SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rolando T. Acosta, P.J.
Peter Tom
Barbara R. Kapnick
Marcy L. Kahn
Ellen Gesmer, JJ.

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In re Save America's Clocks, Inc., et al.,
Petitioners-Respondents,

-against-

City of New York, etc., et al.,
Respondents-Appellants.

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Respondents appeal from the order and judgment (one paper) of the Supreme Court, New York County (Lynn R. Kotler, J.), entered May 17, 2016, granting the petition brought pursuant to CPLR article 78 to annul the Certificate of Appropriateness, issued May 29, 2015, which authorized work on certain features of a designated interior landmark.

Zachary W. Carter, Corporation Counsel, New York (Diana Lawless and Devin Slack of counsel), for City of New York, Office of the Deputy Mayor for Housing and Economic Development, New York City Landmarks Preservation Commission and New York City Department of Buildings, appellants.

Kramer Levin Naftalis & Frankel LLP, New York (Jeffrey L. Braun and Catherine L. Hoge of counsel), for Civic Center Community Group Broadway LLC, appellant.

Hiller, PC, New York (Michael S. Hiller and Jason E. Zakai of counsel), for respondents.

GESMER, J.

This case marks the first time an owner has asked to convert an interior landmark into a private residence. The decision by the Landmarks Preservation Commission (LPC) that petitioners seek to overturn would permit the owner, who purchased the property subject to the landmark designation, to make fundamental alterations to one of the few remaining nineteenth century nonelectrified mechanical clocktowers, which is one of New York City's 117 designated interior landmarks. In particular, the LPC decision would permit the conversion of the space containing the clocktower into a private residence, the disconnection of the clock from its historical mechanism, and the electrification of the clock. The case turns on whether, and to what degree, New York City's Landmarks Preservation and Historic Districts Law (Administrative Code of City of NY § 25-301 *et seq*.) (Landmarks Law) permits the LPC to require the private owner of property purchased subject to a prior interior landmark designation to preserve the historic character and operation of the interior landmark and to continue to permit at least minimal public access to it. Because we agree with the article 78 court that the LPC's decision was based on an error of law and is irrational, we affirm.

Background

The 13 story neo-Italian Renaissance style building at 346 Broadway (the building) was constructed "using the finest craftsmanship and lavish materials" between 1894 and 1898 by the prominent architectural firm McKim, Mead & White for the New York Life Insurance Company. The building sits on the lower Manhattan block bounded by Broadway to the west, Lafayette Street to the east, Leonard Street to the north, and Catherine Lane to the south. At issue in this case is the clocktower that sits atop the western end of the building, and houses the largest of the few purely mechanical tower clocks of its kind in New York. Indeed, the only other clock in the world with a similar mechanism is the one atop Westminster Palace known as Big Ben. The clocktower's construction was supervised by William Mead and was modeled on an Italian Renaissance palazzo. A room on the 14th floor contains an interior spiral staircase which leads up to a landing housing the clock's pendulum, and then to the clocktower's machine room. The four glass and metal clock faces make up the four walls of the machine room, in the center of which the clock mechanism sits inside a glass and wood enclosure. Above the mechanism is the clock's 5,000 pound bell, which strikes the hours.

The remarkable functioning of the mechanism is described as follows in a 2014 New York Times article:

> "It is significant enough that a monumental public clock has survived into the smartphone era. But what makes the clock at 346 Broadway extraordinary is that it is, to this day, a purely mechanical instrument, one that must be wound every week. Once wound up, a 1,000-pound weight drops slowly down a wooden chute from the 14th floor to a landing below, its tremendous power governed by elaborate gear works on a Gothic-style iron frame. They translate its pull into two-second pulses that drive the giant hands outside. The works are housed in a glass and wood enclosure that slightly mutes the sound: Ta-ki-ta-TAT. Ta-ki-ta-TAT. Ta-ki-ta-TAT"

(David W. Dunlap, *A Tower Clock in Danger of Losing its Purpose*, NY Times, Nov. 12, 2014, § A at 31).[1]

In 1968, New York City acquired the building, which it used to house courts and City government offices. The record shows that, from 1972 until the current owner purchased the building in 2013, the bottom level of the clocktower operated as an art gallery and performance space accessible to the public. The gallery also housed several artist studios and a public service radio station, and public events were sometimes held on the clocktower's terrace. Petitioner Marvin Schneider[2] gave regular public tours, and visited the clocktower on a weekly basis to

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[1]The room containing the spiral staircase is actually on the 13th floor of the building, and is so described in the designation of the building as a landmark. However, the parties, and the author of this article, refer to it as being on the 14th floor, consistent with American building convention.

[2]Mr. Schneider is a former New York City Human Resources Administration supervisor.

inspect and wind the clock, until March 2015, when he was denied access. There is no indication in the record of the number of people who could or did visit.[3]

By 1980, the clock mechanism had fallen into disrepair, when city workers Marvin Schneider and Eric Reiner volunteered their time to restore the clock to working order and to wind it each week. The LPC enthusiastically urged the City to appoint a City Clock Master, stating that "[t]he clocks that grace the city's buildings are public treasures. While once common in New York only a few public clocks remain. . . . These clocks are not simply decorative elements on distinguished buildings, they are truly urban amenities." In 1992, Mayor Dinkins appointed Mr. Schneider as Clock Master of the City of New York and, at the appointment ceremony, stated that the city's few remaining

> "large mechanical clocks prominently displayed on buildings . . . were works of art, not only because of the manner in which they were designed and decorated, but also because of the elegant complexity of their mechanical 'innards.' These clocks are driven by mechanisms that were delicate and well balanced enough to keep time accurately but were durable enough to last for years. It is crucial that we carefully preserve and safeguard our City's architectural heritage, and

[3]Our colleague's conclusions that, as of 2015, the public had "long lacked access" to the clocktower, that it was only open for weekly guided tours before that, and that only a "limited number of people" could visit the upper three floors where the mechanism and clock faces are located are not supported by the record.

> the large mechanical clocks are an especially public and important part of that heritage"

Mr. Schneider continued to wind, oil, and maintain the clock, and gave weekly tours of the clocktower to members of the public, from in or about 1980 until 2015, when the current building owner concededly prevented him from doing so.[4]

In 1989, while the building was still owned by the City of New York, the LPC designated it as an Interior Landmark. The Interior Designation Report, completed in 1987, specifically singled out the "interior consisting of the clocktower gallery at the western end of the building and the spiral staircase leading to the clocktower machinery room; . . . interior consisting of the clocktower machinery room . . . , and the fixtures and interior components of these spaces, including but not limited to . . . [the] clock machinery." In making this designation, the LPC made a finding that the building and the designated portions of its interior have

> "a special character, special historical and aesthetic interest and value as part of the development, heritage and cultural characteristics of New York City, and the Interior or parts thereof are thirty years old or more,

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[4]The hearing testimony of the developer's architect, quoted by our colleague, is at odds with Mr. Schneider's affidavit, in which he states that he visited the clocktower every week to wind and inspect the clock, until March 10, 2015, when he was denied access. It is not clear from the record when the last tour took place.

> and that the Interior is one which is customarily open and accessible to the public, and to which the public is customarily invited."

In 2012, the City decided to sell the building to respondent Civic Center Community Group Broadway LLC (owner) based on its plan to repurpose the building as "a combination of residential hotel, retail [uses], and a community facility used for a digital media arts center." The Mayor's Office issued a Negative Declaration, applying to the building and a nearby site, which concluded that the proposed project "would not result in significant adverse impacts to any historic and cultural resources in the study area. It is expected that the project site[] at 346 Broadway . . . would undergo interior renovations and possibly exterior rehabilitation. All above ground and in-ground construction on both Landmark sites, including any . . . work on the LPC-designated interior landmark would require LPC review and issuance of an LPC permit."

In December 2013, the City sold the Building to the owner. Our opposing colleague essentially ignores the fact that the deed provides that the purchase was subject, inter alia, to: "Covenants, conditions, easements, leases and agreements of record[:] a. Notice of Landmark Designation recorded May 25, 1989 in Reel 1580 Lot 1448."

Before the purchase was completed, some of the individuals

involved in maintaining the clocktower met with representatives of the new owner and demonstrated the machinery of the hand-wound mechanical clock.

In October 2014, the owner submitted to the LPC an application for a Certificate of Appropriateness (COA) seeking permission to refurbish the building's exterior and interior and to modify some of the landmarked interior spaces. In particular, the application requested permission to convert the clocktower into a triplex private apartment, to disconnect the clock from its mechanism, and to electrify the clock.

The LPC held a public hearing on the owner's application on November 18, 2014 and a public meeting on December 16, 2014. At the beginning of the hearing, the owner's architects made a presentation about the proposal, stating in answer to a question that "the clocktower . . . is a very unique space, and the clock itself is very special." One of the Commissioners then noted that interior landmark designations are made "for the public benefit, and it seems to me that this [clocktower is] especially an interior that warrants that kind of public interaction" and asked whether it was feasible to make the clocktower open to the public to some degree. In response, the owner's architect stated that it might be possible but it was not their intention to do so. The LPC's counsel responded that the LPC does not have

"power under the Landmarks law to require interior-designated spaces to remain public" and "to require that [the clock] mechanism remain operable." Commissioner Goldblum asked if the clocktower would become private space and then asked:

> "Comm. Goldblum: So [the clocktower apartment owner] can store his suitcases up there.
>
> "Counsel: Correct."

Some of the witnesses, while generally expressing support for the broad outlines of the plan, questioned LPC counsel's interpretation of the Landmarks Law as to interior landmarks. The co-chair of the Landmarks Committee of the Community Board testified that part of the LPC's mandate is "to keep the clock working . . . and a directive must be put in place and in force to keep the clock working." A representative of the Historic Districts Council argued that "the exclusive private use of an interior landmark challenges the authority of the Landmarks Preservation Commission to protect our city's historic built environment." A representative of the Society for the Architecture of the City suggested that the LPC did not have the power to approve a COA that would deprive the public of access to a "beloved interior landmark." A representative of the New York Landmarks Conservancy pointed out that no interior landmark had previously been converted to private residential use. A

representative of the Tribeca Trust argued that the privatization of an interior landmark "constitutes a taking of the public [commons], an erosion of the public good." Petitioner Jeremy Woodoff[5] testified that

> "the current proposal, which would leave the clock mechanism hidden, privatized, not working and at risk . . . would be a great loss to the understanding of the 19th Century American horological advances and refinements and would destroy the historic relationship between the mechanism, clocktower and public time-telling function so carefully encompassed by the [Landmark] designation."

The Chair of the Commission continued to question whether the owner could reconfigure the proposal so that the clocktower would not be within a private apartment, and would be accessible, at least to the other residents of the building, suggesting that there might be some more "utility and benefit" to making the clocktower "more public" and that the LPC should have the ability to regulate "anything happening within that space."[6] Other

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[5]Mr. Woodoff is a member of the Board of Directors of petitioner Save America's Clocks, a former staff member of the LPC from 1980 to 2000, and currently employed in the Historic Preservation Office of the City's Department of Design and Construction.

[6]In support of her argument that the Commissioners' comments reflect a determination that granting any level of public access to the clocktower would be impossible, our colleague quotes only a portion of the LPC Chair's statement characterizing it as a "constrained space." The Chair went on to clarify that the floors making up the clocktower "seem constrained as apartment spaces. They just don't seem like [they] lend themselves as a

Commissioners raised similar questions about maintaining some degree of public access to the clock, and maintaining the historical mechanism. One commented that making the clock digital is "not a preservation of the clock." However, the Commissioners did not directly question the LPC counsel's opinion that they did not have authority to regulate access to the clocktower. The Chair concluded, "it seems like it's impossible for us to enforce." Before the conclusion of the public hearing, Commissioner Devonshire suggested that the Commissioners visit the clocktower rooms since it was such a "hot button" issue. Several of the Commissioners did so.

The Friends of 346 Broadway, which includes several of the institutional and individual petitioners as well as representatives of various horological, architectural and historical organizations, submitted written testimony to the LPC. They noted that, if the clock mechanism continues to be maintained, "it will last essentially forever. It will not 'wear

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private apartment . . . we should have ability to regulate [anything happening within that space]. And I don't know that that necessarily lends itself for being privatized." Commissioner Washington, also quoted by our colleague, suggested that "[s]omething more than what [the developer] originally offered, is, I think, another way [of] looking at it. So that may be the public is at least people in the building or people who they invite. Say that they use that space for, you know, some gathering or some, you know, festival."

out' or need replacement with a modern mechanism." However, the removal or alteration of any of the mechanism's parts "would destroy its integrity," because its "significance is based on its functional technology."[7]

At the beginning of the public meeting, the owner's architect stated that the owner's main reason for deciding to electrify the clock was to avoid anyone having to pass through a private living space to wind and maintain it. The architect could not confirm that all of the clock's mechanism would remain in place. However, upon questioning by the Commissioners, the architect confirmed that one could access the clock mechanism without passing through the living space of the proposed triplex apartment.

During the meeting, the LPC's counsel reiterated his opinion, stated earlier, that the LPC did not have authority to regulate the continued functioning of the clock mechanism or to require access. Seven of the eight Commissioners, including the Chair, spoke to this issue.[8] All but Commissioner Baron stated that they would prefer to mandate that the historic mechanism

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[7]Similarly, petitioner Christopher DeSantis stated in his affidavit to the article 78 court that disconnecting the clock from its mechanism would destroy the clock.

[8]Commissioner Bland did not speak during the hearing.

continue to operate, but that they believed, after hearing the LPC counsel's opinion, that the LPC did not have the authority to do so (Goldblum: "it comes down to what I personally, or others, might like the law to be and what the law is;" Gustafsson: "I think we, the Commissioners, all would love to . . . have the clock function the way it used to . . . . I think that [LPC's counsel] mentioned . . . that we don't require [windows and doors] to work the way they used to work . . ., and what we worry about is the way they look;" Moore: "[r]equiring an owner to operate a mechanism is not something we have done . . . for that clock to move electrically . . . . It's not the hand winding, which would be great, and I'd love to know that that's happening . . .;" Chapin: "it would be "very nice" to maintain the mechanism function, but the LPC can't regulate that; Washington: "I would like to see it continue to be serviced and to function the way it functions without the electronic part . . . and apparently, [this] is not . . . something we can mandate;" Chair Srinivasan: the requirement that the clock mechanism be maintained by a worker who would enter from the roof so as not to disturb the occupant "is not really within the purview of the [LPC]").

Commissioner Baron questioned the attorney's opinion, expressing her concern that the clocktower would be located

within a privately owned apartment, and as a result, would be disconnected from its historic mechanism and operated electrically, even though its unique mechanism was part of the reason for its designation. Accordingly, she voiced her dissent to the approval of the changes to the clock. Since the Rules of the City of New York require only six votes for a final determination (63 RCNY 1-04), the LPC approved the COA. Accordingly, seven Commissioners expressed their preference to require that the mechanism not be disconnected and continue to function, and their belief in counsel's opinion that they could not do so. Had they voted their preference, the application would not have passed. Similarly, had the three Commissioners who spoke in support of some form of continued public access to the clocktower voted against the proposal, and the remaining five Commissioners voted in favor of it, the proposal would not have passed.

The COA, issued on May 29, 2015, grants the owner permission to convert the clocktower into a luxury triplex condominium apartment. It requires that the owner record a restrictive declaration against the property that provides, inter alia,

> "for the permanent operation of the exterior clock faces of the clocktower by electronic or mechanical means, . . . for a cyclical inspection, reporting and maintenance program for the designated interior spaces on the upper floors that would be converted to

> residential use, . . . and that [the owner] and subsequent owners would provide reasonable access to the designated interior spaces to the LPC for periodic inspections and in response to reasonably credible complaints."

Despite the LPC counsel's opinion that the LPC is without authority to require continued public access to an interior landmark, the COA also directed that the owner execute and record a restrictive declaration requiring that the owner provide public access to the "main Banking Hall," another of the building's interior landmarks, and not use it for residential purposes.

Petitioners commenced this CPLR article 78 proceeding on June 17, 2015. On March 31, 2016, the motion court issued a decision, followed by an order and judgment entered on May 17, 2016, in which it granted the petition by partially annulling the COA to the extent that the COA allows work inside the clocktower that would completely eliminate public access, and allows work that would convert the clock from a mechanical to an electrical system of operation. The motion court concluded that the LPC's approval of the COA was affected by a mistake of law, to the extent that it approved the electrification of the clock and the elimination of public access to the clocktower, and that it lacked a rational basis for its decision on the public access issue. Respondents now appeal.

