SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 25, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Friedman, J.P., Renwick, Saxe, Moskowitz, Feinman, JJ.

12 Maria Sepulveda, by her parents, etc., Index 21252/05
Plaintiffs-Respondents,

-against-

Ashlesha Dayal, M.D.,
Defendant-Appellant,

Susan J. Gross, M.D., et al.,
Defendants.

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Kaufman Borgeest & Ryan LLP, Valhalla (Jacqueline Mandell of counsel), for appellant.

Bruce G. Clark & Associates, P.C., Port Washington (Diane C. Cooper of counsel), for respondents.

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Order, Supreme Court, Bronx County (Stanley Green, J.), entered on or about August 6, 2014, which, to the extent appealed from, denied the part of defendants' motion that sought summary judgment dismissing the complaint as against defendant Ashlesha Dayal, M.D., affirmed, without costs.

The infant plaintiff in this case was born with a neuroblastoma tumor, and, as a result, suffered injuries,

including spinal cord damage. Physicians did not detect any anomalies during prenatal ultrasounds performed at approximately 13 weeks, 19.6 weeks, and 30.9 weeks of gestation; plaintiffs claim that defendant's failure to detect the tumor in utero caused a delay in treatment, which in turn resulted in the injuries to the infant plaintiff's neurological system.

Both parties' experts proffered opinions on whether the infant plaintiff's neuroblastoma could have been discovered before birth. One of the experts testifying on defendant's behalf opined that a physician cannot retrospectively assess the size of a tumor in utero based upon the size of the tumor at diagnosis. Moreover, the expert concluded, because neuroblastomas are extremely aggressive tumors, it was "more likely than not" undetectable during plaintiff's pregnancy. Thus, the expert opined, any testimony implying that a physician would be able to identify the size of a tumor in utero based upon the size of the tumor at diagnosis would be speculative and not generally accepted within the medical community.

Yet another expert testifying for defendant opined that there is no scientifically accepted standard of "tumor doubling times" in assessing the size and development of a neuroblastoma. Accordingly, the expert opined, any testimony relating to tumor

growth and the ability to detect the size of a tumor in utero based on the size of the tumor at diagnosis would be testimony not generally accepted within the medical or scientific community.

On the other hand, one of the experts testifying on plaintiffs' behalf stated that in his opinion, with a reasonable degree of scientific certainty, the neuroblastoma was present in the infant plaintiff's body from conception and was of a size large enough to be detected on the third-trimester sonogram taken at 30.9 weeks. The basis for the expert's opinion was that, during the first two months of the infant plaintiff's life, she became unable to move her lower extremities – a deterioration that must have begun before her birth. Accordingly, the expert opined, it was "more likely than not" that the "huge" tumor was evident in the third trimester, when defendant was screening for anomalies in the developing fetus, and that it was a departure from accepted standards of medical practice for defendant to have failed to observe and diagnose the tumor in the infant plaintiff.

A second expert for plaintiffs opined that, based on the medical literature, the tumor, which was excised when the infant plaintiff was eight weeks old, was present and growing in utero. The expert cited articles showing that fetal neuroblastomas have

been detected by routine prenatal sonography, and opined that the mass should have been detected before the birth – specifically, at the ultrasound performed at 30.9 weeks. Another of plaintiffs' experts testified that, based on studies involving mice, and based on the clinical behavior of the infant's "huge" tumor, the neuroblastoma was more likely than not detectable at the ultrasound performed at 30.9 weeks. Notably, although images from the scan taken at 30.9 weeks would have ordinarily been saved, hospital administration told defendant, after plaintiffs filed this action, that the images could not be located.

Defendant's experts established a prima facie case that the ultrasound studies were properly interpreted and that none of defendant's acts or omissions caused the infant plaintiff's alleged injuries. In light of plaintiffs' expert opinions to the contrary, however, we cannot hold on the record presented to us that the opinions of plaintiffs' experts are not generally accepted within the medical and scientific communities. Accordingly, the motion court properly set the matter down for a *Frye* hearing (*Frye v United States*, 293 F 1013 [DC Cir 1923]) to determine (1) whether it is generally accepted in the medical and scientific communities that a physician may offer an opinion to a reasonable degree of medical certainty as to when a tumor such as

the infant plaintiff's tumor would have been detectable by ultrasound examination; and (2) whether it was possible to use any formula, including a doubling formula, to assess whether a neuroblastoma would have been detectable at the ultrasound of the infant plaintiff performed at 30.9 weeks (*Lara v New York City Health & Hosps. Corp.*, 305 AD2d 106 [1st Dept 2003]).

The dissent's assertion that the opinions of plaintiffs' experts were "speculative" and "unsupported by the record" puts the cart before the horse. As noted above, plaintiffs' experts based their opinions partially on peer-reviewed, published articles stating that routine prenatal sonography had detected fetal neuroblastomas. Whether the information conveyed in these articles has gained general acceptance in the medical community, and thus provides support for the opinions of plaintiffs' experts, is precisely the topic of a *Frye* hearing. To reject the opinions of plaintiffs' experts before holding a *Frye* hearing would be to make a determination on the soundness of the experts' conclusions – a determination that would be premature without testing the reliability of the scientific evidence that plaintiffs have proffered.

All concur except Friedman, J.P. and Renwick, J. who dissent in a memorandum by Renwick, J. as follows:

RENWICK, J. (dissenting)

I disagree with the majority's conclusion that this matter is not appropriate for summary disposition. The majority agrees with the motion court, which ordered a hearing to determine whether plaintiffs experts opinions are generally accepted within the medical and scientific communities. On the contrary, I believe that plaintiffs failed to rebut defendant Dr. Dayal's prima facie showing that she had not committed medical malpractice. Accordingly, I respectfully dissent.

This matter involves allegations of medical malpractice, based on the failure to diagnose a neuroblastoma – an embryonic tumor - on the infant plaintiff while she was in utero. The complaint alleges that Drs. Mussali, Gross and Dayal, who performed scans upon plaintiff at 13 weeks, 19.6 weeks, and 30.9 weeks, respectively, failed to timely diagnose the neuroblastoma.

The motion court granted Mussali and Gross summary judgment and dismissed the claims as to the ultrasounds of August 12, 1998 and October 2, 1998, after plaintiff conceded that there was no basis for those claims. The court, however, denied Dayal summary judgment as to the ultrasound study she interpreted on December 16, 1998. Rather than granting or denying the motion on the merits, the court ordered that a hearing be held to determine

whether plaintiffs' experts' opinions are generally accepted within the medical and scientific communities. Unlike the majority, which agrees with the motion court that the matter is not ready for summary disposition, I would find that the motion court improperly denied Dayal's motion for summary judgment dismissing the complaint as against her.

To succeed on her motion for summary judgment, Dayal had to make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Failure to make a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers. If such a showing is made, the burden then shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact warranting a trial of the matter (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Dayal made a prima facie showing that she had not committed malpractice. She submitted affidavits by three experts, all of whom agreed that there were no deviations from the applicable standard of care. To wit, it was appropriate that Dayal

conducted a limited scan as to gestational age, and there was no basis for requiring the doctor to perform anything other than a scan to confirm gestational age versus fetal size. Dayal testified that she performed the scan and was able to visualize the spine, which is not always possible, that no abnormalities were seen, and that the fetus was moving appropriately. Dayal's experts reviewed the October 1998 anatomy scan, taken eight weeks before the scan at issue, and averred that the tumor was not present. The experts also stated that one could not, within a reasonable degree of medical certainty, show that the tumor was visible at the time of the December 1998 third-trimester scan. The experts further stated that any attempt to work backwards from the date of diagnosis using doubling times was flawed science because no accepted doubling times for neuroblastomas exist.

The burden thus shifted to plaintiffs. Generally, the nonconclusory opinion of a qualified expert based on competent evidence that a plaintiff's injuries were the result of a defendant's deviation or departure from accepted medical practice and that such departure was a proximate cause of the injury precludes a grant of summary judgment in favor of the defendant (*see Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002];

Cregan v Sachs, 65 AD3d 101 [1st Dept 2009]). However, general allegations of medical malpractice that are merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice are insufficient to defeat a defendant's summary judgment motion (*Alvarez*, 68 NY2d at 325; *Coronel v New York City Health & Hosps. Corp.*, 47 AD3d 456 [1st Dept 2008]).

Here, the affirmations by plaintiffs' experts are insufficient to contradict Dayal's testimony that she saw no neuroblastoma during the sonogram. To raise an issue, plaintiffs would need evidence supporting their theory that the neuroblastoma was present and of a size, at the time of the scan, that Dayal's failure to observe it was a deviation from the standard of medical care. On that point, plaintiffs' experts' opinions are speculative, vague, and unsupported by the record. Specifically, they fail to rebut defendant's experts' opinions that one cannot prove that the tumor was visible in December of 1998 by working backwards from the tumor's size at diagnosis. Plaintiffs' experts each claimed that the tumor was large enough to diagnose at 30 weeks because double-time calculation shows that the tumor grew from the time of conception to the time of diagnosis. However, none of plaintiffs' experts actually

performed the double-time calculation they claim would determine the size of the tumor in December 1998. In fact, none of plaintiffs' experts state the double-rate of growth that would be applicable to neuroblastoma. This is not surprising since plaintiffs' own experts conceded that neuroblastomas grow inconsistently and can even shrink. Thus, plaintiffs' experts did not rebut defendant's experts' assertions that double-time calculation by its very nature relies on consistent, stable growth to be accurate. In short, absent any double-time calculation, plaintiffs' experts' reliance on the fact that the tumor was "huge" when diagnosed in April 1999 is speculative as to the size it had been 126 days earlier, at the time of the sonogram, on December 16, 1998.

The majority's argument that we are "put[ting] the cart before the horse" is misguided. What we find deficient is not plaintiffs' experts' use of the scientific concept of doubling time to predict tumor size, which is not new (*see e.g. Feldman v Levine*, 90 AD3d 477 [1st Dept 2011]). "*Frye* is not concerned with the reliability of a certain expert's conclusions, but instead with whether the [expert's] deductions are based on principles that are sufficiently established to have gained general acceptance as reliable" (*Nonnon v City of New York*, 32

AD3d 91, 103 [1st Dept 2006], *affd* 9 NY3d 825, 842 [2007]; *see also Marsh v Smyth*, 12 AD3d 307, 308 [1st Dept 2004]). Here, dismissal is warranted because, as fully explained before, plaintiffs' experts' doubling-time analyses rested on speculative evidence.

Accordingly, I would reverse the order of the Supreme Court and grant Dayal's motion.

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

ENTERED: OCTOBER 25, 2016

CLERK

Tom, J.P., Mazzarelli, Manzanet-Daniels, Kapnick, Kahn, JJ.

1468 Julie Ragolia, Index 111180/10
Plaintiff-Appellant,

-against-

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

Aquifer Drilling and Testing, et al.,
Defendants.

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Louis A. Badolato, Roslyn Harbor, for appellant.

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

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Order, Supreme Court, New York County (James E. d'Auguste, J.), entered September 10, 2015, which, to the extent appealed from as limited by the briefs, granted defendant the City of New York's motion for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

The City made a prima facie showing that it did not have prior written notice of the defective roadway condition that allegedly caused plaintiff's bicycle accident, and plaintiff failed to raise a triable issue of fact (Administrative Code of City of NY § 7-201[c][2]; *Yarborough v City of New York*, 10 NY3d 726, 728 [2008]). Plaintiff's submission of a January 2010 inspection report was insufficient to show that the City had

issued a "written acknowledgment" of the defect within the meaning of Administrative Code § 7-201(c)(2), since the report identifies a roadway defect at a different location. "[A]wareness of one defect in the area is insufficient to constitute notice of a different particular defect which caused the accident" (*Espinosa v JMG Realty Corp*, 53 AD3d 408, 409 [1st Dept 2008][internal quotation marks omitted]). In addition, plaintiff's expert's assumption that the City must have created the roadway defect because no permits had been issued is speculative (*Baez v City of New York*, 278 AD2d 83, 83-84 [1st Dept 2000]).

