SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

NOVEMBER 16, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Richter, Andrias, Gesmer, Singh, JJ.

4698-
4699 Index 651422/16

Joseph Aquino,
Plaintiff-Appellant,

-against-

Douglas Elliman Realty, LLC, et al.,
Defendants-Respondents,

Faith Hope Consolo, et al.,
Defendants.

_____

Law Offices of Ian L. Blant, New York (Ian L. Blant of counsel), for appellant.

Kasowitz Benson Torres LLP, New York (Jessica T. Rosenberg of counsel), for respondents.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered on or about December 22, 2016, which, insofar as appealed from as limited by the briefs, granted the motion of the Douglas Elliman defendants to dismiss the first, fourth and fifth causes of action of the amended complaint, with limited leave to replead the first cause of action, unanimously modified, on the law, to permit plaintiff to replead the fourth and fifth causes of action, and as so modified, affirmed, without costs. Appeal from

order, same court and Justice, entered on or about October 24, 2016, unanimously dismissed, without costs, as superseded by the December 22, 2016 order.

The motion court correctly dismissed the first, fourth and fifth causes of action. The court appropriately determined that the complaint failed to state a breach of contract claim since it neither alleged an express nor an implied agreement that the parties mutually agreed upon. As such, there were no terms to be breached (*see Peters v Accurate Bldg. Inspectors Div. of Ubell Enters., Inc.*, 29 AD3d 972, 973 [2d Dept 2006]; *see also Flores v Lower E. Side Serv. Ctr., Inc.*, 4 NY3d 363, 369 [2005]). Additionally, the court properly dismissed the unjust enrichment claim as it failed to explain why the benefit retained by the Douglas Elliman defendants was unjust (*see Sperry v Crompton Corp.*, 8 NY3d 204, 215 [2007]), and the quantum meruit claim as it did not establish the reasonable value of the services plaintiff provided to said defendants (*see Freedman v Pearlman*, 271 AD2d 301, 304 [1st Dept 2000]).

However, in addition to the motion court's limited grant of leave to replead the first cause of action, we grant leave to replead the fourth and fifth causes of action (*see* CPLR 3025[b]; *170 W. Vil. Assoc. v G&E Realty, Inc.*, 56 AD3d 372, 372 [1st Dept 2008] [leave to replead is freely granted absent prejudice or

surprise]). At this juncture it cannot be determined, as a matter of law, that plaintiff will be unable to allege the requisite elements of his various causes of action (*see Slabakis v Schik*, – AD3d –, 2017 NY Slip Op 06884 [1st Dept 2017], citing *Davis v Scottish Re Group Ltd.*, 138 AD3d 230, 236, 238 [1st Dept 2016]).

Accordingly, plaintiff has leave to serve an amended complaint repleading the breach of contract claim insofar as it pertains to the commissions that he has not received, but which have now become due and/or accrued, and as to the deductions allegedly taken by Douglas Elliman. Furthermore, plaintiff is granted leave to replead the unjust enrichment and quantum meruit causes of action as Douglas Elliman disputes whether a contract was ever entered into (*see American Tel. & Util. Consultants v Beth Israel Med. Ctr.*, 307 AD2d 834, 835 [1st Dept 2003]; *Kramer v Greene*, 142 AD3d 438, 441-442 [1st Dept 2016]; *Eastern Consol.*

Props., Inc. v Waterbridge Capital LLC, 149 AD3d 444, 444-445 [1st Dept 2017]; *Farina v Bastianich*, 116 AD3d 546, 548 [1st Dept 2014]).

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

ENTERED: NOVEMBER 16, 2017

CLERK

Richter, J.P., Webber, Kern, Moulton, JJ.

4832 The People of the State of New York, Respondent, Ind. 4947/12

-against-

Michael Tammaro, Defendant-Appellant.

_____

Rosemary Herbert, Office of the Appellate Defender, New York (Sharmeen Mazumder of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Michael J. Obus, J.), rendered June 26, 2013, convicting defendant, upon his plea of guilty, of grand larceny in the second degree, and sentencing him to a term of three to nine years, unanimously affirmed.

Defendant was charged in an indictment with multiple counts of larceny arising out of a fraudulent scheme by which he falsely offered to lease his apartment to numerous individuals, in exchange for their giving him payments for rent and security deposits. Defendant pleaded guilty to the top count of the indictment, grand larceny in the second degree, admitting that over the course of several months, he stole property from a number of people, and the value of that property exceeded $50,000. Defendant also admitted that he performed the scheme on at least 40 people, and that the total amount he had stolen was

over $192,000.

On appeal, defendant maintains that the People improperly aggregated varying amounts taken from different victims at different times in order to meet the $50,000 statutory threshold required for second-degree grand larceny.[1] Defendant contends that because the indictment was "improperly constituted," his plea should be vacated and the second-degree grand larceny count dismissed. Because defendant did not move to dismiss the indictment on this basis, he has failed to preserve the issue for our review (*see People v Brown*, 81 NY2d 798, 799 [1993]; *People v Pepper*, 59 NY2d 353, 360 [1983]; *People Iannone*, 45 NY2d 589, 600 [1978]), and we decline to reach it in the interest of justice. Defendant's generalized reference in his omnibus motion to a "defective" indictment was insufficient to preserve the specific appellate claim presented (*see People v Delvalle*, 114 AD3d 612, 612-613 [1st Dept 2014], *lv denied* 23 NY3d 962 [2014]; *People v Green*, 105 AD3d 611, 612 [1st Dept 2013], *lv denied* 21 NY3d 1015 [2013]).[2]

---

[1] A person is guilty of grand larceny in the second degree when he steals property and when the value of the property exceeds $50,000 (Penal Law § 155.40[1]).

[2] We note that prior to filing the omnibus motion, defendant was aware that the second-degree grand larceny count was premised on the aggregated value of property taken from multiple victims over the course of several months.

As an alternative holding, we conclude that defendant's claim is forfeited by his guilty plea. "Generally, a guilty plea marks the end of a criminal matter as opposed to providing a gateway to further litigation" (*People v Guerrero*, 28 NY3d 110, 115 [2016]). Thus, a plea of guilty will generally result in the forfeiture of a defendant's right to appeal nonjurisdictional defects in a criminal proceeding (*People v Konieczny*, 2 NY3d 569, 572 [2004]). Although matters involving jurisdictional defects will survive a guilty plea (*see People v Guerrero*, 28 NY3d at 115), the alleged insufficiency of an indictment's factual allegations is not a jurisdictional defect (*People v Iannone*, 45 NY2d 589, 600-601 [1978]).

Here, defendant's challenge to the indictment is essentially a claim of factual insufficiency, and thus is waived by his guilty plea (*see id.*; *People v Dickenson*, 262 AD2d 215, 216 [1st Dept 1999]; *People v Kwok*, 257 AD2d 402, 402 [1st Dept 1999], *lv denied* 93 NY2d 875 [1999]). To the extent defendant claims that, due to alleged improper aggregation, the evidence before the grand jury was legally insufficient to establish second-degree grand larceny, that claim too is foreclosed by his guilty plea (*see People v Guerrero*, 28 NY3d at 116 [after a guilty plea has been entered, a defendant cannot challenge the sufficiency of the evidence before the grand jury]).

There is no merit to defendant's claim that improper aggregation resulted in a jurisdictional defect in the indictment. "The distinction between jurisdictional and nonjurisdictional defects is between defects implicating the integrity of the process . . . and less fundamental flaws, such as evidentiary or technical matters" (*People v Dreyden*, 15 NY3d 100, 103 [2010] [internal quotation marks omitted]). "An indictment is rendered jurisdictionally defective only if it does not charge the defendant with the commission of a particular crime, by, for example, failing to allege every material element of the crime charged, or alleging acts that do not equal a crime at all" (*People v Hansen*, 95 NY2d 227, 231 [2000]).

