept sound and operable, and shall be immediately repaired or restored or immediately removed from the job site if damaged." In *Misicki v Caradonna* (12 NY3d 511, 520-521 [2009]), the Court of Appeals held that the third sentence of 12 NYCRR 23-9.2(a), which says, "Upon discovery, any structural defect or unsafe condition in such equipment shall be corrected by necessary repairs or replacement," imposed an affirmative duty, rather than merely reciting common-law principles, and that therefore its violation was sufficiently specific to support a Labor Law § 241(6) claim. The regulation plaintiff relies on here, 12 NYCRR 23-1.5(c), has a structure similar to 12 NYCRR 23-9.2(a): the first two sentences of section 23-9.2(a) and the first two paragraphs of section 23-1.5(c) employ general phrases (e.g., "good repair, "proper operating condition," "sufficient inspections," "adequate frequency") while the third sentence and paragraph "mandate[] a

distinct standard of conduct, rather than a general reiteration of common-law principles, and [are] precisely the type of 'concrete specification' that *Ross* [*v Curtis-Palmer Hydro-Elec. Co.* (81 NY2d 494 [1993])] requires" (*Misicki*, 12 NY3d at 521). Since the final paragraph of section 23-1.5(c) is functionally indistinguishable from the third sentence of section 23-9.2(a), in that both mandate a distinct standard of conduct, we find that the Court of Appeals' reasoning in *Misicki* applies here, and reject the dissent's suggestion that the preamble of section 23-1.5 precludes any reliance on the section for purposes of Labor Law § 241(6).

Our dissenting colleague would affirm the motion court's dismissal, not only because he views the relied-on regulation, 12 NYCRR 23-1.5(c)(3), as too general, but also because it does not explicitly require guards for angle grinders. He takes the position that the only type of portable power-driven tools for which the Industrial Code requires guards are hand operated saws. We disagree. Section 23-1.5(c) is explicitly concerned with the "[c]ondition of equipment *and safeguards*" (emphasis added), and prohibits the use of "equipment which is not in good repair and in safe working condition" (§ 23-1.5[c][1]). Therefore, the directive in paragraph (3) that "[a]ll safety devices, safeguards

and equipment in use shall be kept sound and operable, and shall be immediately repaired or restored or immediately removed from the job site if damaged" provides a basis for liability under Labor Law § 241(6) as long as such angle grinders were ordinarily or originally provided with safety guards.

We therefore conclude that defendants were not entitled to summary judgment dismissing the Labor Law § 241(6) claim predicated upon a violation of Industrial Code (12 NYCRR) § 23-1.5(c)(3).

All concur except DeGrasse, J. who dissents in a memorandum as follows:

DEGRASSE, J. (dissenting)

Plaintiff, a demolition worker, was injured when his hand came into contact with an angle grinder that he was using to cut through cement. Plaintiff invokes Industrial Code (12 NYCRR) § 23-1.5(c)(3) as the predicate for his cause of action under Labor Law § 241(6), the only claim before us. Where relied upon by plaintiff, section 23-1.5(c)(3) provides that "[a]ll safety devices, safeguards and equipment shall be kept sound and operable, and shall be immediately repaired or restored or immediately removed from the job site if damaged." Plaintiff's only theory of liability, which the majority implicitly adopts, is that "[t]he section was violated as the angle grinder was not provided with the proper guarding as required in § 23-1.5."

As a matter of statutory and regulatory construction, I disagree with the result reached by the majority. It is settled that in order to establish liability under Labor Law § 241(6), a plaintiff is required to establish a breach of a provision of the Industrial Code which gives a specific, positive command (*see Rizzuto v L. A. Wenger Contr. Co.*, 91 NY2d 343, 349 [1998]). Regulatory enactments, such as the Industrial Code, are subject to the same canons of construction as statutes (*see matter of ATM One v Landaverde*, 2 NY3d 472, 477 [2004]). Under one such canon

of construction, "where . . . the statute describes the particular situations in which it is to apply, 'an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded'" (*Patrolmen's Benevolent Assn. of City of N.Y. v City of New York*, 41 NY2d 205, 208-209 [1976], quoting McKinney's Cons Laws of NY, Book 1, Statutes § 240; *see also Eaton v New York City Conciliation & Appeals Bd.*, 56 NY2d 340, 345 [1982]).

Section 23-1.12(c)(1) is the only Industrial Code provision that addresses the guarding of portable, hand-operated power-driven tools and it applies to only saws. That section provides that

> "[e]very portable, power-driven, hand-operated saw which is not provided with a saw table, except chain saws and circular brush saws, shall be equipped with a fixed guard above the base plate which will completely protect the operator from contact with the saw blade when the saw is operating and with a movable self-adjusting guard below the base plate which will completely cover the saw blade to the depth of the teeth when such saw blade is removed from the cut."

By contrast, the Industrial Code sets forth no requirement regarding the guarding of grinders. Moreover, section 23-1.5(c)(3), upon which plaintiff bases his claim, is completely silent with respect to guarding. Had the Industrial Code

contemplated a requirement that grinders be guarded there would be a specific provision to that effect. That is precisely what the Code does under section 23-1.12(c)(1) with respect to portable, power-driven, hand-operated saws. Under the foregoing canon of statutory construction, which the majority disregards, the Industrial Code clearly does not require that grinders be guarded. Again, "what is omitted or not included was intended to be omitted or excluded" (*Patrolmen's Benevolent Assn.*, 41 NY2d at 208-209 [internal quotation marks omitted]). This conclusion is inescapable because the canon applies regardless of whether section 23-1.5(c)(3) is treated as a general or specific provision. Therefore, *Misicki v Caradonna* (12 NY3d 511 [2009]), which the majority cites, is not dispositive. In any event, the clear specificity of section 23-1.12(c)(1) belies plaintiff's argument that "there is simply no way for the Commissioner to have drafted 12 N.Y.C.R.R. 23-1.5(c)(3) in a manner more specific than it already is" with respect to the purported requirement that grinders be guarded. Also, although not part of the rule itself, its preamble makes it clear that section 23-1.5, including subdivision (c)(3), was promulgated as a general safety standard rather than a specific standard of conduct: "*These general provisions* shall not be construed or applied in

contravention of any specific provisions of this Part (rule)" (12 NYCRR 23-1.5 [emphasis added]). I would affirm.

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

ENTERED: MARCH 19, 2015

CLERK

Tom, J.P., Acosta, Andrias, Moskowitz, Kapnick, JJ.

14536 The People of the State of New York, Respondent, Ind. 4261/09 5984/09

-against-

Kevin Moore, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Richard D. Carruthers, J. at application to proceed pro se; Lewis Bart Stone, J. at jury trial and original sentencing; Daniel McCullough, J., at resentencing), rendered August 18, 2011, as amended December 18, 2013, convicting defendant of five counts of burglary in the third degree and seven counts of grand larceny in the fourth degree, and sentencing him, as a second felony offender, to an aggregate term of 10 to 20 years, unanimously affirmed.

Before allowing defendant to waive his right to counsel, the court conducted a thorough inquiry and fully warned defendant of the disadvantages and risks of representing himself and of the

important role of an attorney (*see People v Arroyo*, 98 NY2d 101 [2002]; *People v Collins*, 77 AD3d 404 [1st Dept 2010] *lv denied* 16 NY3d 797 [2011]). The court also asked defendant about his psychiatric history, and there is nothing in the record to indicate that defendant was mentally ill or had any mental condition that would affect his ability to waive counsel and proceed pro se (*see People v Stone*, 22 NY3d 520, 527-529 [2014]). Further, the court did not immediately grant defendant's request. Rather, the court adjourned the proceedings so that defendant could consult with defense counsel "at length" about defendant's decision to represent himself. Moreover, although the court was not required to do so, it ordered that defense counsel remain in the case as defendant's legal advisor (*see People v Rodriguez*, 95 NY2d 497, 501 [2000]).

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 19, 2015

CLERK

Tom, J.P., Acosta, Andrias, Moskowitz, Kapnick, JJ.

14537 In re Virginia Santos, Index 153493/12
Petitioner-Appellant,

-against-

City University of New York,
Respondent-Respondent.

_____

Glass Krakower LLP, New York (Bryan D. Glass of counsel), for appellant.

Eric T. Schneiderman, Attorney General, New York (Matthew W. Grieco of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Ellen M. Coin, J.), entered June 3, 2013, which denied the petition pursuant to article 75 of the CPLR to vacate an arbitration award denying petitioner's grievance of respondent CUNY's determination to deny her tenure, and granted CUNY's cross motion to confirm the arbitration award, unanimously affirmed, without costs.

An arbitrator's award will not be vacated "'unless it is violative of a strong public policy, or is totally irrational, or exceeds a specifically enumerated limitation on his power'" (*Azrielant v Azrielant*, 301 AD2d 269, 275 [1st Dept 2002], *lv denied* 99 NY2d 509 [2003]). Petitioner has not carried her "heavy burden" in claiming that the arbitrator's decision

upholding CUNY's determination that tenure was not warranted based on the lack of scholarly publication was "totally irrational" (*see Frankel v Sardis*, 76 AD3d 136, 140, 139 [1st Dept 2010]).

Petitioner's claim that CUNY did not provide adequate notice of any alleged deficiencies is unavailing, as CUNY's bylaws, as well as the collective bargaining agreement, provided notice that publication requirements were rigorous and progressive (*see Ferrari v Iona Coll.*, 95 AD3d 576, 576 [1st Dept 2012], *lv denied* 20 NY3d 859 [2013]). Further, CUNY's November 2007 letter of concern, sent to petitioner approximately five months before the tenure process, one year before her appeal, and fifteen months before President Raab issued her final determination on March 20, 2009, provided adequate notice. As stated by the arbitrator, the fact that petitioner may not have received notice prior to 2007 was based on her own misstatements as to her publications in her 2005 through 2007 evaluations.

In addition, the determination of CUNY's president as to the quality and quantity of petitioner's publications was a proper

exercise of academic judgment (*see Pauk v Board of Higher Educ. of City of N.Y.*, 62 AD2d 660, 664 [1st Dept 1978], *affd* 48 NY2d 930 [1979]). The record also provides no basis for a finding that CUNY denied petitioner tenure in retaliation for her harassment claim against a department chair.

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

ENTERED: MARCH 19, 2015

CLERK

Tom, J.P., Acosta, Andrias, Moskowitz, Kapnick, JJ.