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

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

ENTERED: OCTOBER 25, 2016

CLERK

Friedman, J.P., Richter, Feinman, Kapnick, Kahn, JJ.

1889-
1990 Index 652486/13

Mano Enterprises, Inc.,
Plaintiff-Respondent,

-against-

Metropolitan Life Insurance Company,
Defendant-Appellant.

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d'Arcambal Ousley & Cuyler Burk, LLP, New York (Michelle J. d'Arcambal of counsel), for appellant.

Michael J. Devereaux & Associates PC doing business as Devereaux Law Group, New York (Michael J. Devereaux of counsel), for respondent.

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Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered November 7, 2014, which, to the extent appealed from as limited by the briefs, denied defendant's motion for summary judgment dismissing the first and third causes of action (breach of contract and breach of the covenant of good faith and fair dealing, respectively), unanimously modified, on the law, to grant the motion as to the third cause of action, and otherwise affirmed, without costs. Order, same court and Justice, entered May 18, 2015, which denied defendant's motion for leave to renew and reargue, unanimously affirmed as to renewal, and appeal therefrom otherwise dismissed, without costs, as taken from a nonappealable order.

Plaintiff contends that defendant deprived it of an ownership right under its insurance policy by placing a hold on the policy that prevented plaintiff from assigning it to a third party, which resulted in the lapse of the policy due to nonpayment of the premium. There is an issue of fact as to whether defendant appropriately refused to process the assignment of the policy (*see Ashwood Capital, Inc. v OTG Mgt., Inc.*, 99 AD3d 1, 7-8 [1st Dept 2012]). Plaintiff's damages are not speculative in light of its contract of assignment to the third party; at the time the policy was issued, an action for damages following a breach of the assignment clause, divesting plaintiff of valuable ownership rights, was foreseeable.

The third cause of action is duplicative of the first cause of action (*see Hawthorne Group v RRE Ventures*, 7 AD3d 320, 323 [1st Dept 2004]).

Defendant failed to submit new evidence on its motion for leave to renew (CPLR 2221[e][2]).

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

ENTERED: OCTOBER 25, 2016

CLERK

Friedman, J.P., Andrias, Saxe, Feinman, Kahn, JJ.

1942 Bovis Lend Lease (LMB) Inc., Index 603243/09
Plaintiff,

-against-

Lower Manhattan Development Corporation,
Defendant.
- - - - - -
Bovis Lend Lease (LMB) Inc.,
Third-Party Plaintiff-Appellant-Respondent,

-against-

Arch Insurance Co.,
Third-Party Defendant-Respondent-Appellant.
- - - - - -
Associated General Contractors of NYS, LLC,
Amicus Curiae.

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Sutherland Asbill & Brennan LLP, New York (Jennifer W. Fletcher of counsel), for appellant-respondent.

Torre, Lentz, Gamell, Gary & Rittmaster, LLP, Jericho (Kevin M. Gary of counsel), for respondent-appellant.

Couch White LLP, Albany (Joel M. Howard, III of counsel) for amicus curiae.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered April 21, 2015, which, insofar as appealed from as limited by the briefs and insofar as appealable, granted third-party defendant's (Arch) motion for summary judgment dismissing the third-party cause of action for breach of performance bonds, granted Arch's cross motion for summary

judgment to the extent of limiting its liability under paragraph 3(a) of the "Companion Agreement" to costs incurred by nonparty subcontractor John Galt Corporation (Galt), and denied third-party plaintiff's (Bovis) motion for partial summary judgment on its third-party causes of action for breach of the Companion Agreement and the performance bonds, unanimously modified, on the law, to deny Arch's motion for summary judgment dismissing the cause of action for breach of the bonds, and grant Bovis's motion for partial summary judgment on that cause of action, and otherwise affirmed, without costs.

The court erred in dismissing the claim asserted by Bovis, the general contractor on the construction project and obligee of the performance bonds, that Arch, as surety thereof, breached the bonds. The court found that Arch's alleged nonperformance was excused by Bovis's breach of the bonds by prohibiting Arch from retaining Galt to complete its work after it was terminated. However, the bonds expressly required Arch's replacement of Galt to be "in accordance with" Galt's subcontracts, which incorporated the prime contract. Those contracts required the prior written approval of Bovis and defendant Lower Manhattan Development Corporation (LMDC) for any replacement subcontractor, which applied to the selection of Galt to complete its own work

after it was terminated upon default. It is undisputed that Bovis, in terminating Galt, expressly and unequivocally disapproved of Galt's continued performance of the building abatement work. Moreover, Galt's criminal conviction arising from its performance on the project showed that Galt was a non-responsible contractor and thus disqualified from serving as a subcontractor on the public New York City project (*see Matter of N.J.D. Elecs. v New York City Health & Hosps. Corp.*, 205 AD2d 323, 324 [1st Dept 1994]; *see also* 9 RCNY 2-08). Bovis is entitled to judgment as a matter of law on this claim regardless of which option of the bonds Arch is deemed to have pursued.

Arch's only challenge to the order on appeal is the court's finding that Bovis properly terminated Galt on default. However, since Arch is not aggrieved by the court's dismissal of Bovis's breach of the bonds claim (*see* CPLR 5511), its cross appeal is dismissed (*Pennsylvania Gen. Ins. Co. v Austin Powder Co.*, 68 NY2d 465, 472-473 [1986]).

Nevertheless, Arch's challenge to that finding, considered as an alternative argument in opposition to Bovis's appeal from the dismissal of its breach of the bonds claim, is unavailing. The bonds, by their terms, took effect only if Galt was terminated based on an "Event of Default," contractually defined

to exclude a mere "failure of [Galt] to prosecute the Work," but to include "an act or omission by [Galt] which stops, delays, interferes with, or damages the Work." That definition applied to Galt's removal of a standpipe which supplied water to firefighters, resulting in the deaths of two firefighters and damage to the building. The court properly gave preclusive effect to findings made in a related criminal case following a nonjury trial, in which the court found Galt guilty of reckless endangerment in the second degree based on evidence that, among other things, Galt's foreman, in the course of performing Galt's abatement work, directed a Galt worker to remove a standpipe necessary to supply water to firefighters (*see People v John Galt Corp.*, 113 AD3d 537 [1st Dept 2014] [finding the evidence legally sufficient to support those findings], *lv denied* 23 NY3d 1038 [2014]). Thus, Arch was precluded from contesting whether Galt breached its contractual obligation to maintain the standpipe, since the same issue was resolved in the criminal case and is relevant to the ultimate issue in this case of whether the default termination was proper (*see Grayes v DiStasio*, 166 AD2d 261, 262-263 [1st Dept 1990]).

As for Bovis's claim under the Companion Agreement, which limits the scope of Arch's liability thereunder by reference to

"Galt's Work," and "costs incurred by Galt," the court correctly found that issues of fact exist as to whether, as Bovis argues, the scope of Bovis's work was coextensive with the scope of Galt's work. For example, the agreement obligated Bovis to maintain a second hoist to be erected by another contractor. Moreover, the limitation on Arch's liability to "costs incurred by Galt," found in paragraph 3(a) of the agreement, was omitted from the contemporaneously executed "Supplemental Agreement" concerning Bovis's liability to LMDC (*see Quadrant Structured Prods. Co., Ltd. v Vertin*, 23 NY3d 549, 560 [2014]; *see also Perlbinder v Board of Mgrs. of 411 E. 53rd St. Condominium*, 65 AD3d 985, 987 [1st Dept 2009]). Although, as Bovis argues, paragraph 3(a) concerned the priority of liability among Bovis, Arch, and Galt, it concerned the extent of Arch's liability as well.

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

ENTERED: OCTOBER 25, 2016

CLERK

Tom, J.P., Mazzarelli, Richter, Manzanet-Daniels, Webber, JJ.

2006-2006A The People of the State of New York, Respondent, Ind. 4330/12 6114/11

-against-

Michael P. Johnson, Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (William B. Carney of counsel), for appellant.

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

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Judgments, Supreme Court, New York County (Charles H. Solomon, J.), rendered February 26, 2013, convicting defendant, upon his pleas of guilty, of attempted criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the seventh degree, and sentencing him to an aggregate term of eight months, unanimously affirmed.

Defendant made a valid waiver of his right to appeal, which forecloses review of his suppression claim (*see People v Sanders*, 25 NY3d 337, 341 [2015]; *People v Lopez*, 6 NY3d 248, 255-257 [2006]). By way of its oral colloquy, supplemented by a written waiver, the court adequately described the rights defendant was waiving, and clearly apprised him that he was giving up the right to challenge the denial of his suppression motion. As an

alternative holding, we find that the search warrant at issue on the motion was based on probable cause (*see generally People v Bigelow*, 66 NY2d 417, 423 [1985]).

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

ENTERED: OCTOBER 25, 2016

CLERK

Tom, J.P., Mazzarelli, Richter, Manzanet-Daniels, Webber, JJ.

2008 In re Kenrick C.,
Appellant.
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Presentment Agency

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Tamara A. Steckler, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Mackenzie Fillow of counsel), for presentment agency.

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Order of disposition, Family Court, Bronx County (Gayle P. Roberts, J.), entered on or about September 4, 2015, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he had committed acts that, if committed by an adult, would constitute the crimes of criminal obstruction of breathing or blood circulation, assault in the third degree, criminal mischief in the fourth degree, aggravated harassment in the second degree, and two counts of menacing in the third degree, and imposed a conditional discharge for a period of 12 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's credibility determinations. The fact that

this incident arose from a dispute between appellant and his sister does not diminish the unlawfulness of appellant's acts.

The criminal obstruction charge was established by evidence that appellant threw his sister to the floor and began "squeezing" her neck until she could barely breathe, which supported a reasonable inference of intent to "impede the normal breathing or circulation of the blood of another person" (Penal Law § 121.11; *see People v Briggs*, 129 AD3d 1201, 1204 [3d Dept 2015], *lv denied* 26 NY3d 1038 [2015]). The evidence also established that appellant intended to cause physical injury to the victim, and caused such injury, in that before choking her, he repeatedly punched her and then "threw" or "pushed" her onto the floor, causing cuts and bruises that took a week to heal, soreness that lasted two weeks, and a "dark mark" on her neck that was still visible at the time of the fact-finding hearing

(*see People v Chiddick*, 8 NY3d 445 [2007]; *Matter of Carysse R.*, 90 AD3d 521 [1st Dept 2011]). The remaining offenses were similarly established by the evidence and the reasonable inferences to be drawn therefrom.

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

ENTERED: OCTOBER 25, 2016

CLERK

Tom, J.P., Mazzarelli, Richter, Manzanet-Daniels, Webber, JJ.

2009 Patrina Kitt, as Administratrix of the Estate of Chmaar Kitt Scott, deceased,
Plaintiff-Respondent,

-against-

Benjamin Okonta, M.D., et al.,
Defendants,

Brookhaven Rehabilitation & Health Care Center,
Defendant-Appellant.

Index 300414/10

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Caitlin Robin & Associates, PLLC, New York (Caitlin Robin of counsel), for appellant.

Wallace & Associates, P.C., Brooklyn (Larry Wallace of counsel), for respondent.