Contrary to defendant's contention, the indictment pleads a cognizable and existing crime. The count alleging second-degree grand larceny tracks the language of the statute (Penal Law § 155.40[1]), incorporates that statute by express reference, and alleges every element of the crime (*see People v D'Angelo*, 98 NY2d 733, 735 [2002]; *People v Iannone*, 45 NY2d at 592 n 1). The cases relied upon by defendant are distinguishable. In both *People v Barksdale* (139 AD3d 1080 [2d Dept 2016]) and *People v Lopez* (45 AD3d 493 [1st Dept 2007]), the defendants pleaded guilty to nonexistent, legally impossible crimes (*see Barksdale*, 139 AD3d at 1080 [attempted second-degree assault under Penal Law

§ 120.05(3)]; *Lopez*, 45 AD3d at 494 [attempted depraved indifference murder]; *see also People v Greeman*, 49 AD3d 463, 463-464 [1st Dept 2008], *lv denied* 10 NY3d 934 [2008] [finding that the defendant's claim that a bent MetroCard did not satisfy the forgery statute was foreclosed by guilty plea, and rejecting claim that the defendant pleaded guilty to a nonexisting crime]).

Because of defendant's forfeiture, we need not reach the merits of defendant's claim that these thefts could not be aggregated (*see generally People v Buckley*, 75 NY2d 843, 846 [1990]; *People v Cox*, 286 NY 137, 145 [1941]).

We perceive no basis to reduce defendant's sentence.

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

ENTERED: NOVEMBER 16, 2017

CLERK

Renwick, J.P., Manzanet-Daniels, Andrias, Kern, Oing, JJ.

4965 In re Angelic W.,

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

_____

Neal D. Futerfas, White Plains, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Megan E.K. Montcalm of counsel), for presentment agency.

_____

Order, Family Court, New York County (Adetokunbo O. Fasanya, J.), entered on or about November 3, 2016, which, upon appellant's admission that she had violated the terms of her probation, revoked her probation and placed her with the Administration for Children's Services Close to Home program for a period of 12 months, unanimously affirmed, without costs.

The court properly exercised its discretion in placing appellant in nonsecure detention rather than restoring her to probation (*see Matter of Katherine W.*, 62 NY2d 947 [1984]), in

light of appellant's extensive and repeated violations of her probation conditions, and her failure to avail herself of opportunities for rehabilitation. The court considered, but was not obligated to accept, the reports and recommendations of the agencies involved with appellant.

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

ENTERED: NOVEMBER 16, 2017

CLERK

Renwick, J.P., Manzanet-Daniels, Andrias, Kern, Oing, JJ.

4966 Barbara Oldham, et al., Index 150578/13
Plaintiffs-Appellants,

-against-

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

Waterworks A Joint Venture,
et al.,
Defendants-Respondents.

_____

Salenger, Sack, Kimmel & Bavaro, LLP, Woodbury (Beth S. Gereg of counsel), for appellants.

London Fisher LLP, New York (William C. Lamboley of counsel), for respondents.

_____

Order, Supreme Court, New York County (James E. d'Auguste, J.), entered on or about March 4, 2016, which granted the motion of defendants-respondents (respondents) for summary judgment dismissing the complaint as against them, unanimously reversed, on the law, without costs, and the motion denied.

Respondents failed to establish entitlement to judgment as a matter of law in this action for personal injuries sustained when plaintiff Barbara Oldham tripped and fell in a pothole in the road. The affidavit submitted by respondents' field engineer was insufficient since no facts were set forth by her to indicate that she possessed personal knowledge of the specific road construction work at issue (*see JMD Holding Corp. v Congress Fin.*

Corp., 4 NY3d 373, 384-385 [2005]; *Onewest Bank, FSB v Michel*, 143 AD3d 869 [2d Dept 2016]). The engineer also provided insufficient information that would authenticate the business records on which she relied in order to except such records from application of the hearsay rule (*see* CPLR 4518[a]; *People v Kennedy*, 68 NY2d 569, 579-580 [1986]; *Lodato v Greyhawk N. Am., LLC*, 39 AD3d 494, 495 [2d Dept 2007]).

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

ENTERED: NOVEMBER 16, 2017

CLERK

Renwick, J.P., Manzanet-Daniels, Andrias, Kern, Oing, JJ.

4967 West 17th Street and Tenth Avenue Realty, LLC, Plaintiff-Appellant, Index 159979/14

-against-

The N.E.W. Corp., Defendant-Respondent.

White & Case, LLP, New York (Joshua A. Berman of counsel), for appellant.

Steven Landy & Associates, PLLC, New York (David A. Wolf of counsel), for respondent.

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered August 19, 2016, which, inter alia, granted defendant's motion for summary judgment dismissing the complaint, and awarded defendant the down payment in this failed real estate transaction, unanimously affirmed, without costs.

The court properly found that defendant did not breach the contract by failing to disclose the presence of underground gas tanks on the property. In paragraph 4.13 of the contract, defendant guaranteed and warranted only that it had not generated, stored or disposed of hazardous materials and had no knowledge of the previous presence of such materials on the property. Plaintiff failed to present evidence sufficient to raise a triable issue of fact as to whether defendant was

responsible for the presence of the gas tanks or had any knowledge of it. The former owner of the property and a managing member of defendant testified that he was unaware of the presence of the gas tanks.

In addition, paragraph 5 of the rider, which superseded the terms of the contract, provided that defendant disclaimed and was not making any warranties or representations concerning environmental conditions. Plaintiff acknowledged that it was relying solely on its own expertise and consultants in this regard, and was purchasing the property "as is, where is" (*see e.g. Rivietz v Wolohojian*, 38 AD3d 301 [1st Dept 2007]; *Kasten v Golden*, 50 AD3d 1098 [2d Dept 2008]).

Furthermore, the governmental E designation did not show that the tanks were located on the subject property, since the designation was issued if there were gas tanks on adjacent properties. Defendant demonstrated that the various websites of governmental agencies indicated that gas tanks were located on nearby properties and were not on the property, and plaintiff failed to raise a triable issue of fact as to the presence of the gas tanks on or under the property.

Defendant's failure to disclose approximately $87,000 in rent arrears of one tenant was not material as a matter of law to

this $32.5 million transaction *(see Sevasta v Duffy*, 257 AD2d 435, 436 [1st Dept 1999]).

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: NOVEMBER 16, 2017

CLERK

Renwick, J.P., Manzanet-Daniels, Andrias, Kern, Oing, JJ.

4969 The People of the State of New York, Ind. 1204N/12
Respondent,

-against-

Tracie Brown,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Steven J. Miraglia of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Alan Gadlin counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Michael Sonberg, J.), rendered September 4, 2012,

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

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

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

ENTERED: NOVEMBER 16, 2017

CLERK

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

Renwick, J.P., Manzanet-Daniels, Andrias, Kern, Oing, JJ.

4970-
4971

Index 603387/06
590746/07
590556/10
590243/11

Patricia Kenny,
Plaintiff-Respondent,

-against-

Turner Construction Company, et al.,
Defendants,

The Corporate Source, Inc.
Defendant-Appellant.

- - - - -

Patricia Kenny,
Plaintiff-Appellant,

-against-

Turner Construction Company, et al.,
Defendants-Respondents,

The Corporate Source, Inc., et al.,
Defendants.

- - - - -

[And Third and Fourth-Party Actions]

_____

Hardin, Kundla, McKeon & Poletto, P.A., New York (Ian M. Friend of counsel), for the Corporate Source, Inc., appellant.

The Altman Law Firm, PLLC, New York (Michael T. Altman of counsel), for Patricia Kenny, appellant.

Roth & Roth, LLP, New York (David Roth of counsel), for respondent/appellant.

Malapero & Prisco LLP, New York (Paul Carney of counsel), for Turner Construction Company, respondent.

Zetlin & De Chiara LLP, New York (Bill P. Chimos of counsel), for Richards Meier & Partners, respondent.

Quinn McCabe LLP, New York (Jonathan H. Krukas of counsel), for Michael Harris Spector, AIA, P.C., the Spector Group, Spector

Group Home, LLC and Spector Associates, LLP, respondents.

Byrne & O'Neill, LLP, New York (Dominic Donato of counsel), for Ysrael A. Seinuk, P.C, respondent.

Westermann Sheehy Keenan Samaan & Aydelott, LLP, Uniondale (Joanne Emily Bell of counsel), for Kings County Waterproofing Corp., respondent.