Standard of Review

While we agree with our colleague that rational basis is the correct standard of review, we view the LPC's determination as being both irrational and affected by an error of law. In particular, the LPC's determination was clearly based on the opinion expressed by its counsel that it had no authority to require public access of any kind to an interior landmark, and to require that the clock's historic mechanism continue to operate.[9] For the reasons discussed more fully below, we find that counsel's opinion was incorrect, and therefore, that the LPC's reliance on it requires that the article 78 petition be granted.

The LPC Chair and two Commissioners expressed a preference that the LPC require some level of continued public access to the clocktower, and a belief that they did not have the authority to require this. Seven of the eight Commissioners, including the Chair, expressed a clear preference that the clock mechanism continue to run, and a belief that they did not have the authority to require this. Had those Commissioners not followed

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[9]Contrary to our dissenting colleague's characterizations, we hold neither that the "owner of an interior landmark is required to maintain public accessibility in perpetuity" nor that the LPC was "mandated here to find that the clock had to be maintained mechanically in perpetuity;" rather, we hold only that the LPC has the authority under the Landmarks Law and, in this case, pursuant to the deed's recitation of the Landmark designation, to reject a COA that would cause a designated interior to be totally inaccessible to the public, and to regulate the use of the clock mechanism.

the erroneous legal opinion and instead voted their preference consistent with their expertise, the proposal would not have passed. Indeed, at oral argument before the motion court, the City continued to take the position, as it does before this Court, that the opinion expressed by the LPC's attorney, at the hearing and the public meeting, was correct as to the limits of the LPC's authority. Therefore, we disagree with our colleague to the extent that she finds that there is any ambiguity as to the LPC's reliance on counsel's opinion.

Moreover, we should not defer to the inaccurate legal opinion stated by LPC's legal counsel, and the Commissioners' reliance on it, because the authority of the LPC under the Landmarks Law to regulate public access to the clocktower and mechanical operation of the clock is purely a question of law and not an area within the LPC's expertise (*Matter of Teachers Ins. & Annuity Assn. of Am. v City of New York*, 82 NY2d 35, 42 [1993] ["Such deference . . . is not required where the question is one of pure legal interpretation"]). In *Teachers*, the Court of Appeals held that the interpretation of the phrase "customarily open or accessible to the public" in section 25-302(m) of the Landmarks Law is a question of law, and does not require judicial deference, including to the LPC's prior practice, since the statutory language is clear on its face (*id.* at 42-44, n 1).

Similarly, the interpretation of whether the clock mechanism is encompassed by the statutory term "architectural feature" (Landmarks Law § 25-302[1]), the use and preservation of which the LPC has authority to regulate, constitutes a question of law. We disagree with our colleague's view to the contrary.

The Clock Mechanism

We hold that the LPC has authority under the Landmarks Law to regulate the clock mechanism for two reasons.

First, this result effectuates the statutory purposes. The Landmarks Law, New York City's first historic preservation statute, was enacted in 1965, in response to the City's loss of a number of its more significant historic structures, including the original Pennsylvania Station. It was amended in 1973 to authorize the LPC to designate interior landmarks and promote their use (*Teachers*, 82 NY2d at 41). It declares that "the protection, enhancement, perpetuation and use of improvements[10] . . . of special character or special historical or aesthetic interest or value is a public necessity and is required in the interest of the health, prosperity, safety and welfare of the people" (Landmarks Law § 25-301[b]). The purposes of the

[10]The Landmarks Law defines an "improvement" as "[a]ny building, structure, place, work of art or other object constituting a physical betterment of real property, or any part of such betterment" (Landmarks Law § 25-302[i]).

Landmarks Law include the

> "protection, enhancement and perpetuation of such improvements . . . which represent or reflect elements of the city's cultural, social, economic, political and architectural history; . . . [the] foster[ing of] civic pride in the beauty and noble accomplishments of the past; . . . protect[ing] and enhance[ing] the city's attractions to tourists and visitors and the support and stimulus to business and industry thereby provided; . . . [and] promot[ing] the use of . . . interior landmarks . . . for the education, pleasure and welfare of the people of the city"(Landmarks Law § 25-301[b]).

The LPC is required, in considering an application for a COA, to "determine whether the proposed work would be appropriate for and consistent with the effectuation of the purposes of this chapter" (Landmarks Law § 25-307[a]). Similarly, in determining an application for permission to alter or reconstruct an interior landmark, "the commission shall consider the effects of the proposed work upon the protection, enhancement, perpetuation and use of the interior architectural features of such interior landmark which cause it to possess a special character or special historical or aesthetic interest or value" (Landmarks Law § 25-307[e]). The Interior Designation Report notes that the "clock and clocktower interior, which have not been altered, are a rarity in New York City . . . . The clock is one of the few remaining in New York which has not been electrified." Consistent with this, the LPC designated as an interior landmark the "fourteenth floor interior consisting of the clocktower

machinery room . . . and the fixtures and interior components of these spaces, including but not limited to, . . . clock machinery."[11] Thus, the clock's mechanism represents an element of the city's cultural and economic history and contributes to the building's historical value, and maintaining it would promote pride in the "accomplishments of the past" and advance the statutory purposes. This view was shared by all but one of the Commissioners, the Chair, and several speakers at the hearing, including a representative of the New York Landmarks Conservancy, and petitioners Marvin Schneider and Jeremy Woodoff.

Second, the Landmarks Law defines the term "interior architectural feature" to include the "components of an interior, including, but not limited to . . . the type and style of all . . . fixtures appurtenant to such interior" (Landmarks Law § 25-302[l]). The Landmarks Law permits the LPC to "apply or impose, with respect to the construction, reconstruction,

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[11]In reaching the conclusion that the clock's mechanical operation "is outside the scope of the LPC's statutory authority," our colleague ignores the fact that the landmark designation, consistent with the accompanying Report, specifically refers to the mechanical operation of the clock as a protected feature. Furthermore, as discussed above, the City's appointment in 1992 of a Clock Master to care for the City's few remaining historic clocks underscores that the historical significance of these clocks derives "not only [from] the manner in which they were designed and decorated, but also because of the elegant complexity of their mechanical 'innards.'"

alteration, demolition *or use* of [a designated landmark] or the performance of minor work thereon, regulations, limitations, determinations or conditions which are more restrictive than those prescribed or made by or pursuant to other provisions of law applicable to such activities, work or use" (Landmarks Law § 25-304[b] [emphasis added]). This language clearly gives the LPC authority to require the owner to run the clock by its still functioning mechanism and to deny the request to electrify it.

Indeed, there would be little point in designating the machinery as a landmark without an expectation that it would continue to operate for so long as it can. As Assistant City Clock Master Forest Markowitz commented at the hearing, disconnecting the mechanism and electrifying the landmarked clock would be analogous to replacing the engine of a classic car with a modern engine: "he would now have a Chevy Volt and not a 1948 Dodge."

Nevertheless, our colleague would find that the LPC's determination was rational and not affected by an error of law, even though there was testimony at the public hearing that disconnecting the mechanism would, at best, place the clock mechanism at risk, and, at worst, destroy it, and despite the fact that six of the Commissioners and the Chair (enough to have rejected the proposal) stated that they would have preferred that

the mechanism continue to operate, but believed that they did not have the power to require this.

Our colleague states that the LPC, in approving the proposal to electrify the clock, relied on its own interpretation of "interior architectural features," rather than the legal advice of its counsel, and that, therefore, its decision is not affected by an error of law. This is wrong for two reasons. First, as discussed above, the record makes clear that six Commissioners and the Chair relied on the erroneous legal advice of counsel. Indeed, the only Commissioner who voted against the proposal, Commissioner Baron, did so because she questioned the accuracy of counsel's advice. Second, even if the Commissioners were relying on their own ideas as to what constitutes "interior architectural features" under the Landmarks Law, there can hardly be a more obvious instance of statutory interpretation, on which we owe no duty of deference to the LPC. We are not required to defer to the LPC's misunderstanding of its authority under the Landmarks Law, and we should not do so when that misunderstanding was so clearly contrary to what the Commissioners viewed as the course most in keeping with their expert consideration of the historical and aesthetic importance of the clock and its mechanism.

We also disagree with our colleague's conclusion that the LPC's approval of the clock mechanism proposal was rational.

First, six Commissioners and the Chair stated that they did not want to approve it because they recognized the historical and aesthetic significance of the functioning of the clock's unique mechanism, which was part of the reason for its designation. Second, there was testimony at the hearing to the effect that disconnecting the clock from its mechanism would place it at risk or even destroy it. Indeed, the owner's architect testified that there was no guarantee that all of the mechanism would be preserved. Accordingly, our colleague's conclusion that electrification of the clock is not irrational because it will "modernize[]" it, and that the clock mechanism will be "preserved" is not supported by the record.

When the Landmarks Law was enacted in 1965, no one could have imagined the incredible technological advances in the decades to come, and the resulting vast aesthetic impact on our environment. Objects once thought of as ordinary become increasingly rare, and technologies once thought of as modern become obsolete. Their physical existence and functioning take on new meaning as connections to our history. This majestic clock, and its historically significant functioning mechanism, is a perfect example of the very reason the Landmarks Law exists, because the "protection, . . . perpetuation, and use of [objects] of special character or special historical or aesthetic interest

or value is a public necessity" (Landmarks Law § 25-301[b]). The actions of the LPC in this case are contrary to that purpose. It is important that we clarify that the LPC has the authority to take the action that a majority of its Commissioners believed consistent with their expertise in preservation.

Public Access

Under the Landmarks Law, the LPC may reject a COA that would cause a designated interior to be inaccessible to the public, and may require the owner to continue to provide some degree of public access. To the extent that our colleague would hold otherwise, we disagree, based on explicit provisions of the Landmarks Law.

First, preserving the public's access to landmarked spaces furthers the statutory purpose. It is difficult to see how an interior landmark located in a private home can foster civic pride in the city's past, educate our citizens, enhance tourism and provide the stimulus to business and industry that tourism provides. Thus, the statutory purposes are thwarted if the public is denied access to the clocktower and the opportunity to view its historic mechanism. The issue in this case is not whether, as our colleague puts it, "the owners/occupants of the residential unit would be required to allow members of the public to traverse their private triplex residence," since no such

residential unit has ever existed. Rather, the question is whether the building owner's proposal to transform the clocktower into a private residence violates the interior landmark designation to which its ownership is subject under the deed. We find that it does.

Second, as discussed above, the Landmarks Law gives the LPC broad authority to regulate, limit or condition proposed alterations to landmarked interiors (Landmarks Law § 25-304[b]). Indeed, the LPC exercised this very authority in the COA itself, by requiring that the owner execute a restrictive declaration that the building's landmarked banking hall shall remain open to the public and shall not be used for residential purposes. The owner has not challenged this aspect of the COA. If the LPC has authority to require a restrictive declaration that the banking hall remain open to the public, then it must have the same authority as to the clocktower. Our colleague argues that this "memorializes a voluntary pledge" by the owner. However, the owner's presentation to the LPC included a statement that the banking hall "will be a commercial space, which means it's more open to the public." This is hardly comparable to the permanent legal consequences of a restrictive declaration, which was the requirement imposed by the LPC within the exercise of its authority.

Third, as petitioners point out, the plain language of the Landmarks Law requires that, once designated, an interior landmark is and shall remain accessible by the public. Respondents' and our colleague's view that public accessibility is only a prerequisite of designation and is not required going forward is contrary to the plain language of the statute, and violates the rules of statutory construction. Both our colleague and respondents rely on section 25-302(m) of the Landmarks Law, which defines an "interior landmark" as

> "an interior, or part thereof, any part of which is thirty years old or older, and which is customarily open or accessible to the public, or to which the public is customarily invited, and which has a special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation, and which has been designated as an interior landmark pursuant to the provisions of this chapter."

However, section 25-302(m) clearly describes the characteristics of interior landmarks that have previously been designated, since it uses the past perfect tense in describing an interior landmark as a space that "has been designated as an interior landmark pursuant to the provisions of this chapter." Moreover, section 48 of the General Construction Law provides that, in reading a statute, "[w]ords in the present tense include the future." Since the Landmarks Law provides that a previously designated interior landmark "is" customarily open to the public, or the

public "is" customarily invited to such spaces (Landmarks Law § 25-302[m]), the Landmarks Law contemplates that interior landmarks shall remain accessible to the public in the future.

Fourth, petitioners do not dispute that reasonable limitations on the public's access to an interior landmark are permissible under the Landmarks Law, which explicitly contemplates public access by invitation (Landmarks Law § 25-302[m]). They do not seek constant access, but only some public access, which is consistent with both the definition of an interior landmark (*id.; see also Teachers*, 82 NY2d at 43), and with the clocktower's historic accessibility, which, most recently, consisted of weekly tours. Unlike landmarked exteriors, which the public may enjoy at any time by walking by, interior landmarks (which include lobbies, theaters, restaurants, and, in the case of the only other upper floor interior landmark, the Rainbow Room, a bar) can usually be enjoyed only at certain times, or with other restrictions, such as, in the case of theaters, upon purchase of a ticket. However, until now, there has never been a designated interior landmark permitted to be converted into a private residential space where the public would have no access. Therefore, approval of the COA and the consequent placement of the landmarked clocktower in a private residence curtained from public view is inconsistent with the

statutory definition.

Fifth, our colleague argues that the record does not show that a "majority of the LPC commissioners who voted in favor of the proposal" did so based on counsel's advice. However, the Landmarks Law requires the vote of six Commissioners for a final determination (63 RCNY § 1-04). Therefore, had only the three who expressed that they would have liked to have required some continued public access but believed they could not do so voted against the proposal, only five Commissioners would have remained to vote in favor of the COA, which would not have been sufficient for its approval.

Finally, the argument by the owner and our colleague that requiring some continued public access to the clocktower would constitute a "taking" is incorrect for two reasons. First, government regulation of private property only constitutes a taking requiring just compensation if it is not reasonably necessary to effectuate a substantial public purpose and/or does not permit the owner the reasonable beneficial use of the property (*Penn Cent. Transp. Co. v City of New York*, 438 US 104, 138 [1978]; *see also Lingle v Chevron USA, Inc.*, 544 US 528, 535-40 [2005]). The Supreme Court has previously held that New

York City's Landmarks Law serves a substantial public purpose,[12] and that the mere diminution of property value as a result of legislation designed to protect historically significant properties does not establish a taking (*Penn Cent.*, 438 US at 129, 131). Here, the owner has not even attempted to meet its burden to show that providing some public access to the clocktower will deprive it of any beneficial use of the property (*Keystone Bituminous Coal Assn. v DeBenedictis*, 480 US 470, 499 [1987]). Instead, it argues that continuing to permit some public access to the clocktower constitutes a "per se physical taking," citing *Dolan v City of Tigard* (512 US 374, 391 [1994]). However, in that case, the Supreme Court did not hold that a public easement imposed by a municipality on privately owned property as a condition for a building permit constitutes an impermissible taking per se; rather, it held that, in that case, the public easement constituted a taking because the town's findings in support of it lacked the required "rough

[12]Our colleague's claim that "the number of members of the public visiting the Clocktower Suite would have been very few" is thus beside the point. Indeed, this Court has previously noted that it "is the function of the Landmarks Preservation Commission to ensure the continued existence of those landmarks which lack the widespread appeal to preserve themselves" (*Matter of Society for Ethical Culture in City of N.Y. v Spatt*, 68 AD2d 112, 117 [1st Dept 1979], affd 51 NY2d 449 [1980]). Moreover, our colleague's claim has no support in the record.

proportionality" between the public good sought and the impact of the development for which the property owner sought permits (*Dolan*, 512 US at 391). Accordingly, contrary to the owner's claim, the Supreme Court has not held that a public easement can never withstand constitutional scrutiny. Furthermore, as discussed above, the Supreme Court has already held that the Landmarks Law serves an "entirely permissible governmental goal" (*Penn Cent.*, 438 US at 129) and that is not challenged here. That being the case, it is clear that closing off the public from all access to an interior landmark would vitiate the purpose of the Landmarks Law.