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Order, Supreme Court, Bronx County (Stanley Green, J.), entered September 30, 2015, which, to the extent appealed from, denied defendant Brookhaven Rehabilitation & Health Care Center's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Although Brookhaven made a prima facie showing that it did not depart from good and accepted medical practices (*see Lopez v Gramuglia*, 133 AD3d 424, 425 [1st Dept 2015]; *Matos v Khan*, 119 AD3d 909, 910 [2d Dept 2014]), the report of plaintiff's medical expert raised triable issues of fact as to whether there was a

departure and whether any departure was a proximate cause of decedent's death. In particular, plaintiff's expert opined that decedent presented to Brookhaven with symptoms and complaints indicative of a high risk for deep vein thrombosis and a pulmonary embolism (DVT/PE), which was not ruled out by testing done at a prior medical facility, that Brookhaven should have performed a diagnostic workup for DVT/PE and provided prophylactic anticoagulation treatment, and that it unreasonably delayed in sending decedent to the hospital when he was found on the floor vomiting 11 days after admission (*see Bartholomew v Itzkovitz*, 119 AD3d 411, 415 [1st Dept 2014]; *Jiminian v St. Barnabas Hosp.*, 84 AD3d 647 [1st Dept 2011]).

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

ENTERED: OCTOBER 25, 2016

CLERK

Tom, J.P., Saxe, Richter, Manzanet-Daniels, Webber, JJ.

2010 In re Pari Sara Shirazi, Index 103886/12
Petitioner/Plaintiff-Appellant,

-against-

New York University, et al.,
Respondents/Defendants-Respondents.

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Freedman Lewis LLP, New York (Jennifer Freeman of counsel), for appellant.

Proskauer Rose LLP, New York (Joseph C. O'Keefe of counsel), for respondents.

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Order and judgment (one paper), Supreme Court, New York County (Alexander W. Hunter, Jr., J.), entered April 30, 2014, granting respondents/defendants' (respondents) motion to dismiss the second amended petition/complaint (petition) seeking to, among other things, reinstate petitioner/plaintiff (petitioner) to her former position as an Associate Arts Professor at respondent/defendant New York University (NYU), and dismissing the hybrid plenary action and CPLR article 78 proceeding, unanimously reversed, on the law, without costs, to vacate the judgment, and deny the motion as to the breach of contract causes of action and the article 78 claims, and the portions of the defamation cause of action as indicated herein.

According petitioner the benefit of every favorable

inference on the motion to dismiss (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]), her first cause of action adequately alleges a claim for breach of the appointment and reappointment provisions contained in the Arts Professor Policy Document issued by NYU (policy document). Petitioner adequately alleged that those provisions set forth contractually enforceable parameters governing the lengths of terms of employment for Arts Professors. The policy document was not issued unilaterally by NYU, but was the product of a lengthy "negotiation and bargaining process" between NYU and faculty, indicative of a bilateral agreement reached with NYU (*Wernham v Moore*, 77 AD2d 262, 265 [1st Dept 1980]). Moreover, the policy document's purpose was to provide for fixed terms of employment for Arts Professors, including five-year terms in the case of Associate Arts Professors. Accordingly, it is reasonable to construe the policy document as establishing the "definite period of time" mentioned in NYU's bylaws (*see O'Neill v New York Univ.*, 97 AD3d 199, 208 [1st Dept 2012]).

Petitioner has adequately alleged a breach of the policy document's provisions. According her the benefit of every favorable inference, as of September 1, 2006, she was appointed to an initial five-year term as Associate Arts Professor,

terminating on August 31, 2011, and she received a favorable review before the end of her fourth year. Therefore, according to the policy document, she should have received "[n]otification of renewal" for a new five-year term "by the beginning of the fifth year" — that is, by September 1, 2010. She received no such notification. She did not receive any "noti[ce] of intention not to be reappointed" either, which, according to the policy document, should be given in the event of an unsuccessful review. Instead, she received a letter, effective "as of September 1, 2010," informing her that her "status as a faculty member" was "Associate Arts Professor." For present purposes, petitioner may be said to have reasonably assumed that she had been reappointed to the five-year term specified in the policy document (*see O'Neill*, 97 AD3d at 211-212). Therefore, it remains to be determined whether the policy document applies to petitioner; whether respondents breached the policy document by failing to provide petitioner with any express notice of renewal; whether the September 2010 "status" letter may be reasonably deemed to have constituted notice of reappointment; and whether petitioner acted reasonably in failing until March 2012 to take any action to compel an express confirmation of reappointment to a five-year term. These issues should be decided upon a fuller

record following discovery.

Petitioner's second cause of action adequately states a claim for breach of contract based on her termination without the benefit of the disciplinary procedures set forth in Title IV of NYU's Faculty Handbook (*see Felsen v Sol Café Mfg. Corp.*, 24 NY2d 682, 685-686 [1969]). At this juncture, where no discovery has been had to expand upon the meaning of the various interrelated documents, the disciplinary procedures appear on their face to express an intent to apply to allegations of misconduct by all faculty members, whether tenure-track or not, including petitioner.

"Consistent with the parallel contract causes of action discussed above," petitioner's fourth and fifth causes of action, seeking article 78 relief, sufficiently allege, respectively, that NYU acted arbitrarily and capriciously in failing to notify her of the renewal of her appointment as an Associate Arts Professor, and in failing to adhere to its own disciplinary procedures in the termination of her employment (*O'Neill*, 97 AD3d at 213). The issue of whether petitioner timely asserted her article 78 claims should, like her contract claims, be decided upon a fuller record following discovery.

Petitioner has adequately stated claims for defamation

relating to the alleged statements of respondent/defendant John Sexton, made on December 13, 2011, to the head of the Economic Development Board of Singapore (EDBS), that plaintiff had made improper funds transfers and had used funds of the Tisch School of the Arts Asia (Tisch Asia) for personal purposes, resulting in her removal. These alleged statements were not mere matters of opinion, but rather were factual and defamatory in nature (*see Brian v Richardson*, 87 NY2d 46, 51 [1995]). Moreover, it cannot be said that these statements were protected by any qualified privilege; although the Tisch Asia board members, to whom the statements were also directed, shared a common interest with Sexton in the school's financial health, the head of EDBS did not (*see Stukuls v State of New York*, 42 NY2d 272, 278-279, 281 [1977]). EDBS was an entirely separate governmental or quasi-governmental agency, with its own interests in Tisch Asia, which would not necessarily be aligned with NYU's interests (*see id.*). The November 2011 statements of defendant Joe Juliano, to an outside consultant and an outside contractor, that plaintiff had "violated NYU rules" concerning overseas construction, and that NYU had not approved the resulting cost overruns, are likewise potentially actionable, and not protected by any privilege (*see Liberman v Gelstein*, 80 NY2d 429, 435 [1992]; *Lipman v Ionescu*,

49 AD3d 458, 458 [1st Dept 2008]).

The remaining allegedly defamatory statements in the petition are either nonactionable statements of opinion, or are protected by the common interest privilege, or both (*see Mann v Abel*, 10 NY3d 271, 276 [2008], *cert denied* 555 US 1170 [2009]; *Foster v Churchill*, 87 NY2d 744, 751 [1996]).

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

ENTERED: OCTOBER 25, 2016

CLERK

Tom, J.P., Mazzarelli, Richter, Manzanet-Daniels, Webber, JJ.

2011 The People of the State of New York, Ind. 2464/12
Respondent,

-against-

Michael Lewis,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Bonnie C. Brennan of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Robert C. Mciver of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Raymond L. Bruce, J.), entered March 25, 2015, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Defendant's prior felony sex crime conviction automatically resulted in an override to risk level three (*see People v Howard*, 27 NY3d 337, 342 [2016]). Accordingly, defendant qualifies as a level three offender independently of any point assessments. In any event, defendant's challenges to particular point assessments are unavailing. The court properly exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). There were no mitigating factors that were

not adequately taken into account by the guidelines, and the record does not establish any basis for a downward departure. Although defendant will be subject to a lengthy period of postrelease supervision, we do not find that circumstance to be a significant mitigating factor, particularly because defendant committed the underlying crime while he was on parole from his prior sex crime conviction.

Although defendant challenges the adequacy of the court's findings, we conclude that a remand is unnecessary since the record is sufficient for this Court to make its own findings (*see People v Lacewell*, 103 AD3d 784, 785 [2d Dept 2013], *lv denied* 21 NY3d 856 [2013]), especially because, as noted, the override supports a level three adjudication irrespectively of any point assessments.

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

ENTERED: OCTOBER 25, 2016

CLERK

Tom, J.P., Mazzarelli, Richter, Manzanet-Daniels, Webber, JJ.

2012 In re Clarence Horne, Index 101134/13
Petitioner-Appellant,

-against-

Matthew M. Wambua, etc., et al.,
Respondents-Respondents.

_____

William E. Leavitt, New York , for appellant.

Zachary W. Carter, Corporation Counsel, New York (Marta Ross of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Michael D. Stallman, J.), entered November 26, 2013, denying the petition to annul a determination of respondent Department of Housing Preservation and Development (HPD), dated April 8, 2013, which denied petitioner succession rights to a Mitchell-Lama apartment, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The determination denying petitioner succession rights to the subject apartment has a rational basis in the record and was made in accordance with lawful procedure (CPLR 7803). Petitioner failed to demonstrate that the apartment was his primary residence from the inception of his late wife's tenancy (less than two years before her death) and that he was listed on the

income affidavit submitted during that time period (28 RCNY 3-02[p][3]; *Yunayeva v Kings Bay Hous. Co., Inc.*, 94 AD3d 452, 453 [1st Dept 2012]). Petitioner did not submit any of the suggested proofs of primary residency, such as bank statements, voter registration statements, or bills addressed to him at the apartment, and the affidavits and 2011 W-2 form that he submitted do not conclusively establish co-residency during the relevant time period (*see Matter of Hochhauser v City of N.Y. Dept. of Hous. Preserv. & Dev.*, 48 AD3d 288 [1st Dept 2008]).

Petitioner "may not invoke the doctrine of estoppel to 'prevent HPD from executing its statutory duty to provide Mitchell-Lama housing only to individuals who meet the specified eligibility requirements'" (*Matter of Quinto v New York City Dept. of Hous. Preserv. & Dev.*, 78 AD3d 559, 559-560 [1st Dept 2010], quoting *Matter of Schorr v New York City Dept. of Hous. Preserv. & Dev.*, 10 NY3d 776 [2008]). Nor is he entitled to an evidentiary hearing since HPD's procedures pursuant to its regulations for determining succession rights satisfy due process

(*see Matter of Hochhauser*, 48 AD3d at 289; *Matter of Pietropolo v New York City Dept. of Hous. Preserv. & Dev.*, 39 AD3d 406, 407 [1st Dept 2007]).

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

ENTERED: OCTOBER 25, 2016

CLERK

Tom, J.P., Mazzarelli, Richter, Manzanet-Daniels, Webber, JJ.

2013 Scott A. Barbuto, Index 150695/13
Plaintiff-Respondent,

-against-

Club Ventures Investments LLC
doing business as DavidBartonGym,
Defendant-Appellant.

_____

Havkins Rosenfeld Ritzert & Varriale, LLP, New York (Carla Varriale of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Jennifer G. Schecter, J.), entered on or about January 29, 2016, which, insofar as appealed from, denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant established prima facie that plaintiff, an experienced weightlifter and user of Smith weightlifting machines, assumed the risks inherent in this activity, including the risk of being injured by falling weights while working out on a Smith machine and the risks resulting from open, obvious, and not concealed "suboptimal" conditions such as equipment configuration (*see Bukowski v Clarkson Univ.*, 19 NY3d 353, 357 [2012]; *Butt v Equinox 63rd St., Inc.*, 139 AD3d 614 [1st Dept

2016]; *Roberts v Boys & Girls Republic, Inc.*, 51 AD3d 246 [1st Dept 2008], *affd* 10 NY3d 889 [2008]). In opposition, plaintiff's expert report raised an issue of fact as to whether the subject Smith machine was faulty, which risk plaintiff cannot be said to have assumed (*see Bukowski*, 19 NY3d at 357; *Zelkowitz v Country Group, Inc.*, 142 AD3d 424 [1st Dept 2016]; *Alqurashi v Party of Four, Inc.*, 89 AD3d 1047 [2d Dept 2011]).