Congdon, Flaherty, O'Callaghan, Reid, Donlon, Travis & Fishlinger, Uniondale (Michael T. Reagan of counsel), for Coken Company, Inc., respondent.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered Match 16, 2015, which, to the extent appealed from, denied defendant Corporate Source, Inc.'s motion for summary judgment dismissing the complaint and all cross claims against it, unanimously affirmed, without costs. Order, same court and Justice, entered on or about October 14, 2015, which, upon reargument, adhered to the determination on the original motion, granting defendants Turner Construction Company's, Kings County Waterproofing Inc.'s, Coken Company, Inc.'s, Richard Meier & Partners, Michael Harris Spector, AIA, P.C. a/k/a and d/b/a the Spector Group and Spector Group Home, LLC and Spector Associates, LLP's, and Ysreal A. Seinuk, P.C.'s motions for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

The court providently exercised its discretion in denying as untimely Corporate Source's motion for summary judgment

dismissing the complaint as against it (*see Brill v City of New York*, 2 NY3d 648 [2004]; CPLR 3212[a]). Counsel's excuse that the attorney handling the matter had been on trial for two weeks does not constitute good cause, i.e., "a satisfactory explanation for the untimeliness" (*id.* at 652; *see Maschi v City of New York*, 110 AD3d 460 [1st Dept 2013]). Nor does the fact that the case is complicated and voluminous constitute good cause. We note that 14 other parties to the case made timely motions.

Plaintiff was injured, in 2005, when she fell on a patch of ice in the parking garage of a courthouse where she worked. The construction of the courthouse, including the garage, had been completed in 2000. Plaintiff's theory of liability is that defendants owe her a duty of care because they negligently caused the conditions, thereby launching a force of harm, that injured her (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136 [2002]).

Turner Construction, the general contractor, demonstrated that it owes plaintiff no duty of care since it did not perform the alleged defective work, and its contractual obligation to the owner to supervise the project did not create a duty of care to plaintiff (*see Timmins v Tishman Constr. Corp.*, 9 AD3d 62, 68 [1st Dept 2004], *lv dismissed* 4 NY3d 739 [2004]; *Koeppel v City of New York*, 200 AD2d 477 [1st Dept 1994]).

Kings County Waterproofing, the caulking subcontractor,

demonstrated that it owes plaintiff no duty of care because, even if the alleged leaking of water from the upper level to the lower level of the garage resulted from a misapplication of caulking, the caulking had a one-year warranty and was intended to be replaced after two to three years.

Coken Company, the electrical contractor, demonstrated that there is no support in the record, except speculation by plaintiff's expert, for the allegation that it installed the wrong lighting fixtures (a theory of liability, moreover, improperly raised by plaintiff for the first time in opposition to Coken's motion). There is no evidence in any event that the reason the light was out in the area of the accident was that it had been shorted out by water, as opposed to a bulb merely having blown out.

The Spector defendants made a prima facie showing that their work was performed to professional standards, and plaintiff's expert failed to identify any defect in the design of the parking garage, offering only speculation (*see Talon Air Servs. LLC v CMA Design Studio, P.C.*, 86 AD3d 511, 515 [1st Dept 2011]; *Ragusa v Lincoln Ctr. for Performing Arts, Inc.*, 39 AD3d 294, 295 [1st Dept 2007); *Timmins*, 9 AD3d at 70).

Any obligation that Richard Meier & Partners, the design

architect, and Ysrael Seinuk, the structural engineer, had to inspect the progress of the work for the owner did not impose on them a duty of care to plaintiff (*see 87 Chambers, LLC v 77 Reade, LLC*, 122 AD3d 540 [1st Dept 2014]).

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

ENTERED: NOVEMBER 16, 2017

CLERK

Renwick, J.P., Manzanet-Daniels, Andrias, Kern, Oing, JJ.

4977 Herbert L. Paulling, Index 23443/14
Plaintiff-Appellant,

-against-

City Car & Limousine Services, Inc., et al.,
Defendants-Respondents.

_____

Greenberg Law P.C., New York (Jennifer A. Shafer of counsel), for appellant.

Baker, McEvoy, Morrissey & Moskovits, P.C., Brooklyn (Robert D. Grace of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Donald Miles, J.), entered on or about August 25, 2016, which granted defendants' motion for summary judgment dismissing the complaint based on plaintiff's inability to establish a serious injury within the meaning of Insurance Law § 5102(d), unanimously reversed, on the law, without costs, and the motion denied.

Defendants met their burden on summary judgment by tendering the affirmed reports of their neurologist, who found normal range of motion upon recent examination, of their radiologist, who concluded that plaintiff's MRI films showed preexisting degenerative conditions unrelated to the accident, and their emergency medicine specialist, who found that plaintiff's post-accident hospital records were inconsistent with a traumatically-

induced injury (*see Frias v Gonzalez-Vargas*, 147 AD3d 500 [1st Dept 2017]*; Spencer v Golden Eagle, Inc.*, 82 AD3d 589, 590, [1st Dept 2011]).

In opposition, however, plaintiff raised a triable issue of fact as to whether he sustained an injury involving a "permanent consequential" or "significant" limitation of use of his lumbar spine through his treating physician, who found limitations in spinal range of motion on initial and recent examination. Objective evidence of injury was confirmed by plaintiff's radiologist (*see Pantojas v Lajara Auto Corp.*, 117 AD3d 577 [1st Dept 2014]; *Barhak v L. Almanzar-Cespedes*, 101 AD3d 564 [1st Dept 2012]). Plaintiff's physician sufficiently addressed defendants' expert's findings of degeneration by opining that the injuries to the otherwise asymptomatic plaintiff were consistent with and causally related to the accident (*see Pantojas* at 578; *Yuen v Arka Memory Cab Corp.*, 80 AD3d 481, 482 [1st Dept 2011]).

Defendants waived any argument regarding an alleged gap in treatment by waiting until their reply to raise the argument (*see Sylla v Brickyard Inc.*, 104 AD3d 605 [1st Dept 2013]). In any event, the evidence shows that plaintiff received treatment during the alleged "gap," as evidenced by, inter alia, his Workers' Compensation records, with examinations affirmed by his treating physician (*see Swift v New York Tr. Auth.*, 115 AD3d 507,

508 [1st Dept 2014]).

With respect to plaintiff's 90/180-day claim, although defendants' physicians did not examine plaintiff during the relevant period, defendants met their prima facie burden through the reports of their radiologist, whose opinion of preexisting degeneration was based on review of plaintiff's post-accident MRI films, and of their emergency room physician, who based his opinion on review of medical records that were created the day of the accident. Thus, it is of no moment that the actual reports were rendered later (*see Coley v DeLarosa*, 105 AD3d 527, 529 [1st Dept 2013]). In opposition to defendants' prima facie showing, plaintiff raised an issue of fact through his physician's affirmed workers' compensation reports finding a 100% impairment during the relevant period and the physician's opinion that plaintiff's impairment was causally related to the accident.

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

ENTERED: NOVEMBER 16, 2017

CLERK

Renwick, J.P., Manzanet-Daniels, Andrias, Kern, Oing, JJ.

4978 The People of the State of New York, Respondent, Ind. 5244N/14

-against-

Gregorio Frias, Defendant-Appellant.

_____

Steven N. Feinman, White Plains, for appellant.

_____

Judgment, Supreme Court, New York County (Bonnie Wittner, J.), rendered November 25, 2015, unanimously affirmed.

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

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

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

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

ENTERED: NOVEMBER 16, 2017

CLERK

Renwick, J.P., Manzanet-Daniels, Andrias, Kern, Oing, JJ.

4980 In re Part 60 RMBS Put-Back Litigation — Index 777000/15, 153945/13

- - - - -

Natixis Real Estate Capital Trust 2007-HE2, etc.,
Plaintiff-Respondent,

-against-

Natixis Real Estate Capital, Inc.,
Defendant-Appellant.

_____

Davis & Gilbert LLP, New York (H. Seiji Newman of counsel), for appellant.

Quinn Emanuel Urquhart & Sullivan, LLP, New York (Andrew R. Dunlap of counsel), for respondent.