Our colleague echoes respondents' argument that requiring any level of public access would impose an impermissible burden on the owner because it would require modifications to "achieve ADA compliance." However, this argument fails, since the Americans with Disabilities Act (ADA) only requires removal of barriers to access where "readily achievable" (42 USC § 12182[b][2][A][iv]; 28 CFR § 36.304[a]), meaning that such alteration is "easily accomplishable and able to be carried out without much difficulty or expense" (42 USC § 12181[9]; 28 CFR § 36.304[a]). The ADA technical assistance manual specifies that removal of barriers is not "readily achievable" if it would "threaten or destroy the historic significance of a building or

facility that . . . is designated as historic under State or local law" (ADA Title III Technical Assistance Manual § III-4.4200).

Moreover, our colleague fails to address the fact that the owner in this case purchased the building by a deed that provides that the purchase is subject to the landmark designation. While regulation of public access to a privately owned interior landmark might implicate constitutional issues where the owner purchased the property prior to imposition of the government regulation at issue, that is not the case here. Here, the owner purchased the building by a deed that specifies that the transfer is subject to the landmark designation; that was not true in any of the cases cited by the owner or in the opposing writing (*Dolan*, 512 US 374 [1994], *supra*; *Nollan v California Coastal Commn.*, 483 US 825 [1987]; *Loretto v Teleprompter Manhattan CATV Corp*, 458 US 419 [1982]; *Kaiser Aetna v United States*, 444 US 164 [1979]; *Nectow v City of Cambridge*, 277 US 183 [1928]); *Seawall Assoc. v City of New York*, 74 NY2d 92 [1989], *cert denied* 493 US 976 [1989]). The owner cannot claim the "taking" of a right that it never had, since its ownership rights were limited by the recitation in the deed of the Landmark Designation. The owner has tacitly acknowledged these limits by not challenging the LPC's requirement that the owner execute a restrictive

declaration that the building's landmarked banking hall not be converted to residential space and remain open to the public (*see Lucas v South Carolina Coastal Council*, 505 US 1003, 1028-1029 ["we assuredly *would* permit the government to assert a permanent easement that was a pre-existing limitation upon the land owner's title"] [emphasis in original]; *Penn Cent.*, 438 US at 124-125 ["taking" challenges dismissed where government action caused economic harm but "did not interfere with interests that were sufficiently bound up with the reasonable expectations of the claimant to constitute 'property'"]).

Accordingly, the order and judgment (one paper) of the Supreme Court, New York County (Lynn R. Kotler, J.), entered May 17, 20016, granting the petition brought pursuant to CPLR article 78 to annul the Certificate of Appropriateness, issued May 29, 2015, which authorized work on certain features of a designated interior landmark, should be affirmed, without costs.

All concur except Tom and Kahn, JJ. who dissent in an Opinion by Kahn, J.

KAHN, J. (dissenting)

Because I believe that respondent New York City Landmarks Preservation Commission (LPC) acted properly in issuing a Certificate of Appropriateness (COA) approving work in the landmark-designated clocktower space of the building in question, notwithstanding that the work would effectively deny public access to that portion of the building space, and in approving electronic operation of the historic clock housed in that building space while preserving its original mechanism, I respectfully dissent.

I. *Factual Background*

In 1987, the LPC conferred landmark status on the New York Life Insurance Building, which had been acquired by respondent City of New York (the City) in 1968. In addition to designating the exterior of the building a landmark, the LPC designated 10 interior spaces of the building spanning around 20,000 square feet as interior landmarks, including the banking hall on the ground floor, the main lobby, the clocktower gallery, the clocktower machinery room and fixtures and interior components, including the "No. 4 Striking Tower Clock" - a 5,000-pound bell driven by a 1000-pound weight and a hammer powered by two 800-pound weights, located in the "Clocktower Suite," which consists of four floors beginning on the 14th floor of the building.

In 2013, the City sold the building to respondent Civic Center Community Group Broadway LLC (Civic Center) for $145 million as part of a broader plan to redevelop the area in which the building is located.

In August 2014, Civic Center applied to the LPC for a COA in order to permit Civic Center to perform its proposed work on the building's landmark designated exterior and interior spaces in furtherance of a plan to convert the building to mixed commercial and residential use. Civic Center proposed to use the Clocktower Suite as a private triplex apartment, preserving both the Clocktower Suite and the clock's original mechanism. Under the proposal, the clock's original mechanism, although preserved, would be nonoperational, with continuous operation of the clock shifted to a newly installed electronic clock mechanism. In addition, Civic Center's proposal included provisions that the LPC would be entitled to inspect the Clocktower Suite periodically, and the clock's exterior would remain visible to the public from the street with the clock appearing outwardly unchanged.

On November 18, 2014 and December 16, 2014, the LPC held a public hearing on Civic Center's application. Some of those who testified at the hearing argued that LPC should require Civic Center to open the Clocktower Suite to the public and to preserve

the original mechanical operation of the clock. During the hearing, LPC's general counsel commented that the LPC had no power under the Landmarks Preservation Law (Landmarks Law) to require that interior-designated spaces remain open to the public or that the original clock mechanism remain in operation. The architect for the work project testified that the clocktower was, in fact, then "inaccessible to the public, legally and from a practical and safety point of view."

On December 16, 2014, at the conclusion of the hearing, with eight members of the LPC present, the LPC voted to approve Civic Center's application, with seven commissioners in favor of full approval and with one commissioner dissenting in part.

On May 29, 2015, the LPC issued the COA. The COA reflected the LPC's approval of restoring of the Clocktower Suite's cast-iron spiral staircase; restoring of the "retaining the counterweight and enclosure"; disconnecting, retaining and protecting the existing clock mechanism; restoring the "wood and glass mechanism enclosure" and "electrifying the clock operation." The COA also required the owner (and its successors) to preserve the clock's mechanical components in place but permitted the owner to disconnect the clock from its

mechanical system and to install an electronic operating system.[1] In addition, Civic Center made a Restrictive Declaration that it would provide the LPC with reasonable access to the designated interior landmark spaces for cyclical inspections and in response to reasonably credible complaints.

II. *Legal Standards*

Where an article 78 proceeding concerns an administrative determination by the LPC, such as issuance of a COA, the scope of permissible judicial review is limited to two inquiries: first, whether the LPC's action has a rational basis in the record and is not arbitrary and capricious (*see Matter of Teachers Ins. and Annuity Assn. of Am. v City of New York*, 82 NY2d 35, 41 [1993]; *Matter of Stahl York Ave. Co. LLC v City of New York*, 76 AD3d 290, 295 [1st Dept 2010] *lv denied* 15 NY3d 714 [2010]; *Matter of Society of Ethical Culture in the City of N.Y. v Spatt*, 68 AD2d 112, 116 [1st Dept 1979], *affd* 51 NY2d 449 [1980]), and second, whether the LPC's action has "a reasonable basis in law" (*Teachers Ins.*, 82 NY2d at 41). If an LPC determination meets each of these two basic criteria, the reviewing court must uphold it (*id.*).

As the agency charged with implementing the Landmarks Law

[1] The LPC also approved the full restoration of the building's main lobby stair hall and banking hall.

(Administrative Code of City of NY §§ 25-301 - 25-322), the LPC is presumed to have developed expertise that would require deference to its interpretation of that law if not unreasonable (*Teachers Ins.*, 82 NY2d at 42, citing *Kurcsics v Merchants Mut. Ins. Co.*, 49 NY2d 451, 459 [1980]). As the Court of Appeals has explained:

> "Where the interpretation of a statute or its application involves knowledge and understanding of underlying operation practices or entails an evaluation of factual data and inferences to be drawn therefrom, the courts regularly defer to the governmental agency charged with the responsibility for administration of the statute"

(*Kurcsics* at 459). A reviewing court cannot substitute its own judgment for that of the LPC, as informed by its own historians and architects (*see Matter of Committee to Save Beacon Theater v City of New York*, 146 AD2d 397, 405 [1st Dept 1989] ["The (LPC) is a body of historical and architectural experts to whom deference should (be) given"]; *see also Matter of Stahl York Ave. Co. LLC v City of New York*, 76 AD3d at 295 [same]; *Matter of Citineighbors Coalition of Historic Carnegie Hill v New York City Landmarks Preserv. Commn.*, 306 AD2d 113, 114 [1st Dept 2003], *appeal dismissed* 2 NY3d 727 [2004] [same]; *Matter of Socy. of Ethical Culture v Spatt*, 68 AD2d at 117-118 [same]).

Deference to the LPC is not required when the question is one of pure legal interpretation of a statute, however (*Teachers*

Ins., 82 NY2d at 42, citing *Matter of Moran Towing & Transp. Co. v New York State Tax Commn.*, 72 NY2d 166, 173 [1988]). Pure statutory interpretation is a matter of "pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent" without the need "to rely on any special competence or expertise of the administrative agency" (*Kurcsics v Merchants Mut. Ins. Co.*, 49 NY2d at 459).

III. *Discussion*

A. Public Access

1. Rational basis

Under the circumstances presented in this case, I believe that the LPC acted rationally in issuing the COA to the extent that it permitted work that would eliminate public access to the Clocktower Suite, notwithstanding the LPC's prior designation of the Clocktower Suite as an interior landmark.

The Landmarks Law defines an "interior landmark" as follows:

> "An interior, or part thereof, any part of which is thirty years old or older, and which is customarily open or accessible to the public, or to which the public is customarily invited, and which has a special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation, and which has been designated as an interior landmark pursuant to the provisions of this chapter" (Administrative Code § 25-302[m]).

The Landmarks Law imposes duties on "persons in charge of an

improvement containing an interior landmark" to (1) keep in good repair of all portions of the interior landmark and any improvements performed on them (Administrative Code § 25-311[b]) and (2) refrain from "alter[ing], reconstruct[ing] or demolish[ing]" any of the interior landmark without the LPC's prior approval (Administrative Code § 25-305[a][1]).

The Landmarks Law does not explicitly state that the owner of a building containing an interior landmark is required to maintain public access to that landmark in perpetuity, however. Although a space must be "customarily open or accessible to the public, or one to which the public is customarily invited" in order to be *designated* as an interior landmark (Administrative Code § 25-302[m]), *maintenance* of public accessibility to an interior landmark has never been deemed an ongoing obligation of its owner. In the 50 years since the Landmarks Law was first enacted, "it has been the City's policy and practice that an interior landmark owner's sole obligation was to preserve its protected features of special historical or aesthetic interest or value" (Frank E. Chaney, *What's Yours Is Mine: Public Access to Private NY Property*, www.law360.com [April 18, 2016]). The City's adherence to this policy is illustrated by the fact that after September 11, 2001, many building lobbies that had been designated as interior landmarks were closed to the general

public and only those people having business in the buildings were permitted to enter (*id.*). The majority's contrary view, that an owner of an interior landmark is required to maintain public accessibility in perpetuity, is without support in settled law.

The pragmatic nature of the project of landmark preservation touted by the City (and embraced by the author of the article) at least achieved continued public access to 10 designated interior spaces. The loss of public access to the Clocktower Suite, an interior space that was never capable of being widely open to the public due to its location and other structural issues, and that is highly amenable to conversion to private use, appears to be a reasonable compromise since robust public access would, as argued by respondents, "leave little to no room for residential use of the suite and, quite possibly, a broad swath of the 14th floor," or would otherwise create a logistical nightmare, and would make preservation of the suite's other architectural features impossible because such access would require renovations to make the space compliant with the Americans With Disabilities Act (ADA) and the building code.[2]

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[2] We recognize that, as the majority points out, installation of such facilities may not be required by the Americans With Disabilities Act, as the ADA requires removal of preexisting barriers to access only if "readily achievable" (42

Nonetheless, the majority maintains that because section 25-302(m) defines "interior landmark" as a space that "*has been* [so] designated," the references in that definition to "[a]n interior . . which *is* customarily open or accessible to the public or . . . to which the public *is* customarily invited" amount to requirements with which owners must continuously comply even after "interior landmark" designation (Administrative Code § 25-302[m] [emphasis added]). In advancing this argument, the majority's reliance on General Construction Law § 48, which states the general principle that words set forth in the present tense in a statute include the future, is misplaced. At the outset, the general principle set forth in General Construction Law § 48 is not applicable where the statute indicates a contrary intention (*see* McKinney's Cons Laws of NY, Book 1, Statutes § 75 [b]). In the case of the Landmarks Law, the only express requirements set forth by the legislature were that interior landmarks be maintained in good repair (Administrative Code § 25-

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USC § 12182[b][2][A][iv]) and such measures are deemed not "readily achievable" if they "would threaten or destroy the historic significance of a building" (Department of Justice Technical Assistance Manual § III-4.4200). The majority points to no proof, however, that installation of elevators would not be readily achievable. Assuming that such installation would be readily achievable, it would be required by the ADA and would still impose a burden on the owner of the building in terms of time and expense.

311[b]) and that their owners refrain from alteration, reconstruction or demolition of interior landmarks without prior approval by the LPC (Administrative Code § 25-305[a][1]). Had the legislature intended that the Landmarks Law impose requirements on owners of interior landmarks to maintain public access, the legislature would have been fully capable of saying so. The fact that the Landmarks Law does not include such an express requirement indicates that the interpretation of the phrases "is customarily open or accessible to the public" and "to which the public is customarily invited" in section 25-302(m) as imposing post-designation public access requirements on owners is not reflective of the intent of the legislature.

Further, "[t]he language of a statute is generally construed according to its natural and most obvious sense, without resorting to an artificial or forced construction" (McKinney's Cons Laws of NY, Statutes § 94). Here, the natural and most obvious sense of the language of section 25-302(m) is that it simply sets forth all of the other characteristics that an interior space must possess in order to be designated an "interior landmark" by the LPC. In interpreting the language of section 25-302 as imposing post-designation requirements on owners of interior landmarks beyond those expressly stated in other provisions of the Landmarks Law, the majority is employing

an artificial and forced construction of that statute.

Furthermore, prior to issuing the COA, the LPC held extensive hearings on the public access issue, and the record evidence provides ample support for its determination. As is evident from the record, in order to provide the public with access to the Clocktower Suite, the owners/occupants of the residential unit would be required to allow members of the public to traverse their private triplex residence in order to reach the clocktower gallery and mechanism room. Additionally, provision of access to the upper three floors of the Clocktower Suite would necessarily be limited to visitors without mobility issues unless the cast iron spiral staircase leading to the 15th and 16th floors, where the existing clock pendulum and mechanism are housed, and the ceiling hatch and ladder leading to the 17th floor, where the bell is located, were supplemented with an elevator and other means of access to the upper three floors of the Clocktower Suite, which would be installed at the risk of sacrificing the integrity of the architectural features of the Clocktower Suite. These measures would impose upon Civic Center additional burdens in terms of time and cost which it did not agree to assume at the time it purchased the building, and would also inhibit Civic Center's ability to market its prime condominium unit.

Moreover, as is evident from the small floor areas of the Clocktower Suite[3] the number of people who would avail themselves of public access, were it afforded, would be necessarily small. Under these circumstances, the LPC's decision to grant a COA that would permit the owner to proceed with work that would preserve the integrity of the clocktower area while denying public access was a rational determination.

Relying on *Matter of Society for Ethical Culture in City of New York v Spatt*, the majority argues that in determining whether the LPC's effective denial of public access to the Clocktower Suite was rational, we are wrong to consider the small number of persons who would visit the Clocktower Suite should public access be required, in that among the LPC's purposes is "to ensure the continued existence of those landmarks which lack the widespread appeal to preserve themselves" (68 AD2d at 117). That argument misses the mark, however. In this case, our view that the number of visitors to the Clocktower Suite would be relatively small is based upon space limitations in the upper floors of the clocktower area, rather than any lack of public support for its preservation as a landmark, which was the concern in *Spatt*.

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[3] For example, the interior floor area on the 15th floor, which houses the clock pendulum mechanism, measures approximately 17 feet by 17 feet, including the space occupied by the pendulum enclosure and the spiral staircase.