Defendant established prima facie that it neither created nor had actual or constructive notice of the alleged defect, by submitting evidence that the employees who ran the gym were unaware of any previous complaints or accidents involving the machine and that the machine was found to be in good working order immediately after the accident and thereafter continued to be used safely (*see Dyer v City of Albany*, 121 AD3d 1238 [3d Dept 2014]). In opposition, plaintiff raised an issue of fact as to actual notice by submitting an affidavit by another gym member stating that he had previously complained about the subject machine, which was frequently out of order. Although plaintiff initially submitted the witness's statement in inadmissible form, he indicated that the witness would be available to testify, and, in reply on his cross motion, submitted an affidavit by the witness with the explanation that the witness had been traveling

outside the state and was unable to submit a sworn statement until his return (*see Maldonado v Townsend Ave. Enters., Ltd. Partnership*, 294 AD2d 207 [1st Dept 2002]; *Ralat v New York City Hous. Auth.*, 265 AD2d 185 [1st Dept 1999]). As to defendant's contention that plaintiff was the sole proximate cause of his accident, the conflicting expert opinions preclude summary judgment.

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

ENTERED: OCTOBER 25, 2016

CLERK

Tom, J.P., Mazzarelli, Richter, Manzanet-Daniels, Webber, JJ.

2014 The People of the State of New York, Ind. 2737/11
Respondent,

-against-

Gary Crawford,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Samuel J. Mendez of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Dmitriy Povazhuk of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Eugene Oliver, J.), rendered February 3, 2015, as amended February 19, 2015, unanimously affirmed.

Although we do not find that defendant made a valid waiver of the right to appeal, we perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 25, 2016

CLERK

Tom, J.P., Mazzarelli, Richter, Manzanet-Daniels, Webber, JJ.

2015 Amnon Shiboleth, et al., Index 600350/98
Plaintiffs-Respondents,

-against-

Joseph Yerushalmi, et al.,
Defendants-Appellants,

N.S.N. International Industries, N.V., et al.,
Defendants.

_____

Meltzer Lippe Goldstein & Breitstone LLP, Mineola (Thomas J. McGowan of counsel), for appellants.

Joseph Yerushalmi, appellant pro se.

Flemming Zulack Williamson Zauderer LLP, New York (Richard A. Williamson of counsel), for respondents.

_____

Order, Supreme Court, New York County (Lancelot B. Hewitt, Special Referee), entered August 13, 2014, which granted plaintiffs' motion to set aside an order, same court and Special Referee, entered August 29, 2013, adopted new factual findings and, consistent with those findings, directed the Clerk to enter judgment in favor of plaintiffs against defendants Joseph Yerushalmi and Yerushalmi & Associates, LLP (together the Yerushalmi defendants), jointly and severally, in the amount of $850,582, plus interest, costs and disbursements, and directed the Clerk to enter judgment in favor of the Yerushalmi defendants

against plaintiffs, jointly and severally, in the amount of $50,750, plus interest, costs, and disbursements, unanimously modified, on the law and the facts, to strike the direction that the Clerk enter judgment, and remand the matter to the Special Referee to apportion the Phoenix Group fee in accordance with this decision, and otherwise affirmed, without costs.

A fair interpretation of the evidence supports the Special Referee's finding of fact that the $901,332 payment from the National Kibbutz Movement (NKM) was in partial satisfaction of the fee owed by the Phoenix Group to plaintiff law firm based on work performed before the dissolution of the firm. However, the Special Referee, in reapportioning the Phoenix fee, failed to take into consideration the fact, as established by the evidence, that the $901,332 payment, as well as a payment to the firm of $197,238, was obtained owing entirely to the Yerushalmi defendants' postdissolution efforts to recover monies owed to the firm that would otherwise not have been recovered (*see Shiboleth v Yerushalmi*, 58 AD3d 407, 408 [1st Dept 2009]). Accordingly, the matter is remanded to apportion the value of the Phoenix fee based upon equitable considerations that take into account the

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

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

ENTERED: OCTOBER 25, 2016

CLERK

Tom, J.P., Mazzarelli, Richter, Manzanet-Daniels, Webber, JJ.

2017 In re Shaniyah D.C., and Another,

Children Under the Age of Eighteen Years, etc.,

Olivia C.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

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

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

Kenneth M. Tuccillo, Hastings on Hudson, attorney for the children.

_____

Appeal from order of fact-finding and disposition, Family Court, Bronx County (Karen I. Lupuloff, J.), entered on or about December 24, 2014, upon consent, which granted a final order of custody to the nonparty father of the subject children, unanimously dismissed, without costs, as taken from a nonappealable order.

The record reflects that respondent consented to the dispositional order. Since no appeal lies from an order entered on consent, the appeal is dismissed (*see Matter of Ian C.*, 254 AD2d 132 [1st Dept 1998]). Were we to address the merits, we

would find that the record shows that, contrary to respondent's argument, the parties engaged in a discussion devoted to appellate waivers, and the court made clear that the appellate waiver was separate and apart from the other rights at issue (*see People v Cole*, 165 AD2d 737 [1st Dept 1990], *lv denied* 76 NY2d 1020 [1990]). In addition, respondent's counsel conferred with and explained the waiver to her, in open court, and, several times, on the record, she indicated that she understood that she was waiving her right to appeal. Accordingly, we conclude respondent's waiver was valid, and decline to consider any issues she raised on appeal (*see People v Callahan*, 80 NY2d 273, 280 [1992]).

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: OCTOBER 25, 2016

CLERK

Tom, J.P., Mazzarelli, Saxe, Richter, Manzanet-Daniels, JJ.

2018 The People of the State of New York, Ind. 3271/12
Respondent,

-against-

Harold Grant,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Shannon Henderson of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Robert Sackett, J.), rendered April 27, 2015,

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

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

ENTERED: OCTOBER 25, 2016

CLERK

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

Tom, J.P., Mazzarelli, Richter, Manzanet-Daniels, Webber, JJ.

2019 Angela M. Boyd, Index 302353/13
Plaintiff-Appellant,

-against-

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

_____

Robert Dembia, P.C., New York (Robert Dembia of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Max O. McCann of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Mary Ann Brigantti, J.), entered April 1, 2015, which granted defendants' motion for summary judgment dismissing the complaint, and denied plaintiff's motion for partial summary judgment on her claim for false arrest and imprisonment, unanimously affirmed, without costs.

Plaintiff cannot prevail on her false arrest and imprisonment claim, because her confinement was privileged (*De Lourdes Torres v Jones*, 26 NY3d 742, 759 [2016]). The police had probable cause to arrest plaintiff based on the three controlled drug buys out of her first floor apartment, including from a woman matching her physical description; utilities records showing that the basement where the contraband was found was not a separate apartment; and the fact that the police actually found

drugs and drug paraphernalia in the basement when executing a search warrant (*id.*). Further, plaintiff had constructive possession of the contraband, because she had dominion and control over the basement apartment, which she could access from her first floor apartment without a key (*People v Diaz*, 24 NY3d 1187, 1190 [2015]; *People v Manini*, 79 NY2d 561, 573 [1992]).

Plaintiff provides no compelling basis to challenge the presumed validity of the search warrant (*People v Calise*, 256 AD2d 64, 65 [1st Dept 1998], *lv denied* 93 NY2d 851 [1999]).

Because the City conceded that the police were acting within the scope of their employment, plaintiff may not proceed with her claim for negligent hiring and retention (*Gonzalez v City of New York*, 133 AD3d 65, 67-68 [1st Dept 2015]; *Sugarman v Equinox Holding, Inc.*, 73 AD3d 654, 655 [1st Dept 2010]).

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: OCTOBER 25, 2016

CLERK

Tom, J.P., Mazzarelli, Richter, Manzanet-Daniels, Webber, JJ.

2020 Enid Griffiths, et al., Index 301728/11
Plaintiffs-Respondents,

-against-

The Durst Organization Inc.,
et al.,
Defendants,

Nouveau Elevator,
Defendant-Appellant.

_____

Chesney & Nicholas LLP, Syosset (John F. Janowski of counsel), for appellant.

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

_____

Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered September 24, 2015, which, to the extent appealed from as limited by the briefs, denied defendant Nouveau Elevator's motion for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Plaintiff alleges that she was injured when an elevator in which she was riding suddenly descended. Plaintiff testified that after the elevator's doors closed on the 40th floor, it started "dropping fast and shaking violently" until it came to an abrupt stop on the 29th floor, making a loud noise, as though a bomb had gone off. There is significant evidence showing that a

similar accident occurred 12 days earlier involving the same elevator.

Nouveau's motion was correctly denied, regardless of the sufficiency of the opposing papers, because it failed to make a prima facie showing that it either lacked notice of the condition of the elevator's doors, or that, as the elevator's exclusive maintenance contractor, it used reasonable care to discover and correct the dangerous condition (*see Rogers v Dorchester Assoc.*, 32 NY2d 553, 559 [1973]; *see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Even if Nouveau had met its prima facie burden, plaintiff raised triable issues of fact based on the evidentiary rule of res ipsa loquitur (*see Miller v Schindler El. Corp.*, 308 AD2d 312, 313 [1st Dept 2003]; *see also Smith v Moore*, 227 AD2d 854, 856 [3d Dept 1996], citing *Notice v Regent Hotel Corp.*, 76 AD2d 820, 820 [1st Dept 1980]).

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

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

ENTERED: OCTOBER 25, 2016

CLERK

CORRECTED ORDER - DECEMBER 5, 2016

Tom, J.P., Mazzarelli, Richter, Manzanet-Daniels, Webber, JJ.

2021-
2022 **Ind. 1179/13**

The People of the State of New York,
Respondent,

-against-

Jose Flores,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (James J. Wen of counsel), for respondent.

_____

Order, Supreme Court, New York County (Megan Tallmer, J.), entered on or about July 30, 2013, which adjudicated defendant a level two sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court providently exercised its discretion in declining to grant defendant's request for a downward departure to a risk level one (*see People v Gillotti*, 23 NY3d 841 [2014]). The mitigating factors defendant relied upon were adequately taken into account in the risk assessment instrument, and were, in any

event, outweighed by the egregiousness of defendant's underlying conduct, committed against a child.

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

ENTERED: OCTOBER 25, 2016

CLERK

Tom, J.P., Mazzarelli, Richter, Manzanet-Daniels, Webber, JJ.

2023 JPMC Specialty Mortgage LLC, Index 380797/12
Plaintiff-Respondent,

-against-

Luis Espada, et al.,
Defendants-Appellants,

Criminal Court of the
City of New York, et al.,
Defendants.

_____

Carl E. Person, New York, for appellants.

Fein, Such & Crane, LLP, Syracuse (John A. Cirando of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered July 23, 2015, which denied the proposed intervenors' motion to dismiss the complaint or, in the alternative, to vacate their default and grant leave to answer, unanimously affirmed, without costs.

The proposed intervenors lack standing to raise the improper service defense on behalf of the mortgagor (*see Wells Fargo Bank, N.A. v Bowie*, 89 AD3d 931 [2d Dept 2011]). In any event, the defense is unavailing in light of the affidavits of service (*see Matter of de Sanchez v JP Morgan Chase Bank*, 57 AD3d 452, 454 [1st Dept 2008]).

The limited power of attorney held by the proposed intervenors does not authorize them to litigate to protect the mortgaged property since they hold no title and are not mortgagors, and the title-holding owner purposefully chose not to litigate over the property (*cf. Lorisa Capital Corp. v Gallo*, 119 AD2d 99, 108-109 [2d Dept 1986] [realty management functions to which power of attorney was limited reasonably included litigating on behalf of absentee owner who could not do so for himself]). In a similar vein, since the mortgagor intentionally stopped mortgage payments and declined to answer the complaint, no reasonable excuse could be shown to vacate the default (*see Amalgamated Bank v Helmsley-Spear, Inc.*, 109 AD3d 418, 419-420 [1st Dept 2013], *affd* 25 NY3d 1098 [2015]).