14538 In re 985 Amsterdam Avenue Housing Development Fund Corporation,
Petitioner-Respondent,

-against-

Suzanne A. Beddoe, etc., et al.,
Respondents-Appellants.

Index 102332/12

_____

Zachary W. Carter, Corporation Counsel, New York (Hanh H. Le of counsel), for appellants.

Mallin & Cha, P.C., New York (Jiyoung Cha of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Lucy Billings, J.), entered September 20, 2013, granting petitioner's article 78 petition, vacating three default orders and judgments against petitioner, and remanding the proceeding to respondents to grant petitioner's request for a new hearing, unanimously modified, on the law, to the extent of remanding to respondents for determination of whether petitioner is entitled to vacatur of the defaults and a new hearing under the "good cause" standard set forth in New York City Charter § 1049-a(d)(1)(h), and otherwise affirmed, without costs.

The article 78 court found that the administrative record failed to demonstrate that petitioner was served with default

orders regarding its failure to appear at a hearing related to three notices of violation. This finding was the basis for the court's determination that respondents arbitrarily deprived petitioner of the opportunities to vacate a default provided for, respectively, in the Environmental Control Board's (ECB) so-called vacate-default rule, 48 RCNY § 3-82, and in New York City Charter § 1049-a(d)(1)(h). The ECB rule provides that a request for a new hearing made within 45 days of the date of the missed hearing "shall be granted unless such request is found to be made in bad faith." Under the City Charter provision, the entry of a default may be avoided by a request for a new hearing made within 30 days of the mailing of the notice of default and upon a showing of "good cause."

Respondents argue that the premise of defective service underlying the court's determination cannot be sustained. It submitted to the court a "daily affidavit of mailing" from September 20, 2011, which represents that the default orders at issue were among the 670 orders mailed by ECB on that date. Respondents argue that "a properly executed affidavit of service raises a presumption that a proper mailing occurred, and a mere denial of receipt is not enough to rebut this presumption" (*Kihl v Pfeffer*, 94 NY2d 118, 122 [1999]). We find that the court did

not err in concluding that any presumption of proper mailing was rebutted under all the circumstances, including, most prominently, respondents' failure to produce copies of the default orders or notices allegedly mailed to petitioner – a circumstance that caused the court to doubt whether these documents were ever generated for mailing. The court's determination of this factual issue is entitled to deference.

Nevertheless, we find that the court exceeded its review function in an article 78 proceeding when it simply ordered a new hearing rather than remanding the proceeding to ECB for a determination whether petitioner demonstrated good cause for default. "While the court is empowered to determine whether the administrative body acted arbitrarily, it may not usurp the administrative function by directing the agency to proceed in a specific manner, which is within the jurisdiction and discretion of the administrative body in the first instance" (*Burke's Auto Body v Ameruso*, 113 AD2d 198, 200-201 [1st Dept 1985]).

Here, the essence of the court's ruling was that, because there was inadequate evidence of proper service, it was improper for respondents to conclude that petitioner's requests for a new

hearing fell outside the respective 30-day time limit imposed by New York City Charter § 1049-a(d)(1)(h). The question of good cause, however, under New York City Charter § 1049-a(d)(1)(h), was never adjudicated by the agency. It is for the agency to rule on this question in the first instance.

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

ENTERED: MARCH 19, 2015

CLERK

Tom, J.P., Acosta, Andrias, Moskowitz, Kapnick, JJ.

14540 The People of the State of New York, Ind. 666/07
Respondent,

-against-

Alfonzo Faulk,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Harold V. Ferguson, Jr. of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Manu K. Balachandran of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Arlene R. Silverman, J.), rendered October 15, 2007, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the fourth degree and three counts of criminally using drug paraphernalia in the second degree, and sentencing him, as a second felony offender, to an aggregate term of 2½ years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence. There is no basis upon which to disturb the jury's determinations concerning credibility. Defendant's proximity to cocaine, crack pipes and a scale with cocaine residue, all in open view, in the back bedroom of an apartment in which 1000 glassine envelopes were found in a

storage area, permitted the jury to reasonably infer that defendant exercised dominion and control over the cocaine in that bedroom (*see e.g. People v Perez*, 259 AD2d 274 [1st Dept 1999], *lv denied* 93 NY2d 976 [1999]). Moreover, the inference that defendant was the person in charge of the drug activity in that apartment was corroborated by evidence subsequently recovered from defendant's own apartment in the same building.

Defendant was also properly convicted under the drug factory presumption (*see* Penal Law § 220.25[2]), which the court correctly submitted to the jury. The evidence, and reasonable inferences to be drawn therefrom, established each of the elements of that presumption, and defendant's arguments to the contrary are without merit.

We have considered and rejected defendant's remaining claims.

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

ENTERED: MARCH 19, 2015

CLERK

Tom, J.P., Acosta, Andrias, Moskowitz, Kapnick, JJ.

14541-
14542 Joern Meissner, etc.,
Plaintiff-Appellant,

-against-

Tracy Yun, et al.,
Defendants-Respondents.

Index 650913/12

Higgins & Trippett LLP, New York (Thomas P. Higgins of counsel), for appellant.

Gertner Mandel & Peslak LLC, New York (Arthur M. Peslak of counsel), for respondents.

Orders, Supreme Court, New York County (Jeffrey K. Oing, J.), entered February 28, 2014, and March 27, 2014, which denied plaintiff's motion for partial summary judgment on the breach of fiduciary duty cause of action and for a preliminary injunction, unanimously affirmed, without costs.

Plaintiff brought this action individually and derivatively on behalf of Manhattan Review LLC against Tracy Yun, the alleged minority owner of Manhattan Review, and her company, Manhattan Enterprise Group, LLC (d/b/a Manhattan Elite Prep), for, inter alia, breach of fiduciary duty, self-dealing, and unjust enrichment. Manhattan Review, now a dissolved company, was founded in 2005 for the purpose of teaching review courses to

business school applicants preparing for the GMAT exam. Plaintiff claims that Yun cancelled Manhattan Review's charter in January 2012 without his knowledge or consent, and transferred all the company's assets to Manhattan Elite Prep for the purpose of stealing Manhattan Review and treating it as her own.

The parties' sharply conflicting affidavits raise material factual issues that preclude summary judgment on the breach of fiduciary duty cause of action (*see Talansky v Schulman*, 2 AD3d 355, 357 [1st Dept 2003]). Plaintiff claims that he was the majority owner of Manhattan Review. However, Yun contends that she owned the company outright in December 2011 and thus did not owe plaintiff a fiduciary duty (*see Burry v Madison Park Owner LLC*, 84 AD3d 699 [1st Dept 2011]). Plaintiff relies on a series of emails and a draft operating agreement that he concedes was never signed as evidence of Yun's minority stake. These documents are insufficient to meet plaintiff's initial burden on his motion. In any event, in opposition, Yun stated in an affidavit that plaintiff intentionally avoided writing business-related emails to conceal his ulterior motives. She also submitted a separate draft operating agreement that seems to reflect her 100% ownership in Manhattan Review.

Yun contends that her actions in December 2011 were not

misconduct (*see id.*), but a justified defensive reaction to plaintiff's own misdeeds in setting up a secret, competing entity and diverting more than $177,000 from Manhattan Review's operating account without her consent or knowledge. Plaintiff claims that Yun's statements are false and have no evidentiary support. Credibility is not properly determined on summary judgment; Yun's statements in opposition to plaintiff's motion – which raise issues of fact – are accepted as true (*Adam v Cutner & Rathkopf*, 238 AD2d 234, 237-238 [1st Dept 1997]).

Plaintiff failed to establish his entitlement to injunctive relief (see *City of New York v Untitled LLC*, 51 AD3d 509, 511-512 [1st Dept 2008]). He did not demonstrate a likelihood that he would ultimately prevail on the merits of his claim. Nor did he demonstrate that he or Manhattan Review would suffer irreparable harm, since he failed to show that an award of money damages would not be fair compensation (*see Zodkevitch v Feibush*, 49 AD3d 424 [1st Dept 2008]).

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

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

ENTERED: MARCH 19, 2015

CLERK

Tom, J.P., Acosta, Andrias, Moskowitz, Kapnick, JJ.

14543 In re Ze'Nya G.,

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

Nina W.,
Respondent-Appellant,

Commissioner of Social Services
of the City of New York,
Petitioner-Respondent.

_____

Kenneth M. Tuccillo, Hastings on Hudson, for appellant.

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

Andrew J. Baer, New York, attorney for the child.

_____

Order of custody and disposition, Family Court, New York County (Clark V. Richardson, J.), entered on or about February 7, 2014, granting the father custody of the subject child, and, in the proceeding against respondent mother pursuant to article 10 of the Family Court Act, upon a finding of neglect, directing that the child be released to the father without the supervision of petitioner Administration for Children's Services, unanimously affirmed, without costs.

The finding of neglect is supported by a preponderance of the evidence showing deplorable and unsanitary conditions in

respondent's home, as well as a lack of supervision and care for the child (*see Matter of Josee Louise L.H. [DeCarla L.]*, 121 AD3d 492 [1st Dept 2014], *lv denied* 24 NY3d 913 [2015]).

The award of custody to the father is in the child's best interests (see *Eschbach v Eschbach*, 56 NY2d 167 [1982]; *Matter of Weeden v Weeden*, 256 AD2d 831 [3d Dept 1998], *lv denied* 93 NY2d 804 [1999]). The neglect finding against respondent constitutes a change in circumstances warranting a modification of the prior custody arrangement, and the award of custody to the father is supported by evidence that the father has provided a stable and happy home, where the child is thriving, and is consistent with the expressed preference of the teenage child.

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

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

ENTERED: MARCH 19, 2015

CLERK

Tom, J.P., Acosta, Andrias, Moskowitz, Kapnick, JJ.

14544 Elhadj Y. Diako, Index 309612/11
Plaintiff-Appellant,

-against-

Leonardo Dany Aguirre Yunga, et al.,
Defendants-Respondents.

_____

Macaluso & Fafinski, P.C., Bronx (Donna A. Fafinski of counsel), for appellant.

Amabile & Erman, PC, Staten Island (Marc J. Falcone of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered February 14, 2014, which denied plaintiff's motion for partial summary judgment on the issue of liability, unanimously reversed, on the law, without costs, and the motion granted.

