SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 13, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Richter, Manzanet-Daniels, Tom, Gesmer, JJ.

902-
903 In re Gabrielle N., and Another,

Children Under the Age of Eighteen
Years, etc.,

The Administration for
Children's Services,
Petitioner-Respondent,

-against-

Jacqueline T., et al.,
Respondents-Appellants.

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George E. Reed, White Plains, for Jacqueline T., appellant.

Law Office Israel Premier Inyama, New York (Israel Inyama of counsel), for Delroy N., appellant.

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

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

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Order of disposition, Family Court, Bronx County (Monica Drinane, J.), entered on or about July 1, 2014, to the extent it brings up for review a fact-finding order, same court and Justice, entered on or about April 15, 2013, which found that

respondents parents neglected one daughter and derivatively neglected another, unanimously affirmed, without costs, and the appeal therefrom otherwise dismissed, without costs, as moot.[1]

Since Family Court continued the children's placement in foster care after conducting subsequent permanency hearings, respondents' challenge to the July 1, 2014 dispositional order is moot (*see Matter of Skye C. [Monica S.]*, 127 AD3d 603, 604 [1st Dept 2015]).

A preponderance of the evidence supports the court's finding that respondents neglected the special needs child by interfering with her medical care, and delaying necessary treatment to the point where ACS sought, and was granted, a medical override of the parents' refusal to consent to surgery (*see Matter of Jaquan F. [Alexis F.]*, 120 AD3d 1113, 1114 [1st Dept 2014]).

The finding of derivative neglect was also appropriate

[1]On May 12, 2016 this Court remanded the matter to Family Court for a reconstruction hearing because the medical records from four health facilities that treated the special needs child, received into evidence in Family Court, were not submitted to this Court as part of the original record and were missing (*Matter of Gabrielle N. [Jacqueline T.]*, 139 AD3d 504 [1st Dept 2016]). On or about November 17, 2017 this Court received the missing records.

inasmuch as respondents' behavior demonstrated such an impaired level of parental judgment as to create a substantial risk of harm for any child in their care (*see Matter of Joshua R.*, 47 AD3d 465, 466 [1st Dept 2008], *lv denied* 11 NY3d 703 [2008]).

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

ENTERED: FEBRUARY 13, 2018

CLERK

Acosta, P.J., Sweeny, Gische, Andrias, JJ.

5478 In re Save Gansevoort, LLC, et al., Index 158482/16
Petitioners-Appellants,

-against-

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

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

Zachary W. Carter, Corporation Counsel, New York (Elina Druker of counsel), for City of New York, the New York City Landmarks Preservation Commission and Meenakashi Srinivasan, respondents.

Fox Rothschild LLP, New York (Karen Binder of counsel), for 60-74 Gansevoort Street, LLC, respondent.

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Judgment (denominated decision and order), Supreme Court, New York County (Joan B. Lobis, J.), entered March 27, 2017, denying the petition to annul a certificate of appropriateness issued by respondent New York City Landmarks Preservation Commission (the Commission), dated January 17, 2017, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Petitioners in this article 78 proceeding contend that there is no rational basis for the Commission's approval of respondent 60-74 Gansevoort Street's (developer) application to perform work on buildings located within the Gansevoort Market Historic District. Petitioners claim that the Commission, by issuing a

certificate of appropriateness (COA), permitting the alteration of one building and proposed demolition and replacement of another building, has effectively rescinded the district's landmark status under the guise of a COA. We find that there is ample evidence to support the Commission's determination, and since it is rationally based, we affirm Supreme Court's dismissal of the petition.

The two buildings at issue in this appeal are within the Gansevoort Market Historic District, so designated by the Commission in 2003.[1] Such a designation means that the district contains improvements that have a "special character or special historical or aesthetic interest or value" (Administrative Code of City of NY § 25-302[h]) (Landmarks Law). Permission is required to alter, reconstruct or demolish any of the improvements encompassed by the district (Landmarks Law § 25-305[a][1]). At issue in this proceeding are proposals submitted by the developer to add three stories to 60-68 Gansevoort Street (60-68), a two-story building, and to demolish a one-story "no-style" building located at 70-74 Gansevoort Street (70-74)

[1]The district, which consists of 104 buildings, most dating from the 1840s to the 1940s, was a bustling marketplace. Its boundaries are West 14th Street to the north, Gansevoort Street to the south, Hudson Street to the east, and 10th Avenue to the west.

and replace it with a six-story building.