Moreover, this case stands in stark contrast to *Penn Central Transp. Co. v City of New York* (438 US 104 [1979]), where the United States Supreme Court observed that the preservation of the facade of Grand Central Terminal achieved a substantial public purpose in being visible to millions of the City's residents, visitors and commuters (438 US at 129). In any event, in this case denial of public access to the Clocktower Suite, regardless of the number of members of the public who would have access to its upper floors, would work to preserve the architectural integrity of the clocktower by eliminating the need to install an elevator or other means of facilitating public access that might adversely impact the clocktower's interior architectural features.

Additionally, the majority argues that there is no support in the record for the notions that the public long lacked access to the clocktower, that, when it was open to the public, it was only open for weekly guided tours and that only a limited number of people could visit the upper three floors of the clocktower. The affidavit of Forest Markowitz states that he conducted almost weekly tours of the clocktower until access to the clocktower was terminated on March 10, 2015. Moreover, as the record shows, access to the upper three floors was limited to people without mobility issues, in that the 15th and 16th floors were accessible

only by a cast iron staircase and the 17th floor only by a ceiling hatch and ladder.

The majority's assertion that the LPC's determination in this case is unprecedented, in that there has never been a designated interior landmark which the LPC has permitted to be converted into a private residential space without provision for public access, does not compel a contrary conclusion. The LPC's determination here, even if unprecedented, seems a reasonable compromise, given that fair provision of public access to all members of the public, including those with mobility issues, would require the installation of an elevator or other form of alternative means of safe access to the upper floors of the Clocktower Suite. As stated above, such an installation would impinge upon the integrity of the interior architectural features of the space by rendering them more difficult to see and by risking their reduction or removal in order to make way for an elevator shaft or other means of access. To the extent that petitioners view the LPC's pragmatic determination in this case as indicative of its tendency to favor private development over the preservation of, and public access to, landmarks, that concern is appropriately resolved in the political arena.

Although not required to do so, given the limitations on the scope of our review in this article 78 proceeding, were I to

address the issue of whether the LPC could have properly required Civic Center to provide public access to the Clocktower Suite in perpetuity, as the majority effectively holds, I would find that such a requirement would raise issues under the Fifth Amendment's taking clause (*see Nollan v California Coastal Commn.*, 483 US 825, 831 [1987] ["Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, . . . we have no doubt there would have been a taking"]).

The majority's reliance on *Penn Central* in support of the contrary view is misplaced. In *Penn Central*, the United States Supreme Court set forth the principle that government regulation of private property could constitute a taking "if not reasonably necessary to the effectuation of a substantial public purpose" (438 US at 127, citing *Nectow v City of Cambridge*, 277 US 183, 188 [1928] [governmental land use restriction "cannot be imposed if it does not bear a substantial relation to the public health, safety, morals or general welfare"]). In determining whether a governmental entity's action constitutes a taking, the consideration of the level of public good achieved by the action must be balanced against the degree of adverse impact the action would have on the owner's use of the property (*see Penn Central*, 438 US at 127).

The procedural postures and factual backgrounds of *Penn Central* and this case are markedly different, however. In *Penn Central,* the owners of Grand Central Terminal (GCT) brought suit against the LPC on federal constitutional grounds, alleging that its refusal to permit construction of a multistory office tower above GCT, which had previously been designated a landmark by the LPC, constituted a taking.

The facts and circumstances presented in *Penn Central* led the Supreme Court to conclude that the LPC's determination was not a taking, however. Specifically, the *Penn Central* Court found that the LPC's refusal to permit construction of the office tower achieved a substantial public purpose, in that the preservation of GCT's 42nd Street facade as an historic landmark would enhance the quality of life of millions of the City's residents, visitors and commuters "by preserving the character and desirable aesthetic features of [the City]" (438 US at 129). The Court also found that the LPC's refusal did not deprive the owner of the use of its air rights, in that those rights were transferable to other parcels in the vicinity of GCT, thereby mitigating any financial burdens imposed on the owner (438 US at 137).

Here, by contrast, were the LPC to have permitted public access to the Clocktower Suite in perpetuity, the number of

members of the public visiting the Clocktower Suite would have been very few, given the record evidence as to the small size of its upper floors. This relatively small number of prospective visitors to the Clocktower Suite stands in stark contrast to the millions of people who can easily view the facade of GCT on a daily basis. Thus, while leaving the GCT facade intact achieved a substantial public purpose, in that the facade could be seen and enjoyed by many (*see Penn Central*, 438 US at 129), no substantial public purpose would be achieved by public access to the interior of the clocktower to a relative few. On the other hand, here, passersby will still be able to view the clock, which would remain fully operational, from the street. Moreover, as previously stated, requiring public access to the Clocktower Suite would compel its owners to allow members of the public to traverse their private residence, likely requiring them to install an elevator and take other measures to ensure the accessibility of its upper floors by all members of the public, including those with mobility issues. The result would reduce the marketability of the Clocktower Suite as a private residential unit. Thus, if I were to reach this issue, I would find that a requirement of public access would be of minimal benefit to the public at large, yet would engender substantial burdens for both Civic Center and the owners of the Clocktower

Suite. Therefore, weighing the minimal public good and the substantial burden to the building owner that public access would achieve, imposition of any such requirement would, under the *Penn Central* principle, likely raise issues of a taking.

The majority urges that the owner cannot claim any constitutional "taking," because its ownership rights were limited by the provisions of the deed, which incorporated by reference the covenants and conditions of the landmark designation. In making that argument, the majority assumes that the landmark designation requires the owner to provide public access. As already discussed, this assumption is not supported by the Landmarks Law and cannot be read into the building's designation as a landmark. Nor is there is any express provision in either the Notice of Landmark Designation or the deed requiring the owner to maintain public access to the Clocktower Suite.

In sum, upon review of all of the record evidence in this proceeding, and according due deference to the expertise of the LPC in making its determination, I conclude that the LPC had a rational basis for approving work that would eliminate public access to the Clocktower Suite (*see Teachers Ins.*, 82 NY2d at 41; *Matter of Stahl York Ave. Co. LLC v City of New York*, 76 AD3d at 295).

2. Error of law

Petitioners contend that the LPC's approval of the effective elimination of public access to the Clocktower Suite was based on an error of law, in that the LPC relied on the erroneous advice of its counsel that the LPC lacked authority to require public access.

The comments of three of the eight LPC commissioners present on December 16 to the effect that they would have preferred continued public access to the Clocktower Suite but did not have the authority to require it do not substantiate the majority's view that the LPC's determination in this regard was made in reliance upon the allegedly erroneous advice of the LPC's counsel. In any event, the LPC's counsel's advice and the stated views of those three commissioners that the LPC lacked the authority to require public access to the Clocktower Suite were correct, as there is no provision in the Landmarks Law conferring such statutory authority on the LPC. Although the majority points out that a vote of six commissioners was required for approval and that, had the three commissioners in question voted in accordance with their personal preferences, the application would have failed, again, those commissioners who believed that, regardless of their personal preferences, they could not require public access and voted accordingly were correct.

Even assuming that the LPC counsel's advice to that effect was erroneous, moreover, the record evidence is insufficient to establish that the majority of the LPC commissioners who voted in favor of the proposal did so solely based upon the belief that the LPC lacked the power to require public access or solely in reliance upon the LPC's counsel's advice to that effect. Rather, the comments of the commissioners appear to reflect the recognition that granting the general public access to the interior of the clocktower was not possible, given its space and logistical constraints ([Chair Srinivasan: "the clock tower's space and the space above where you have the mechanism, it's a very constrained space"] [Chair Srinivasan: "it's square footage that basically you cannot use, especially the topmost floor"]; [Comm. Washington: "it's not so much a question of having access to the [clock] mechanism as it is that the mechanism be serviced or maintained so that the clock works"]). At this point in the proceedings, the commissioners, who, as these comments reveal, were fully aware of the clocktower's space constraints, were considering whether, given the clocktower's limited capacity, provision of restricted public access, such as to residents of the building only, was feasible as an alternative to having the clocktower converted to a private apartment. Ultimately, after conducting a site inspection and hearing the architect's

testimony that the clocktower was inaccessible to the public for legal, practical and safety reasons, the commissioners abandoned the idea of limited public access to the clocktower and concluded that conversion of the clocktower to use as a private apartment for was both feasible and acceptable.

The LPC's Chair's comment regarding "utility and benefit" to the public, made in the course of this discussion, appears to be a reference to finding a way to operate the clock in order for the public to appreciate it from the street rather than providing the general public access to the clocktower (Chair Srinivasan: referring to "utility and benefit for being more public" followed shortly thereafter by "the idea of the clock working and how it works"). The record reflects that the LPC considered the effective denial of public access to the interior of the clocktower a trade-off for the restoration of its interior architectural features, as well as the enhancement and increased public accessibility to the building as a whole (Chair Srinivasan: "I just want to comment . . . on the point of trade-offs looking at this . . . holistically. There are interior spaces within this building that are so worthy of being enhanced . . . their restoration and bringing them back to the public is such a significant benefit that I would urge [the] Commissioners to look at the entire project holistically"). As the LPC's

determination could have been based upon these concerns, the majority's argument that the LPC's denial of public access was solely attributable to the commissioners' belief that they lacked the authority to require public access or upon the LPC counsel's advice to that effect is not supported by the record, and is based upon mere speculation.

The majority's position, that if the LPC has the authority to require a restrictive declaration by Civic Center that it would provide public access to the banking hall portion of the building, it must have similar authority with respect to the Clocktower Suite, is, at the outset, without legal basis. The language in the restrictive declaration regarding public access to the banking hall is not the result of a directive from the LPC that compelled Civic Center to commit to providing such access, but instead memorializes a voluntary pledge made by Civic Center in the course of applying for the COA that it would maintain public access to that area. The building owner's willingness to be subject to a restrictive declaration consistent with its stated intention to keep the banking hall open to the public does not demonstrate that the LPC has the authority to impose, over the objections of the building owner, a restrictive declaration requiring public access to the clocktower portion of the building. Moreover, as stated above, the 15th and 16th floors of

the Clocktower Suite are accessible only by the cast iron staircase, and the 17th floor can be accessed only by means of a ladder leading to a ceiling hatch. In any event, any action taken by LPC with respect to the readily accessible banking hall space has no bearing on its action concerning the smaller and far less accessible clocktower space.

Therefore, the LPC's determination to approve Civic Center's proposal to perform work that would effectively deny public access to the Clocktower Suite was not based on an error of law.

B. Operation of the Clock Mechanism

1. Rational basis

I also believe that Supreme Court correctly held that the LPC had a rational basis for approving conversion of the operation of the clock from a mechanical to an electronic system. A review of the record reveals that LPC reached its conclusion based on the testimony of the owner's architect that "in effect, we are really protecting the mechanism" in that the operation of the clock would be modernized by electrification, thereby assuring its continued maintenance for the foreseeable future,[4] and the visibility of exterior clock faces to the public would be

[4] Currently, there is only one mechanic in the City who appears qualified and available to maintain the mechanical operation of the clock.

enhanced by LED or some other form of modernized lighting, while the clock faces would remain in their original, pristine condition. The architect also testified that a clear glass liner would be installed on the inside faces of the clock, thereby protecting the original clock mechanism from the weather and preserving its elements. In addition, both the Civic Center's proposal and the LPC's COA included the requirement of preservation of the original clock mechanism intact, to the extent feasible.

There is no basis for concluding that, as the majority argues, the LPC's determination was based solely upon the LPC's counsel's advice that the LPC lacked the authority to require that the clock be mechanized. There were other reasons upon which the LPC may well have based their determination. The electrification of the clock maintains its interior while balancing its owner's interest in making use of its property. Moreover, the operation of the clock would not appear to be different to the general public, while the owner would be relieved of the heavy burden of continuing to allow for and preserve its mechanical operation.

Petitioners argue that it was irrational for the LPC to allow for the conversion to electric operation because the primary reason the LPC designated this interior landmark was the

clock's special and rare mechanism. However, petitioners fail to show that a key purpose of the designation was to keep the mechanism in actual operation, as opposed to ensuring the preservation of that mechanism.

In any event, given their expertise, the LPC commissioners were best situated to determine that the clock could be preserved by allowing the owner to maintain it electronically while keeping its original mechanism intact (*Teachers Ins.*, 82 NY2d at 42; *Matter of Stahl York Ave. Co. LLC v City of New York*, 76 AD3d at 295)). Petitioners' dissatisfaction with the loss of use of a rare clock mechanism is insufficient to warrant annulment of that portion of the COA which permits the work of disengaging the clock mechanical operating system and installing the electronic operating system on the basis that the LPC acted irrationally or arbitrarily.

Therefore, upon review of all of the record evidence, and giving due deference to the expertise of the LPC, I would conclude that the LPC had a rational basis for permitting the conversion of the clock from a mechanical to an electronic operating system (*see Teachers Ins.*, 82 NY2d at 41; *Matter of Stahl York Ave. Co. LLC v City of New York*, 76 AD3d at 295).

2. Error of law

In making the determination to issue a COA approving

alteration, demolition or enhancement of an interior landmark, the LPC must consider the effects of the proposed work upon the protection, enhancement, perpetuation and use of the interior architectural features of that interior landmark that cause it to possess a special character or special historical or aesthetic interest or value (Administrative Code § 25-307[e]). An "interior architectural feature" is defined as "[t]he architectural style, design, general arrangement and components of an interior including, but not limited to, the kind, color and texture of the building material and the type and style of all windows, doors, lights, signs and other fixtures appurtenant to such interior" (Administrative Code § 25-302[l]). The LPC's jurisdiction extends not only to realty but also personalty (*Teachers Ins.*, 82 NY2d at 45 [holding that fixtures such as metal railings, ceiling panels and hanging sculptures are interior architectural features subject to the LPC's jurisdiction]).

This case is distinguishable from *Teachers*, however. In *Teachers*, it was held that the LPC had jurisdiction over the preservation of various fixtures. Here, however, all of the elements of the original clock mechanism will be preserved. Accordingly, the issue at hand is not the LPC's authority with respect to the preservation of the original clock mechanism, but

rather whether the statute empowers the LPC to direct the manner in which that mechanism is to be operated, an issue not before the Court in *Teachers*.

Administrative Code § 25-302 limits "interior architectural features" to the "style, design, general arrangement, and components of an interior[.]" In this case, while the § 25-302 statutory definition of "interior architectural features" applies to the style, design, arrangement or components of the clock mechanism, it does not include the actual operation of the mechanism. The LPC evidently came to this conclusion based upon its interpretation of what constitutes an "interior architectural feature" under § 25-302. As the question of what constitutes an "interior architectural feature" is a matter within the expertise of the LPC, and its interpretation of that term in this case is not unreasonable, this Court must give the LPC's interpretation deference (*see Teachers Ins.*, 82 NY2d at 41-42). The matter of what elements of an interior space constitute style, design, arrangement or components of that space was clearly left by the legislature for determination by the LPC. Because the LPC, in the exercise of its experience and discretion, construed § 25-302 as not including the actual operation of the clock mechanism within the definition of "interior architectural feature," the LPC did not err in concluding that it had no authority to

consider the effects of the proposed work on the clock's mechanical operation.

To the extent that, as the majority argues, the LPC relied on the advice of LPC's counsel in making this conclusion, the LPC counsel's advice was correct and the LPC did not err in relying upon it. The stated purposes of the Landmarks Law make clear that the LPC's authority is limited to preservation and protection of the physical features of a building and does not include the manner of their operation. Specifically, the Landmarks Law provides that "[t]he purpose of this chapter is to . . . effect and accomplish the protection, enhancement and perpetuation of . . . improvements" (Administrative Code § 25-301[b]). "Improvement" is defined as "[a]ny building, structure, place, work of art or other object constituting a physical betterment of real property, or any part of such betterment" (Administrative Code § 25-302[i]). Because the Landmarks Law's stated purposes are limited to protection of buildings, structures and other physical objects, were the LPC to order the continued operation of the clock mechanism, the LPC's action would be ultra vires (*see* Administrative Code § 25-301[b]). In any event, the Landmarks Law includes no clear and unambiguous language that compels the conclusion that the LPC can designate an operation and compel that the operation be continued. The

majority's reliance on Administrative Law § 25-304(b) in arguing the contrary is misplaced, as that section empowers the LPC to impose regulations with respect to the overall "use" of a designated landmark but does not clearly and unambiguously confer upon the LPC the authority to regulate the operation of the interior architectural features of that landmark.