_____

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered on or about November 10, 2016, which, to the extent appealed from as limited by the briefs, denied, with prejudice, defendant's motion for commissions permitting it to serve subpoenas on a corporation and an individual located in Texas, insofar as those subpoenas requested information about the appointment of Computershare Trust Co., N.A. as Separate Securities Administrator, unanimously modified, on the law, to make the denial without prejudice, and, so modified, affirmed, without costs.

We affirm the denial of defendant's motion, but for different reasons than stated by the motion court. In making our

determination, we take judicial notice of the briefs, orders, and pleadings submitted on the motion (*see Kinberg v Kinberg*, 85 AD3d 673, 674 [1st Dept 2011]; *Assured Guar. [Uk] Ltd. v J.P. Morgan Inv. Mgt. Inc.*, 80 AD3d 293, 303 [1st Dept 2010], *affd* 18 NY3d 341 [2011]). We also review the motion court's order de novo, since the court denied the motion based on law of the case — a matter of law (*see Gulf Ins. Co. v Transatlantic Reins. Co.*, 13 AD3d 278, 279 [1st Dept 2004]).

The motion court erred in denying the motion based on law of the case. Neither this Court's decision on the prior appeal (149 AD3d 127 [1st Dept 2017]) nor the order it affirmed, denying defendant's CPLR 3211 motion to dismiss, bars defendant's argument that Computershare lacks capacity to sue because its appointment as Separate Securities Administrator failed to satisfy the requirements of section 10.10 of the Pooling and Services Agreement (PSA). That particular issue was not actually litigated on defendant's motion to dismiss (*see People v Grasso*, 54 AD3d 180, 210 [1st Dept 2008]). Moreover, the procedural posture and evidentiary burden on the motion to dismiss differs from the present motion (*see Feinberg v Boros*, 99 AD3d 219, 224 [1st Dept 2012], *lv denied* 21 NY3d 851 [2013]). On the motion to dismiss, defendant had to accept as true the complaint's allegation that Computershare had been duly appointed, and it was

only after discovery commenced that defendant could determine whether the requirements of section 10.10 had been satisfied.

Defendant did not waive the defense that Computershare lacked capacity to sue. Defendant moved to dismiss for lack of standing, and it included lack of standing as an affirmative defense in its answer. While capacity to sue and standing are different legal concepts (*see Silver v Pataki*, 96 NY2d 532, 537 [2001]), this Court has used the terms interchangeably (*see e.g. Springwell Nav. Corp. v Sanluis Corporacion, S.A.*, 81 AD3d 557 [1st Dept 2011]). Thus, defendant should not be penalized for using the term "standing" instead of "capacity" (*see* CPLR 3026).

Nor should the affirmative defense be deemed waived on the ground that it is too conclusory (*see Robbins v Growney*, 229 AD2d 356, 358 [1st Dept 1996]). It "would be an excessively severe result" to "treat[] the defense as waived" (*Scholastic Inc. v Pace Plumbing Corp.*, 129 AD3d 75, 81 [1st Dept 2015]), especially since plaintiff has known since at least April 29, 2016 that defendant was disputing the effectiveness of Computershare's appointment. Moreover, "[i]f the [capacity] defense is meritorious, a determination of that issue would result in a speedy and less expensive conclusion to otherwise protracted litigation" (*id.*).

Despite the foregoing, we deny the motion, since defendant

did not demonstrate that a commission is "necessary or convenient" (CPLR 3108). In particular, defendant's motion papers did not include "allegations that the proposed out-of-State deponent[s] would not cooperate with a notice of deposition or would not voluntarily come within this State or that the judicial imprimatur accompanying a commission will be necessary or helpful" (*MBIA Ins. Corp. v Credit Suisse Sec. [USA] LLC*, 103 AD3d 486, 488 [1st Dept 2013] [internal quotation marks omitted]). However, since defendant can cure this defect, we make the denial of the motion without prejudice.

We have considered the remaining arguments and find them unavailing.

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

ENTERED: NOVEMBER 16, 2017

CLERK

Renwick, J.P., Manzanet-Daniels, Andrias, Kern, Oing, JJ.

4981 The People of the State of New York, Respondent, Ind. 2606/14

-against-

Joseph Franco, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Ruth Pickholz, J. at suppression hearing; Bonnie G. Wittner, J. at plea and sentencing), rendered November 2, 2015, convicting defendant of assault in the second degree, and sentencing him, as a second felony offender, to a term of 3½ years, unanimously affirmed.

Defendant made a valid waiver of his right to appeal, which forecloses his suppression and excessive sentence claims. Although the oral colloquy was brief, it separated the right to appeal from the rights automatically given up by pleading guilty, and, when taken together with a comprehensive written waiver, the colloquy satisfied the requirements for a valid waiver (*see People v Bryant*, 28 NY3d 1094 [2016]).

Regardless of whether defendant made a valid waiver, we find that the hearing court properly denied defendant's suppression

motion, and that defendant's arguments concerning the conduct of the hearing and the court's discretionary decision to grant the People's reargument motion do not warrant reversal. We also perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 16, 2017

CLERK

Renwick, J.P., Manzanet-Daniels, Andrias, Kern, Oing, JJ.

4982-
4982A In re James Pettus, et al.,
Petitioners-Appellants,

-against-

Board of Directors, et al.,
Respondents-Respondents.

Index 251413/14

James Pettus, appellant pro se.

Charlene Thompson, appellant pro se.

Boyd Richards Parker Colonnelli, P.L., New York (Bryan J. Mazzola of counsel), for respondents.

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered June 30, 2015, which, among other things, granted respondents' motion to dismiss the petition pursuant to CPLR 3211(a)(1) and (7), unanimously affirmed, without costs. Appeal from order, same court (Norma Ruiz, J.), entered February 2, 2016, which denied petitoners' motion to reargue (denominated a motion to renew and reargue), unanimously dismissed, without costs, as taken from a nonappealable order.

Petitioners, a married couple, allege that respondents, the board of directors and managing agent of the cooperative where they reside, and of which petitioner Thompson is a shareholder, abused its discretion in crediting Thompson's monthly maintenance bill in the amount of her shares of a tax abatement and New York

State School Tax Relief (STAR) refund, rather than issuing a check in the amount of the abatement and refund. Petitioners do not challenge the amount credited, only that it was passed on to Thompson as a credit, rather than paid directly.

Supreme Court correctly dismissed the petition for failure to state a cause of action and based on the documentary evidence (CPLR 3211[a][1], [7]), as respondents' actions complied with Real Property Tax Law § 425(2)(k)(iii)(B)(I), as well as the cooperative's bylaws (*see Village In The Woods Owners Corp. v Powles*, 25 Misc 3d 10 [App Term, 2d Dept 2009]).

Petitioners' motion denominated as one for leave to renew and reargue was not based on new facts unavailable at the time of the original motion, and thus was actually a motion for leave to reargue, the denial of which is not appealable (*see D'Alessandro v Carro*, 123 AD3d 1, 3 [1st Dept 2014]; *Grosso Moving & Packing Co. v Damens*, 233 AD2d 128, 128 [1st Dept 1996]; CPLR 2221[e][2]). That the motion was decided by a Justice other than the Justice who signed the underlying order of dismissal does not compel a different result, given that the CPLR permits sua sponte recusals and reassignments of such motions (*see* CPLR 2221[a]; *C&N Camera & Elecs. v Public Serv. Mut. Ins. Co.*, 210 AD2d 132,

133 [1st Dept 1994]; *Fabiano v Philip Morris Inc.*, 29 Misc 3d 395, 401 [Sup Ct, NY County 2010]).

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

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

ENTERED: NOVEMBER 16, 2017

CLERK

Renwick, J.P., Manzanet-Daniels, Andrias, Kern, Oing, JJ.

4983 The People of the State of New York, Respondent, Ind. 3051/08

-against-

Peter Habersharn, Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Whitney A. Robinson of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Ronald A. Zweibel, J.), entered on or about May 5, 2016, 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 when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). The mitigating factors cited by defendant were adequately taken into account by the risk assessment instrument,

or did not otherwise support a departure. Defendant's conduct and accomplishments while incarcerated were not so extraordinary as to warrant a departure, given the seriousness of the underlying offense against a 12-year-old child.