Plaintiff established entitlement to judgment as a matter of law on the issue of liability by submitting his testimony that he was traveling in the left lane of an expressway at 50 miles per hour when defendants' vehicle came up behind him at a rapid rate of speed and struck the rear end of his vehicle (*see Cruz v Lise*, 123 AD3d 514 [1st Dept 2014]; *Cabrera v Rodriguez*, 72 AD3d 553 [1st Dept 2010]).

In opposition, defendants failed to come forward with a

nonnegligent explanation for the accident (*see e.g. Johnson v Phillips*, 261 AD2d 269, 271 [1st Dept 1999]). Defendant driver Yunga testified that he was traveling in the left lane, 200 feet behind plaintiff's vehicle, when he saw plaintiff begin to pump his breaks and gradually slow down. The gap between the vehicles closed and then plaintiff made a sudden stop causing Yunga to "tap" the rear of plaintiff's vehicle. Defendants' assertion that plaintiff came to a sudden stop "is insufficient to rebut the presumption of negligence" (*Cabrera* at 553; *see Santana v Tic-Tak Limo Corp.*, 106 AD3d 572 [1st Dept 2013]).

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: MARCH 19, 2015

CLERK

Tom, J.P., Acosta, Andrias, Moskowitz, Kapnick, JJ.

14548 In re Tyrik W.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.
- - - - -
Presentment Agency

_____

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

Zachary W. Carter, Corporation Counsel, New York (Kathy Chang Park of counsel), for presentment agency.

_____

Order of disposition, Family Court, New York County (Susan R. Larabee, J.), entered on or about May 22, 2014, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of attempted robbery in the first degree, attempted assault in the second degree, criminal possession of a weapon in the fourth degree, menacing in the second degree (two counts), criminal facilitation in the fourth degree, criminal mischief in the fourth degree and harassment in the first degree, and placed him on level two probation for a period of 15 months, unanimously affirmed, without costs.

The court fully complied with Family Court Act § 341.2(3) when it permitted appellant's mother to be present, even though

she was not seated at the defense table. There is nothing in the statute that restricts a court's general discretion regarding courtroom seating arrangements and decorum. Furthermore, the record establishes that appellant's mother sat only 7½ feet from the defense table, and was accorded ample opportunity for consultation. Appellant has not established that he was prejudiced in any way by these arrangements.

The disposition was the least restrictive dispositional alternative consistent with appellant's needs and the community's need for protection (*see Matter of Katherine W.*, 62 NY2d 947 [1984]). An adjournment in contemplation of dismissal would not have provided adequate supervision, given, among other things, the seriousness of the underlying incident and appellant's conduct and attendance at school.

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

ENTERED: MARCH 19, 2015

CLERK

Tom, J.P., Acosta, Andrias, Moskowitz, Kapnick, JJ.

14550 KSK Construction Group, LLC, Index 111912/11
Plaintiff-Respondent, 590947/11

-against-

26 East 64th Street, LLC, et al.,
Defendants-Appellants,

2961 Associates, L.P., et al.,
Defendants.

[And a Third-Party Action]

_____

Farrell Fritz, P.C., Uniondale (Jason S. Samuels of counsel), for appellants.

King & King, LLP, Long Island City (Peter M. Kutil of counsel), for respondent.

_____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered December 11, 2013, which, to the extent appealed from, denied defendants-appellants' (defendants) motion for summary judgment, unanimously modified, on the law, to grant the motion to the extent of dismissing the tortious interference claim against defendant Sedesco, Inc. and the claim to foreclose on the lien against the premises at 29 East 61st Street (61st Street property), vacating that lien, and directing the Clerk of the Court to disburse $13,625 of the funds deposited with the Clerk to defendant 26 East 64th Street, LLC (26 East), and

otherwise affirmed, without costs.

In this action seeking to recover for amounts claimed to be due with respect to construction management work on two properties, defendants failed to establish their entitlement to summary judgment dismissing the breach of contract claims. Plaintiff's use of a variant of its legal name on the construction contract with defendant 26 East does not warrant dismissal of its claim against that defendant (*see Cohen v OrthoNet N.Y. IPA, Inc.*, 19 AD3d 261 [1st Dept 2005]). Plaintiff submitted evidence that it applied for payment using its full legal name and that 26 East certified payment to plaintiff.

Defendants have not shown that they have standing to seek dismissal of the breach of contract claim against defendant 2961 Associates, L.P., which has not appeared or answered.

Defendant Sedesco is entitled to summary judgment dismissing the tortious interference with contract claim against it, since it is undisputed that it was acting as an agent of the owners of the two properties. An agent cannot be held liable for inducing its principal to breach a contract where it is acting on behalf of its principal and within the scope of its authority (*Devash LLC v German Am. Capital Corp.*, 104 AD3d 71, 79 [1st Dept 2013], *lv denied* 21 NY3d 863 [2013]).

The court erred in failing to address defendants' motion with respect to the mechanic's liens. Defendant 26 East's payment of money to the court discharged the liens only on the two properties and shifted the liens to the court fund (*see Harlem Plumbing Supply Co. v Handelsman*, 40 AD2d 768, 768 [1st Dept 1972]; *see also* Lien Law § 20).

Defendants are entitled to summary judgment dismissing plaintiff's cause of action for foreclosure on the lien on the 61st Street property, vacating that lien, and releasing the funds deposited by 26 East for that lien. Defendants made a prima facie showing that the lien was defective because it misidentified the owner of the property (*see* Lien Law § 9[2]; *see also Matter of Rigano v Vibar Constr., Inc.*, 24 NY3d 415, 420 [2014] [misidentification amounts to a jurisdictional defect invalidating the lien]), and plaintiff has asserted that it has abandoned its claim to foreclose on that lien.

Defendants are not entitled to summary judgment dismissing plaintiff's cause of action for foreclosure on the lien on the 64th Street property, nor are they entitled to summary judgment

on their counterclaim. Issues of fact exist as to whether plaintiff willfully exaggerated the lien against the 64th Street property (*see On the Level Enters., Inc. v 49 E. Houston LLC*, 104 AD3d 500, 500 [1st Dept 2013]; *see also* Lien Law § 39).

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

ENTERED: MARCH 19, 2015

CLERK

Tom, J.P., Acosta, Andrias, Moskowitz, Kapnick, JJ.

14551 The People of the State of New York, Ind. 3115/04
Respondent,

-against-

Alfred Ford,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered on or about December 19, 2012, unanimously affirmed.

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

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

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

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

ENTERED: MARCH 19, 2015

CLERK

Tom, J.P., Acosta, Andrias, Moskowitz, Kapnick, JJ.

14552 Maria I. Perez, Index 104542/11
Plaintiff-Respondent,

-against-

68 Orchard LLC, et al.,
Defendants-Appellants,

Champ Construction Corp., et al.,
Defendants.

_____

Carol R. Finocchio, New York, for appellants.

Paul G. Vesnaver, PLLC, Rockville Centre (Paul G. Vesnaver of counsel), for respondent.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered March 19, 2014, which denied defendants 65 Orchard LLC and Baruch Singer's (defendants) motion for summary judgment dismissing the complaint and all cross claims as against them, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiff's testimony sufficiently identified the area where she tripped on a plastic strap that was on the sidewalk abutting defendants' premises. She stated that she fell under a sign depicted in a photograph, which indicated that the premises was owned by defendants.

However, plaintiff, in opposition to defendants' prima facie

showing, failed to present evidence sufficient to raise a triable issue of fact concerning whether defendants caused, created or had knowledge of the plastic strap on the sidewalk for a sufficient period of time to remedy the condition (*see Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). Plaintiff presented no evidence as to where the strap came from, how it came to be on the sidewalk, or for how long it was there.

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

ENTERED: MARCH 19, 2015

CLERK

Tom, J.P., Acosta, Andrias, Moskowitz, Kapnick, JJ.

14553 Luisa E. Matos, Index 304214/10
Plaintiff-Appellant,

-against-

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

_____

Greenstein & Milbauer, LLP, New York (Andrew W. Bokar of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Victoria Scalzo of counsel), for municipal respondent.

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

_____

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered January 17, 2014, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for leave to serve an amended notice of claim and an amended complaint, and granted defendants' motions to dismiss the complaint as against them, unanimously affirmed, without costs.

The court properly denied plaintiff's motion to amend the notice of claim pursuant to General Municipal Law § 50-e(6) and to amend the complaint, because plaintiff's inconsistency as to the location of the accident and her failure to move timely to correct the notice of claim prejudiced defendant City's ability

to investigate the incident while the surrounding facts were still fresh (*see Rodriguez v City of New York*, 38 AD3d 268 [1st Dept 2007]). Plaintiff's vague General Municipal Law § 50-h testimony and the photographs she provided in which she was unable to identify the accident location failed to correct the defect.

The court properly considered defendant Restani's second motion for summary judgment, having expressly granted Restani leave to renew after discovery. Restani established prima facie that it could not have created the defect in the road that allegedly caused plaintiff to trip and fall, and plaintiff failed to raise an issue of fact in opposition.

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

ENTERED: MARCH 19, 2015

CLERK

Tom, J.P., Acosta, Andrias, Moskowitz, Kapnick, JJ.

14554 Carole Abraido, Index 109772/10
Plaintiff-Appellant,

-against-

2001 Marcus Avenue, LLC, et al.,
Defendants-Respondents.

_____

Kujawski & Kujawski, Deer Park (Mark C. Kujawski of counsel), for appellant.

Hitchcock & Cummings, LLP, New York (John W. Hanson of counsel), for respondents.

_____

Order, Supreme Court, New York County (Anil C. Singh, J.), entered March 7, 2014, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants established their entitlement to judgment as a matter of law in this action where plaintiff was injured when she tripped and fell over a wheel stop in defendants' parking lot in the early evening. Defendants submitted evidence showing that the wheel stop was an open and obvious condition and not inherently dangerous (*see Wachspress v Central Parking Sys. of N.Y., Inc.*, 111 AD3d 499 [1st Dept 2013]*; Broodie v Gibco Enters., Ltd.*, 67 AD3d 418 [1st Dept 2009]). The evidence demonstrated that the wheel stop's placement had been approved by

the local zoning board, the parking lot lights had been set to turn on at 4:00 p.m., the lights were inspected daily and found to be in good condition on the following day, and there had been no prior complaints about the wheel stop or inadequate lighting.