Based on the record, the most that can be concluded about the LPC's official position at the hearing is that while the LPC has some power to designate and regulate the operation of a landmark, it was not mandated here to find that the clock had to be maintained mechanically in perpetuity. Given the ambiguity of the statutes in this regard and the judicial deference due to the Commission's interpretation, I would conclude that the Commission's decision was not made based upon an error in law.

The majority argues that my conclusion that the LPC's determination was rational and unaffected by error of law is incorrect in light of testimony at the public hearing on the COA application that disconnecting the mechanism would put the clock mechanism "at risk" and, at worst, "destroy" it. Apart from the fact that this testimony was offered solely by one individual speaking on his own behalf and without explanation or record support for how disconnecting of the clock's original mechanism would put it "at risk," the majority's argument does not take

into account that had the LPC taken any action to perpetuate the operation of the clock by means of that mechanism rather than disconnecting it, that action would have been ultra vires. In any event, this individual's single conclusory statement, provided without any factual basis, cannot retroactively render irrational the LPC's reliance on the overwhelming evidence reflecting that the clock operation will be preserved for current and future operation.

Furthermore, the propriety of the LPC's conclusion in this regard is unaltered by the aspirational comments of seven of its commissioners, which, as noted by the majority, were to the effect that they would have preferred that the mechanical operation of the clock be maintained. Had these commissioners believed that they had the authority to direct that mechanical operation of the clock be maintained, and that such operation was a practical and feasible option, they would have voted accordingly. In any event, to the extent that, as the majority maintains, the commissioners relied on the advice of the LPC's counsel that the LPC lacked the authority to require mechanical operation of the clock, their reliance was well placed, in that the counsel's advice was correct in that there in nothing in the Landmarks Law that grants the LPC any such authority. The majority cites no statutory or case law authority in support of

the contrary view.

The validity of the LPC's conclusion is also unaffected by the majority's broad interpretation of the statutory language authorizing LPC to "apply or impose . . . regulations, limitations, determinations or conditions which are more restrictive than those prescribed or made by or pursuant to other provisions of law applicable to [the] . . . use [of a designated landmark]" (Administrative Code § 25-304[b]) to include the authority to require continued operation of the clock mechanism. Assuming that the language of § 25-304(b) is applicable to the LPC's determination in this regard, in permitting the conversion of operation of the clock to an electronic system, the LPC's action was consistent with that language, in that it "impose[d] . . . conditions . . . applicable to [the] use" of the clock.

Supreme Court erred in conflating the concept of protection and preservation of the components of the clock mechanism, which is within the purview of the LPC as established in the Landmarks Law, with the concept of maintaining the clock's mechanical operation, which is outside the scope of the LPC's statutory authority. Similarly, the majority erroneously conflates these two concepts by interpreting the language describing the scope of the LPC's designation of the clocktower area as an interior landmark as including "fixtures and interior components . . .

including but not limited to, . . . clock machinery" to mean that the LPC's powers encompass both preservation of the physical clock mechanism and oversight of its operation. Thus, in issuing the COA permitting the building owner to take steps to preserve, to the extent feasible, the original clock mechanism intact without imposing any limitation on the manner in which the clock would be operated, the LPC acted within the scope of its authority under the Landmarks Law (*see* Administrative Code § 25-304[b]).

The majority argues that I ignore the fact that the landmark designation specifically refers to the mechanical operation of the clock as a protected feature. The landmark designation's references to protection of the "clock machinery" do not include maintaining the mechanical operation of the clock, however. While the landmark designation protects the physicality of the clock machinery, it does not specify that the machinery must remain operational. Put otherwise, "clock machinery" is not synonymous with "clock operation."

Therefore, the LPC's determination to approve work related

to conversion of the clock from its original mechanical operating system to an electronic operating system was not based on an error of law.

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

ENTERED: November 30, 2017

CLERK

SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

NOVEMBER 30, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

3925 Nineteen Eighty-Nine, LLC, Index 601265/07
Plaintiff-Appellant,

-against-

Carl C. Icahn, et al.,
Defendants-Respondents.

_____

Fleming Zulack Williamson Zauderer LLP, New York (Mark C. Zauderer of counsel), for appellant.

Law Office of Robert R. Viducich, New York (Robert R. Viducich of counsel), and Law Office of Herbert Beigel, New York (Herbert Beigel of counsel), for respondents.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered September 23, 2015, which denied plaintiff's posttrial motion to set aside the verdict and order a new trial, unanimously affirmed, without costs.

In November 2001, defendant Chelonian Subsidiary, LLC, controlled by defendant Carl C. Icahn, and 1989 Ltd., formed 1879 Hall, LLC (Hall), a Delaware limited liability corporation. 1989 Ltd. assigned its interest to plaintiff, Nineteen Eighty-Nine, LLC, controlled by Q Investments.

The sole purpose of Hall was "to acquire, hold, own and dispose of . . . Securities and Claims" of Federal-Mogul Corporation (FMO), an auto parts manufacturer that was in bankruptcy. Under the LLC agreement, if Chelonian, as Hall's manager, wanted to acquire more FMO securities or claims for Hall's account, it was to issue a written "Capital Call" requesting that plaintiff pay its pro rata share (23.411%), accompanied by a statement outlining the nature of the interests to be acquired and all material documentation relied on by Chelonian in deciding to acquire them. Plaintiff then had the option of participating or declining to participate in the transaction. Plaintiff alleges that in addition to the FMO trades for which it received notice, some of which plaintiff participated in and some of which it did not, defendants engaged in 18 transactions in 2002 in which they purchased FMO bonds for their own account without notifying plaintiff in any manner (the 2002 FMO bond trades). Defendants contend that plaintiff received oral notice of those trades.

We previously granted plaintiff partial summary judgment on its breach of contract claim, finding that defendants had not proven that the LLC Agreement had been "modified by a course of conduct where business was conducted solely on a verbal basis"

(96 AD3d 603, 605 [1st Dept 2012]). In a subsequent decision, we made clear that we "did not find that defendants failed to give oral notice" and that "defendants [were] free to present evidence that plaintiff [was] not entitled to consequential damages because, for example, it sometimes declined to buy FMO bonds when defendants offered it the opportunity to do so, i.e. plaintiff did not always buy when Icahn bought" (116 AD3d 624, 624, 625 [1st Dept 2014]).

At trial, the jury unanimously found that plaintiff had received oral notice of the 2002 FMO bond trades and awarded plaintiff nominal damages of $1 for Chelonian's technical breach of failing to provide written notice. The trial court denied plaintiff's motion to set aside the verdict and for a new trial pursuant to CPLR 4404(a). We now affirm.

The exclusion of certain testimony during plaintiff's direct examination of Q Investments' principal, Geoffrey Raynor, about what he "would have done" if defendants had notified plaintiff of the 2002 FMO bond trades, even if erroneous, does not warrant reversal. Any error was mitigated when plaintiff was given the opportunity to present testimony as to what Raynor would have done on redirect examination, and there is no indication that the initial ruling prejudiced a substantial right of plaintiff or had

a substantial influence on the result of the trial (CPLR 2002; *see Corneroli v Borghi*, 11 AD3d 409 [1st Dept 2004]; *Milone v Milone*, 266 AD2d 363 [2d Dept 1999]).

Significantly, the initial ruling did not prevent the jury from fully learning, and, during deliberations, having access to all of the relevant evidence from Raynor and the other witnesses for both sides on the notice issue. Rather, it bore only on direct and consequential damages, an issue that the jury did not reach once it determined that plaintiff received oral notice and was only entitled to nominal damages (*see Gilbert v Luvin*, 286 AD2d 600, 600 [1st Dept 2001] ["Where an error at trial bears only upon an issue that the jury did not reach, the error is harmless and may not serve as a ground for a new trial"]).

Furthermore, the initial ruling did not prevent plaintiff from presenting a coherent story through the testimony of Raynor, other witnesses, and documentary evidence. Raynor was allowed to testify on direct, based on plaintiff's internal records and protocols, that plaintiff did not receive oral notice of the 2002 FMO bond trades and that receiving notice of those trades was important because it would have allowed him to gauge Icahn's interest in the FMO bonds, which was crucial to his decision-making process. Raynor was also allowed to testify that

plaintiff was damaged because "we weren't allowed to participate on these 18 trades, and these 18 trades made a substantial amount of money," that if he had participated in other FMO bond trades in June and October 2003 he would have made more money, and that knowing of the trades in 2002 would have given him different insight with respect to his investment decisions in 2004 and 2005 to sell plaintiff's FMO bonds to defendants or their affiliates. In this regard, plaintiff introduced charts into evidence detailing the 2001-2002 and 2003-2005 FMO bond trades, as well as plaintiff's alleged direct and consequential losses. Raynor was allowed to testify on direct that the charts showed $5.1 million in direct losses from not participating in the 2002 FMO bond trades and approximately $22 million in losses flowing from his decisions not to participate in the 2003 trades and to sell plaintiff's FMO bonds in 2004 and 2005.

In any event, on revisiting the issue, the court ruled that it would permit Raynor to testify on redirect that if he had known about the 2002 FMO bond trades he would have considered that the tipping point and elected to participate in the 2003 bond trades and would have held on to plaintiff's FMO bonds rather than selling them to defendants in 2004 and 2005. Based on this ruling, Raynor testified on redirect that had he known of

the 2002 FMO bond trades it would have suggested a frequency of trading, which would have absolutely been important to his investment decisions on whether or not to participate in FMO bond trades in June and October 2003 and to sell his bonds to defendants in 2004 and 2005. Plaintiff's counsel did not ask Raynor whether he would have participated in the subject trades had he known about them.

Similarly, the exclusion of certain of plaintiff's in-house counsel's testimony as hearsay was not prejudicial, because the proffered testimony was irrelevant. Further, plaintiff's counsel was not prevented from impeaching one of defendants' witnesses, but was merely directed to rephrase his question in a less prejudicial manner (*see People v Lopez*, 72 AD3d 593 [1st Dept 2010], *lv denied* 15 NY3d 807 [2010]). Additionally, the court providently exercised its discretion in excluding, as prejudicial, evidence of defendants' profits but allowing evidence of their component parts — i.e., the price of the securities purchased and the percentage of profits retained (*see Hyde v County of Rensselaer*, 51 NY2d 927, 929 [1980]).

There is no basis to disturb the jury's credibility determinations, and plaintiff has not demonstrated that the jury's determination was against the weight of the credible

evidence produced at trial. The jury could rationally credit the testimony that plaintiff received notice of the 2002 FMO bond trades.

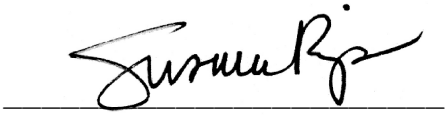
The trial court did not excessively intervene in the proceedings so as to deny plaintiff a fair trial (*see DeCrescenzo v Gonzalez*, 46 AD3d 607, 608-609 [2d Dept 2007]; *Taromina v Presbyterian Hosp. in City of N.Y.* , 242 AD2d 505, 506 [1st Dept 1997]). A trial court has "broad authority to control the courtroom, rule on the admission of evidence, elicit and clarify testimony, expedite the proceedings and to admonish counsel and witnesses when necessary" (*Campbell v Rogers & Wells*, 218 AD2d 576, 579 [1st Dept 1995]). Plaintiff has not shown that the court's conduct had the cumulative effect of "divert[ing] the jurors' attention from the issues to be determined" (*Desinor v New York City Tr. Auth.*, 34 AD3d 521, 522 [2nd Dept 2006], *lv denied* 11 NY3d 704 [2008]). The record does not reflect repeated baseless criticism of plaintiff's counsel in the presence of the jury or gratuitous comments on the credibility of plaintiff's witnesses to unduly influence the jurors and prevent them from considering the issues in a "fair, calm and unprejudiced manner"

(*Salzano v City of New York*, 22 AD2d 656 [1st Dept 1964]).

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: NOVEMBER 30, 2017



CLERK

Sweeny, J.P., Moskowitz, Kahn, Gesmer, JJ.

4545-
4545A In re Angel P., and Another,

Children Under Eighteen Years
of Age, etc.,

Jose C.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

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Richard L. Herzfeld, P.C., New York (Richard L. Herzfeld of counsel), for appellant.

Jose C., appellant pro se.

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

Kenneth m. Tuccillo, Hastings on Hudson, attorney for the child Angel P.

Aleza Ross, Patchogue, attorney for the child Diamond C.

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Order of disposition, Family Court, Bronx County (Robert D. Hettleman, J.), entered on or about October 29, 2015, which, to the extent appealed from as limited by the briefs, brings up for review a fact-finding order, same court and Judge, entered on or about October 29, 2015, which found that respondent Jose C. abused and severely abused Angel P., and derivatively abused and severely abused Diamond C., unanimously modified, on the law, to

vacate the finding of severe abuse as to Angel P., and otherwise affirmed, without costs. Appeal from fact-finding order, unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

Family Court's determination that respondent was a person legally responsible for the care of Angel P. care is supported by a preponderance of the evidence (*see Matter of Keoni Daquan A. [Brandon W.—April A.]*, 91 AD3d 414, 415 [1st Dept 2012]). However, the court could not, at the time of the fact-finding order's entry, make a finding of severe abuse as to Angel P., because it is undisputed that respondent is not that child's parent (*see Matter of Kaylene H. [Brenda P.H.]*, 133 AD3d 477, 478 [1st Dept 2015]; *Matter of Brett DD. [Kevin DD.]*, 127 AD3d 1306, 1307-1308 [3d Dept 2015], *lv denied* 25 NY3d 908 [2015]). Contrary to petitioner's contention, the now amended Family Court Act § 1051(e), which became effective after the fact-finding order was entered, may not be retroactively applied, as nothing in the legislative history establishes that the legislature intended for it to have retroactive effect, and the amendment clearly states that it was not to take effect until the 90th day after it was signed (*see Matter of Deutsch v Catherwood*, 31 NY2d 487, 489-490 [1973]; *Matter of Hays v Ward*, 179 AD2d 427, 429

[1st Dept 1992], *lv denied* 80 NY2d 754 [1992]).

Nonetheless, a preponderance of the evidence demonstrated that respondent abused Angel. The child's out-of-court statements, as recounted by his step-mother, the ACS caseworker, and the examining doctor were sufficiently corroborated by their observations of the child's injuries and his hospital records (*see Matter of Francini C. [Yasmin P.]*, 112 AD3d 532 [1st Dept 2013]).

Clear and convincing evidence demonstrated that respondent's actions constituted derivative abuse and derivative severe abuse of his biological child Diamond C., as his actions evinced depraved indifference to Angel P.'s life, and resulted in serious and protracted disfigurement (*see e.g. Matter of George S. [Hilton A.]*, 135 AD3d 563 [1st Dept 2016]*; People v Coote*, 110 AD3d 485 [1st Dept 2013], *lv denied* 22 NY3d 1198 [2014]).

The court properly drew a negative inference against respondent based upon his failure to testify at the fact-finding hearing, despite that a criminal case was pending against him at the time of the hearing (*see Matter of Leah M. [Anthony M.]*, 81 AD3d 434 [1st Dept 2011]). Having reviewed the record, we conclude that respondent received effective assistance of counsel (*see Matter of Dylan R. [Jeremy T.]*, 137 AD3d 1492, 1495 [3d Dept

2016], *lv denied* 27 NY3d 912 [2016]), and Family Court did not err by failing to sua sponte adjourn the proceedings pending resolution of the related criminal action (*see Matter of Germaine B.*, 86 AD2d 847, 848 [1st Dept 1982]).

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

ENTERED: NOVEMBER 30, 2017

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Webber, Oing, JJ.

4678- Ind. 5170/11
4679 The People of the State of New York,
Respondent,

-against-

Stan XuHui Li,
Defendant-Appellant.

_____

Belair & Evans LLP, New York (Raymond W. Belair of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Michael R. Sonberg, J.), rendered December 19, 2014, convicting defendant, after a jury trial, of 2 counts of manslaughter in the second degree, 3 counts of reckless endangerment in the first degree, 3 counts of reckless endangerment in the second degree, 170 counts of criminal sale of a prescription, 1 count of scheme to defraud in the first degree, 2 counts of grand larceny in the third degree, 9 counts of falsifying business records in the first degree, and 8 counts of offering a false instrument for filing in the first degree, and sentencing him to an aggregate term of 10 to 20 years, unanimously affirmed.