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

ENTERED: NOVEMBER 16, 2017

CLERK

Renwick, J.P., Manzanet-Daniels, Andrias, Kern, Oing, JJ.

4984 The People of the State of New York, Respondent, Ind. 2336/15

-against-

Remeses Williams, Defendant-Appellant.

Seymour W. James, Jr., The Legal Aid Society, New York (Katheryne M. Martone of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Jill Konviser, J.), rendered February 23, 2016, convicting defendant, upon his plea of guilty, of burglary in the third degree, and sentencing him to a term of three to six years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence to a term of two to four years, and otherwise affirmed.

We find the sentence excessive to the extent indicated.

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

ENTERED: NOVEMBER 16, 2017

CLERK

Renwick, J.P., Manzanet-Daniels, Andrias, Kern, Oing, JJ.

4985N Ah Bee Pua, Index 154527/14
Plaintiff-Respondent,

-against-

Yuen Fai M. Lam, et al.,
Defendants,

C&H Herb Shop, Inc.,
Defendant-Appellant.

_____

Milber Makris Plousadis & Seiden, LLP, Woodbury (Lorin A. Donnelly of counsel), for appellant.

Sacco & Fillas, LLP, Astoria (Richard Schirmer of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered on or about September 28, 2016, which denied defendant C&H Herb Shop, Inc.'s motion to, among other things, vacate the note of issue and extend its time to make summary judgment motions to 120 days following the completion of discovery, unanimously reversed, on the law, on the facts, and in the exercise of discretion, and the motion granted, with costs.

When, as in this case, statements in a certificate of readiness concerning completion of discovery are incorrect or blatantly false, a motion to strike the note of issue should be granted (*see e.g. Cromer v Yellen*, 268 AD2d 381 [1st Dept 2000]). Plaintiff's contention that the motion has been mooted by the

completion of most discovery is based on representations concerning subsequent matters, not in the appellate record, and of which judicial notice cannot be taken (*see Walker v City of New York*, 46 AD3d 278 [1st Dept 2007]). In any event, plaintiff acknowledges that discovery remains outstanding.

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: NOVEMBER 16, 2017

CLERK

Renwick, J.P., Manzanet-Daniels, Andrias, Kern, Oing, JJ.

4986 In re Reginald Herbin, Index 2754/16
[M-4953] Petitioner, O.P. 121/17

-against-

Hon. Robert Stolz, et al.,
Respondents.

Reginald Herbin, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Angel Guardiola II of counsel), for Hon. Robert Stolz and Hon. Jill Konviser, respondents.

Cyrus R. Vance, Jr., District Attorney, New York (Ross D. Mazer of counsel), for Cyrus R. Vance, Jr. and Michael Mulanphy, respondents.

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

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

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

ENTERED: NOVEMBER 16, 2017

CLERK

Richter, J.P., Manzanet-Daniels, Andrias, Kern, Singh, JJ.

5137 The People of the State of New York, Respondent, Ind. 2829/14

-against-

Pedro Morales, Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Nancy D. Killan of counsel), for respondent.

_____

Appeal from judgment, Supreme Court, Bronx County (Margaret L. Clancy, J.), rendered April 5, 2016, convicting defendant, upon his plea of guilty, of course of sexual conduct against a child, and sentencing him to a term of 13 years, held in abeyance, the application by assigned counsel to withdraw on the ground that there are no non-frivolous issues to be raised on appeal (*People v Saunders*, 52 AD2d 833 [1st Dept 1976]), is denied, and the time to perfect the appeal is enlarged to the March 2018 Term of this Court.

Counsel states that defendant validly waived his right to appeal, thus foreclosing any challenge to the length of the sentence imposed. However, a nonfrivolous argument could be made that the written waiver of appeal signed by defendant is invalid (*see People v Powell*, 140 AD3d 401 [1st Dept 2016], *lv denied* 28

NY3d 1074 [2016]; *People v Santiago*, 119 AD3d 484 [1st Dept 2014], *lv denied* 24 NY3d 964 [2014]). We note that the written waiver in this case contains different language than those waivers found invalid in *Powell* and *Santiago*, and the court here conducted a thorough oral colloquy. This issue requires briefing. Absent a valid waiver of the right to appeal, an excessive sentence issue survives.

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

ENTERED: NOVEMBER 16, 2017

CLERK

Richter, J.P., Manzanet-Daniels, Andrias, Kern, Singh, JJ.

5145 In re Robert Doar, Index 401644/12
Petitioner-Respondent,

Barbara Guidotti, also known as
Barbara Akines-Guidotti, etc.,

-against-

John Korper,
Respondent-Appellant.

_____

Steven N. Feinman, White Plains, for appellant.

The Vera Institute of Justice, Inc., Brooklyn (Anne P. Meyer of counsel), for The Vera Institute of Justice, Inc., Guardianship Project, co-guardian of Barbara Guidotti.

Paul A. Shneyer, PC, New York (Paul A. Shneyer of counsel), for Karen Blackwell, co-guardian of Barbara Guidotti.

_____

Order, Supreme Court, New York County (Laura Visitacion-Lewis, J.), entered March 16, 2016, which, insofar as appealed from, ordered that the alleged incapacitated person (AIP) remain in a nursing facility permanently, that respondent be evicted from the premises owned by the AIP, that the AIP's cooperative apartment be sold and the property contained in the apartment be disposed of, and that respondent's contact with the AIP in the nursing facility be supervised, unanimously modified, on the law and the facts, to vacate the decretal paragraphs that order the permanent placement of the AIP in a nursing facility, the sale of the apartment, and the disposal of the apartment's contents, and

otherwise affirmed, without costs.

The court properly ordered respondent's eviction from the AIP's apartment, since the record shows that respondent violated the June 2014 so-ordered agreement that permitted him to reside there. Respondent admitted that he allowed the AIP to make her own medical appointments, took her to those appointments, hired and fired home health aides without consulting either of the AIP's co-guardians, and failed to administer the AIP's medication in accordance with the terms of the agreement. Moreover, respondent failed to rebut the testimony of one of the guardians that he denied her entry to the apartment.

Respondent contends that the agreement should be enforced based on his substantial performance of his obligations under it. However, the record does not support a finding of substantial performance. Respondent admitted that he violated numerous express terms of the agreement. In any event, the doctrine of substantial performance may not be used to excuse a party's failure to perform an express condition (*Tak Chio Cheong v Jinghong Zhu*, 138 AD3d 433 [1st Dept 2016]).

The court improperly ordered that the AIP remain in a

nursing facility permanently (and that her apartment and possessions be disposed of), because no party requested this relief. Indeed, the AIP's social worker and case manager both testified that the AIP could return to her home with 24-hour medical assistance.

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

ENTERED: NOVEMBER 16, 2017

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Dianne T. Renwick
Richard T. Andrias
Anil C. Singh
Peter H. Moulton, JJ.

4648
Index 116364/09

_____x

Roberto Haibi, etc.,
Plaintiff-Respondent,

-against-

790 Riverside Drive Owners, Inc.,
individually and doing business as
Riviera Cooperative, et al.,
Defendants-Appellants.
_____x

Defendants appeal from an order of the Supreme Court, New York County (Lucy Billings, J.), entered February 22, 2017, which, insofar as appealed from as limited by the briefs, denied defendants' motion for summary judgment dismissing so much of the complaint as alleged inadequate lighting of the premises, and granted plaintiff's cross motion to amend the bill of particulars to the extent of including the applicable 1916 Building Code provision regarding adequate lighting.

Mauro Lilling Naparty, LLP, Woodbury (Gregory A. Cascino and Matthew W. Naparty of counsel), for appellants.

Rheingold Giuffra Ruffo & Plotkin LLP, New York (Jeremy A. Hellman and Thomas P. Giuffra of counsel), for respondent.

RENWICK, J.

Plaintiff, Roberto Haibi, brings this action as the Administrator of his father Erasmo Haibi's estate to recover damages for Erasmo's injuries from a fall on October 24, 2009, on a stairway in a residential apartment building owned by defendant 790 Riverside Drive Owners, Inc., and managed by defendant Orsid Realty Corp. The stairway connects the main and southern lobbies near an entrance to defendants' building. Plaintiff alleges that his father was injured by a fall on the lobby stairs because of, among other things, inadequate illumination.