In opposition, plaintiff failed to raise a triable issue of fact. Her claim that an optical illusion created by inadequate lighting made the wheel stop less visible is insufficient to raise a triable issue of fact, as her testimony established that she was looking toward her car at the time of the accident (*see Franchini v American Legion Post*, 107 AD3d 432 [1st Dept 2013]). Moreover, a photograph marked at her deposition reveals that the portion of the curb on which plaintiff allegedly tripped was near a light post (*see Philips v Paco Lafayette LLC*, 106 AD3d 631 [1st Dept 2013]). Plaintiff's affidavit in which she claimed to have been unable to see the surface of the parking lot and wheel stop directly contradicts her earlier testimony and raises only a feigned issue of fact (*see Smith v Costco Wholesale Corp.*, 50 AD3d 499, 501 [1st Dept 2008]). Furthermore, plaintiff failed to rebut defendants' showing that they did not create and had no prior notice of the alleged inadequate lighting condition (*see Resto v 798 Realty, LLC*, 28 AD3d 388 [1st Dept 2006]). A photograph purporting to accurately depict the layout of the

parking lot, apparently taken from a different perspective, lacks probative value as to the nature of the lighting conditions, in the area of her fall, at the time of the accident.

The affidavit of plaintiff's expert was vague and conclusory, and thus insufficient to raise a triable issue, as it failed to reference specific, applicable safety standards or practices in support of his conclusions (*see Buchholz v Trump 767 Fifth Ave., LLC*, 5 NY3d 1, 8-9 [2005]). Furthermore, the expert's "measurement of light output performed [three] years after the accident is not probative of whether the measure of light output was the same at the time of the accident" (*Gilson v Metropolitan Opera*, 15 AD3d 55, 59 [1st Dept 2005], *affd* 5 NY3d 574 [2005]).

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

ENTERED: MARCH 19, 2015

CLERK

Tom, J.P., Acosta, Andrias, Moskowitz, Kapnick, JJ.

14555 The People of the State of New York, Ind. 1429/03
Respondent,

-against-

Clarence Wade, also known as
Clarence Wood,
Defendant-Appellant.

_____

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

Clarence Wade, appellant pro se.

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

_____

Judgment of resentence, Supreme Court, New York County (Edward McLaughlin, J.), rendered October 16, 2012, resentencing defendant to an aggregate term of 47 years in prison, with an aggregate term of 4 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise

unlawful (*see People v Lingle*, 16 NY3d 621 [2011]). We perceive no basis for reducing the term of postrelease supervision.

Defendant's pro se arguments concerning the underlying conviction are not cognizable on this appeal, and his arguments concerning his resentencing are without merit.

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

ENTERED: MARCH 19, 2015

CLERK

Tom, J.P., Acosta, Andrias, Moskowitz, Kapnick, JJ.

14556 Lucille Mahai-Sharpe, Index 8694/06
Plaintiff-Appellant,

-against-

Riverbay Corporation,
Defendant-Respondent.

_____

Sim & Record, LLP, Bayside (Sang J. Sim of counsel), for appellant.

Armienti, DeBellis, Guglielmo & Rhoden, LLP, New York (Vanessa M. Corchia of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered December 5, 2013, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant established its entitlement to judgment as a matter of law by showing that it neither created nor had notice of the condition that allegedly caused plaintiff to slip and fall in the laundry room of defendant's building. Defendant submitted evidence including plaintiff's testimony that she did not see any water on the floor in the area where she fell, and that she presumed that she slipped on water because her pants were damp. Defendant also submitted an affidavit from its janitorial supervisor, who stated that in accordance with the established

maintenance schedule, he checked the laundry room floor three times on the day of the accident and found that it was clean and dry (*see Pagan v New York City Hous. Auth.*, 121 AD3d 622 [1st Dept 2014]). Furthermore, defendant's claims representative stated that for the three-month period before the date of the accident, no complaints were lodged relating to water on the floor of the laundry room.

In opposition, plaintiff failed to raise a triable issue of fact. Plaintiff's reliance on the affidavit of her expert, who stated that the design and construction of the laundry room ventilation system created a dangerous, slippery condition on the floor, is misplaced because as noted by the motion court, the expert did not demonstrate that the testing he performed sufficiently replicated the conditions in the laundry room on the day of the accident, which was five months earlier (*see Alston v Zabar's & Co., Inc.*, 92 AD3d 553 [1st Dept 2012]). The expert also lacked the expertise to offer his opinion with respect to the ventilation system in the laundry room (*see Schechter v 3320 Holding LLC*, 64 AD3d 446, 449-450 [1st Dept 2009]). Even assuming plaintiff's expert was qualified to render an expert opinion, it is noted that his affidavit states that he touched

the laundry room floor with his hand and found that it was "wet and damp." However, he did not state that the floor was wet in the area where plaintiff fell, and, "an expert's examination of a part of the general area is insufficient to preclude summary judgment" (*Murphy v Connor*, 84 NY2d 969, 972 [1994]).

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

ENTERED: MARCH 19, 2015

CLERK

Mazzarelli, J.P., DeGrasse, Richter, Feinman, JJ.

14559 The People of the State of New York, Dkt. 38649/10
Respondent,

-against-

Salam Seck,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (David E.A. Crowley of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered January 27, 2011, convicting defendant, after a nonjury trial, of two counts of disorderly conduct, and sentencing him to a conditional discharge, five days of community service and a $250 fine, 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]). Defendant was convicted of disorderly conduct under a theory that he recklessly created a risk of public inconvenience, annoyance, or alarm by obstructing pedestrian traffic (*see* Penal Law § 240.20[5]), and by congregating with other persons in a public place and refusing to

comply with a lawful order of the police to disperse (*see* Penal Law § 240.20[6]). The People's proof demonstrated that a police officer observed defendant and others friends standing on the sidewalk obstructing pedestrian traffic. When the officer approached defendant and ordered the men to disperse, defendant repeatedly refused, and pushed the officer. When the officer attempted to place defendant in handcuffs, defendant began yelling, and grabbed the officer's pepper spray and radio. At this point, defendant's associates surrounded defendant and the officer. This evidence established the elements of the two types of disorderly conduct at issue.

The original and superseding accusatory instruments were not jurisdictionally defective, since they sufficiently alleged the above-discussed offenses (*see generally People v Jackson*, 18 NY3d 738, 741 [2012]).

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

ENTERED: MARCH 19, 2015

CLERK

Mazzarelli, J.P., DeGrasse, Richter, Feinman, JJ.

14560 Sondra Neuschotz, Index 311514/09
Plaintiff-Respondent,

-against-

Nilson Neuschotz,
Defendant-Appellant.

_____

Robert G. Smith, New York, for appellant.

Blank Rome LLP, New York (Inbal Paz Garrity and Jacqueline Silbermann of counsel), for respondent.

_____

Order, Supreme Court, New York County (Ellen Gesmer, J.), entered July 11, 2013, which, to the extent appealed from as limited by the briefs, denied defendant's motion to dismiss the cause of action for breach of the implied covenant of good faith and fair dealing, unanimously affirmed, without costs.

Defendant was not entitled to dismissal of plaintiff's second cause of action for breach of the implied covenant of good faith and fair dealing. The allegations in the complaint, as bolstered by plaintiff's affidavit set forth actionable claims at this pleading stage (*see Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976]).

Although the separation agreement afforded defendant the sole responsibility of selecting a suitable apartment, the

implied covenant of good faith and fair dealing would prevent him from arbitrarily refusing to make such selection (*see Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 [1995]; *Peacock v Herald Sq. Loft Corp.*, 67 AD3d 442, 443 [1st Dept 2009]). The issue of whether defendant acted arbitrarily or unreasonably in refusing to select a suitable apartment presents questions of fact that cannot be resolved on this motion to dismiss (*see Peacock*, 67 AD3d at 443).

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

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

ENTERED: MARCH 19, 2015

CLERK

Mazzarelli, J.P., DeGrasse, Richter, Feinman, JJ.

14561 In re Exceed Contracting Corp., et al.
Petitioners,

-against-

Industrial Board of Appeals, et al.,
Respondents.

Index 100914/13

_____

O'Brien & Manister, P.C., Hicksville (Todd J. Manister of counsel), for petitioners.

Eric T. Schneiderman, Attorney General, New York (C. Michael Higgins of counsel), for respondents.

_____

Determination of respondent Industrial Board of Appeals (IBA), dated April 29, 2013, which, after a hearing, among other things, affirmed respondent Commissioner of Labor's Orders to Comply, dated May 3, 2010, directing petitioners to pay certain unpaid wages, 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 [Peter H. Moulton, J.], entered September 20, 2013), dismissed, without costs.

The determination that petitioner Exceed Contracting Corp. was an "employer" within the meaning of Labor Law § 190(3) is

supported by substantial evidence (*see Matter of Yick Wing Chan v New York Indus. Bd. of Appeals*, 120 AD3d 1120 [1st Dept 2014]; *compare Matter of Ovadia v Office of the Indus. Bd. of Appeals*, 19 NY3d 138 [2012] [reversing determination that general contractor was employer of workers for whom it provided work site and materials and whose work it otherwise did not control]). Exceed, a drywall/taping subcontractor on a Manhattan construction site, signed an agreement purportedly retaining Jose Rodriguez as a subcontractor to perform the full scope of the work required by Exceed's contract with the general contractor. However, two of the six claimants testified that Exceed's vice president, petitioner Correa, set their hours and, at a meeting, directed them to appear for work earlier than they had been doing. The claimants testified that Rodriguez followed Correa's orders to reassign them to sites located in Brooklyn and Long Island on certain days of the week, while continuing to work at the Manhattan site on other days. Correa supervised their work at the Brooklyn and Long Island sites closely; he also transported one of the claimants to the Long Island site. In addition, one of the claimants testified that he was required to sign in to work and to write Exceed's name in a space for his company's name.

There is no basis for disturbing the IBA's finding that the claimants testified credibly (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]). Furthermore, the IBA's finding that Rodriguez was effectively a foreman or agent for Exceed is supported by substantial evidence. It is not dispositive that Correa did not supervise the manner of the claimants' work at the site at issue or that the claimants were paid by Rodriguez rather than by petitioners (*see Zheng v Liberty Apparel Co. Inc.*, 355 F3d 61, 72 [2d Cir 2003], citing *Rutherford Food Corp. v McComb*, 331 US 722, 726 [1947]).

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

ENTERED: MARCH 19, 2015

CLERK

Mazzarelli, J.P., DeGrasse, Richter, Feinman, JJ.

14562-
14562A Christine Derrick, Index 108030/10
Plaintiff-Appellant,

-against-

American International Group, Inc., et al.,
Defendants-Respondents.