The Commission held a public hearing in November 2015, at which time the Commission heard the objections raised by petitioners, and received testimony and comments by others in attendance, including businesses and individuals. Some of these comments and testimony were in favor of the proposal and some were against it. The Commission also received some 800 written comments, again some in favor of and some against the proposal. At a second meeting, held in February 2016, the developer called in experts to respond to public comments regarding the proposed buildings. Members of the Commission presented their opinions and concerns regarding the proposal, making specific recommendations as to how the structures should be designed, including a reduction in the height of 60-68.

At a subsequent meeting, held in June 2016, the developer presented a revised proposal, taking into account the recommendations that had been made by the Commission at the February 2016 meeting. The Commission approved the developer's revised proposal, determining that the alteration of 60-68 and the proposal for the 70-74 building that would be built were consistent with and in keeping with the style, height and design of other buildings in the area. Petitioner's appeal challenges the Commission's COA.

Pursuant to title 25 of the Landmarks Law, the Commission has the power to approve changes to buildings within a historic district by issuing a COA. Landmarks Law § 25-307(b)(2) sets forth nine factors that the Commission "shall" consider in determining whether an application for a permit to construct, reconstruct, alter or demolish any structure in an historic district should be granted. These factors include the structure's aesthetic, historical and architectural values and significance, and its architectural style, design, arrangement, texture, material and color. In sum, this means the Commission must consider the effect of the proposed work and the relationship between the results of the work and the exterior architectural features of neighboring improvements in such district (Landmarks Law § 25-307[b][1][a], [b]; *see e.g. 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]). Although each of the nine factors was not expressly enumerated in the Commission's final approval, the extensive proceedings and record developed before the Commission make it clear the factors were considered as part of the entire deliberative process undertaken by it. The Commission did not simply issue a COA based on the fact that one of the buildings was designated "no style" in the original

landmark designation report, but in consideration of the factors, it required the developer to modify its original proposal. The weight to be given any particular factor is within the discretion of the Commission.

In reviewing the Commission's actions, a court's review is limited to whether the Commission's determination has a "rational basis" (*Matter of Committee to Save Beacon Theater v City of New York*, 146 AD2d 397, 405 [1st Dept 1989]). This is an "extremely deferential" standard of review (*Matter of Beck-Nichols v Bianco*, 20 NY3d 540, 559 [2013], citing *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]). Although such deference does not apply in circumstances where a matter of pure legal interpretation is involved (*see Matter of Teachers Ins. & Annuity Assn. of Am. v City of New York*, 82 NY2d 35, 42 [1993]), here the historical and/or aesthetic interest of the buildings is implicated. Given those circumstances, Supreme Court correctly accorded due deference to the Commission's expertise (*see Stahl York Ave. Co. v City of New York*, 76 AD3d 290, 295 [1st Dept 2010], *lv denied* 15 NY3d 714 [2010]; *Matter of Teachers Ins. & Annuity Assn.*, 82 NY2d at 41-42).

Contrary to petitioners' argument, Supreme Court did not apply a heightened or insurmountable standard of review (*see*

Beck-Nichols v Bianco, 20 NY3d at 559). The court took into account the extensive commentary period involved in vetting the developer's proposal, the original report designating the Gansevoort area a historic district, and the fact that the developer was responsive to recommendations on how its proposal should be revised to address the concerns raised, not only by the public but members of the Commission itself. Only after the developer presented a suitably tailored proposal did the Commission issue a COA for alteration and demolition. By doing so, the Commission properly considered the architectural, historical, and other factors relevant to the proposal as a whole in light of the historic designation it conferred on the district in 2003, and its decision to issue a COA for the proposed work was "the result of reasoned deliberation" (*Citineighbors*, 306 AD3d at 114). In doing so, the Commission acted rationally.