Erasmo Haibi's granddaughter, Danette Rodriguez, who lived with her grandfather in the building at the time of his accident, did not observe his fall, but found him lying injured at the bottom of the lobby stairs. Erasmo Haibi died February 5, 2011, from a cause unrelated to his fall, before he was deposed in this action. The building's surveillance cameras, however, recorded his fall on a videotape that Rodriguez viewed on the day of the fall. Although Rodriguez orally requested a copy of the videotape from defendants, and plaintiff's attorney requested in writing that they preserve the tape, defendants destroyed it. In anticipation of trial, plaintiff moved for an adverse inference instruction to the jury, at trial, due to defendants' destruction of the tape. The motion court granted plaintiff an instruction

allowing the jury to infer that the videotape would have supported Rodriguez's depiction of the stairs and of Erasmo Haibi's fall, based on Rodriguez's viewing of the tape.

In response, before the trial commenced, defendants moved for summary judgment claiming that there was no dangerous condition on their stairway that caused Erasmo Haibi's fall. Initially, the motion court granted defendants' summary judgment motion to the extent of dismissing plaintiff's claims that the stairway was unsafe due to the lack of handrails, and nonuniform treads and risers on the stairs. The court denied, however, defendants' summary judgment motion seeking a dismissal of the action, upon a finding that defendant had not eliminated issues of fact as to the adequacy of the lighting on the subject stairway and proximate cause. We now affirm.

Whether or not defendants met their prima facie burden on the issue of inadequate lighting -- by submitting photographs and deposition testimony demonstrating that the subject area was illuminated by overhead light fixtures at the time of the accident -- we find that plaintiff raised a triable issue of fact. Specifically, plaintiff submitted an expert's nonconclusory affidavit stating that, although the applicable 1916 Building Code of the City of New York only directed buildings to provide "adequate lighting" of all stairways (*see*

City of NY, Code of Ordinances art 8, § 159[2] [1916]), upon his inspection the light levels were a fraction of what was considered adequate lighting under later building codes from 1968 and 2008.

We reject defendants' contention, adopted by the dissent, that plaintiff's expert affidavit should be disregarded because he did not specify when his inspection of the area occurred, and under what conditions. While such details would be important for a visual observation, here plaintiff's expert performed an objective measurement, as compared to the witnesses' subjective observations, of the light level, which he found to be significantly lower than what was deemed "adequate lighting" under later building codes. For this reason, defendants' related argument, that because the applicable 1916 Building Code did not define the acceptable light level, there can be no claim of inadequacy, is equally unavailing. We perceive no reason why adequate lighting in 1916 would differ from adequate lighting in 1968 or 2008.

On the issue of proximate cause, we find that defendants failed to meet their burden. Proximate cause is almost invariably a factual issue (*see Turturro v City of New York*, 28 NY3dD 469, 485 [2016]; *Kriz v Schum*, 75 NY2d 25, 33-34 [1989]; *Eiseman v State of New York*, 70 NY2d 175 [1987]; Restatement

[Second] of Torts § 433B, Comment b). Ordinarily, it is for the trier of fact to determine the issue of proximate cause (*see Howard v Poseidon Pools*, 72 NY2d 972, 974 [1988]). However, the issue of proximate cause may be decided as a matter of law "'where only one conclusion may be drawn from the established facts'" (*id.* at 974, quoting *Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980]).

The dissent contends, however, that the issue of proximate cause must be decided as matter of law in favor of defendants because "none of [the witness to the accident or who reviewed the videotape of the accident] claimed that the decedent misstepped or lost his balance due to inadequate lighting." The law, however, does not apply such a stringent requirement. To be sure, a plaintiff's inability to identify the cause of a fall is fatal to an action because a finding that the defendant's negligence proximately caused a plaintiff's injuries would be based on speculation (*Siegel v City of New York*, 86 AD3d 452 [1st Dept 2011]). However, this simply requires that the evidence identifies the defect or hazard itself and provides sufficient facts and circumstances from which causation may be reasonably inferred (*Burgos v Aqueduct Realty Corp.*, 92 NY2d 544 [1998]).

The dissent cannot and does not dispute that inadequate lighting itself may constitute a dangerous condition where the

inadequacy of lighting renders the appearance of premises deceptive. Such deception occurs by the illusion that two areas of the same premises are on the same level whereas, in fact, there is a change in floor level to which the available lighting does not call sufficient attention.

In addition, we find that the evidence adduced by defendants failed to eliminate all issues of fact as to whether this alleged dangerous condition on the subject stairway contributed to the decedent's fall. In this regard, the building's residential manager, Jose Aramis Fornier (Aramis), testified that he viewed the videotape of the accident and that it showed that the decedent fell while walking up the set of stairs connecting the upper and lower lobby on the ground floor of the building. Specifically, Aramis described what he observed in the videotape as follows:

> "Q. When did you first watch the video after the incident?
> "A. The day after the incident.
> "Q. What did the video depict?
> "A. Depict my tenant carrying something in his hand, takes a step up a stair, attempts to bring the other step, lose his balance and falls off."

Likewise, the decedent's granddaughter, Danette Rodriguez, testified that she viewed the videotape of the accident and it showed that the decedent fell while walking up the set of stairs connecting the upper and lower lobby on the ground floor of the

building. From what Rodriguez could observe in the videotape, she estimated that the decedent was on one of the middle steps, "not on the very bottom level but not on the very top." Rodriguez described the decedent's fall as follows:

> "Q. And he was walking toward the right side of the steps?
> "A. Right.
> "Q. And then what did you see?
> "A. I saw him reach up to grab the column there and he missed it or – yeah, he missed it or he lost grip or something and he fell like towards the left side. Like he hit himself on the left side (indicating). It was very quick, the video. I saw it once, but what I think I recall is that his head hit the marble seat there, but that's what I recall. Like I said, I saw the video very quick, but I know he landed on this left side of his head (indicating)."

Defendants also presented the deposition testimony of the decedent's son, Roberto Haibi, who did not view the videotape of the incident but talked to his father about the fall, at the hospital. According to Roberto Haibi, his father told him that "he was going up the stairs and that he slipped and fell backwards." Although his father was not precise as to which one of the steps he was on before the fall, he did tell his son that he "was on his way up the steps" when he fell.

We find that such evidence, when viewed in a light most favorable to plaintiff, as the opponent of summary judgment (*Johnson v Goldberger*, 286 AD2d 604 [1st Dept 2001]), creates

questions of fact as to whether the alleged inadequate lighting on the subject stairway was a proximate cause of the decedent's fall. Unlike the dissent's rigid analysis of proximate cause, we take into account that "[c]ircumstantial evidence or common knowledge may provide a basis from which the causal sequence may be inferred" (Prosser, Torts, § 41, at 246 [3d ed.]). "If as a matter of ordinary experience a particular act or omission might be expected, under the circumstances, to produce a particular result, and that result in fact has followed, the conclusion may be permissible that the causal relation exists" (*Vitanza v Growth Realties*, 91 AD2d 917, 917 [1st Dept 1983] [internal quotation marks omitted]). In this case, the dangerous condition of the stairway and the decedent's fall thereon establish the natural and reasonable inference of the proximate cause that the dissent denies.

Still, the dissent points to the deposition testimony from an eyewitness to the accident, who, unlike the decedent's relatives and defendants' employee, attributes the decedent's fall to his own negligence. Specifically, the decedent's neighbor testified that the decedent was walking down the stairs too fast, staring straight ahead and shuffling his feet. However, given the conflicting deposition testimony submitted in support of defendants' motion as to how the subject accident

occurred, defendants failed to establish their prima facie entitlement to judgment as a matter of law, since that testimony raised triable issues of fact and credibility as to whether defendants are at fault in the happening of the accident.