_____

Goldberg & Fliegel LLP, New York (Kenneth A. Goldberg of counsel), for appellant.

Lipman & Plesur, LLP, Jericho (Robert D. Lipman of counsel), for respondents.

_____

Order, Supreme Court, New York County (Richard F. Braun, J.), entered October 18, 2013, which granted defendants' motion to dismiss the third amended complaint, and order (same court and Justice), entered October 18, 2013, which denied plaintiff's motion for leave to file a fifth amended complaint, unanimously reversed, on the law, without costs, plaintiff's motion for leave to serve her proposed fifth amended complaint granted, and defendants' motion to dismiss the third amended complaint denied as academic.

The determination of the Unemployment Insurance Appeal Board, denying plaintiff's claim for unemployment insurance benefits, does not preclude her from bringing any of the claims

asserted herein (*see* Labor Law § 623[2]; *Silberzweig v Doherty*, 76 AD3d 915, 916 [1st Dept 2010], *lv denied* 16 NY3d 709 [2011]).

According plaintiff's submissions "their most favorable intendment" for purposes of defendants' CPLR 3211(a)(5) motion to dismiss (*Arrington v New York Times Co.*, 55 NY2d 433, 442 [1982], *cert denied* 459 US 1146 [1983]), her claims under the New York State and City Human Rights Laws, governed by a three-year limitations period, are timely in the present procedural posture (*see* CPLR 214[2]; Administrative Code of City of NY § 8-502[d]; *Murphy v American Home Prods. Corp.*, 58 NY2d 293, 307 [1983]). Plaintiff's cause of action under 42 USC § 1981, governed by a four-year limitations period, relates back to plaintiff's original timely pleading and is, therefore, also timely asserted (*see* CPLR 203[f]; 28 USC § 1658[a]; *Jones v R.R. Donnelley & Sons Co.*, 541 US 369, 372-373, 382 [2004]). Plaintiff has also adequately alleged claims under Section 1981 for invidious discrimination and retaliation (*see Vivenzio v City of Syracuse*, 611 F3d 98, 106 [2d Cir 2010]; *McDowell v North Shore-Long Is. Jewish Health Sys.*, 839 F Supp 2d 562, 566 [ED NY 2012]).

Since the claims asserted by plaintiff in her proposed fifth amended complaint are sufficiently meritorious to warrant granting leave to amend (*see* CPLR 3025[b]), it is not necessary

to consider the remaining discrete claims in her superseded third amended complaint. Review of those claims is further barred in light of the parties' so-ordered stipulation, directing that the third amended complaint be considered only in the event that those asserted in the fifth amended complaint were insufficient.

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

ENTERED: MARCH 19, 2015

CLERK

Mazzarelli, J.P., DeGrasse, Richter, Feinman, JJ.

14564 Angel Ortiz, Index 300384/11
Plaintiff-Appellant,

-against-

Burke Avenue Realty, Inc., et al.,
Defendants-Respondents.

_____

Ephrem J. Wertenteil, New York, for appellant.

Callan, Koster, Brady & Nagler, LLP, New York (Jordan I. Rothman of counsel), for Burke Avenue Realty, Inc., respondent.

Barry, McTiernan & Moore, LLC, New York (Laurel A. Wedinger of counsel), for S&D Beauty Supply and Diogo Diallo, respondents.

_____

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered March 13, 2014, which denied plaintiff's motion for partial summary judgment on the issue of liability on his Labor Law § 240(1) claim, unanimously reversed, on the law, without costs, and the motion granted.

Plaintiff established entitlement to judgment as a matter of law by submitting evidence showing that he had been standing on the extension ladder performing work for several minutes, when the feet of the ladder suddenly slid backwards away from the wall and fell (*see Estrella v GIT Indus., Inc.*, 105 AD3d 555 [1st Dept 2013]; *Dwyer v Central Park Studios, Inc.*, 98 AD3d 882, 883 [1st Dept 2012]). Plaintiff was not required to show that the ladder

was defective to meet his burden (*see Siegel v RRG Fort Greene, Inc.*, 68 AD3d 675 [1st Dept 2009]).

In opposition, defendants failed to raise a triable issue of fact. Their contentions that plaintiff slipped, and that his own actions caused the ladder to move, are unsupported and based on speculation (*see Angamarca v New York City Partnership Hous. Dev. Fund Co., Inc.*, 56 AD3d 264 [1st Dept 2008]), and the fact plaintiff did not ask his brother to hold the ladder also does not raise a triable issue as to sole proximate causation (*see McCarthy v Turner Constr., Inc.*, 52 AD3d 333 [1st Dept 2008]). That the accident was not witnessed does not bar judgment in plaintiff's favor, where nothing in the record contradicts his version of the events or raises an issue as to his credibility (*see Klein v City of New York*, 89 NY2d 833 [1996]; *Verdon v Port Auth. of N.Y. & N.J.*, 111 AD3d 580, 581 [1st Dept 2013]). The inconsistencies in the record relied upon by defendants, including the conflicting testimony as to who provided the subject ladder, are irrelevant to the dispositive issue of whether defendants provided plaintiff with proper protection under the statute (*see Lipari v AT Spring, LLC*, 92 AD3d 502, 503-504 [1st Dept 2012]; *Romanczuk v Metropolitan Ins. & Annuity Co.*, 72 AD3d 592 [1st Dept 2010]). Furthermore, defendants' argument

that plaintiff was not engaged in covered activity at the time of the accident, raised for the first time on appeal, is not availing.

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

ENTERED: MARCH 19, 2015

CLERK

Mazzarelli, J.P., DeGrasse, Richter, Feinman, JJ.

14567 The People of the State of New York, Ind. 4720/12
Respondent,

-against-

Rogelio Innis,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Andrew E. Seewald of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Ruth Pickholz, J.), rendered May 23, 2013, as amended, July 15, 2013, convicting defendant, after a jury trial, of persistent sexual abuse, and sentencing him, as a predicate felony sex offender previously convicted of a violent felony, to a term of four years, unanimously affirmed.

The prosecution's summation comments about the absence of medical records provide no basis for reversal. The court thoroughly instructed the jury that a defendant has no burden of

proof. The jury is presumed to have followed the court's instructions.

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

ENTERED: MARCH 19, 2015

CLERK

Mazzarelli, J.P., DeGrasse, Richter, Feinman, JJ.

14569 Mercedes Villafane, et al., Index 302382/11
Plaintiffs-Appellants,

-against-

Macombs Grocery Superette, Corp.,
Defendant-Respondent.

_____

Thomas D. Wilson, P.C., Brooklyn (Thomas D. Wilson of counsel), for appellants.

Paganini, Cioci, Pinter, Cusumano & Farole, Melville (Joseph P. Minasi of counsel), for respondent.

_____

Appeal from order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered April 14, 2014, which granted defendant's motion to vacate a judgment and bill of costs, dated November 12, 2013, unanimously dismissed, without costs, as moot.

The issue on appeal, defendant's responsibility for interests, costs, and disbursements, pursuant to CPLR 5003-a, has been rendered moot by the offer of defendant's insurer to pay the disputed amount, and the case is not of the type that would warrant an invocation of the exception to the mootness doctrine

(*see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714 [1980]).

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

ENTERED: MARCH 19, 2015

CLERK

Mazzarelli, J.P., DeGrasse, Richter, Feinman, JJ.

14570 Plaza Tower LLC, Index 100279/13
Plaintiff-Appellant,

-against-

Ruth's Hospitality Group, Inc.,
formerly known as Ruth's Chris
Steak House, Inc.,
Defendant-Respondent.

_____

Rosenberg & Estis, P.C., New York (Jason R. Davidson and Dani Schwartz of counsel), for appellant.

Herrick, Feinstein LLP, New York (John P. Sheridan of counsel), for respondent.

_____

Order, Supreme Court, New York County (Peter H. Moulton, J.), entered September 15, 2014, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for summary judgment on its claim for air conditioning charges, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Defendant's defense of overcharges is barred by its unconditional guaranty and waiver of defenses (*see Citibank v Plapinger*, 66 NY2d 90, 94-95 [1985]; *LFR Collections LLC v Blan Law* Offices, 117 AD3d 486 [1st Dept 2014]; Red *Tulip, LLC v Neiva*, 44 AD3d 204, 209-213 [1st Dept 2008], *lv dismissed* 10 NY3d 741 [2008]). Defendant's reliance on *Walcutt v Clevite Corp.* (13

NY2d 48 [1963]), which recognized failure of consideration as a defense to enforcement of a guaranty, is misplaced; the guaranty in *Walcutt* was not unconditional and did not contain a waiver of defenses (*see Harrison Ct. Assoc. v 220 Westchester Ave. Assoc.*, 203 AD2d 244 [2d Dept 1994]).

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

ENTERED: MARCH 19, 2015

CLERK

Mazzarelli, J.P., DeGrasse, Richter, Feinman, JJ.

14571 The People of the State of New York Ind. 356/09
Respondent,

-against-

Allen Dewitt, etc.,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (T. Charles Won of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Doris M. Gonzalez, J.), rendered November 15, 2011, as amended December 20, 2011, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender previously convicted of a violent felony, to a term of six years, unanimously affirmed.

The court properly exercised its discretion in denying defendant's mistrial motion, made after an undercover officer testified that defendant told him that "he had just got out of jail." The court gave curative instructions that were sufficient to prevent any prejudice (*see People v Santiago*, 52 NY2d 865 [1981]), and that the jury is presumed to have followed (*see People v Davis*, 58 NY2d 1102, 1104 [1983])

The court properly exercised its discretion in declining to order a competency examination of defendant pursuant to CPL Article 730 (*see Pate v Robinson*, 383 US 375 [1966]; *People v Tortorici*, 92 NY2d 757 [1999], *cert denied* 528 US 834 [1999]; *People v Morgan*, 87 NY2d 878 [1995]). When the court learned that defendant may have had a psychiatric history, it conducted a sufficient inquiry of defendant and his counsel, and correctly determined that no examination was necessary. Neither defendant's trial testimony, nor anything else in the record, casts doubt on defendant's ability to understand the proceedings or assist in his defense.

The People's demonstration at the *Hinton* hearing (*People v Hinton*, 31 NY2d 71 [1972]) of an overriding interest in courtroom closure also satisfied the People's burden under *People v Waver* (3 NY3d 748 [2004]) of establishing the need for the undercover

officer to testify anonymously (*see e.g. People v Ortiz*, 74 AD3d 672 [1st Dept 2010], *lv denied* 15 NY3d 894 [2010]). We have considered and rejected defendant's arguments to the contrary.