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

ENTERED: OCTOBER 25, 2016

CLERK

Tom, J.P., Mazzarelli, Richter, Manzanet-Daniels, Webber, JJ.

2025 The People of the State of New York, Ind. 1861/14
Respondent,

-against-

Juan Bermejo,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Robert Mciver of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Margaret Clancy, J.), rendered April 14, 2015,

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

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

ENTERED: OCTOBER 25, 2016

CLERK

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

Tom, J.P., Mazzarelli, Richter, Manzanet-Daniels, Webber, JJ.

2026 The People of the State of New York, ex rel. Bejal J. Shah, on behalf of Theodore Shearin,
Petitioner-Appellant,

-against-

Joseph Ponte, Commissioner, etc.,
Respondent-Respondent.

Index 450539/16

_____

An appeal having been taken to this Court by the above-named appellant from a judgment (denominated an order), of the Supreme Court, New York County (Larry Stephen, J.), entered on or about May 11, 2016,

And said appeal having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated September 28, 2016,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: OCTOBER 25, 2016

CLERK

Tom, J.P., Mazzarelli, Richter, Manzanet-Daniels, Webber, JJ.

2027N In re Hanover Insurance Company, Index 650542/15
Petitioner-Appellant,

-against-

Demetrio Vasquez,
Respondent-Respondent.

_____

Crisci Weiser & McCarthy, New York (Eleanor R. Goldman of counsel), for appellant.

Guerrero & Rosengarten, New York (Howard Rosengarten of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Joan M. Kenney, J.), entered May 11, 2016, granting the petition to vacate an arbitration award, dated February 17, 2016, and directing the parties to proceed to a new arbitration, unanimously reversed, on the law, without costs, the petition denied, and the award confirmed. The Clerk is directed to enter judgment accordingly.

The parties dispute whether the arbitration was voluntary or compulsory. We need not resolve the question, because the award denying respondent supplementary uninsured motorist benefits should not have been vacated even under the less stringent standard of review associated with compulsory arbitration; the award is rationally supported by the record (*see Matter of Curley*

[State Farm Ins. Co.], 269 AD2d 240 [1st Dept 2000]). The hearing evidence includes expert opinions that respondent's claimed neck, back and shoulder injuries resolved with physical therapy and arthroscopic surgery and that no disability arose from the motor vehicle accident, as well as medical evidence of preexisting, chronic degenerative conditions in respondent's neck, back and shoulders. The arbitrator's credibility findings are supported by the record, as is her resolution of the conflicts presented by the competing expert opinions.

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

ENTERED: OCTOBER 25, 2016

CLERK

Tom, J.P., Mazzarelli, Richter, Manzanet-Daniels, Webber, JJ.

2028 & [M-4551] In re Dwayne Riley
Petitioner,

-against-

Cyrus R. Vance, etc., et al.,
Respondents.

Ind. 4647/15

Dwayne Riley, petitioner pro se.

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

Eric T. Schneiderman, Attorney General, New York (Charles F. Sanders of counsel), for Eric T. Schneiderman, respondent.

The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

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

ENTERED: OCTOBER 25, 2016

CLERK

Acosta, J.P., Renwick, Saxe, Feinman, Kahn, JJ.

2029 The People of the State of New York, Respondent, Ind. 5536/13

-against-

Jacob Lopez, Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Julia P. Cohen of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered October 10, 2014, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him to a term of four years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the prison term to three years, and otherwise affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility and identification, including its evaluation of alleged discrepancies between an officer's description of defendant and his actual appearance.

We find the sentence excessive to the extent indicated.

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

ENTERED: OCTOBER 25, 2016

CLERK

Acosta, J.P., Renwick, Saxe, Feinman, Kahn, JJ.

2031 In re Kirsten G.,
Petitioner-Appellant,

-against-

Melvin G. Sr.,
Respondent-Respondent.

_____

Tennille M. Tatum-Evans, New York, for appellant.

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

_____

Order, Family Court, Bronx County (Tracey A. Bing, J.), entered on or about September 11, 2015, which, after a fact-finding hearing in a proceeding brought pursuant to article 8 of the Family Court Act, dismissed the petition seeking an order of protection against respondent for failure to establish a prima facie case, unanimously affirmed, without costs.

Viewing petitioner's testimony in a light most favorable to her, and accepting that testimony as true, we conclude that the testimony failed to establish a prima facie case that respondent's actions constituted the family offenses of harassment in the second degree, disorderly conduct or menacing in the third degree.

Petitioner testified that respondent never touched her

during the September 23, 2014 incident. Although petitioner did testify that after the police made respondent leave the premises, he called her on her cell phone and told her that she "would be sorry, because [she] was trying to come between him and his child," his statement cannot be penalized because it is not a genuine threat of physical harm nor does it present "a clear and present danger of some serious substantive evil" (*People v Dietze*, 75 NY2d 47, 51 [1989]; *see e.g. McGuffog v Ginsberg*, 266 AD2d 136 [1st Dept 1999]). Moreover, petitioner never established that respondent had engaged in a course of conduct intended to annoy or alarm her, and her testimony regarding a 2002 incident was adjudicated in a prior proceeding (*see Matter of Esther H. v Eddie H.*, 78 AD3d 526 [1st Dept 2010]).

In addition, we find that petitioner's testimony does not establish a prima facie case that respondent's conduct during the September 23, 2014 incident constituted disorderly conduct, because there was no evidence that he intended to cause public inconvenience, annoyance or alarm, or recklessly created a risk thereof, by "ranting and raging" outside her apartment door, as she presented no evidence regarding the proximity of her neighbors or other members of the public, or that this conduct otherwise could have caused public inconvenience, annoyance, or

alarm (*see* Penal Law § 240.20; *Matter of Shiffman v Handler*, 115 AD3d 753 [2d Dept 2014]; *Matter of Janice M. v Terrance J.*, 96 AD3d 482 [1st Dept 2012]).

Lastly, the Family Court properly found that petitioner failed to establish a prima facie case that respondent's conduct during the September 23, 2014 incident constituted the family offense of menacing in the third degree because she presented no evidence that he intentionally placed, or attempted to place her in fear of "death, imminent serious physical injury or physical injury" (Penal Law § 120.15; *see People v Peterkin*, 245 AD2d 1050 [4th Dept 1997], *lv denied* 91 NY2d 1011 [1998]).

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

ENTERED: OCTOBER 25, 2016

CLERK

Acosta, J.P., Renwick, Saxe, Feinman, Kahn, JJ.

2033 Victor Saavedra, Index 154454/14
Plaintiff-Appellant,

-against-

89 Park Avenue LLC, et al.,
Defendants-Respondents.

_____

Brand, Brand, Nomberg & Rosenbaum, LLP, New York (Brett J. Nomberg of counsel), for appellant.

Holland & Knight, New York (Robert S. Bernstein of counsel), for respondents.

_____

Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered April 7, 2016, 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.

Denial of summary judgment on plaintiff's claim pursuant to Labor Law § 240(1) was in error where plaintiff electrician was injured when he fell from an A-frame ladder as he was attempting to descend it. Plaintiff's use of a six-foot ladder that required him to stand on the top step did not make him the sole proximate cause of his accident where the eight-foot ladder could not be opened in the space due to the presence of construction debris (*see Noor v City of New York*, 130 AD3d 536 [1st Dept

2015], *lv dismissed* 27 NY3d 975 [2016]; *Keenan v Simon Prop. Group, Inc.*, 106 AD3d 586 [1st Dept 2013]). Defendants' reliance on the affidavit of the high-rise superintendent is misplaced. Although the superintendent speculated that there was sufficient space to open an eight-foot ladder, this was inconsistent with his prior deposition testimony and was thus calculated to create a feigned issue of fact (*see e.g. Pinto v Selinger Ice Cream Corp.*, 47 AD3d 496 [1st Dept 2008]).

Nor was plaintiff a recalcitrant worker (*see Stolt v General Foods Corp.*, 81 NY2d 918, 920 [1993]). While the site safety manager who worked for a subcontractor of defendants testified that she told plaintiff that he should not work in the room because it was unsafe due to all the debris, she explicitly denied that she directed plaintiff to stop work, explaining that she had no such authority. Moreover, prior communications between plaintiff and the safety manager, as well as the site safety logs and photographs, indicate that the debris was an ongoing safety issue. On more than one occasion prior to the accident date, the site safety manager told plaintiff that she had passed along his complaints about the debris, and was trying to get the area cleaned. There was no reason for plaintiff to believe that, on the day of his accident, the site safety manager

was directing him to cease working because of the recurring condition that was well known to both of them in the months prior.

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

ENTERED: OCTOBER 25, 2016

CLERK

Acosta, J.P., Renwick, Saxe, Feinman, Kahn, JJ.

2034-
2034A

The People of the State of New York,
Respondent,

Ind. 4295/10
1051/11

-against-

Jose Blanco,
Defendant-Appellant.

_____

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

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

_____

Judgments, Supreme Court, New York County (Carol Berkman, J.), rendered May 11, 2011, as amended May 31, 2011, convicting defendant, upon his pleas of guilty, of assault in the second degree and attempted robbery in the second degree, and sentencing him to concurrent terms of two years, unanimously affirmed.

Although it is undisputed that defendant was entitled to an express youthful offender (YO) determination at sentencing (*see People v Rudolph*, 21 NY3d 497 [2013]), defendant does not request a remand for that purpose, but instead asks this Court to grant YO treatment as a matter of discretion in the interest of justice. However, we find that YO treatment would be inappropriate. As for the first conviction, defendant violated the conditions of his plea (*see e.g. People v Stoudymire*, 91 AD3d 543 [1st Dept 2012], *lv denied* 19 NY3d 867 [2012]), and the

second conviction involved the commission of a new felony while sentencing had been deferred on the prior felony. Moreover, both convictions were for violent felonies.

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

ENTERED: OCTOBER 25, 2016

CLERK

Acosta, J.P., Renwick, Saxe, Feinman, Kahn, JJ.

2035 In re Xao He Lu, Index 101201/14
Petitioner-Appellant,

-against-

New York City Police Department,
Respondent-Respondent.

_____

Xao He Lu, appellant pro se.

Zachary W. Carter, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Alexander W. Hunter, Jr., J.), entered June 23, 2015, denying the petition seeking to compel respondent to disclose records of interviews of one of the two victims of a crime pursuant to the Freedom of Information Law (FOIL), and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Respondent met its burden to justify withholding the documents pursuant to a state statute (Public Officers Law § 87[2][a]), by affirming that both of the responsive documents located through a diligent search refer to the victim of a sex offense by name, thereby demonstrating that disclosure of the records would be prohibited by Civil Rights Law § 50-b(1) (*see Matter of Fappiano v New York City Police Dept.*, 95 NY2d 738, 746

[2001]). Respondent properly withheld these records in their entirety rather than disclosing redacted copies (*see Matter of Karlin v McMahon*, 96 NY2d 842, 843 [2001]). It is of no moment that petitioner's FOIL request focuses only on the male victim of the crimes committed against the two victims, and that the sex offense was committed only against the female victim.

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

ENTERED: OCTOBER 25, 2016

CLERK

Acosta, J.P., Renwick, Saxe, Feinman, Kahn, JJ.

2040 Enzon Pharmaceuticals, Inc. formerly known as Enzon, Inc., Plaintiff-Appellant, Index 652823/15

-against-

Nektar Therapeutics formerly known as Inhale Therapeutic Systems, Inc., Defendant-Respondent.

_____

Holland & Knight LLP, New York (Charles A. Weiss of counsel), for appellant.

Greenberg Traurig LLP, New York (Louis M. Solomon of counsel), for respondent.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered February 5, 2016, which granted defendant's motion to dismiss the complaint, unanimously reversed, on the law without costs, and the motion denied.