Finally, unlike the dissent, we find it significant in this case that the court has granted a permissive adverse inference charge to plaintiff for defendants' destruction of the video that recorded the decedent's fall. We reject the dissent's suggestion that the spoliation was inadvertent because it took place when the "video that recorded decedent's fall was automatically taped over by defendants 30 days after the accident." The dissent ignores the fact that defendants' employees failed to comply with the decedent's granddaughter's request for a copy of the video after viewing it the same day of the accident. Nor do we find persuasive the dissent's conclusion that such adverse inference has no relevance on the issue of proximate cause. Again, the dissent ignores the fact that the unavailability of the videotape to plaintiff may have impaired his ability to establish that the alleged defective condition contributed to the decedent's fall by preventing the jury from making a proper assessment of the context of the videotape.

Of course, the grant of an adverse inference charge alone may not be sufficient to withstand a motion for summary judgment.

Nevertheless, here it is an appropriate consideration, along with the other evidence adduced by defendants, as to whether the issue of proximate cause is one for the jury. It bears repeating that the issue of proximate cause may be decided "as a matter of law where only one conclusion may be drawn from the established facts;" but "where [as here] there is any doubt, confusion, or difficulty in deciding whether the issue ought to be decided as a matter of law, the better course is to leave the point for the jury to decide" (*White v Diaz*, 49 AD3d 134, 139 [1st Dept 2008] [internal quotation marks and citation omitted]; *see Nicole Dillard v New York City Housing Authority*, 112 AD3d 504 [1st Dept 2013]).

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

Accordingly, the order of the Supreme Court, New York County (Lucy Billings, J.), entered February 22, 2017, which, insofar as appealed from as limited by the briefs, denied defendants' motion for summary judgment dismissing so much of the complaint as alleged inadequate lighting of the premises, and granted

plaintiffs' cross motion to amend the bill of particulars to the extent of including the applicable 1916 Building Code provision regarding adequate lighting, affirmed, without costs.

All concur except Andrias, J. who dissents in an Opinion.

ANDRIAS, J. (dissenting)

On October 24, 2009, Erasmo Haibi (decedent), age 87, fell while traversing a three-step stairway that connected the lower lobby to the upper lobby in an apartment building owned and managed by defendants. On February 5, 2011, decedent died from unrelated causes before he could be deposed. A surveillance video that recorded decedent's fall was automatically taped over by defendants 30 days after the incident. Based on plaintiff's counsel's assertion that a copy of the videotape had been requested during the 30-day period, the court, on a previous motion, granted plaintiff's request for a permissive adverse inference charge which would allow the jury to infer that "the videotape would have supported plaintiff's depiction of [decedent's] fall and the stairs' condition when [decedent] fell."

In the order under review, Supreme Court granted defendants' motion for summary judgment in part, "dismissing plaintiff's claims that the lack of handrails and of uniform treads and risers on defendants' stairs where [decedent] fell caused his fall." However, based on decedent's granddaughter's testimony that the lighting in the lobby was "dim," the court denied defendants' motion with regard to plaintiff's claim that "the stairs' inadequate lighting caused the fall" and granted

plaintiff's cross motion to supplement his bill of particulars to the extent of including the applicable 1916 Building Code provision regarding lighting.

Defendants appeal from the order insofar as it denied their motion for summary judgment in part and granted plaintiff's cross motion in part. The majority affirms, finding that plaintiff raised a triable issue of fact as to the adequacy of the lobby lighting and defendants failed to sustain their prima facie burden of establishing that inadequate lighting was not a proximate cause of decedent's fall. Because I believe that defendants established their prima facie entitlement to summary judgment with regard to both the adequacy of the lighting and the absence of proximate cause, and that plaintiff's submissions, even when enhanced by an adverse inference, did not raise a material issue of fact, I dissent.

Defendants established prima facie that there was adequate natural and artificial lighting in the area of the steps through photographs and the testimony of four witnesses (*see Pwangsunthie v Marco Realty Assoc., L.P.*, 136 AD3d 502 [1st Dept 2016], *lv denied* 27 NY3d 906 [2016]; *Franchini v American Legion Post*, 107 AD3d 432 [1st Dept 2013]).

The photographs, including one decedent's granddaughter took a few days after the incident, showed the open and obvious

condition of the stairway and the overhead lighting illuminating the area. The granddaughter, who lived in the building, testified that everything in the photograph looked like it did on the date of decedent's accident, and that there was a light in the ceiling in the center of the upper level of the lobby that was "always on" and a light on top of the lower level of the lobby that was illuminated on the date of the accident. She also testified that she had never complained about the lighting in the area and had no personal knowledge of anyone else ever complaining.

When asked if there was light in the area when he saw decedent fall, the only eyewitness to the incident responded, "Yes, there is a double [floor to ceiling] window right between the staircase" that lets in "a lot of light." He also testified that there was a ceiling light at the top of the steps, a hall lamp, and a "huge opening . . . on the Riverside Drive that light floods through to the mezzanine."

Plaintiff testified that last time he saw his father before the accident the lobby was "lit up" in the daytime and that the lighting was also "fine" at night. The building's resident manager testified that he never received any complaints about the stairway, and that there were no accidents on the steps at any time prior to decedent's accident.

The majority states that whether or not defendants met their prima facie burden on the issue of inadequate lighting, plaintiff raised an issue of fact through the affidavit of an expert who stated that although the applicable 1916 Building Code only directed buildings to provide "adequate" lighting, upon his inspection, the light levels were a fraction of what was considered adequate lighting under later building codes from 1968 and 2008. However, plaintiff's expert did not identify any specific code sections and his affidavit did not suffice to establish that the lighting was not "adequate" under the 1916 Building Code, which does not define the acceptable light level, and was otherwise deficient.

The accident occurred at 4:30 p.m. on October 24, 2009, at which time, as evidenced by the deposition testimony, the area was illuminated by both natural and artificial light. Plaintiff's expert inspected the premises more than a year later, at the end of November, at which time it becomes darker earlier in the day due, in part, to the end of daylight saving time. The expert did not specify what time of day his inspection occurred, what the weather was like outside, or what lights were on, all of which would have affected the illumination levels in the lobby at the time of his inspection. While the expert did state that "[it] was indicated to me that during the site inspection, the

illumination levels at the stairway was essentially the same as the lighting condition when [decedent] suffered his injuries," he did not identify who made this representation, the source of their information, what the subjective term "essentially the same" meant to them, or whether he measured just the artificial lighting or both the artificial and natural lighting. Given these deficiencies, plaintiff's expert's measurement of light output performed more than a year after the accident is not probative of whether the measure of light output was the same at the time of the accident (*see Gilson v Metropolitan Opera*, 15 AD3d 55, 59 [1st Dept 2005], *affd* 5 NY3d 574 [2005]; *Santiago v United Artists Communications, Inc.*, 263 AD2d 407, 408 [1st Dept 1999]).

The majority states that these details are unimportant because the expert performed an "objective" measurement of light levels "as compared to the witnesses' subjective observations." However, without knowing the time of day and conditions at the time of plaintiff's expert's inspection, and how they compared to the conditions at the time of the accident, it is impossible to determine whether the same amount of natural light was flooding into the lobby. Similarly, without the expert stating which lights were on at the time of his inspection, it cannot be determined if the same amount of artificial light existed.

In any event, contrary to the view of the majority, defendant demonstrated prima facie the absence of proximate cause through deposition testimony. Decedent's granddaughter testified that the surveillance video showed that decedent was walking towards the right side of the staircase when he "reach[ed] up to grab the column there and he missed it . . . or he lost grip or something and he fell like towards the left side." The building's resident manager testified that the surveillance video showed decedent "carrying something in his hand [mail], takes a step up a stair, attempts to bring the other step, lose[s] his balance and falls off." Plaintiff testified that decedent told him that "he was going up the stairs and he slipped and fell backwards." The eyewitness testified that when decedent walked he "shuffled"; "[h]e didn't pick his heels up, he just slid across the floor." On the date of the accident, the eyewitness was coming down the stairs and saw decedent "staring straight ahead and shuffling his feet, but he was going kind of fast -- , not fast, fast, but fast." The eyewitness told decedent to slow down, but he "shuffled right off the top step." The eyewitness also testified that the building's resident manager told him that decedent's granddaughter asked to see the surveillance tape after her grandfather told her that the witness had pushed him, which the witness denied. While these descriptions of the accident may

differ, the salient fact is that none of these witnesses claimed that decedent misstepped or lost his balance due to inadequate lighting or that the stairs were inherently dangerous or constituted a trap (*see Lumpkin v 3171 Rochambeau Ave LLC*, 148 AD3d 511, 512 [1st Dept 2017]; *Richards v Kahn's Realty Corp.*, 114 AD3d 475 [1st Dept 2014]).