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

ENTERED: MARCH 19, 2015

CLERK

Mazzarelli, J.P., DeGrasse, Richter, Feinman, JJ.

14572 In re Anthony W.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.
- - - - -
Presentment Agency

_____

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

Zachary W. Carter, Corporation Counsel, New York (Kathy Chang Park of counsel), for presentment agency.

_____

Order of disposition, Family Court, Bronx County (Peter J. Passidomo, J.), entered on or about February 3, 2014, which adjudicated appellant a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would constitute the crime of sexual abuse in the second degree, and placed him on probation for a period of 14 months, unanimously affirmed, without costs.

The court properly exercised its discretion in denying appellant's request to convert the juvenile delinquency proceeding into a person in need of supervision proceeding (*see e.g. Matter of Steven O.*, 89 AD3d 573 [1st Dept 2012]). A 14-month period of probation was the least restrictive dispositional alternative consistent with appellant's needs and the community's

need for protection, given the seriousness of appellant's actions toward the six-year old victim and the recommendations of the Probation Department and treating psychologist.

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

ENTERED: MARCH 19, 2015

CLERK

Mazzarelli, J.P., DeGrasse, Richter, Feinman, JJ.

14573 The People of the State of New York, Ind. 1199/12
Respondent,

-against-

David McLaren,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered on or about October 24, 2012, unanimously affirmed.

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

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

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

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

ENTERED: MARCH 19, 2015

CLERK

Mazzarelli, J.P., DeGrasse, Richter, Feinman, JJ.

14574 Darius Clive Neil, Index 307740/11
Plaintiff,

Jonathan Carnot,
Plaintiff-Appellant,

-against-

Coulibaly Tidani, et al.,
Defendants-Respondents.

_____

Gana LLP, New York (Adam Gana of counsel), for appellant.

Galvano & Xanthakis, P.C., New York (Matthew Kelly of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered on or about December 16, 2013, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing the complaint based on plaintiff Jonathan Carnot's inability to demonstrate that he suffered a serious injury to his right knee within the meaning of Insurance Law § 5102(d), unanimously reversed, on the law, without costs, and the motion denied as to Carnot's claims that he suffered "permanent consequential" and "significant" limitation injuries to his right knee.

Defendants made a prima facie showing of entitlement to summary judgment based on their medical expert's findings of

normal range of motion and that the MRI of plaintiff's right knee showed no evidence of traumatic injury (*see Spencer v Golden Eagle, Inc.*, 82 AD3d 589, 590-591 [1st Dept 2011]). In opposition, plaintiff raised a triable issue of fact through the affirmed reports of his physician and surgeon, who found deficits in the range of motion of plaintiff's right knee during examinations, and a torn ligament in the right knee during surgery (*see Prince v Lovelace*, 115 AD3d 424 [1st Dept 2014]).

Plaintiff's range of motion limitations were sufficient to raise an issue for jury resolution as to whether the deficits were "significant" or "permanent consequential" limitations of use of his right knee, particularly where plaintiff had undergone a lengthy course of physical therapy, and his pain had persisted to the point of needing surgery, which revealed the torn ligament (*see Collazo v Anderson*, 103 AD3d 527, 528 [1st Dept 2013]; *Perez v Vasquez*, 71 AD3d 531, 532 [1st Dept 2010]).

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

ENTERED: MARCH 19, 2015

CLERK

Mazzarelli, J.P., DeGrasse, Richter, Feinman, JJ.

14575 Michael Hedges, etc., et al., Index 101854/12
Plaintiffs-Respondents.

-against-

East River Plaza, LLC, et al.,
Defendants,

Bob's Discount Furniture of NY, LLC,
Defendant-Appellant.

_____

Smith, Mazure, Director, Wilkins, Young & Yagerman, P.C., New York (Jacob J. Young and Daniel Y. Sohnen of counsel), for appellant.

Kramer, Dillof, Livingston & Moore, New York (Matthew Gaier of counsel), for respondents.

_____

Order, Supreme Court, New York County (Lucy Billings, J.), entered July 31, 2013, which, to the extent appealed from as limited by the briefs, denied the motion of defendant Bob's Discount Furniture of NY, LLC (Bob's) to dismiss the complaint and all cross claims as against it, unanimously affirmed, without costs.

At this stage, affording the pleadings a liberal construction, accepting as true the facts alleged in the complaint and submissions in opposition to the motion, and according plaintiffs the benefit of all available inferences (*see generally Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), the

complaint set forth a cause of action against Bob's for negligence.

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

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

ENTERED: MARCH 19, 2015

CLERK

Mazzarelli, J.P., DeGrasse, Richter, Feinman, JJ.

14576 In re Andre Lissone, Index 101433/12
Petitioner-Appellant,

-against-

Dennis M. Walcott, etc., et al.,
Respondents-Respondents.

_____

Wolin & Wolin, Jericho (Alan E. Wolin of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Pamela Seider Dolgow of counsel), for respondents.

_____

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered October 16, 2013, which denied petitioner's motion to renew, unanimously affirmed, without costs, and the petition dismissed.

The court properly determined that there was no basis to annul respondents' determination to discontinue petitioner's probationary employment as an assistant principal. Petitioner failed to show that respondents' determination, upon reinvestigation and reconsideration, was made in bad faith, in

violation of lawful procedure, or for a constitutionally impermissible purpose (*see Matter of Kolmel v City of New York*, 88 AD3d 527, 528 [1st Dept 2011]; *see also Matter of Witherspoon v Horn*, 19 AD3d 250, 251 [1st Dept 2005]).

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

ENTERED: MARCH 19, 2015

CLERK

Mazzarelli, J.P., DeGrasse, Richter, Feinman, JJ.

14577 S.A. de Obras y Servicios, Copasa, Index 651555/12
Plaintiff-Appellant-Respondent, 651649/13

-against-

The Bank of Nova Scotia, et al.,
Defendants-Respondents-Appellants.

- - - - -

Cointer Chile, S.A., et al.,
Plaintiffs-Appellants-Respondents,

-against-

The Bank of Nova Scotia, et al.,
Defendants-Respondents-Appellants.

_____

Wilk Auslander LLP, New York (Jay S. Auslander of counsel), for S.A. de Obras y Servicios, Copasa, appellant-respondent.

Quinn Emanuel Urquhart & Sullivan, LLP, New York (Stephen A. Broome of counsel), for Cointer Chile, S.A. and Azvi Chile, S.A., appellants-respondents.

Shearman & Sterling LLP, New York (Daniel H.R. Laguardia of counsel), for respondents-appellants.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered June 13, 2014, which, insofar as appealed from, dismissed plaintiff S.A. De Obras Y Servicios, Copasa's (Copasa) complaint in its entirety, dismissed plaintiff Cointer Chile, S.A. and Azvi Chile, S.A. Agencia En Chile's (Cointer) first, second, and eighth causes of action, denied defendants The Bank of Nova Scotia and Scotiabank Global Banking and Markets f/k/a

Scotia Capital Inc.'s motion to dismiss Cointer's sixth cause of action and declined to apply a contractual indemnification provision to bar plaintiffs' claims and provide recovery of defendants' attorney's fees, unanimously modified, on the law, to reinstate Copasa's complaint and Cointer's first cause of action, and otherwise affirmed, without costs.

At this stage of the litigation, prior to key depositions being held, it cannot be determined whether any "outrageous acts of folly" were involved (*see Hartford Ins. Co. v Holmes Protection Group*, 250 AD2d 526, 528 [1st Dept 1998]). Accordingly, the contract-based claims for gross negligence should not have been dismissed.

The motion court properly found that the indemnification provision, on its face, expressly contemplates third-party litigation without clearly implying that the parties intended the provision to apply to intra-party claims (*see Wells Fargo Bank N.A. v Webster Bus. Credit Corp.*, 113 AD3d 513, 516 [1st Dept 2014], *lv denied* 23 NY3d 902 [2014]).

The court properly declined to dismiss Cointer's sixth cause of action. Issues of fact exist as to whether the parties reached a binding preliminary contract giving rise to a duty to

negotiate in good faith, and, if so, whether Scotiabank breached it (*see SNC, Ltd. v Kamine Eng'g & Mech. Contr. Co.*, 238 AD2d 146 [1st Dept 1997]).

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

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

ENTERED: MARCH 19, 2015

CLERK

Mazzarelli, J.P., DeGrasse, Richter, Feinman, JJ.

14578N Rose Grobman, Index 150301/13
Plaintiff-Appellant,

-against-

Etoile 660 Madison LLC, et al,
Defendants,

First Quality Maintenance II,
LLC, etc.,
Defendant-Respondent.

[And a Third-Party Action]

_____

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

Gallo Vitucci & Klar LLP, New York (Kimberly A. Ricciardi of counsel), for respondent.

_____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered November 22, 2013, which granted defendant First Quality Maintenance II, LLC's (FQM) motion to vacate the default judgment against it, extend its time to answer, and deem its proposed answer served upon timely service of a copy of the order with notice of entry, unanimously affirmed, without costs.

FQM failed to demonstrate a reasonable excuse for its default, as required by CPLR 5015, since it did not offer an affidavit based on personal knowledge as to whether or not its registered agent had received the summons and complaint at the

agent's designated mailing address for service of process. However, FQM's argument that it lacked personal notice of this action until it received a copy of the third-party complaint is substantiated by affidavits. Moreover, the argument was made before the motion court (and not refuted). Thus, FQM's reliance on CPLR 317 in support of the vacatur of its default, though raised for the first time on appeal, does not prejudice plaintiff, and in addition to showing that it did not receive notice of the summons in time to defend, FQM demonstrated a meritorious defense, i.e., the statute of limitations, which is apparent from the face of the record (*see e.g. Augustin v Augustin*, 79 AD3d 651 [1st Dept 2010]).

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

ENTERED: MARCH 19, 2015

CLERK

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

14579N Brunelle & Hadjikow, P.C., Index 158213/12
Plaintiff-Respondent,

-against-

James G. O'Callaghan,
Defendant-Appellant.

_____

James G. O'Callaghan, appellant pro se.

Brunelle & Hadjikow, P.C., New York (George Brunelle of counsel), for respondent.

_____

Appeal from order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered on or about June 17, 2013, which granted plaintiff's motion for summary judgment, deemed appeal from judgment, same court and Justice, entered August 29, 2013, awarding plaintiff $157,662.46, plus 9% simple annual interest, and so considered, said judgment unanimously affirmed, with costs.