We also reject petitioner's argument that the Commission's

actions were a de facto repeal of the district's landmark designation. The approval pertained to two buildings out of 104 in the district and was made with due regard for the historical and architectural styles in the district.

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

ENTERED: FEBRUARY 13, 2018

CLERK

Friedman, J.P., Andrias, Kapnick, Gesmer, JJ.

3320 Michael Licata, et al., Index 112822/08
Plaintiffs-Appellants-Respondents,

-against-

AB Green Gansevoort, LLC, et al.,
Defendants-Respondents-Appellants,

J.E.S. Plumbing & Heating Corp., et al.,
Defendants-Respondents.

- - - - -

Orion Mechanical Systems, Inc.,
Third-Party Plaintiff-Respondent,

-against-

Alfa Piping Corp.,
Third-Party Defendant-Respondent,

Coastal Sheet Metal Corp.,
Third-Party Defendant.

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Grey and Grey, LLP, Farmingdale (Sherman B. Kerner of counsel), for appellants-respondents.

Barry, McTiernan & Moore LLC, New York (Laurel A. Wedinger of counsel), for AB Green Gansevoort, LLC, Hotelsab, LLC, and Pavarini McGovern LLC, respondents-appellants.

Bartlett, McDonough & Monaghan, LLP, White Plains (David C. Zegarelli of counsel), for J.E.S. Plumbing & Heating Corp., respondent.

Gannon, Rosenfarb & Drossman, New York (Lisa L. Gokhulsingh of counsel), for Orion Mechanical Systems, Inc., respondent.

Congdon, Flaherty, O'Callaghan, Reid, Donlon, Travis & Fishlinger, Uniondale (Michael T. Reagan of counsel), for Alfa Piping Corp., respondent.

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Order, Supreme Court, New York County (Paul Wooten, J.),

entered July 9, 2015, which granted defendants' and third-party defendant Alfa Piping Corp.'s respective motions for summary judgment, unanimously modified, on the law, to deny the cross motion of defendants AB Green Gansevoort, LLC, Hotelsab, LLC and Pavarini McGovern, LLC (collectively the owner defendants) insofar as they sought summary judgment dismissing plaintiff Michael Licata's (plaintiff) Labor Law § 241(6) claim against the owner defendants, and plaintiff's common-law negligence and Labor Law § 200 claims against Pavarini; and to deny the respective motions of defendants J.E.S. Plumbing & Heating Corp. and Orion Mechanical Systems, Inc. insofar as they sought summary judgment dismissing the owner defendants' contractual indemnification claims against them, and otherwise affirmed, without costs.

Plaintiff, a carpenter, was framing a bathroom on the 12th floor of the owner defendants' building. As he stepped backwards off the ladder on which he had been working, his left foot got "caught . . . like sandwiched" in an unmarked and uncovered hole in the floor. Plaintiff twisted backwards, injuring his knee, but stopped himself from falling to the ground by placing a hand out. Plaintiff then straightened himself and pulled his foot out of the hole.

Plaintiff testified that the inside of the room, which was either 12 feet by 15 feet or 15 feet by 18 feet, "was a little

bit of a mess" with a pile of sheetrock, pipes and/or pieces of pipes and a "lot of garbage," including food, papers and stuff, on the floor. The hole was round and "maybe about six, eight-inch, nine-inch [in] circumference." It did not have any pipes in it, and went all the way through the concrete slab to the floor below.

Plaintiff did not see the hole before the accident. When asked if there was anything covering the hole when he set up the ladder, he replied: "There was garbage all over the floor. I don't recall. It's very possible. I don't recall." When pressed further on whether he saw anything covering the hole, he replied: "No, I don't – like I said, there was garbage. I don't know if it was covering the hole or not." When asked if he saw any cover for the hole in the room, like wood, he replied: "I didn't see any. Like I said there was a lot of stuff on the floor."

Labor Law § 241(6) imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to construction workers (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993]). To state a claim, the plaintiff must demonstrate that his or her injuries were proximately caused by a violation of a specific and applicable provision of the New York State Industrial Code (12 NYCRR § 23 *et*

seq) (*id.* at 502; *see also Ortega v Everest Realty LLC,* 84 AD3d 542, 544 [1st Dept 2011]).