Defendant was a physician specializing in pain management.

In 2004, he opened a pain management clinic in Queens. According to the People, the clinic was nothing more than a "pill mill" catering to people who were hopelessly addicted to pain medicine, primarily opioids. The People's evidence showed that, despite having been trained in the wide variety of methods for identifying legitimate pain and treating it, defendant engaged in only the most cursory attempts to confirm patients' complaints, such as asking them where they had pain, and occasionally palpating a purportedly sore area or testing the range of motion of a limb. He rarely ordered diagnostic scans. Moreover, defendant, despite the plethora of options for treating pain, regularly prescribed opioids as a first resort, and not a last resort, which would have been the prudent course given the highly addictive nature of those drugs.

Further demonstrating the fact that defendant's clinic was not focused on the legitimate practice of pain medicine, but rather profiting from the opioid addiction epidemic, is that appointments were not necessary and all payments were required to be made in cash. A typical visit would cost $100, but patients who came back earlier than a month later for their next month's prescriptions, who obtained prescriptions from other doctors or who needed more than three prescriptions or prescriptions for

more than 60 mg per day of opioid were charged an additional $50. Patients usually handed the money to defendant, who placed the money directly into his pocket. Defendant often prescribed whatever medication patients requested. On occasion, he would issue a prescription without seeing the patient at all, and if he hesitated in writing a particular prescription, he could be persuaded if he was offered more money. From 2008 through October 2011, defendant wrote over 21,000 prescriptions for controlled substances, at an increasing pace, with more than half for substances containing the opioid oxycodone, and more than a quarter for alprazolam (Xanax). As explained by the People's expert, NYU Director of Pain Medicine Christopher Gharibo, Xanax, when taken with opioids, can depress respiration, making the combination particularly dangerous.

Indeed, defendant's prescription practices led to tragedy. Two of defendant's patients, Joseph Haeg and Nicholas Rappold, died within days of their last visits to defendant's clinic. Toxicological evidence revealed that Haeg's body contained over 20 times what would be considered a therapeutic amount of oxycodone – a fatal dose - and a moderately high therapeutic amount of Xanax. Although Rappold was not found to have fatal levels of either oxycodone or Xanax in his system when he died,

his death was determined to have been caused by the drugs' having worked synergistically to depress his respiration. In connection with the deaths, defendant was charged with second degree manslaughter. He was also charged with first-degree reckless endangerment with respect to three other patients, and second-degree reckless endangerment with respect to four more patients. For all 19 patients at issue defendant was charged with criminal sale of prescriptions; an aggregate 180 counts of this charge were leveled. Finally, although not at issue on this appeal, defendant was charged with one count of first-degree scheme to defraud, two counts of third-degree grand larceny from Medicare and Blue Cross/Blue Shield; 11 counts of first-degree falsifying business records submitted to the Centers for Medicare and Medicaid Services; and 16 counts of first-degree offering a false document for filing with the New York State Department of Health's Office of Professional Medical Conduct. He was convicted after a jury trial of all charges, save for one second-degree reckless endangerment count, 10 criminal sale counts, and 2 falsifying records counts.

Defendant argues that the manslaughter convictions should be reversed because, as a matter of law, the sale of a controlled substance can never support a homicide charge in the absence of

express legislative authorization. He bases this position on a Second Department decision, *People v Pinckney* (38 AD2d 217 [2d Dept 1972] *affd* 32 NY2d 749 [1973]). In *Pinckney*, the defendant sold heroin, and provided the means to inject it, to the victim, who died (38 AD2d at 218). He was charged with, inter alia, manslaughter in the second degree and criminally negligent homicide (*id.*). Contrasting the sale of heroin with the sale of wood alcohol, which is known to be inherently deadly, the Court held that the defendant could not be held criminally responsible for the death, because

> "[a]lthough it is a matter of common knowledge that the use of heroin can result in death, it is also a known fact that an injection of heroin into the body does not generally cause death. The homicide cases involving a sale or use of an illegal drug or instrument for the purpose of causing an abortion were prosecutions . . . pursuant to express statutory provisions. There are no provisions contained in the present Penal Law which set forth that the illegal sale of a dangerous drug which results in death to the user thereof constitutes manslaughter or criminally negligent homicide" (*id.* at 219 [citations omitted]).

Defendant contends that there is no legal distinction between himself and the drug dealer in *Pinckney*, since, he claims, opioids are not even as dangerous as heroin and, in any event, he merely provided the pills, and was not present when Haeg and Rappold ingested them. He argues that, since the Penal

Law, in the sections criminalizing sales of controlled substances, is silent on the consequences if a sale results in the buyer's death, his prosecution for manslaughter is without any legal basis.

We disagree. Nothing in *Pinckney* suggests that one who provides a controlled substance, whether it be heroin by a street dealer, or opioids by a medical doctor, can never be indicted on a manslaughter charge. Indeed, in *People v Cruciani* (36 NY2d 304 [1975]), the Court of Appeals affirmed the second degree manslaughter conviction of the defendant, who injected the victim with heroin, because he knew she was already in a highly intoxicated state. The *Cruciani* Court distinguished *Pinckney*, because in the latter case there was not

> "any proof, as here, of awareness of the ongoing effect of drugs in the victim's body at the time any self-inflicted injection might have been made, or, beyond the general knowledge of the injuriousness of drug-taking, of a real threat to life. The remoteness of that fatal injection from the fact of sale diffused intent and *scienter* by possibly unknown or intervening events beyond Pinckney's control" (36 NY2d at 305-306).

At bottom, all that was needed for the manslaughter charge to be sustained was for the People to satisfy its elements. That is, that defendant was "aware of and consciously disregard[ed] a substantial and unjustifiable risk that [death] [would] occur

. . . The risk [being] of such nature and degree that disregard thereof constitute[d] a gross deviation from the standard of conduct that a reasonable person would observe in the situation" (Penal Law § 15.05[3]; *People v Lora*, 85 AD3d 487, 491 [1st Dept 2011], *appeal dismissed* 18 NY3d 829 [2011]).

The question then becomes whether the People presented sufficient evidence to establish that defendant consciously disregarded the risk that Haeg and Rappold would die as a result of his prescribing practices. Trial evidence is legally sufficient to support a conviction if, viewed in the light most favorable to the People, it could lead a rational jury to find the defendant guilty beyond a reasonable doubt (*see People v Danielson*, 9 NY3d 342, 349 [2007]). A jury's verdict is supported by sufficient evidence if the evidence presented supports "any valid line of reasoning and permissible inferences which could lead a rational person to the conclusion reached by the jury" (*People v Bleakley,* 69 NY2d 490, 495 [1987]).

Defendant attacks the proof of his responsibility for Rappold's death because there was no evidence that the oxycodone that was found in Rappold's system came from defendant. Further, although there is no question that the Xanax found in Rappold's system was prescribed by defendant days before his death, and

that 55 pills were missing from the bottle, defendant asserts that he should not be held responsible for Rappold's having consumed an amount of pills "monumentally and tragically beyond what had been prescribed by [defendant], as the Xanax was to be taken at only one pill (2 milligrams) three times a day, which was a common therapeutic dose (emphasis omitted)." With respect to Haeg, defendant argues that the evidence does not show that he should have anticipated that Haeg would abuse the drugs he prescribed him. For example, he states that, despite Haeg's friends' and relatives' testimony that his addiction was obvious from his physical appearance, there is no proof that he himself was informed of this or noticed anything out of the ordinary about his patient.

We find that there was sufficient evidence to convict defendant of second degree manslaughter in the deaths of Haeg and Rappold. The People's expert, Dr. Gharibo, reviewed defendant's files for all of the 19 victims at issue in the indictment, including Haeg. Citing defendant's failure to obtain sufficient background history, to confirm patient claims about medications they were already taking, to order appropriate evaluative tests, to diagnose the causes of pain, to explore nonopioid treatment, to minimize opioid dosages, and to avoid prescribing to obviously

addicted patients, Gharibo identified 180 prescriptions that defendant wrote that were, in his expert medical opinion, without medical basis. Gharibo further concluded that defendant usually prescribed highly addictive opioids in much higher dosages than were reasonable, and engaged in practices that created and fostered addiction and otherwise endangered the lives of patients. Specifically with respect to Haeg, Gharibo testified that defendant prescribed unusually high dosages of oxycodone and Xanax. Haeg returned to defendant every three weeks for a month's prescription on October 17, November 14, and December 5, again receiving similar prescriptions from defendant that were not, according to Gharibo's professional opinion, medically warranted. On December 26, 2009, Haeg, who, according to the testimony of friends and family members, was exhibiting overt signs of decline and addiction, saw defendant, who added gabapentin and naproxen to his drug regime without reducing his oxycodone dosage. On the morning of December 29, 2009, Haeg's mother found him dead in his apartment from a fatal dose of oxycodone, which was amplified by "a moderately high therapeutic" amount of Xanax.

Moreover, Gharibo testified that, based on Haeg's profile and history, the prescriptions written for him by defendant on

December 26, 2009 created a "very high" risk to Haeg of a wide spectrum of ill effects, which included "overdosing due to misusing [the] medication and dying from respiratory death." Based on this testimony, it was reasonable for the jury to infer that defendant was using his prescriptions not to treat legitimate pain but to feed an addiction to opioids, and, with respect to Haeg, that he knew the patient would consume the medication in a manner consistent with a person who is taking it in such quantities to achieve and maintain a narcotic high, not for its therapeutic benefits, and that he consciously disregarded the possibility that, in taking the medication in such quantities, Haeg could die.

According to Gharibo, defendant also wrote medically unjustified prescriptions for Rappold, who appeared at defendant's clinic in July 2009, complaining of back and leg pain and claiming to have been taking 30 mg of Roxicodone four times per day. Without verifying Rappold's medical condition or ordering any tests, defendant prescribed Rappold the same very high dosage, but reduced the frequency to three times per day. On August 8, 2010, Rappold returned to see defendant, claiming he had hurt his back. While defendant noted "tenderness" and difficulty with a straight leg raise test, he did not diagnose

the cause of the pain. Without further examination, defendant issued Rappold what Gharibo opined was a medically unjustified prescription for Roxicodone 30 mg pills four times a day and Xanax 2 mg pills twice a day. Rappold returned to defendant on August 14, claiming to have lost the previous week's prescription. Without checking to see if that prescription had been filled, and without recording any medical explanation for the decision to issue a prescription different from the one reported lost, defendant wrote Rappold a prescription for Percocet 10 mg four times daily and Xanax 1 mg three times daily. On September 11, 2010, Rappold told defendant that the prior prescription had not helped, and defendant then prescribed 90 Xanax 2 mg pills to be taken three times daily and 120 Roxicodone 30 mg pills to be taken four times daily, which, according to Gharibo, created "a high probability of overdose and death" even if taken as directed. On September 14, 2010, Rappold was found dead in his car from the combined effect of the Xanax defendant had prescribed and whatever oxycodone Rappold had taken along with it.

The People's theory is that, regardless of who prescribed the oxycodone ingested by Rappold immediately before his death, the Xanax that was unquestionably prescribed by defendant was a

contributing factor in his death and thus served as a sufficient legal basis for the manslaughter charge. Defendant counters that, absent direct proof that the drugs prescribed by him combined to cause the death, no causal link can be drawn between his actions and Rappold's death. Defendant relies on *Burrage v United States* (___ US___, 134 S Ct 881 [2014]) in arguing that the People were required to establish a "but for" connection between the Xanax prescription and Rappold's death, and that the court erred in not so instructing the jury. We reject this position. *Burrage* interpreted specific causation language employed by Congress in the federal Controlled Substance Act, which language is not included in New York's manslaughter statute (Penal Law § 125.15). Moreover, the Court of Appeals, in *People v Davis* (28 NY3d 294 [2016]), which was decided after *Burrage*, reiterated that the causation element in a homicide case is satisfied when the People prove "(1) that defendant's actions were an actual contributory cause of the death, in the sense that they forged a link in the chain of causes which actually brought about the death; and (2) that the fatal result was reasonably foreseeable" (28 NY3d at 300 [internal quotation marks and citations omitted] [alteration omitted]). Here, the Xanax prescription furnished by defendant to Rappold was a contributory

cause of Rappold's death because it combined with the oxycodone Rappold also ingested, causing his death. Further, Rappold's death was reasonably foreseeable to defendant because, as Gharibo testified, defendant was prescribing oxycodone and Xanax in dosages that greatly increased the probability of death. Further, there was sufficient evidence that Rappold was taking the drugs to get high, and not for therapeutic purposes, and there was sufficient evidence for the jury to infer that defendant knew Rappold would take the Xanax in such a quantity that, combined with oxycodone, it would kill him.

We also affirm the convictions for criminal sale of a prescription for a controlled substance and for reckless endangerment. With respect to the former charge, the People had to prove that defendant "knowingly and unlawfully s[old] a prescription for a controlled substance" (Penal Law § 220.65), other than in good faith in the course of his professional practice. There is no adequate basis to overturn the jury's finding that 170 out of the 180 counts of criminal sale were proved beyond a reasonable doubt. The jury's determination with respect to the credibility of the People's expert testimony on these counts is given great weight, and defendant's general contentions regarding the improper nature of the prosecution and

the proper nature of his usual prescription practices do not overcome the showing made by the People with respect to the medically unlawful prescriptions.

Regarding the reckless endangerment in the first degree convictions, there was ample evidence to support a finding that defendant's prescription and treatment practices with respect to these patients created an imminent danger of an overdose that could have been life threatening, which thereby evinced depraved indifference to human life. Defendant also makes the procedural argument that all the reckless endangerment counts (the three first-degree counts and the four second-degree counts) were improper because the indictment did not specify particular office visits or occurrences of prescriptions, but rather simply listed a time period so extensive that it was virtually impossible for defendant to have adequately ascertained which of his actions, visits, treatments or prescriptions were alleged to have created a risk to each relevant patient.

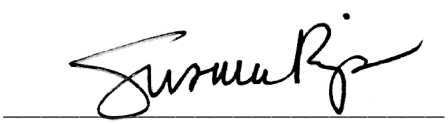
This argument is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we find it to be without merit. The general rule that a count is duplicitous if it charges more than one crime does not apply, where, as here, the charges are for continuing crimes (*see People*

v Hernandez, 235 AD2d 367, 368 [1st Dept 1997], *lv denied* 89 NY2d 1012 [1997]). Contrary to defendant's claim, the indictment properly charged the reckless endangerment counts as continuing crimes. These charges against defendant were not based on a single prescription that recklessly endangered the patient. Rather, the theory was that each patient was endangered as a result of defendant's continuing prescriptions and overall course of treatment, which over time endangered the patient as the risks compounded. Further, under the circumstances here, there was no way that either defendant or the jury could have misunderstood which allegations about defendant's conduct pertained to which count. Accordingly, the indictment also satisfied the specificity requirement, and provided defendant with sufficient information to prepare a defense and avoid double jeopardy.

We have considered and rejected defendant's remaining arguments, including those addressed to the weight of the evidence and to the court's charge.

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

ENTERED: NOVEMBER 30, 2017



CLERK

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

4972-
4973 In re Tyzavier M.,

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

Shanice M.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Susan Barrie, New York, for appellant.

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

Tamara A. Steckler, The Legal Aid Society, New York (Claire V. Merkine of counsel), attorney for the child.

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Order of disposition, Family Court, New York County (Susan K. Knipps, J.), entered on or about September 2, 2015, which, upon a finding of neglect, placed the child in the custody of the Commissioner of Social Services until the next permanency hearing then scheduled for December 16, 2015, and directed respondent mother to comply with her mental health services, including medication management and dyadic therapy, and to obtain stable housing with on-site services, unanimously affirmed, with respect to the finding of neglect, and the appeal therefrom otherwise dismissed, without costs, as moot.

"A [parent's] mental condition may form the basis of a finding of neglect if it is shown by a preponderance of the evidence that his or her condition resulted in imminent danger to the child" (*Matter of Noah Jeremiah J. [Kimberly J.]*, 81 AD3d 37, 42 [1st Dept 2010] [internal quotation marks omitted]). Proof of past or present harm to the child is not necessary when the evidence demonstrates that the child is at risk of harm based on demonstrable conduct by the parent (*Matter of Jacob L. [Chasitiy P.]*, 121 AD3d 502 [1st Dept 2014]). As such, "the court need not wait for a child to be harmed before extending its protective cloak around [the] child" (*Matter of Noah Jeremiah J.*, at 42 [internal quotation marks omitted]).