Dismissal of the complaint was not warranted in light of the ambiguity in the contract provisions at issue, as they are "susceptible of reasonable interpretations supportive of differing outcomes to the parties' dispute" (*Hambrecht & Quist Guar. Fin., LLC v El Coronado Holdings, LLC*, 27 AD3d 204, 204 [1st Dept 2006]). Accordingly, the development of a full factual record as to the parties' intent is necessary.

Furthermore, contrary to defendant's contention, plaintiff's

reasonable interpretation of the agreement would not make it unlawful as an impermissible extension of royalty fees on expired patents (*see Kimble v Marvel Entertainment, LLC*, __US__, 135 S Ct 2401 [2015]; *Brulotte v Thys Co.*, 379 US 985 [1964]).

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

ENTERED: OCTOBER 25, 2016

CLERK

Acosta, J.P., Renwick, Saxe, Feinman, Kahn, JJ.

2041 In re Melinda M.,
Petitioner-Respondent,

-against-

Anthony J.H., Jr.,
Respondent-Appellant.

_____

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

Leslie S. Lowenstein, Woodmere, for respondent.

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

_____

Order, Family Court, Bronx County (Lauren Norton Lerner, Ref.), entered on or about August 3, 2015, which, upon the purported default of respondent father, dismissed his motion (incorrectly referred to as a petition to modify an order of visitation and custody) to vacate the court's earlier order granting custody of the subject children to petitioner mother upon the father's default, unanimously reversed, on the law and the facts, without costs, the father's motion to vacate granted, the matter remitted to a different jurist for a full hearing on the mother's modification of custody petition filed in May 2015, and the court's temporary award of custody to the mother, with visitation to the father, reinstated pending a full hearing and

determination on the mother's petition.

Reversal is required because the father was deprived of his statutory right to assigned counsel (Family Ct Act § 262[a][v]; *Matter of Brown v Wood*, 38 AD3d 769, 770 [2d Dept 2007]; *see Matter of Mora v Alatriste*, 99 AD3d 540 [1st Dept 2012]). The record shows that after Family Court dismissed the father's assigned counsel, it conducted several hearings in this custody matter, and granted a final order of custody to the mother, without the father's presence and without reassigning him counsel.

Reversal is also required because Family Court improperly determined that the father had defaulted on his vacatur motion. Although the father was not in court when the motion was called at 11:58 a.m., the motion was scheduled for 9:00 a.m. and his former assigned counsel, who was notified of the hearing, relayed that he believed the father was in the bathroom. In addition, the court allowed counsel to argue the merits of the motion in the father's absence (*compare Matter of Bradley M.M. [Michael M.—Cindy M.]*, 98 AD3d 1257, 1258 [4th Dept 2012] [the father's failure to appear did not constitute a default where the father's attorney advised the court that he was authorized to proceed in the father's absence and objected to entry of a default order],

with Matter of Iyana W. [Shamark W.], 124 AD3d 418, 418 [1st Dept 2015] [Family Court properly deemed the father to be in default where his trial counsel did not state that he wished to proceed in his absence or that he was authorized to do so]). Moreover, this Court favors "the resolution of disputes on their merits, especially where a fundamental parental right . . . is concerned" (*Matter of Vanessa B.*, 23 AD3d 273, 274 [1st Dept 2005] [internal quotation marks omitted] [ellipsis in original]). This is particularly true where, as here, the parties' oldest child has a life-threatening medical condition.

Although Family Court did not reach the merits of the father's vacatur motion, we reach it in the interest of justice and judicial economy. The father provided a reasonable excuse for his failure to appear at a June 2015 hearing on the mother's refiled modification petition (*see* CPLR 5015[a][1]; *Arred Enters. Corp. v Indemnity Ins. Co. of N. Am.*, 108 AD2d 624, 623 [1st Dept 1985]; *see also Matter of Amirah Nicole A. [Tamika R.]*, 73 AD3d 428, 428-429 [1st Dept 2010], *lv dismissed* 15 NY3d 766 [2010]). The father contends that he was not served with the mother's refiled petition, and the attorney for the children concedes that there is no affidavit of service in the record. Further, the father moved promptly to vacate his default, there was no showing

of his intent to abandon the action, and there was no showing of prejudice to the mother (*see Arred*, 108 AD2d at 626).

The father also set forth a meritorious defense to the mother's petition (*id.*) — namely, that the oldest child had been hospitalized on three occasions while in the mother's care, and had never been hospitalized while she was living with him.

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

ENTERED: OCTOBER 25, 2016

CLERK

Acosta, J.P., Renwick, Saxe, Feinman, Kahn, JJ.

2042 Schlesinger & Company, LLC, Index 151955/14
Plaintiff-Appellant,

-against-

SLG 220 News Owner LLC,
Defendant-Respondent,

SL Green Realty Corp., et al.,
Defendants.

_____

Emery Celli Brinckerhoff & Abady LLP, New York (David A. Lebowitz of counsel), for appellant.

Stempel Bennett Claman & Hochberg, P.C., New York (Richard L. Claman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Barry R. Ostrager, J.), entered on or about March 17, 2016, which denied plaintiff's motion for partial summary judgment on its cause of action for breach of a brokerage agreement as against defendant SLG 220 News Owner LLC, unanimously affirmed, without costs.

Plaintiff failed to establish prima facie that the successor to the original tenant was, as required by the lease's limitation on the right to exercise the option to renew, a "successor entity to [the original] Tenant," i.e., that it had some measure of common ownership with the original tenant (*see Matter of TBA Global, LLC v Fidus Partners, LLC*, 132 AD3d 195, 210 [1st Dept

2015]). Plaintiff's alternative interpretation of the limitation clause, that any assignee of the lease was a "successor entity," would impermissibly read the limitation out of the lease (*see God's Battalion of Prayer Pentecostal Church, Inc. v Miele Assoc., LLP*, 6 NY3d 371, 374 [2006]).

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

ENTERED: OCTOBER 25, 2016

CLERK

Acosta, J.P., Renwick, Saxe, Feinman, Kahn, JJ.

2043 BitSight Technologies, Inc., et al., Index 650042/15
Plaintiffs-Appellants,

-against-

SecurityScorecard, Inc.,
Defendant-Respondent.

_____

Goodwin Procter LLP, New York (Jordan D. Weiss of counsel), for appellants.

Pillsbury Winthrop Shaw Pittman LLP, New York (Kenneth W. Taber of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered on or about January 25, 2016, which, insofar as appealed from as limited by the briefs, granted defendant's motion pursuant to CPLR 3211 to dismiss the claims for misappropriation of confidential information/unfair competition, false advertising/unfair competition, a permanent injunction, and breach of section 10.2 of the contract between defendant and plaintiff NSEC-Sistemas Informaticos, S.A., d/b/a Anubis Networks (Anubis), unanimously modified, on the law, to deny the motion as to misappropriation of confidential information/unfair competition, a permanent injunction, and breach of section 10.2, and otherwise affirmed, without costs.

We find that section 10.1 of the contract between defendant

and Anubis (the definition of "Confidential Information") is ambiguous (*see e.g. Telerep, LLC v U.S. Intl. Media, LLC*, 74 AD3d 401, 402 [1st Dept 2010]). Therefore, the claim of breach of section 10.2 of the contract should not have been dismissed.

By its strict terms, section 10.1 does not apply to cyberfeeds. Cyberfeeds are not "information relating to ... product information ... of" Anubis; rather, they are Anubis's product itself. However, if "Confidential Information" did not include cyberfeeds, then a description of cyberfeeds (i.e., information relating to Anubis's product information) would be given more protection than cyberfeeds themselves, which is absurd (*see Matter of Lipper Holdings v Trident Holdings*, 1 AD3d 170 [1st Dept 2003]). On the other hand, there is evidence within the contract that supports defendant's interpretation that "Confidential Information" does not include cyberfeeds. Annex 1, which is part of the contract, contains a section called "Authorization to Resell Cyberfeed," which includes check-off boxes for "yes" and "no." In the contract between defendant and Anubis, the "no" box is checked. However, if the "yes" box were checked, "Confidential Information" could not include cyberfeeds, since the customer could not comply with section 10 (the confidentiality provisions) while reselling cyberfeeds.

The first cause of action (misappropriation of confidential information/unfair competition) should not have been dismissed. When a party sells information to subscribers with the requirement that the latter keep the information confidential, the information is still protected (*see International News Serv. v Associated Press*, 248 US 215, 237 [1918]; *Dodge Corp. v Comstock*, 140 Misc 105, 109 [Sup Ct, Erie County 1931]). At least for the purposes of a CPLR 3211 motion to dismiss, Anubis "took sufficient precautionary measures" to keep cyberfeeds confidential (*Edelman v Starwood Capital Group, LLC*, 70 AD3d 246, 249 [1st Dept 2009], *lv denied* 14 NY3d 706 [2010]), since a trier of fact might find that cyberfeeds are covered by the contract's confidentiality provisions. As for the unfair competition part of the first cause of action, the complaint's allegations fall under the "misappropriation theory of unfair competition" (*ITC Ltd. v Punchgini, Inc.*, 9 NY3d 467, 477 [2007]; *see also Macy's Inc. v Martha Stewart Living Omnimedia, Inc.*, 127 AD3d 48, 56-57 [1st Dept 2015]).

The third cause of action (false advertising/unfair competition) was correctly dismissed. It fails to allege, as required under General Business Law § 350, that defendant engaged in "consumer-oriented conduct" (*see Koch v Acker, Merrall &*

Condit Co., 18 NY3d 940, 941 [2012] [internal quotation marks omitted]). "In New York law, the term 'consumer' is consistently associated with an individual or natural person who purchases goods, services or property primarily for personal, family or household purposes" (*Cruz v NYNEX Info. Resources*, 263 AD2d 285, 289 [1st Dept 2000] [some internal quotation marks omitted]). It does not encompass "businesses which purchase a widely sold service that can only be used by businesses" (*id.* at 286). All the parties provide services to *businesses*, not individuals.

At this early stage, the fifth cause of action (injunctive relief) should be permitted to survive. The complaint alleges that defendant has diverted sales away from plaintiff BitSight Technologies, Inc. BitSight's "loss of current or future market share may constitute irreparable harm" (*Grand Riv. Enter. Six Nations, Ltd. v Pryor*, 481 F3d 60, 67 [2d Cir 2007]). Moreover, defendant acknowledged in its contract with Anubis that "any breach of its obligations with respect to Confidential Information ... would cause substantial harm to the other party

that could not be remedied by payment of damages alone" (*see Ticor Tit. Ins. Co. v Cohen*, 173 F3d 63, 69 [2d Cir 1999]).

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

ENTERED: OCTOBER 25, 2016

CLERK

Acosta, J.P., Renwick, Saxe, Feinman, Kahn, JJ.

2044-
2044A

The People of the State of New York,
Respondent,

Ind. 4791/13
2338/14

-against-

Brian Deale,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Ross D. Mazer of counsel), for respondent.

_____

Judgments, Supreme Court, New York County (Robert M. Stolz, J. at controlled substance plea; Edward J. McLaughlin, J. at suppression hearing, conspiracy plea and sentencing), convicting defendant, upon his pleas of guilty, of criminal possession of a controlled substance in the third degree and conspiracy in the fourth degree, and sentencing him, as a second felony drug offender previously convicted of a violent felony, to an aggregate term of six years, unanimously affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations. An officer with extensive experience in drug investigations, including numerous drug arrests at the location of defendant's arrest, saw defendant look from side to side and

immediately hand to another person a small, mostly white object, that appeared to the officer to be a glassine envelope of heroin. Although the officer was unable to be certain of this, probable cause does not require certainty, and the totality of the circumstances provided probable cause for defendant's arrest (*see People v Jones*, 90 NY2d 835 [1997]; *People v McRay*, 51 NY2d 594, 603-604 [1980]).

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

ENTERED: OCTOBER 25, 2016

CLERK

Acosta, J.P., Renwick, Saxe, Feinman, Kahn, JJ.