In support of his Labor Law § 241(6) claim against the owner defendants, plaintiff relies 12 NYCRR 23-1.7(e)(2), which states: "Working Areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed."

12 NYCRR 23-1.7(e)(2) is sufficiently specific to sustain a claim under Labor Law § 241(6) (*see Matter of 91st St. Crane Collapse Litig.*, 133 AD3d 478 [1st Dept 2015]; *Smith v McClier Corp.*, 22 AD3d 369, 370 [1st Dept 2005]). Here, after plaintiff's foot got caught in a hole, he twisted, but was able to stop himself from falling to the floor. Plaintiff testified unequivocally that he did not see the hole before the accident. Although plaintiff could not state with certainty whether or not the garbage and debris actually covered the hole, when his extensive deposition testimony is viewed in its entirety, an inference may be drawn that strewn garbage and debris obscured his view of the floor and hid the hole from him, even if it did not actually cover it, thereby creating a hazardous condition. This theory was not newly raised for the first time in opposition

to summary judgment (*see Goodwin v Western Beef Retail, Inc.*, 117 AD3d 537, 538 [1st Dept 2014]). Thus, because strewn garbage and debris obstructing his view of the hole may have contributed to plaintiff's accident, defendants were not entitled to dismissal of his Labor Law § 241(6) claim predicated on 12 NYCRR 23-1.7(e)(2) (*Singh v Young Manor, Inc.*, 23 AD3d 249, 249 [1st Dept 2005] ["In light of the circumstances under which the accident occurred, i.e., plaintiff stepped on a nail near a pile of debris in the work area that had been permitted to accumulate for several days, Industrial Code (12 NYCRR) § 23-1.7 (e) (2) is applicable to support plaintiff's Labor Law § 241(6) claim"]).

Labor Law § 200 is a "codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" *(Cruz v Toscano*, 269 AD2d 122, 122 [1st Dept 2000] [internal quotation marks omitted]). "Where an existing defect or dangerous condition caused the injury, liability [under Labor Law § 200] attaches if the owner or general contractor created the condition or had actual or constructive notice of it" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 [1st Dept 2012]). Proof of the defendants' supervision and control over a plaintiff's work is not required (*see Cordeiro v Midtown Holdings, LLC*, 87 AD3d 904, 906 [1st Dept 2011]).

Pavarini is not entitled to dismissal of plaintiff's common-law negligence and Labor Law § 200 claims. Plaintiff testified that he was in the space the entire day and the area was filled with garbage, debris, dirt and material. It was Pavarini's responsibility to clean garbage on the site. While Pavarini's project executive and mechanical, electrical, and plumbing superintendent each testified that they never observed unprotected holes or tub drains in their walk-throughs, defendants point to no evidence that they did not have notice of the strewn garbage and debris that allegedly contributed to plaintiff's accident by obscuring such holes. Accordingly, Pavarini has failed to eliminate all triable issues of fact as to whether it had, or should have had, notice of the hazardous condition on the premises in reasonable time to correct it, and whether it performed its task of cleaning the site in an appropriate and correct manner.

Supreme Court correctly dismissed the common-law negligence claim against J.E.S. Plumbing. Although plaintiff argues that J.E.S. Plumbing is the only entity that could have removed the cover on the hole, which is the only grounds he raises in support of his negligence claim against that entity, there is no evidence that J.E.S. Plumbing left the hole uncovered.

The owner defendants are not entitled to common-law

indemnification or contribution from contractors J.E.S. Plumbing, Orion, or Alfa, because there is no evidence that the contractors were negligent (*see Martins v Little 40 Worth Assoc., Inc.*, 72 AD3d 483, 484 [1st Dept 2010]; *see also Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp.*, 71 NY2d 599, 603 [1988]). Because Alfa was not negligent, and because its sub-subcontract required it to defend the owner defendants only from damages arising from Alfa's work *and* caused by Alfa's negligence, the owner defendants are not entitled to contractual indemnification from Alfa.