In this action to recover legal fees, plaintiff law firm established its entitlement to judgment as a matter of law on its account stated claim by demonstrating that defendant received and retained the invoices without objection for a reasonable time and made partial payments thereon (*see Cohen Tauber Spievak & Wagner, LLP v Alnwick*, 33 AD3d 562, 562 [1st Dept 2006]*; Rosenberg*

Selsman Rosenzweig & Co. v Slutsker, 278 AD2d 145 [1st Dept 2000]). Notably, after plaintiff performed extensive legal services for defendant, he made approximately thirty payments between April 2003 and October 2006, and agreed to pay the outstanding amount. In July 2007, defendant acknowledged that he owed the outstanding amounts, precluding his current objection to how the majority of the invoices were calculated.

In opposition to the motion, defendant failed to raise an issue of material fact. Defendant's letter, dated December 27, 2006, contained nonspecific and conclusory allegations and did not comply with the retainer agreement's objection requirements. Accordingly, it was insufficient to defeat plaintiff's summary judgment motion (*Cohen*, 33 AD3d at 562).

Finally, defendant's argument that the motion court decided the motion before the deadline for submitting opposition papers is unavailing. Pursuant to court order, dispositive motions were to be made no later than 60 days after the note of issue was filed. This did not preclude either party from submitting motion papers prior to that time. Defendant did not suffer any prejudice as a result of his misunderstanding since he received

two notices of motion and the court accepted his untimely opposition papers.

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

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

ENTERED: MARCH 19, 2015

CLERK

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

13635 Ladenburg Thalmann & Co, Inc., Index 651982/13
Plaintiff-Respondent,

-against-

Signature Bank,
Defendant-Appellant.

_____

Robert M. Rosenblith, Tarrytown, for appellant.

Philip S. Ross P.C., New York (Philip S. Ross of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (O. Peter Sherwood, J.), entered March 10, 2014, affirmed, without costs.

Opinion by Saxe, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
Rolando T. Acosta
David B. Saxe
Darcel D. Clark
Barbara R. Kapnick, JJ.

13635
Index 651982/13

_____x

Ladenburg Thalmann & Co, Inc.,
Plaintiff-Respondent,

-against-

Signature Bank,
Defendant-Appellant.

_____x

Defendant appeals from the judgment of the Supreme Court, New York County (O. Peter Sherwood, J.), entered March 10, 2014, declaring that plaintiff's drawdown request under defendant's standby letter of credit was proper, and awarding plaintiff damages.

Robert M. Rosenblith, Tarrytown, for appellant.

Philip S. Ross P.C., New York (Philip S. Ross of counsel), for respondent.

SAXE, J.

This case presents the issue of whether a letter of credit that requires the originals of all documents to trigger payment can be satisfied by a true copy of one of the original amendments to the letter of credit.

BACKGROUND

Defendant, Signature Bank, issued an Irrevocable Transferable Standby Letter of Credit in the amount of $833,000 upon the application of nonparty law firm Arkin Kaplan LLP, for the benefit of plaintiff, Ladenburg Thalman Co., Inc. The letter of credit was issued as security for plaintiff, as sublandlord, to ensure payment by Arkin Kaplan, its subtenant, of rent and additional rent under their sublease.

Defendant bank's obligation to pay under the letter of credit was conditioned on defendant's receiving from plaintiff a presentation of documents including a drawing statement, "the original of this standby letter of credit, and all amendments, if any, and the operative notice." The letter of credit was amended six times.

On April 10, 2013, after Arkin Kaplan defaulted in paying a portion of the rent and additional rent, plaintiff made a written demand under the letter of credit for an initial draw down of $39,920.88. Plaintiff included in its presentation the original

letter of credit, a "sight draft," and original amendments 1, 4, 5, and 6. It had been unable to locate amendments 2 and 3.

By letter dated April 15, 2013, defendant dishonored the demand, citing as a defect in the presentation plaintiff's failure to present the original amendments 2 and 3. Thereafter, plaintiff's counsel requested true copies of those items from defendant's counsel. On May 7, 2013, in an email response to counsel's request, defense counsel provided plaintiff's attorney with true copies of the two requested amendments.[1]

Plaintiff then brought this action for (1) a declaration that defendant was required to honor the drawdown request and any future drawdown request without requiring it to provide the originals of amendments 2 and 3 to the letter of credit; and (2) breach of contract, based on defendant's failure to honor the initial drawdown request. The cause of action for breach of contract seeks damages in the amount of $39,920.88 together with interest commencing April 10, 2013.

Defendant moved to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, and for summary judgment pursuant to CPLR 3211(c). Citing Uniform

[1] In the course of the litigation, in August 2013, plaintiff located the original of amendment 3; however, it continued to be unable to locate the original of amendment 2.

Commercial Code § 5-108(a), defendant argued that it properly dishonored the presentation since the complaint on its face admitted plaintiff's failure to strictly comply with the requirements set forth in the letter of credit.

At oral argument on November 12, 2013, the court declined to dismiss the case. Rather, it agreed to an adjournment to provide plaintiff with the opportunity to cure the defect in its first presentation. As part of its new presentation, plaintiff was instructed to present a copy of amendment 2, supported by an affidavit of the appropriate person certifying the source of the copy and that the copy had not been altered in any way.

The next day, November 13, 2013, as instructed by the court, plaintiff submitted a drawdown request in the amount of $406,058.80[2]. In this second presentation, plaintiff included the original letter of credit and all the original amendments in its possession, and a copy of amendment 2, with an affirmation of plaintiff's counsel regarding the source of the copy.

By letter dated November 25, 2013, defendant dishonored the demand.

On the adjourned date, December 5, 2013, the court denied

[2]For the sake of clarity, we note that there is a $1,000 difference between this request and the amount awarded in the judgment.

defendant's motion to dismiss the complaint. Specifically, it held that plaintiff had substantially complied with the terms of the letter of credit. In so holding, the court reasoned that amendment 2 was no longer a material amendment, as it was undisputed that the missing original amendment had merely extended the expiration date of the letter of credit to August 31, 2010, and had since been superseded by amendment 3, which had extended the term of the letter of credit to August 31, 2011, and amendment 4, which further extended the term of the letter of credit to June 29, 2015. Therefore, it concluded that defendant's refusal to comply with the drawdown request on the sole basis that plaintiff had not provided defendant with the original of amendment 2 was arbitrary, entitling plaintiff to summary judgment.

DISCUSSION

New York commercial law requires strict compliance with the terms of a letter of credit. UCC 5-108(a) states that "an issuer shall honor a presentation that . . . appears on its face to strictly comply with the terms and conditions of the letter of credit."

It is true that the parties to the letter of credit can alter their legal responsibilities, such as Arkin Kaplan did here in paragraph 6(a) of the application, authorizing defendant-bank

to accept documents that were in substantial compliance with the letter of credit under certain conditions. Supreme Court relied on this provision to conclude that Arkin Kaplan had waived strict compliance, and therefore that defendant had unreasonably exercised its discretion to reject documents on the ground that they were not in strict compliance. However, as defendant points out, that provision gave it discretion to demand strict compliance. The full provision reads:

> "6. Acceptable Documents Under the [Letter of] Credit.
> a) Substantial Compliance. Except as expressly provided otherwise on the Application, we authorize you and the issuer to accept as complying with the Credit any Drafts and/or Documents which are in substantial but not strict compliance with the Credit without affecting or relieving us of any of our Liabilities under this Agreement. *Nevertheless, the Issuer may in its discretion refuse to accept any or all such Drafts and/or Documents unless they are in strict compliance with the Credit* (emphasis added)."

From its language and structure, we conclude that paragraph 6(a) must be understood to authorize but not require the bank to accept documents that are in substantial compliance, and to leave to the bank's discretion the decision whether to require strict compliance. The insertion of the word "Nevertheless" at the beginning of the second sentence modifies the first by empowering the bank to make the final call. Therefore, the bank's reliance on the strict compliance standard was proper, and it was error for the motion court to hold plaintiff to the lesser standard of

substantial compliance.

However, even applying the standard of strict compliance, plaintiff's drawdown request should have been honored because, under these circumstances, the production of a true copy of amendment 2, instead of an original, was sufficient even to satisfy the strict compliance standard.

Strict compliance has been said to require that "the papers, documents and shipping directions . . . be followed as stated in the letter [of credit]," that "[n]o substitution and no equivalent, through interpretation or logic, will serve," and that "[t]here is no room for documents which are almost the same, or which will do just as well" (*United Commodities-Greece v Fidelity Intl. Bank*, 64 NY2d 449, 455 [1985] [internal quotations marks omitted]; *J.P. Doumak, Inc. v Westgate Fin. Corp.*, 4 AD3d 62, 65 [1st Dept 2004], *appeal dismissed* 3 NY3d 635 [2004]). Even slight discrepancies in compliance with the terms of a letter of credit have been held to justify refusal to pay (*see e.g. Hellenic Republic v Standard Chartered Bank*, 219 AD2d 498 [1st Dept 1995]).

"The [strict compliance] rule finds justification in the bank's role in the transaction being ministerial . . . and to require it to determine the substantiality of discrepancies would

be inconsistent with its function" (*United Commodities-Greece Fidelity Intl. Bank*, 64 NY2d at 455 [internal citation omitted]). The "reason for the strict [compliance] rule is to protect the issuer from having to know the commercial impact of a discrepancy in the documents" (*E & H Partners v Broadway Nat. Bank*, 39 F Supp 2d 275, 282 [SD NY 1998] [internal quotation marks omitted]).

However, as this Court has recently observed, "According to the official UCC commentary, the strict compliance standard does not require that the documents presented by the beneficiary be exact in every detail" (*BasicNet S.P.A v CFP Servs., Ltd.*, __ AD3d __, __, 2015 NY Slip Op 02080, *7 [1st Dept 2015]). The doctrine of strict compliance "does not mean slavish conformity to the terms of the letter of credit . . . [and] does not demand oppressive perfectionism" (*id.*, quoting Official Comment 1, reprinted in McKinney's Cons Laws of NY, Book 62½, UCC 5-108 at 367).