At the time the Administration for Children's Services brought the petition, the child was approximately 14 months old. The record reflects that the mother has a history of mental illness and hospitalizations, including two involuntary hospitalizations that occurred after the birth of the child. The mother advised her caseworker that the child resided with the maternal grandmother during her hospitalizations, but did not know how he got there. The Covenant House records show that the mother missed appointments, resisted filling out paperwork, and engaged in other inappropriate behaviors including screaming in

hallways and threatening staff. Family Court also took into account incidents at the Covenant House when the mother incorrectly administered asthma medication to the child and used the stairs while the child was in his stroller.

Based on the foregoing, Family Court's finding of neglect is supported by a preponderance of the evidence and we decline to disturb the court's fact-finding determination that the child's physical, mental or emotional condition was in imminent danger of becoming impaired as a result of the mother's mental illness (*see* Family Ct Act § 1046[b][i]).

The challenge to the disposition is moot since the order expired by its own terms and the child has been returned to the mother's care.

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

ENTERED: NOVEMBER 30, 2017

CLERK

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Kahn, Moulton, JJ.

5081 The People of the State of New York, Ind. 231/14
Respondent,

-against-

Miguel Cortes,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J. at suppression motion; James M. Burke, J. at jury trial and sentencing), rendered October 7, 2015, convicting defendant of burglary in the second degree (two counts), burglary in the third degree, and grand larceny in the fourth degree (six counts), and sentencing him, as a persistent violent felony offender, to an aggregate term of 41½ years, 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 an aggregate term of 19 years to life, and otherwise affirmed.

The hearing court properly denied defendant's motion insofar as it sought to suppress a bag (but not its contents) and a jacket that police observed in his bedroom, which matched

corresponding items carried and worn by the suspect in surveillance videotapes of burglaries the officers were investigating. The record supports the hearing court's finding that defendant consented to the police entry. Contrary to defendant's assertion, defendant did more than simply "sit down." After defendant's roommate permitted the police to enter the apartment he shared with defendant, the officers knocked on defendant's bedroom door and peaceably identified themselves. Defendant opened the door for the officers, left the door open, turned around, and sat on his bed. Such actions reasonably constituted tacit consent for the police to enter (*see People v Brown*, 234 AD2d 211, 213 [1st Dept 1996], *affd* 91 NY2d 854 [1997]; *see also People v Smith*, 239 AD2d 219 [1st Dept 1997], *lv denied* 90 NY2d 908 [1997]). The hearing evidence also established that defendant then voluntarily agreed to accompany the officers to the police station.

Although an officer testified that he opened the bag to voucher its contents, the evidence failed to establish a lawful inventory search following defendant's arrest (*see People v Gomez*, 13 NY3d 6, 11 [2009]). Nevertheless, any error in the admission of testimony and evidence regarding burglar's tools discovered in the bag was harmless in light of the overwhelming

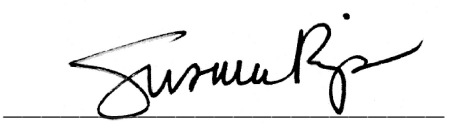
evidence of defendant's guilt, including surveillance video from the locations of the burglaries, defendant's admissions that two of the videos or still images taken from them depicted him, and the in-court identification of defendant (*see People v Crimmins*, 36 NY2d 230 [1975]). The items of physical evidence contained in the bag were the only suppressible fruits of the illegality, and we reject defendant's assertions to the contrary (*see People v Tolentino*, 14 NY3d 382, 384-385 [2010]; *People v Pena*, 95 AD3d 541, 542 [1st Dept 2012], *lv denied* 20 NY3d 934 [2012]).

Defendant's challenge to the prosecutor's summation is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we find that the remarks at issue were not so egregious as to deprive defendant of a fair trial (*see People v D'Alessandro*, 184 AD2d 114, 118-119 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]).

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 30, 2017



CLERK

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Kahn, Moulton, JJ.

5082 Colebrooke Theatrical LLP, Index 651440/14
Plaintiff-Respondent,

-against-

Stephane Bibeau, et al.,
Defendants-Appellants,

Jean-Francois Rodrigue,
Defendant.

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Mangan Ginsberg LLP, New York (Michael P. Mangan of counsel), for appellants.

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Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered on or about August 8, 2016, which to the extent appealed from, denied the motion of defendants to vacate the default judgment as against Stephane Bibeau and C3 Global Capital HK Limited (C3 Global), unanimously affirmed, with costs.

Bibeau's conclusory denials that service did not occur are insufficient to rebut the presumption of service as detailed in the affidavit of service (*see Marston v Cole*, 147 AD3d 678, 680 [1st Dept 2017]; *Trini Realty Corp. v Fulton Ctr. LLC*, 53 AD3d 479 [2d Dept 2008]; *Colon v Beekman Downtown Hosp.*, 111 AD2d 841 [2d Dept 1985]). Nor are they sufficient to require a traverse hearing (*see Reem Contr. v Altschul & Altschul*, 117 AD3d 583, 584 [1st Dept 2014]). C3 Global was also validly served, pursuant to

the Hague Convention and Hong Kong Rules, at its registered office, an office it may not have occupied on the date of service, but nonetheless used (Hague Convention, Declaration of Hong Kong, Article 5[1][a]).

Defendants' arguments pursuant to CPLR 5015(a)(1) are also without merit. Bibeau's opinion that he had not been properly served, and was thus free to ignore the suit, a copy of which he received in the mail, was not reasonable (*see Yao Ping Tang v Grand Estate, LLC*, 77 AD3d 822, 823 [2d Dept 2010]). In any event, neither Bibeau, nor C3 Global, presented a meritorious defense to this breach of contract action.

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

ENTERED: NOVEMBER 30, 2017

CLERK

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Kahn, Moulton, JJ.

5083 In re Diane K.,
Petitioner-Respondent,

-against-

Yasmin Q.,
Respondent-Appellant.

_____

Leslie S. Lowenstein, Woodmere, for appellant.

Anne Reiniger, New York, for respondent.

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

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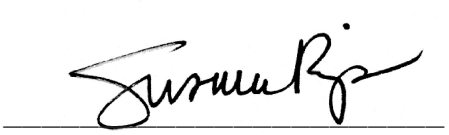
Order, Family Court, Bronx County (Robert D. Hettleman, J.), entered on or about May 31, 2016, which, inter alia, granted sole physical and legal custody of the child to petitioner grandmother, unanimously affirmed, without costs.

The determination that it is in the child's best interests to be in petitioner's custody is amply supported by the record (*see Matter of Bennett v Jeffreys*, 40 NY2d 543 [1976]). Petitioner has supported the child and provided a stable and loving home for him, and the child is thriving (*see Matter of Ruth L. v Clemese Theresa J.*, 104 AD3d 554 [1st Dept 2013], *lv denied* 21 NY3d 860 [2013]). Respondent mother remains in a long-term relationship with a man (not the child's father) who has repeatedly engaged in acts of domestic violence against her in

the child's presence, and she has stated her intention to continue to live with this man. Following an assault in September 2012 that left her hospitalized with a broken arm and burns and various bruises, respondent resumed living with the man within days. She denied, and continues to deny, that he poses a danger to herself and the child. For his part, the man has engaged in limited therapy and has stated that he has no issues to work on. In determining custody, the court properly considered this history of domestic violence (*see* Domestic Relations Law § 240[1][a]; *Matter of Rena M. v Derrick A.*, 122 AD3d 457, 458 [1st Dept 2014], *lv denied* 25 NY3d 906 [2015]).

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

ENTERED: NOVEMBER 30, 2017



CLERK

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Kahn, Moulton, JJ.

5084 Terell Ballo, Index 152263/12
Plaintiff-Appellant,

-against-

AIMCO 2252-2258 ACP, LLC,
Defendant-Respondent,

P.J.'S Cocktail Lounge & Restaurant, Inc., et al.,
Defendants.

_____

Law Office of Annette G. Hasapidis, White Plains (Annette G. Hasapidis of counsel), for appellant.

Mintzer Sarowitz Zeris Ledva & Meyers, LLP, New York (Peter A. Frucchione of counsel), for respondent.

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Order, Supreme Court, New York County (Cynthia S. Kern, J), entered May 31, 2016, which granted the motion of defendant AIMCO 2252-2258 ACP, LLC (AIMCO) for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Dismissal of the complaint as against AIMCO was proper in this action for personal injuries sustained by plaintiff when, while standing on the sidewalk outside a bar owned and operated by codefendant P.J. Cocktail Lounge & Restaurant, Inc. (PJ's), he was shot in the foot. The record demonstrates that AIMCO owned the commercial space and had leased it to PJ's, and as a premises owner, AIMCO cannot be held liable in negligence for an assault

that occurred on a public street over which it exercised no control (*see Ramsammy v City of New York*, 216 AD2d 234, 236 [1st Dept 1995], *lv dismissed in part and denied in part* 87 NY2d 894 [1995]; *see also White v Celebrity Lounge*, 215 AD2d 650 [2d Dept 1995]).

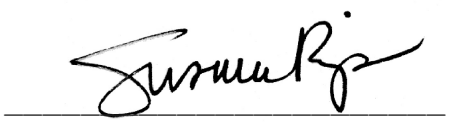
AIMCO also owed plaintiff no duty of care to prevent the incident since the evidence showed that AIMCO was an out-of-possession landlord when the shooting happened (*see Regina v Broadway-Bronx Motel Co.*, 23 AD3d 255, 256 [1st Dept 2005]), and while it had the right to reenter the premises for the purpose of effecting repairs, there is no evidence that it retained control over the premises or was involved with how PJ's operated its bar (*see Borelli v 1051 Realty Corp.*, 242 AD2d 517, 518 [2d Dept 1997]). The 2009 stipulation of settlement between nonparty City of New York, AIMCO and PJ's regarding a public nuisance action fails to raise a triable issue, because it expired by its own terms before the shooting and did not require AIMCO to do anything with regard to how the bar was being operated.

Furthermore, there are no triable issues as to whether AIMCO is liable to plaintiff for his injuries under the Dram Shop Act (General Obligations Law § 11-101) or Alcoholic Beverage Control

Law § 65. There is no evidence that the shooter was underage or visibly intoxicated when the shooting occurred, or that AIMCO had sold him an alcoholic beverage.

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

ENTERED: NOVEMBER 30, 2017



CLERK

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Kahn, Moulton, JJ.

5085 Alexander Ashkenazi, etc., Index 115034/07
Plaintiff-Appellant,

-against-

AXA Equitable Life Insurance Company,
Defendant-Respondent.

_____

Lipsius-BenHaim Law LLP, Kew Gardens (Ira S. Lipsius of counsel), for appellant.

Krantz & Berman LLP, New York (Larry H. Krantz of counsel), for respondent.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered on or about October 11, 2016, which, among other things, granted defendant insurer's renewed motion for summary judgment dismissing plaintiff's complaint, granted defendant's motion for summary judgment on its counterclaim for rescission of insurance policies issued to the insured, and denied plaintiff's cross motion for summary judgment dismissing defendant's counterclaim for fraud, unanimously affirmed, without costs.

The motion court correctly granted defendant's motion for summary judgment on its rescission counterclaim, given the material misrepresentations contained in the insured's insurance applications (*Geer v Union Mut. Life. Ins. Co.*, 273 NY 261, 265,

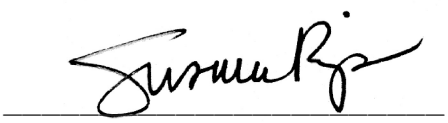
266 [1937]). There is no dispute that the applicants grossly overstated the insured's financial circumstances. Further, defendant has provided ample evidence of its underwriting manual and practices indicating that but for the misrepresentations contained in the application, it would not have issued the policies (*see e.g. Feldman v Friedman*, 241 AD2d 433, 434 [1st Dept 1997]).

The motion court correctly denied plaintiff's cross motion for summary judgment dismissing defendant's fraud counterclaim. Issues of fact exist concerning whether the applicants, including plaintiff and the insured, intended to commit fraud when they applied for the policies (*Matter of Setters v AI Props. & Devs. [USA] Corp.*, 139 AD3d 492, 493 [1st Dept 2016]). The potential return of the premiums plaintiff paid rests on a resolution of the fraud claim, since defendant may be entitled to offset the

return of premiums against the damages it incurred from the alleged fraud (*see e.g. Mincho v Bankers' Life Ins. Co.*, 129 App Div 332, 334 [1st Dept 1908]).

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

ENTERED: NOVEMBER 30, 2017



CLERK

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Kahn, Moulton, JJ.

5086 In re Charlene Thompson, Index 261117/14
Petitioner-Appellant,

-against-

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

_____

Charlene Thompson, appellant pro se.

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

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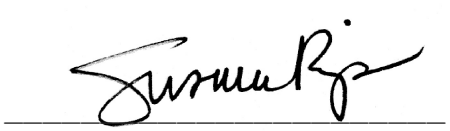
Appeal from order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered on or about December 17, 2015, which denied petitioner's motion for, in effect, reargument of her ex parte application for an order to show cause seeking, in effect, reargument of respondents' motion to dismiss the petition brought pursuant to CPLR article 78, and denied her motion for reargument of respondents' motion, unanimously dismissed, without costs, as taken from a nonappealable order.

No appeal lies from an order denying reargument (*D'Andrea v Hutchins*, 69 AD3d 541 [1st Dept 2010]).

We note that, since petitioner did not appeal from the order granting respondents' motion to dismiss the petition, her arguments addressed to that determination are not properly before us (*id.*).

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

ENTERED: NOVEMBER 30, 2017



CLERK

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Kahn, Moulton, JJ.

5089-
5090-
5090A Index 800031/12

Yovanka Bylander, etc.,
Plaintiff-Appellant,

-against-

Anthony Jahn, M.D., et al.,
Defendants-Respondents.

_____

Jaroslawicz & Jaros PLLC, New York (Natascia Ayers and David Tolchin of counsel), for appellant.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Judy C. Selmeci of counsel), for respondents.

_____

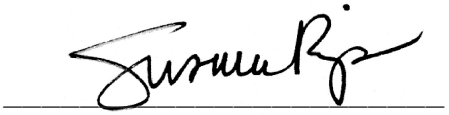
Order, Supreme Court, New York County (Alice Schlesinger, J.), entered on or about May 18, 2015, which granted defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied. Appeal from orders, same court and Justice, entered October 14, 2015 and October 16, 2015, which granted plaintiff's motion to reargue and adhered to the original determination, and denied her motion to renew, unanimously dismissed, without costs, as academic.

The record presents triable issues of fact as to whether defendant Anthony Jahn, M.D. departed from good and accepted medical practice (*see Severino v Weller*, 148 AD3d 272, 276 [1st

Dept 2017]). Defendants' experts opined that Dr. Jahn acted appropriately and consistent with the standard of care based on plaintiff's decedent's test results and presenting symptoms, which was mainly episodic dizziness. However, in opposition, plaintiff's experts opined, based on a review of the medical records, that decedent exhibited symptoms, such as episodic vision problems, dizziness, and imbalance, consistent with the presence of the brain aneurysm that eventually ruptured and caused his death. Plaintiff's experts further opined that Dr. Jahn should have referred decedent for a neurological consult or for additional neurological testing, which would have detected his unruptured cerebral aneurysm and permitted timely treatment. Plaintiff's experts further raised questions of fact as to whether Dr. Jahn failed to follow up on an abnormal finding on a videonystagmography test administered to decedent, consistent with a central nervous system disorder, by making appropriate referrals that would have led to the timely discovery of the aneurysm.

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

ENTERED: NOVEMBER 30, 2017



CLERK

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Kahn, Moulton, JJ.

5091-
5092 Index 653650/13

Ulm I Holding Corp.,
Plaintiff-Respondent,

-against-

Craig Antell,
Defendant-Appellant,

CAAM, LLC, et al.,
Defendants.

_____

White and Williams LLP, New York (Nicole A. Sullivan of counsel), for appellant.