2045-
2045A Eion Michael Properties, LLC,
Plaintiff-Appellant,

Index 306955/09

-against-

102 Bruckner Boulevard Realty LLC,
Defendant-Respondent.

_____

Horing Welikson & Rosen P.C., Williston Park (Richard T. Walsh of counsel), for appellant.

Burke, Miele & Golden, LLP, Goshen (Robert M. Miele of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Mary Ann Brigantti, J.), entered November 19, 2015, after a nonjury trial, in favor of defendant, unanimously modified, on the law, to declare in favor of defendant as indicated herein, and, as so modified, affirmed, without costs. Appeal from order, same court (Kenneth L. Thompson, Jr., J.), entered June 12, 2012, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for summary judgment, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The motion court correctly determined that an issue of fact existed as to whether plaintiff's intended use of the easement over defendant's property was impaired beyond the convenience to

which plaintiff was accustomed (*see Robinson v Eirich*, 2 AD3d 617, 618 [2d Dept 2003]; *see also Thibodeau v Martin*, 119 AD3d 1015, 1016 [3d Dept 2014]).

The trial court correctly granted defendant's motion for a directed verdict (*see* CPLR 4401). The ruling did not rest on credibility but rather on plaintiff's principal's testimony that large trucks were able to enter the easement but needed to maneuver. That testimony contradicted plaintiff's repeated, earlier conclusory allegations that passage was completely blocked by defendant's encroachments. Moreover, there was no testimony or other evidence showing a complete blockage.

The trial court providently exercised its discretion in denying plaintiff's request for a continuance at the close of its evidence (*see* CPLR 4402). The surveyor plaintiff sought to call as a witness would not offer testimony on the material issue of whether plaintiff's easement was impaired beyond the convenience to which it was accustomed, the expert testimony had not been revealed in expert disclosure, and plaintiff knew of the need for this witness from the outset but chose to call him at the end of its case (*see Black v St. Luke's Cornwall Hosp.*, 112 AD3d 661, 661 [2d Dept 2013]).

Since this is a declaratory judgment action, defendant is

entitled to a declaration that plaintiff's intended use of the easement over defendant's property was not impaired. We have considered plaintiff's remaining arguments and find them unavailing.

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

ENTERED: OCTOBER 25, 2016

CLERK

Acosta, J.P., Renwick, Saxe, Feinman, Kahn, JJ.

2047 The People of the State of New York, Ind. 5877/13
Respondent,

-against-

Jovanny Cintron,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Ronald Zweibel, J. at plea; Daniel P. FitzGerald, J. at sentencing), rendered December 18, 2014,

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

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

ENTERED: OCTOBER 25, 2016

CLERK

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

Acosta, J.P., Saxe, Feinman, Kahn, JJ.

2048 The People of the State of New York, Ind. 794/11
Respondent,

-against-

Kevin Fisher,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (James Wen of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Judith Lieb, J.), rendered October 16, 2014, unanimously affirmed.

Although we do not find that defendant made a valid waiver of the right to appeal (*see People v Powell*, 140 AD3d 401 [1st Dept 2016]), we perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 25, 2016

CLERK

Acosta, J.P., Renwick, Saxe, Feinman, Kahn, JJ.

2049 Chynna A., an Infant under the Age of Fourteen Years, by her Mother and Natural Guardian, Nitoscha A., et al., Plaintiffs-Respondents,

-against-

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

Index 20363/13

Zachary W. Carter, Corporation Counsel, New York (Diana Lawless of counsel), for appellants.

Belovin & Franzblau, LLP, Bronx (Jeffrey J. Belovin of counsel), for respondents.

Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered May 19, 2015, which denied defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

There is no dispute that dismissal of the complaint as against defendant City of New York is warranted since it is not a proper party to the action (*see Kamara v City of New York*, 93 AD3d 449 [1st Dept 2012]; *Perez v City of New York*, 41 AD3d 378 [1st Dept 2007], *lv denied* 10 NY3d 708 [2008]).

The remaining defendants established their entitlement to

judgment as a matter of law by submitting evidence showing that infant plaintiff's thumb injury was proximately caused by a sudden and unexpected collision with a fellow student during a regularly played game of tag that was held during the seventh-grade students' gym class. No amount of supervision could have guarded against the injurious event, and as such, the alleged inadequacy of the gym teacher's supervision of the students playing the tag game was not a substantial factor in the cause of the injury (*see e.g. Kamara v City of New York*, 93 AD3d at 450; *Kovalenko v New York City Dept. of Educ.*, 135 AD3d 710 [2d Dept 2016]).

In opposition, plaintiffs failed to raise a triable issue of fact. Apart from their speculative theories, plaintiffs failed to offer an expert opinion, or competent facts from which a reasonable inference could be drawn, to substantiate their contention that the tag game was a hazardous activity for infant plaintiff's gym class (*see Luis S. v City of New York*, 130 AD3d 485 [1st Dept 2015]). There was no evidence indicating that infant plaintiff was injured due to crowded conditions, or due to the gym's size, or because of any unchecked, unruly student activity. Furthermore, there was no evidence of any prior injuries sustained during the tag game that was regularly played

in the school gym (*see id.* at 485-486).

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

ENTERED: OCTOBER 25, 2016

CLERK

Acosta, J.P., Renwick, Saxe, Feinman, Kahn, JJ.

2050 The People of the State of New York, Ind. 3074/12
Respondent,

-against-

Samuel Brimmage,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Beth Fisch Cohen of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered November 4, 2013, convicting defendant, upon his plea of guilty, of robbery in the first degree, and sentencing him to a term of 18 years, unanimously affirmed.

Defendant's challenge to the voluntariness of his plea does not come within the narrow exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662, 665-666 [1988]), and we decline to review this unpreserved claim in the interest of justice. As an alternative holding, we also reject it on the merits. During his plea allocution, defendant complained about the length of the promised sentence, but said nothing that cast any doubt on his guilt (*see People v Toxey*, 86 NY2d 725 [1995]), and the allocution, viewed as a whole, establishes the

voluntariness of the plea. Since defendant neither denied his guilt during the allocution nor moved to withdraw the plea, the court had no obligation to conduct a sua sponte inquiry into defendant's postplea denial of guilt reflected in the presentence report (*see e.g. People v Praileau*, 110 AD3d 415 [1st Dept 2013], *lv denied* 22 NY3d 1202 [2014]; *People v Pantoja*, 281 AD2d 245 [1st Dept 2001], *lv denied* 96 NY2d 905 [2001]), or defendant's statement made at sentencing that essentially reiterated his desire for a more lenient sentence.

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 25, 2016

CLERK

Acosta, J.P., Renwick, Saxe, Feinman, Kahn, JJ.

2051 Frank Valente, et al., Index 158634/13
Plaintiffs-Respondents,

-against-

Lend Lease (US) Construction LMB, Inc., et al.,
Defendants-Appellants,

Lend Lease Project Management & Construction, et al.,
Defendants.

_____

Fabiani Cohen & Hall, LLP, New York (Marcy Sonneborn of counsel), for appellants.

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

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Order, Supreme Court, New York County (Alice Schlesinger, J.), entered June 15, 2016, which, insofar as appealed from as limited by the briefs, granted plaintiffs' motion for partial summary judgment on the Labor Law § 240(1) claim, unanimously affirmed, without costs.

Plaintiffs established prima facie that plaintiff Frank Valente's slip and fall on grease on planks that he was using as a makeshift ramp to descend five feet from the top of a building to a scaffold was "the direct consequence of a failure to provide adequate protection against a risk arising from a physically

significant elevation differential" and therefore is covered under Labor Law § 240(1) (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]; *see also Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 8-9 [1st Dept 2011]).

Defendants failed to raise an issue of fact as to whether plaintiff was the sole proximate cause of his accident because he chose to use the planks instead of using a ramp that he knew was available or constructing a proper ramp from material that was readily available on site. Affidavits and other testimonial evidence demonstrate that the ramp that was available was not long enough to reach the scaffold and that plaintiff did not have time to build a ramp before meeting the crane that was approaching to assist in dismantling the scaffold (*see Miranda v NYC Partnership Hous. Dev. Fund Co., Inc.*, 122 AD3d 445 [1st Dept 2014]).

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

ENTERED: OCTOBER 25, 2016

CLERK

Acosta, J.P., Renwick, Saxe, Feinman, Kahn, JJ.

2052N National Union Fire Insurance Co. of Pittsburgh, PA, Petitioner-Respondent, Index 162684/14 651067/15

-against-

Odyssey Reinsurance Company Respondent-Appellant.

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[And Another Proceeding]

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Clyde & Co US LLP, New York (Nicholas L. Magali of counsel), for appellant.

Stroock & Stroock & Lavan LLP, New York (Andrew S. Lewner of counsel), for respondent.

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Order, Supreme Court, New York County (Carol R. Edmead, J.), entered on or about April 7, 2016, which, insofar as appealed from, sua sponte awarded petitioner reasonable attorneys' fees and referred the matter to a special referee to hear and determine, unanimously reversed, on the law, without costs, and the award of reasonable attorneys' fees to petitioner and the referral to a special referee vacated.

In the absence of a statute, agreement between the parties or court rule, the court was without authority to award petitioner legal fees (*see Matter of A.G. Ship Maintenance Corp. v Lezak*, 69 NY2d 1, 5-6 [1986]; *Gotham Partners, L.P. v High Riv.*

Ltd. Partnership, 76 AD3d 203 [1st Dept 2010], *lv denied* 17 NY3d 713 [2011]).

Furthermore, the record demonstrates that Supreme Court improvidently exercised its discretion in requiring respondent to pay reasonable attorneys' fees, since there is no evidence in the record that respondent's conduct, namely its delay in selecting an umpire for the parties' arbitration dispute, which occurred pre-litigation, was frivolous within the meaning of the Rules of the Chief Administrator of the Courts (22 NYCRR) § 130-1.1(c) (*see Nichols v Branton*, 45 Misc 3d 981 [Sup Ct, Columbia County 2014]). Significantly, we note that the parties' arbitration clause specifically provides for judicial appointment of an

umpire, "if the arbitrators fail to appoint an umpire within one month of a request in writing by either of them."

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

ENTERED: OCTOBER 25, 2016

CLERK

Sweeny, J.P., Renwick, Manzanet-Daniels, Kapnick, JJ.

203 In re Michael P. Thomas, Index 100538/14
Petitioner-Respondent,

Letitia James, etc., et al.,
Petitioners-Intervenors-Respondents,

-against-

New York City Department of
Education, et al.,
Respondents-Appellants.
- - - - -
The Council of School Supervisors and
Administrators,
Amicus Curiae.

_____

Zachary W. Carter, Corporation Counsel, New York (Jane L. Gordon of counsel), for appellant.

Michael P. Thomas, respondent pro se.

New York Lawyers for the Public Interest, New York (Mark Ladov of counsel), for Letitia James and Class Size Matters, respondents.

David N. Grandwetter, New York, for amicus curiae.

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Order and judgment (one paper), Supreme Court, New York County (Peter H. Moulton, J.), entered April 23, 2015, affirmed, without costs.

Opinion by Kapnick, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

John W. Sweeny, Jr., J.P.
Dianne T. Renwick
Sallie Manzanet-Daniels
Barbara R. Kapnick, JJ.

203
Index 100538/14

_____x

In re Michael P. Thomas,
Petitioner-Respondent,

Letitia James, etc., et al.,
Petitioners-Intervenors-Respondents,

-against-

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

- - - - -

The Council of School Supervisors
and Administrators,
Amicus Curiae.

_____x

Respondents appeal from the order and judgment (one paper) of the Supreme Court, New York County (Peter H. Moulton, J.), entered April 23, 2015, which granted the petition seeking, inter alia, a determination that respondents violated the Open Meetings Law by denying the general public (petitioner) access to meetings of a New York City public schools School Leadership Team.