In *BasicNet*, the defendant bank issued two standby letters of credit (SLCs), one with plaintiff BasicNet as beneficiary, the other with plaintiff Basic Properties as beneficiary, in connection with BasicNet's license to defendant Kappa North America, Inc. (Kappa), for which defendant Total Apparel Group, Inc. (TAG) was Kappa's guarantor. After Kappa and TAG defaulted on their obligations under the license agreement, the plaintiffs

made drawdown demands on their letters of credit; the defendant bank refused to honor the demands, citing certain discrepancies in their presentation. Supreme Court denied the plaintiffs' motion for summary judgment. This Court reversed, holding that the plaintiffs had established, as a matter of law, their right to payment under the SLCs. While acknowledging that the standard of strict compliance was applicable, this Court explained that the discrepancies invoked by the bank were "nonmeaningful" (__ AD3d at __, 2015 NY Slip Op, 02080, *7), quoting *Ocean Rig ASA v Safra Natl. Bank of N.Y.*, 72 F Supp 2d 193, 199 [SD NY 1999]). That is, those discrepancies did not run the risk of "mislead[ing] [the bank] to its detriment" (__ AD3d at __, 2015 NY Slip Op 02080, *7, quoting *E & H Partners*, 39 F Supp 2d at 283-84, and citing *Bank of Cochin Ltd. v Manufacturers Hanover Trust Co.*, 612 F Supp 1533, 1541 [SD NY 1985], *affd* 808 F2d 209 [2d Cir 1986]).

One of the "nonmeaningful" discrepancies in *BasicNet* arose from a condition of the letter of credit requiring a signed, written statement from the plaintiffs that the applicant (Kappa) had "FAILED TO DISCHARGE ITS OBLIGATIONS AS PER THE TERMS OF THE UNDERLYING CONTRACT [THE LICENSE AGREEMENT] AND THIS SLC." Plaintiffs' signed, written statements complied with this requirement except that, instead of the words "this SLC," they

used the words, "SLC [relevant number]" (*BasicNet*, __ AD3d at __, 2015 NY Slip Op 02080, *7). This Court concluded that there was no possibility that the difference between "this SLC" and "SLC [relevant number]" could mislead the bank (*id.*).

Another requirement of the letter of credit in *BasicNet* was "[a] SIGNED LETTER OF DEFAULT NOTICE FROM []THE BENEFICIARY TO APPLICANT KAPPA . . . WITH A TEN BUSINESS DAY CURE PERIOD PROVISION CALLING FOR THE AMOUNT OF PAYMENT DUE AS PER THE CONTRACT SENT VIA FEDEX OR DHL SUPPORTED BY PROOF OF DELIVERY OF THIS DEFAULT NOTICE TO KAPPA . . . AT 525 SEVENTH AVENUE SUITE 501 NEW YORK, NY 10018 ISSUED BY FEDEX/DHL OR FEDEX/DHL WRITTEN CONFIRMATION EVIDENCING INABILITY TO DELIVER FOR ANY REASON WHATSOEVER" (*id.* at __, 2015 NY Slip Op 02080, *3). Plaintiffs submitted signed letters of default notice to Kappa, sent via FedEx, and written confirmations from FedEx evidencing inability to deliver. The bank refused to pay on the letter of credit because, instead of one FedEx notice of inability to deliver being addressed to BasicNet and the other being addressed to Basic Properties, they were both addressed to BasicNet. However, this Court observed that since both FedEx notices stated that Kappa had moved, it was irrelevant whether BasicNet or Basic Properties sent the package -- Kappa would not have received it in either event. The Court therefore considered the fact that

both FedEx confirmations were addressed to BasicNet to be a "'nonmeaningful' error" (*id.* at __, 2015 NY Slip Op 02080, *7).

Federal case law construing UCC 5-108(a) agrees that certain types of minor discrepancies may not be used to establish a failure of strict compliance. Even under the strict compliance standard, some variances may be allowable, if they do not "call upon the reviewing bank officer to exercise discretion on a commercial matter, [but] only to exercise discretion as a banker," or if the errors "[do] not compel an inquiry into the underlying commercial transaction" (*E & H Partners*, 39 F Supp 2d at 284).

In the Official Comment to UCC 5-108(a), the drafters expressly endorse the conclusion of the court in *New Braunfels Natl. Bank v Odiorne* (780 SW2d 313 [Tex App 1989]), rejecting the propriety of a bank's dishonor of a letter of credit based on the draft's reference to "Irrevocable Letter of Credit No. 86-122-*5*" instead of "86-122-*S*" (at 316). The Texas court held that it would be obvious to any bank document examiner that the discrepancy was merely a typographical or clerical error and of no possible significance, and stressed that it was not replacing the strict compliance standard with the more relaxed substantial compliance standard, but, rather, that, under these conditions, strict compliance "means something less than absolute, perfect

compliance" (*id.* at 318).

Another instructive case endorsed in the Official Comment is *Tosco Corp. v Federal Deposit Ins. Corp.* (723 F2d 1242 [6th Cir 1983]), where the letter of credit required that a draft contain the following legend: "drawn under Bank of Clarksville Letter of Credit Number 105" (at 1247). The bank refused to honor the presentation because the draft presented to the Bank of Clarksville stated: "Drawn under Bank of Clarksville, Clarksville, Tennessee letter of Credit No. 105" (*id.*). The bank found a lack of strict compliance because of the use of the lowercase "l" rather than an uppercase "L" in "Letter," the use of "No." instead of "Number," the addition of the word "Tennessee" after the word "Clarksville," and the fact that the language was placed on the draft by Tosco, and not by the negotiating bank (*id.*). The Court rejected the bank's strict compliance defense because, despite those minor variations, the presentation conformed (*id.* at 1248).

Also illustrative is *Bank of Cochin Ltd. v Manufacturers Hanover Trust Co.* (612 F Supp 1533, 1541 [SD NY 1985], *affd* 808 F2d 209 [2d Cir 1986], *supra*), where the court found that the failure of the beneficiary to provide a sixth set of identical documents as required in the letter of credit did not violate the strict compliance standard, since such failure "could not have

misled the bank."

While these federal decisions are not controlling, similar reasoning has been adopted by the New York State Bar Association Committee Report, which confirms that the strict compliance standard of the revised UCC 5-108(a) "does not mean absolute and unswerving conformity to the terms of the letter of credit," but, rather, "is to be determined by standard practice of financial institutions that regularly issue letters of credit" (McKinney's Cons Laws of NY, Book 62½, UCC 5-108 at 364).

In the matter before us, there is no possibility that the presentation of a true copy of amendment 2, instead of the original, could mislead defendant to its detriment. Indeed, this copy had been prepared by defendant itself, and was provided to plaintiff by defendant's own attorney. Its accuracy was not in dispute, and there is no dispute regarding the content of the document, which merely extended the expiration date of amendment 2 and which had since been superseded by subsequent amendments. Since the submission of a true copy of amendment 2 would not compel any inquiry by the bank into the underlying transaction, the rationale for the strict compliance rule, "to protect the issuer from having to know the commercial impact of a discrepancy in the documents" (*E & H Partners*, 39 F Supp 2d at 284 [internal quotation marks omitted]), has no applicability here.

The decisions cited by defendant are all distinguishable. In *Hellenic Republic v Standard Chartered Bank* (219 AD2d 498 [1st Dept 1995], *supra*), this Court held that the documents plaintiff submitted for honor were discrepant. The letter of credit required a "SIGNED STATEMENT ON EMBASSY OR GREECE HELLENIC DEFENSE ATTACHE LETTERHEAD PURPORTEDLY SIGNED BY AN AUTHORIZED OFFICER OF EMBASSY OF GREECE, HELLENIC DEFENSE ATTACHE." Plaintiff submitted a statement on the letterhead of "EMBASSY OF GREECE, DEFENSE AND MILITARY ATTACHE" signed by a "Lt. Col. Constandinos Bairaktaris, Ass. Defense and Military Attache" (*id.* at 498). This Court found that the discrepancy was material because defendant could not be expected to determine, from the face of the documents, that "DEFENSE AND MILITARY ATTACHE" was the same as "HELLENIC DEFENSE ATTACHE" (*id.* at 498).

Similarly, in *Beyene v Irving Trust Co.* (596 F Supp 438 [SD NY 1984], *affd* 762 F2d 4 [2d Cir 1985]), the bill of lading listed the party to be notified as Mohammed Soran instead of as Mohammed Sofan. The court held that the misspelling of a party's name was sufficient to excuse the bank from paying on the letter of credit (*Beyene*, 596 F Supp at 442). The Court noted that the bank did not have to establish whether the misspelling of an Arab name was a meaningful mistake or find that it was a major error before it could claim that a discrepancy in the documents existed

(*id.* at 442).

The materiality of a misspelled name is self-evident: the misspelling requires a bank to review documents that were not prepared by it and make determinations as to their contents. However, that concern is not present here.

Finally, we observe that although the letter of credit at issue here may be read to require submission of the original amendments, there is some ambiguity in the plain language of the letter in that regard. The terms of the letter of credit expressly require presentation of "the original of this standby letter of credit, and all amendments, if any, and the operative notice." As a matter of contract interpretation, because the first clause requiring plaintiff to present the original letter of credit is set off by a comma from "and all amendments," the word "original" does not necessarily modify the words "and all amendments." As the court in *E & H Partners* stated, "[A]mbiguities in the instructions in a letter of credit will be resolved, if reasonableness allows, against the issuing bank" (39 F Supp 2d at 282; *see also BasicNet*, __ AD3d at __, 2015 NY Slip Op 02080, *6). On that theory, there was no variance between plaintiff's submission and what the letter of credit required.

Even accepting that the SLC technically required originals of amendments as well as of the letter of credit itself, the

substitution of a true copy of a long-expired amendment constitutes an inconsequential defect that does not violate the strict compliance standard. While Supreme Court incorrectly used the substantial compliance standard rather than the strict compliance standard to reject defendant's refusal to honor plaintiff's demand to pay on the letter of credit, the court was nonetheless correct in its grant of summary judgment in favor of plaintiff.

Lastly, the court correctly awarded plaintiff judgment in the principal amount of $406,058.80, having declared that plaintiff's November 13, 2013 drawdown request in that amount was proper and was improperly dishonored by the bank.

Accordingly, the judgment of the Supreme Court, New York County (O. Peter Sherwood, J.), entered March 10, 2014, declaring that plaintiff's drawdown request dated November 13, 2013 in the amount of $405,058.80 under defendant's standby letter of credit

was proper, and awarding plaintiff the principal amount of $406,058.80, plus interest, should be affirmed, without costs.

All concur.

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

ENTERED: MARCH 19, 2015

CLERK