Jaffe, Ross & Light LLP, New York (Mark N. Antar of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Shlomo Hagler, J.), entered November 4, 2016, awarding plaintiff the aggregate amount of $439,881.85 as against defendant Craig Antell, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered June 10, 2016, which, inter alia, granted plaintiff's motion for summary judgment as against Antell, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

"Something more than a bald assertion of forgery is required to create an issue of fact contesting the authenticity of a signature. . . . Although an expert's opinion is not required to establish a triable issue of fact regarding a forgery allegation,

where an expert is used to counter the moving party's prima facie proof, the expert opinion must be in admissible form and state with reasonable professional certainty that the signature at issue is not authentic" (*see Banco Popular N. Am. v Victory Taxi Mgt.*, 1 NY3d 381, 384 [2004]).

Here, Supreme Court properly concluded that plaintiff landlord sustained its prima facie burden of showing that Antell breached the "good guy" guaranty he signed in connection with the commercial lease by providing a copy of the guaranty, which was notarized in a form consistent with Real Property Law § 309-a; an affidavit of the notary acknowledging his stamp and signature on the document; and an affidavit of Antell submitted in connection with another proceeding, acknowledging that he had signed the guaranty.

In opposition, Antell failed to submit evidence sufficient to raise a triable issue of fact. He provided only a bald assertion that the signature on the guaranty was a forgery and the unsworn report of an expert that there were differences between the signature on the guaranty and signatures on other documents. Under the circumstances here presented, the unsworn report is not in admissible form and may not be considered in opposition to the summary judgment motion, and Antell did not provide an acceptable excuse for failing to submit an expert

report in admissible form (*see Bendik v Dybowski*, 227 AD2d 228, 229 [1st Dept 1996]).

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

ENTERED: NOVEMBER 30, 2017

CLERK

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Kahn, Moulton, JJ.

5093 The People of the State of New York, Ind. 3026/15
Respondent,

-against-

Michael Burnett,
Defendant-Appellant.

_____

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

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

_____

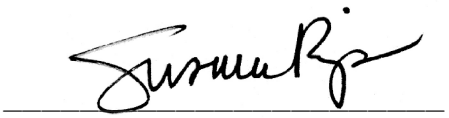
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Ronald A. Zweibel, J. at plea; Juan Merchan, J. at sentencing), rendered March 24, 2016,

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 30, 2017



CLERK

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

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Kahn, Moulton, JJ.

5094 The People of the State of New York, Ind. 3363/14
Respondent,

-against-

Naim Jabbar,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Samuel Z. Goldfine of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Gregory Carro, J. at suppression hearing; Daniel P. Conviser, J. at jury trial and sentencing), rendered May 12, 2015, convicting defendant of robbery in the third degree and grand larceny in the fourth degree, and sentencing him, as a second felony offender, to an aggregate term of 3½ to 7 years, unanimously affirmed.

The court properly denied defendant's motion to suppress a lineup identification (*see People v Chipp*, 75 NY2d 327, 336 [1990], *cert denied* 498 US 833 [1990]). The police carefully selected fillers who matched defendant's appearance, including his distinctive haircut, and the procedure was not rendered unduly suggestive by the fact that defendant was the only participant wearing a black T-shirt. This was a common item of clothing (*see People v Cruz*, 55 AD3d 365, 365 [1st Dept 2008], *lv*

denied 11 NY3d 924 [2009]), and it did not figure prominently in the victim's detailed description of his assailant, which was primarily focused on the assailant's physical appearance (*see e.g. People v Torres*, 182 AD2d 587, 588 [1st Dept 1992], *lv denied* 80 NY2d 897 [1992]). Moreover, the victim had described the shirt as black or dark-colored, and some of the other lineup participants had dark shirts. Although the victim commented at the lineup that defendant was dressed the same way as he was during the robbery, the victim also emphasized that he had selected defendant because of his facial features and not his clothing.

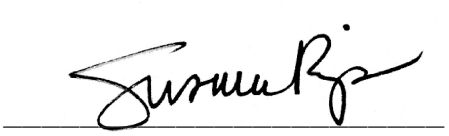
The verdict was not against the weight of the evidence. There is no basis for disturbing the jury's determinations concerning credibility, including its evaluation of any discrepancies in the victim's version of events (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]).

The court properly denied defendant's request for submission of petit larceny as a lesser included offense, because such a charge was not supported by a reasonable view of the evidence, viewed most favorably to defendant. The victim unwaveringly testified that he surrendered his money because of defendant's use or threat of force, and not because of defendant's efforts to take the money by false pretenses. The only means by which

defendant could have been found not guilty of the greater crimes and guilty of the lesser one was through the impermissible "selective dissection of the integrated testimony of a single witness as to whom credibility, or incredibility, could only be a constant factor" (*People v Scarborough*, 49 NY2d 364, 373 [1980]; see *also People v Negron*, 91 NY2d 788, 792 [1998]).

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

ENTERED: NOVEMBER 30, 2017



CLERK

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Kahn, Moulton, JJ.

5095 In re Miguel Angel S.,

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

Wendy Carolina S.,
Respondent-Appellant,

Cardinal McCloskey Community Services,
Petitioner-Respondent.

_____

George E. Reed, Jr., White Plains, for appellant.

Geoffrey P. Berman, Larchmont, for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Claire V. Merkine of counsel), attorney for the child.

_____

Order, Family Court, Bronx County (Robert Hettleman, J.), entered on or about July 1, 2016, which, after a hearing, found that respondent mother permanently neglected the subject child, and terminated her parental rights and transferred the guardianship and custody of the child to the Commissioner for the Administration for Children's Services and petitioner agency for the purpose of adoption, unanimously affirmed, without costs.

The finding of permanent neglect is supported by clear and convincing evidence that respondent failed to maintain contact with or plan for the future of the child for a period of more than one year, notwithstanding the agency's diligent efforts to encourage and strengthen the parental relationship (*see* Social

Services Law § 384-b[7]1]; *Matter of Star Leslie W.*, 63 NY2d 136 [194]). The agency referred respondent for various parenting programs and mental health services, including domestic violence counseling and random drug testing, and scheduled and facilitated visitation with the child (*see Matter of Ashley R. [Latarsha R.]*, 103 AD3d 573 [1st Dept 2013], *lv denied* 21 NY3d 857 [2013]). Nevertheless, respondent did not avail herself of the referred services, failed to submit to random drug testing, a mental health evaluation, or domestic violence counseling, and failed to obtain suitable housing (*see Matter of Cerenithy B. [Ecksthine B.]*, 149 AD3d 637, 638 [1st Dept 2017], *lv denied* 29 NY3d 1106 [2017]).

The determination that it was in the best interests of the child to terminate respondent's parental rights, and that a suspended judgment was not warranted, is supported by the evidence that respondent was not in a position to care for and provide an adequate home for the child (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]; *Matter of Alani G. [Angelica G.]*, 116 AD3d 629 [1st Dept 2014], *lv denied* 24 NY3d 903 [2014]; *Matter of Jenna Nicole B. [Jennifer Nicole B.]*, 118 AD3d 628, 629 [1st Dept 2014]). Conversely, the record shows that the child has bonded with his foster father and two foster brothers, and wishes to remain in his pre-adoptive foster home, where he is

well cared for. The child attends school regularly and receives appropriate services, and his behavior and performance have improved.

The record also shows that the child's best interests would not be served by granting his maternal grandmother custody. During the year that he was in her care, the child was consistently late to school, and his grandmother permitted respondent to take him out of her home unsupervised, which resulted in respondent's disappearing with the child for two days and returning him to his grandmother with a broken arm. After the child was moved to his current foster home, his grandmother's behavior was erratic, she refused to treat him appropriately for his age, and her visitation with him was discontinued. The child expressed his wish to remain with his foster father and not to resume visits with his grandmother. At the time of the hearing, neither respondent nor the grandmother had seen the child for approximately two years.

The court properly exercised its discretion in denying respondent's requests for adjournments, in light of her failure

to notify her attorney of her incarceration or provide proof supporting her medical excuses.

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

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

ENTERED: NOVEMBER 30, 2017

CLERK

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Kahn, Moulton, JJ.

5096 The People of the State of New York, Dkt. 20096/16
Respondent,

-against-

Melvin Martin,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Tandra L. Dawson, J.), rendered July 13, 2016, convicting defendant, upon his plea of guilty, of menacing in the second degree, and sentencing him to a term of seven months, unanimously affirmed.

The accusatory instrument was jurisdictionally sound because it contained nonconclusory factual allegations that, if assumed to be true, established each element of second-degree menacing and provided reasonable cause to believe that defendant committed that crime (*see People v Jackson*, 18 NY3d 738 [2012]; *People v*

Dreyden, 15 NY3d 100 [2010]). The fact that the firsthand account contained in the victim's supporting deposition corrected some minor inaccuracies contained in a detective's secondhand supporting deposition did not create any jurisdictional defect.

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

ENTERED: NOVEMBER 30, 2017

CLERK

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Kahn, Moulton, JJ.

5097 Edgar Villongco, Index 153093/14
Plaintiff-Appellant,

-against-

Tompkins Square Bagels, et al.,
Defendants-Respondents,

Nathan Bershadsky,
Defendants.

_____

Goidel & Siegel, LLP, New York (Jonathan M. Goidel of counsel), for appellant.

Hannum Feretic Prendergast & Merlino, LLC, New York (William C. Lawlor of counsel), for respondents.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered on or about May 18, 2016, which granted the motion of defendants Tompkins Square Bagels and Sage the Cat, LLC (collectively defendant), for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Summary judgment was properly granted in this action for personal injuries sustained when defendant restaurant's employee (defendant Bershadsky) followed plaintiff customer outside the restaurant and punched him in the face. Bershadsky clearly acted beyond the scope of his employment, and was motivate by private concerns not related to any conduct in furtherance of defendant's business, and thus defendant is not liable under the doctrine of

respondeat superior (*see Conde v Yeshiva Univ.*, 16 AD3d 185, 187 [1st Dept 2005]). Furthermore, defendant is not liable for plaintiff's injuries based upon negligent training or supervision, as there is nothing in the record to demonstrate that defendant knew, or should have known, of Bershadsky's propensity for violence (*see Sheila C. v Povich*, 11 AD3d 120, 129-130 [1st Dept 2004).

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: NOVEMBER 30, 2017

CLERK

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Kahn, Moulton, JJ.

5098 The People of the State of New York, Ind. 5334N/14
Respondent,

-against-

Rohan Samuels,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (James M. Burke, J.), rendered September 16, 2015, unanimously affirmed.

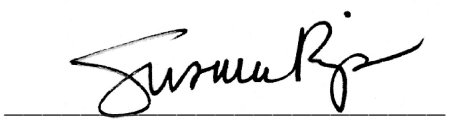
Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised 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 30, 2017



CLERK

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Kahn, Moulton, JJ.

5100 The People of the State of New York, Ind. 1698/12
Respondent,

-against-

Steven Jimenez,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Jeffrey A. Wojcik of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Juan M. Merchan, J.), rendered June 24, 2014, convicting defendant, after a jury trial, of assault in the first degree, and sentencing him, as a second felony offender, to a term of 12 years, unanimously affirmed.

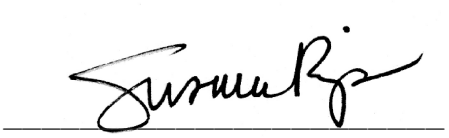
The evidence was legally sufficient to establish that the injury inflicted by defendant when he slashed the victim across the face with a box cutter caused serious disfigurement, thereby satisfying the serious physical injury element of first-degree assault (*see People v McKinnon*, 15 NY3d 311, 315-316 [2010]). The People presented evidence that the victim sustained a laceration to the right side of his face that ran from his forehead to his jaw, and that the laceration resulted in a permanent scar, which the jury observed. "[V]iewed as a whole,

and especially considering the prominent location of the wound on the face, [the evidence] support[s] the inference that at the time of trial the scar[] remained seriously disfiguring under the *McKinnon* standard" (*People v Coote*, 110 AD3d 485, 485 [1st Dept 2013], *lv denied* 22 NY3d 1198 [2014]).

We perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 30, 2017



CLERK

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Kahn, Moulton, JJ.

5101-
5101A Wilmington Trust, etc.,
Plaintiff-Respondent,

-against-

Ragobar Sukhu also known as
Ragobar D. Sukhu,
Defendant-Appellant,

Bank of America, N.A., et al.,
Defendants.

Index 850313/14

_____

Zimmerman Law, P.C., Huntington Station (Antonio Marano of counsel), for appellant.

Akerman LLP, New York (Jordan M. Smith of counsel), for respondent.

_____

Orders, Supreme Court, New York County (Debra A. James, J.), entered May 20, 2016, which, respectively, granted plaintiff summary judgment on its mortgage foreclosure claim, and denied defendant's motion to dismiss the complaint, unanimously affirmed, without costs.

Plaintiff established its prima facie entitlement to mortgage foreclosure as a matter of law, by producing the note, mortgage, assignment, and evidence of defendant's nonpayment, and defendant failed to raise a triable issue as to a defense (*Wall St. Mtge. Bankers v Gonzalez*, 126 AD3d 602 [1st Dept 2015]; *Horizons Invs. Corp. v Brecevich*, 104 AD3d 475 [1st Dept 2013]).

Defendant waived his right to assert a defense based on plaintiff's alleged failure to provide 30 days' written notice of default, because he failed to assert it as an affirmative defense in his answer and failed to timely raise it in response to plaintiff's motion for summary judgment (*Signature Bank v Epstein*, 95 AD3d 1199, 1200-1201 [2d Dept 2012]; *see also* CPLR 3015, 3018[b]). Defendant was precluded from raising his contractual notice defense for the first time in his order to show cause to dismiss the complaint, which was in fact a motion to reargue (*Matter of Setters v AI Props. & Devs. [USA] Corp.*, 139 AD3d 492 [1st Dept 2016]).

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 30, 2017

CLERK

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Kahn, Moulton, JJ.

5102N Vivian Spencer, Index 302682/13
Plaintiff-Respondent,

-against-

Willard J. Price Associates, LLC, et al.,
Defendants-Appellants.

_____

Babchik & Young, LLP, White Plains (Thomas G. Connolly of counsel), for appellants.

Arze & Mollica, LLP, Brooklyn (Raymond J. Mollica of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Laura G. Douglas, J.), entered August 18, 2016, which, to the extent appealed from as limited by the briefs, denied defendants' motion to compel plaintiff to provide an authorization for her Social Security Disability records, unanimously affirmed, without costs.

In this slip and fall action, plaintiff seeks to recover for orthopedic injuries allegedly sustained to her knees, neck, back and shoulder. Under the circumstances, the motion court did not improvidently exercise its discretion in denying defendants' motion to compel discovery of over 20 years of disability records relating to other conditions (*see Gumbs v Flushing Town Ctr. III, L.P.*, 114 AD3d 573 [1st Dept 2014]). By bringing suit to recover for her physical injuries, plaintiff waived the physician-patient

privilege as to all medical records relating "to those conditions affirmatively placed in controversy" (*Felix v Lawrence Hosp. Ctr.*, 100 AD3d 470, 471 [1st Dept 2012]), but the court reasonably found that she did not place in issue her entire medical condition, including her diabetic condition and high blood pressure (*see Kenneh v Jey Livery Serv.*, 131 AD3d 902 [1st Dept 2015]; *Gumbs* at 574).

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

ENTERED: NOVEMBER 30, 2017

CLERK

Acosta, P.J., Tom, Kapnick, Kahn, Gesmer, JJ.

3422 In re Save America's Clocks, Inc., et al., Petitioners-Respondents, Index 101109/15

-against-

City of New York, etc., et al., Respondents-Appellants.

_____

Zachary W. Carter, Corporation Counsel, New York (Diana Lawless of counsel), for City of New York, Office of the Deputy Mayor for Housing and Economic Development, New York City Landmarks Preservation Commission and New York City Department of Buildings, appellants.

Kramer Levin Naftalis & Frankel LLP, New York (Jeffrey L. Braun of counsel), for Civic Center Community Group Broadway LLC, appellant.

Hiller, PC, New York (Michael S. Hiller of counsel), for respondents.

_____

Order and judgment (one paper), Supreme Court, New York County (Lynn R. Kotler, J.), entered May 17, 2016, affirmed, without costs.

Opinion by Gesmer, J. All concur except Tom and Kahn, JJ. who dissent in an Opinion by Kahn, J.

Order filed.