The majority finds that the evidence adduced by defendants failed to eliminate all issues of fact with respect to whether the inadequacy of the lighting rendered the appearance of the steps deceptive. However, optical confusion occurs when conditions in an area create the illusion of a flat surface that visually obscures any steps (*see Langer v 116 Lexington Ave., Inc.*, 92 AD3d 597, 599 [1st Dept 2012], *lv denied* 24 NY3d 907 [2014]). Here, defendants sustained their prima facie burden through the photographs of the stairway showing an open and obvious drop in elevation and the deposition testimony which did not attribute decedent's fall to the inability to detect the elevation differential between upper and lower lobby (*see Remes v 513 W. 26th Realty, LLC*, 73 AD3d 665, 666 [1st Dept 2010] ["In light of the photographs, which show an obvious drop in elevation and trimmings against the wall outlining the steps, and the deposition testimony that no prior similar incidents had occurred and that bright lights illuminated the stairway area, Owner made

a prima facie showing that the stairway area did not constitute a hazardous condition or hidden trap proximately causing plaintiff's injuries"]; *Broodie v Gibco Enters., Ltd.*, 67 AD3d 418, 418 [1st Dept 2009] ["several color photographs in the record depicted the step as not particularly high, and clearly painted in white and black so as to be visible even in the low light provided by the recessed ceiling bulb above"]; *Burke v Canyon Rd. Rest.*, 60 AD3d 558, 559 [1st Dept 2009] [the defendants granted summary judgment because deposition testimony established that the area of the step was illuminated, and the general manager of the restaurant for the last several years was not aware of any complaints or accidents]).

In opposition to defendants' prima facie showing, plaintiff failed to raise a triable issue of fact as to proximate cause. "Even if an expert alludes to potential defects on a stairway, the plaintiff still must establish that the slip and fall was connected to the supposed defect, absent which summary judgment is appropriate" (*see Kane v Estia Greek Rest.*, 4 AD3d 189, 190 [1st Dept 2004]). Furthermore, "[w]here the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation, . . . the opinion should be given no probative force and is insufficient to withstand summary judgment (*Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]). Here, plaintiff's

expert did not state that he reviewed any of the deposition testimony describing how the accident occurred and his conclusory opinion "that the poor lighting and the configuration of the stairway caused [decedent] to stumble and lose his footing," rather than a misstep or loss of balance, is based on sheer speculation (*see Humphrey v Merivil,* 109 AD3d 792 [2d Dept 2013]; *Costantino v Webel*, 57 AD3d 472, 472-473 [2d Dept 2008]; *Lissauer v Shaarei Halacha, Inc.*, 37 AD3d 427, 428 [2d Dept 2007]).

The granddaughter's testimony that the lighting was "dim" does not establish the existence of material issues of fact (*see Branham v Loews Orpheum Cinemas, Inc.*, 31 AD3d 319, 325 [1st Dept 2006], *affd* 8 NY3d 931 [2007]). When asked if she ever felt like she "could not see adequately in the lobby because of the lighting," the granddaughter replied, "I've never complained, but it is a dim light, you know." However, she never addressed the natural light in the area. Nor can a reasonable inference of defendants' negligence be drawn from her testimony that when she watched the videotape she saw decedent "reach up to grab the column . . . and he missed it . . . or he lost [his] grip or something." Even if decedent missed the column, rather than losing his grip, the granddaughter did not testify that decedent did not perceive the step or column due to poor lighting (*see Fishelson v Kramer Props., LLC,* 133 AD3d 706 [2d Dept 2015];

Knickerbocker v Ulster Performing Arts Ctr, 74 AD3d 1526 [3d Dept 2010]).

In holding otherwise, the majority places great weight on the fact that the court had previously granted plaintiff's request for an adverse inference charge due to defendants' destruction of the videotape. However, the granting of plaintiff's motion for an adverse inference charge did not preclude defendants from offering evidence that the stairway was safe or that it did not cause decedent to fall, including the testimony of the resident manager and decedent's granddaughter as to what they saw on the videotape. Moreover, an adverse inference does not shift the burden of proof of plaintiff, the nonmoving party on summary judgment, to make a sufficient showing on an essential element of his case (*see Baez v City of New York*, 278 AD2d 83, 83-84 [1st Dept 2000]). Rather, the charge would only allow the jury to infer that the videotape would have supported plaintiff's depiction of decedent's fall and the condition of the stairs.

Here, in describing the accident, plaintiff's counsel stated that

> "[a]s [decedent] ascended a stairway in the main lobby, he lost his footing on the treading. He attempted to avoid falling and to regain his footing by grasping the post of the railing. There was no handrail to provide a secure handhold. As a result of the lack of hand

> rail at the location, [decedent] was unable to regain to his footing and fell down the stairs, down into the lobby."

Counsel did not point to any testimony connecting inadequate lighting to this description. Nor did he, or any of plaintiff's witnesses, assert that the accident was the result of optical confusion. Moreover, in granting defendant summary judgment in part, the court found that the steps were not inherently dangerous. Specifically, the court found that defendants established "that the stairs' lack of a handrail and their nonuniform treads and risers did not pose an unlawful condition that defendants were required to correct, to which plaintiff has offered no contrary evidence," and plaintiff "does not claim that the stairs' lack of a handrail and their non-uniform treads and risers, despite their compliance with code requirements, still posed a dangerous condition because of their design or configuration." Plaintiff has not appealed these determinations. Thus, there is no basis, other than speculation, to conclude that optical confusion contributed to plaintiff's accident.

Accordingly, I would grant defendants' motion for summary judgment dismissing so much of the complaint as alleged

inadequate lighting of the premises, and deny plaintiffs' cross motion to amend the bill of particulars to the extent of including the applicable 1916 Building Code provision regarding adequate lighting.

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

ENTERED: NOVEMBER 16, 2017

CLERK

CORRECTED ORDER - NOVEMBER 22, 2017

Renwick, J.P., Manzanet-Daniels, Andrias, Kern, Oing, JJ.

4963 The People of the State of New York, Respondent, Ind. 3045/12

-against-

Sharife Moses, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J. at suppression hearing; Daniel P. FitzGerald, J. at jury trial and sentencing), rendered January 8, 2015, as amended January 9, 2015, convicting defendant of murder in the second degree, robbery in the first and second degrees and criminal possession of a weapon in the second degree, and sentencing him to an aggregate term of **40 years** to life, unanimously modified, as a matter of discretion in the interest of justice, to the extent of directing that all sentences be served concurrently, resulting in a new aggregate term of 25 years to life, and otherwise affirmed.

The court properly denied defendant's motion to suppress a lineup identification. The lineup was not unduly suggestive. Defendant and the fillers were all reasonably similar in appearance, and there was no substantial likelihood that

defendant would be singled out (*see People v Chipp*, 75 NY2d 327, 336 [1990], *cert denied* 498 US 833 [1990]). The difference in height between defendant and almost all of the fillers was not so significant as to create a risk of misidentification, and, in any event, the lineup was conducted so as to limit any effect of a height differential (*see People v Johnson*, 306 AD2d 214 [1st Dept 2003], *lv denied* 100 NY2d 621 [2003]).

Defendant's challenge to the content of the court's instructions regarding corroboration of accomplice testimony is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we find that the better practice would have been to read the CJI without augmentation since the charge was revised to accord with *Reome*; however the instructions, read as a whole, conveyed the appropriate principles (*see People v Reome*, 15 NY3d 188 [2010]). Similarly, we reject defendant's claim that his counsel rendered ineffective assistance by failing to object to the instructions (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]); accordingly, we do not find that the lack of

preservation should be excused on the ground of ineffective assistance.

While the court lawfully imposed a consecutive sentence for the conviction under Penal Law § 265.03(3), we nevertheless, in our discretion run all the sentences concurrently.

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

ENTERED: NOVEMBER 16, 2017

CLERK