Zachary W. Carter, Corporation Counsel, New York (Jane L. Gordon, Cecelia Chang and Richard Dearing of counsel), for appellants.

Michael P. Thomas, respondent pro se.

New York Lawyers for the Public Interest, New York (Mark Ladov of counsel) and Advocates for Justice, New York (Laura D. Barbieri of counsel), for Letitia James and Class Size Matters, respondents.

David N. Grandwetter and Marvin Pope, New York, for the Council of School Supervisors and Administrators, amicus curiae.

KAPNICK, J.

In this article 78 proceeding, petitioner sought, inter alia, a declaration that School Leadership Teams (SLTs) at New York City public schools are "public bodies" whose meetings must be open to the general public pursuant to the Open Meetings Law.[1]

Background

The Education Law requires each New York City public school to have a "school-based management team" (SBMT) (Education Law §§ 2590-h[15][b], [b-1]). By regulation, respondent New York City Department of Education (DOE) has implemented this mandate through the establishment of SLTs in every school (*see Mulgrew v Board of Educ. of City Sch. Dist. of City of N.Y.*, 75 AD3d 412, 413 [1st Dept 2010]; NYC Chancellor's Regulations [CR] A-655). SLTs have between 10 and 17 members, made up of school parents, teachers, staff, and administrators, and may also include "representatives of Community Based Organizations" (CR A-655 §§ III[A],[B],[C][2]). The school principal, president of the parent association, and chapter leader of the teachers' union must be members. At least two student members are also required

[1] The parties and the IAS court, however, treated this proceeding as a pure article 78 proceeding and not a hybrid article 78/declaratory judgment action. Thus, the court reviewed respondents' determination to deny petitioner access to the meeting under the arbitrary and capricious standard and made no declaration.

for each high school (*id.* at [C][2]). SLTs must meet at least once a month "at a time that is convenient for the parent representatives" (Education Law § 2590-h[15][b-1][ii]). Notice of this meeting must be provided in a manner "consistent with the open meetings law" (Education Law § 2590-h[15][b-1][iii]).

The SLT helps formulate "school-based educational policies" and ensure that "resources are aligned to implement those policies" (CR A-655 § I; *see* Education Law § 2590-h[15][b-1][i]). The SLT's primary responsibility is to develop the school's annual comprehensive education plan (CEP), which sets the school's needs, goals, and instructional strategies (*see* Education Law § 2590-h[15][b-1][i]; CR A-655 § II). In this regard, the SLT "must use consensus based decision-making and must seek assistance" from the "District Leadership Team" or the district superintendent "if it is unable to reach consensus on the CEP" (CR A-655 § II[A][4]). If the SLT is "still not able to reach consensus," then the superintendent "shall make the determination on developing the CEP" (*id.*).

SLTs also "consult on the school-based budget pursuant to" Education Law § 2590-r. That section, in turn, provides for "the principal to propose a school-based budget, after consulting with members of the" SLT (Education Law § 2590-r[b][i]). Consistent with these statutory provisions, DOE regulations make clear that

the principal "is responsible for" and "makes the final determination concerning the school-based budget," albeit only after "consult[ing] with the SLT during this development process so that the budget will be aligned with the CEP" (CR A-655 § II[A][2]).

Petitioner is a retired DOE mathematics teacher. On March 17, 2014, petitioner asked the Chair (Victoria Trombetta) and three mandatory members (Linda Hill, Principal; Laura Cavalerri, PTA President; and Francesco Portelos, UFT Chapter Leader) of the SLT for IS 49, a Staten Island middle school, for permission to attend the SLT's next meeting. By email dated March 18, 2014, Trombetta invited petitioner to attend the SLT's April 1 meeting.

On March 19, 2014, Trombetta rescinded the invitation. Trombetta explained that she had "reviewed the SLT Bylaws" and "realized" that "only" "school community members" are "permitted to attend" SLT meetings. Since petitioner was "not a member of the school community," he could not attend a meeting. Petitioner agreed with Trombetta that the SLT's "bylaws are consistent with DOE policy," but explained that he wanted to "challenge that policy in court" and needed to be "denied entrance onsite" in order to "have 'standing.'" Petitioner informed Trombetta that he would attempt to gain entrance to the meeting. On April 1, 2014, petitioner presented himself to security at IS 49's front

entrance, and was denied admittance to the SLT meeting.

Thereafter, petitioner commenced this article 78 proceeding by notice and petition verified May 17, 2014. Petitioner contended that the SLT was a "public body," such that its refusal to permit him to attend the meeting violated the Open Meetings Law. DOE served an answer verified August 19, 2014, denying the petition's material allegations and asserting affirmative defenses. Petitioner served a reply verified August 26, 2014, responding to the answer.[2]

Supreme Court granted the petition and found that "SLT meetings entail a public body performing governmental functions," and are thus "subject to the Open Meetings Law." Relying on *Matter of Perez v City Univ. of N.Y.* (5 NY3d 522 [2005]) and *Matter of Smith v City Univ. of N.Y.* (92 NY2d 707 [1999]), the court reasoned:

> "First, SLTs are established pursuant to the Education Law, which gives them a role in school governance. DOE's own by-laws specify that SLTs are part of the 'governance structure' of New York City's Schools. The public's interest in SLT meetings is

[2] By order to show cause dated January 12, 2015, Letitia James, the New York City Public Advocate, and Class Size Matters, a New York-based nonprofit organization dedicated to achieving smaller class sizes across the country, moved to intervene as petitioners. The intervenors served a proposed petition generally echoing the main petition. The intervenors' application was granted as part of the order on appeal herein.

demonstrated by the fact that announcement of such meetings must be made in accordance with the Open Meetings Law.

"Second, . . . SLTs play a crucial iterative role in developing CEPs and ensuring that CEPs are aligned with the school's budget. A principal must consult with her school's SLT in developing a CEP. If the principal and her SLT cannot agree on the contours of the annual CEP, then the District Superintendent may resolve the difference. However, the SLT must have input into the CEP's development. In December 2007 the DOE issued a prior version of Regulation A-655 which gave principals in New York City final decision making authority over the CEP. The State Education Commissioner ruled that the regulation was in derogation of Education Law § 2590-h(15)(b-1), because it stripped the SLTs of their 'basic, statutorily mandated authority to develop the CEP.'

"The CEP is an important blueprint at each school. It describes annual goals concerning student achievement, teacher training, parent involvement, and compliance with federal law including Title I. The CEP also includes 'action plans' to achieve those goals. . . . [T]he role of an SLT in formulating its school's CEP is one of decision maker. In fulfilling this role the SLT acts in conjunction with, and not subordinate to, the school's principal. If it is fulfilling its statutory role, a school's SLT is not a mere advisor to the principal. SLTs are also stakeholders and participants in school closings. These SLT activities touch on the core functions of a public school. The proper functioning of public schools is a public concern, not a private concern limited to the families who attend a given public school" (citations and footnotes omitted).

Accordingly, the court held that DOE's "failure to open

School Leadership Team Meetings to the general public pursuant to the Open Meetings Law is arbitrary and capricious and contrary to law."[3]

Promulgated in 1976 following the Watergate scandal, the Open Meetings Law "was intended – as its very name suggests – to open the decision-making process of elected officials to the public while at the same time protecting the ability of the government to carry out its responsibilities," and its provisions are "to be liberally construed in accordance with the statute's purposes" (*Matter of Gordon v Village of Monticello*, 87 NY2d 124, 126-127 [1995]). In enacting the law, "the Legislature sought to ensure that 'public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy'" (*Matter of Perez v City Univ. of N.Y.*, 5 NY3d at 528; Public Officers Law § 100).

The Open Meetings Law provides generally that "[e]very meeting of a public body shall be open to the general public"

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[3] By order entered October 15, 2015, this Court ruled that an automatic stay of the order is in effect, pursuant to CPLR 5519(a)(1). By order entered December 29, 2015, this Court granted the Council of School Supervisors and Administrators leave to appear as amicus curiae.

(Public Officers Law § 103 [a]). The statute defines "public body" as "any entity, for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof" (Public Officers Law § 102[2]). A "meeting" is "the official convening of a public body for the purpose of conducting public business" (Public Officers Law § 102[1]).

Whether an entity is a public body turns on various criteria, including "the authority under which the entity was created, the power distribution or sharing model under which it exists, the nature of its role, the power it possesses and under which it purports to act, and a realistic appraisal of its functional relationship to affected parties and constituencies" (*Matter of Smith v City Univ. of N.Y.*, 92 NY2d at 713).

The "mere giving of advice, even about governmental matters, is not itself a governmental function" (*Goodson Todman Enters. v Town Bd. of Milan*, 151 AD2d 642, 643 [2d Dept 1989], *lv denied* 74 NY2d 614 [1989]). It has thus been held that an entity which is "advisory in nature" and "d[oes] not perform governmental functions" will not be deemed to be a "public body" for purposes of the Open Meetings Law (*Matter of Jae v Board of Educ. of Pelham Union Free School Dist.*, 22 AD3d 581, 584 [2d Dept 2005],

lv denied 6 NY3d 714 [2006]; *see also Smith*, 92 NY2d at 714 ["It may be that an entity exercising only an advisory function would not qualify as a public body within the purview of the Open Meetings Law"]). By contrast, "a formally chartered entity with officially delegated duties and organizational attributes of a substantive nature . . . should be deemed a public body that is performing a governmental function" (*Smith*, 92 NY2d at 714).

If a court "determines that a public body failed to comply with [the Open Meetings Law], the court shall have the power, in its discretion, upon good cause shown, to declare that the public body violated [the Open Meetings Law] and/or declare the action taken . . . void" (Public Officers Law § 107[1]).

DOE argues that the SLTs do not perform "governmental functions" characteristic of public bodies under the Open Meetings Law, but rather merely "serve a collaborative, advisory function." Amicus curiae Council of School Supervisors and Administrators supports DOE's arguments and emphasizes that opening SLT meetings to the public would frustrate SLTs' collaborative goals by permitting outsiders to "attend for their own personal agendas or satisfaction in open or veiled dissonance from" the SLT's purpose.

Petitioner, along with intervenors Letitia James and Class Size Matters, argue that the trial court properly analyzed the

question of whether SLTs are public bodies because they were created under the authority of state law as a mandatory and necessary part of the governing structure of the New York City public school system.

As the IAS court properly found, under the factors set forth in *Smith* and *Perez*, SLTs qualify as a public body performing governmental functions, and, therefore, are subject to the Open Meetings Law.

It cannot be disputed that SLTs are established pursuant to state law and are a part of DOE's "governance structure." It also cannot be disputed that SLTs have decision making authority to set educational and academic goals for a school through the CEP. The notion that SLTs merely serve an advisory role is not supported by the regulatory history. As the IAS court pointed out in its decision, in December 2007, the DOE issued a prior version of Regulation A-655 in an effort to give principals the final decision making authority over CEPs. However, the revised regulation was overruled by the State Education Commissioner because it violated the Education Law's mandate that SLTs have a "basic, statutorily mandated authority" to develop the CEP.

Although principals do have the final approval over a school's budget, principals must consult with SLTs, so that the budget and the CEP can be aligned. The fact that the SLT and

principal must collaborate with each other does not, in and of itself, disqualify the SLT from being considered a public body performing governmental functions (*see Perez*, 5 NY3d at 530).

Moreover, state law requires that an SLT hold monthly meetings during the school year and that notice of the meetings be provided in accordance with the Open Meetings Law. This is a clear indication of the public concern over the functioning of SLTs and public schools in general.

Accordingly, the order and judgment (one paper) of the Supreme Court, New York County (Peter H. Moulton, J.), entered April 23, 2015, granting the petition seeking, inter alia, a determination that respondents violated the Open Meetings Law by denying the general public (petitioner) access to a meeting of a New York City public school's SLT, should be affirmed, without costs.

All concur.

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

ENTERED: OCTOBER 25, 2016

CLERK