However, J.E.S. Plumbing and Orion are subject to a far broader indemnification clause which provides, inter alia:

> "A. To the greatest extent permitted by law, each Trade Contractor shall indemnify, defend, save and hold the Owner . . ., the Construction Manager . . . harmless from and against all liability, damage, loss, claims, demands and actions of any nature whatsoever, which arise out of or are connected with, or are claimed to arise out of or be connected with, Inter alia:
>
> "1. The performance of work by the Trade Contractor, or any act or omission of Trade Contractor;
>
> "2. Any accident or occurrence which happens, or is alleged to have happened, in or about the place where such work is being performed or in the vicinity thereof (a) while the Trade Contractor is performing the work, either directly or indirectly through a second tier trade contractor or material agreement, or (b) while any of the Trade Contractor's property, equipment or personnel are in or about such place or the vicinity thereof by reason of or as a result of the performance of the work."

The clause does not require negligence on the part of J.E.S. Plumbing and Orion as a condition to their indemnity obligations and could be triggered even in the absence of negligence by either of them (*see Matter of New York City Asbestos Litig.*, 142 AD3d 408, 410 [1st Dept 2016], *lv dismissed* 28 NY3d 1178 [2017], *lv denied* 28 NY3d 915 [2017]; *Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 178 [1990]; *Santos v BRE/Swiss, LLC*, 9 AD3d 303 [1st Dept 2004]). J.E.S. Plumbing and Orion failed to establish that the pipes on the floor in the vicinity of the accident, as alleged by plaintiff, were not their property and did not result from their work. Thus, they have failed to conclusively demonstrate that paragraph A(2)(a) of the indemnity provision was not triggered. At a minimum, because plaintiff asserted direct claims against J.E.S. Plumbing and Orion, to the extent that the owner defendants incurred damages in defending this action, they are entitled to contractual indemnification for such damages up until dismissal of the claims against J.E.S. Plumbing and Orion.

Accordingly, the owner defendants' contractual indemnification claims against J.E.S. Plumbing and Orion should be reinstated.

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

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

ENTERED: FEBRUARY 13, 2018

CLERK

Andrias, J.P., Kapnick, Gesmer, Moulton, JJ.

5679 The People of the State of New York, Respondent,

Ind. 11970/93

-against-

Alex Silvagnoli,
Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (Lawrence T. Hausman of counsel), and Milbank, Tweed, Hadley & McCloy LLP, New York (Alexis E. Kim of counsel), for appellant.

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

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Order, Supreme Court, New York County (Bruce Allen, J.), entered on or about November 14, 2014, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The record supports the court's discretionary upward departure, based on clear and convincing evidence establishing the existence of aggravating factors not adequately accounted for by the risk assessment instrument (*see People v Gillotti*, 23 NY3d 841, 861-862 [2014]; *People v Velasquez*, 143 AD3d 583 [1st Dept 2016], *lv denied* 28 NY3d 914 [2017]). Although defendant was assessed 20 points under risk factor 13 for his conduct while confined, the risk assessment instrument did not adequately take

into account the seriousness of his misconduct of a sexual nature toward female correction officers (*see e.g. People v Ratcliff*, 107 AD3d 476 [1st Dept 2013], *lv denied* 22 NY3d 852 [2013]). Defendant also displayed a general lack of rehabilitation that demonstrated a risk of reoffense. He served all 21 years of a 7-to-21-year sentence imposed in 1993, and his bad behavior persisted almost to the end of his incarceration.

We have considered and rejected defendant's remaining contentions.

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

ENTERED: FEBRUARY 13, 2018

CLERK

Renwick, J.P., Andrias, Kapnick, Gesmer, Moulton, JJ.

5681-
5682 Index 150047/14

Manuel Guaman, etc.,
Plaintiff-Appellant-Respondent.

-against-

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

- - - - -

D'Onofrio General Contractors Corp.,
Third-Party Plaintiff-Respondent-Appellant,

-against-

Yukon Enterprises, Inc.,
Third-Party Defendant-Respondent-Appellant.

- - - - -

Yukon Enterprises, Inc.,
Second Third-Party Plaintiff
-Respondent-Appellant,

-against-

Diego Construction, Inc.,
Second Third-Party Defendant
-Respondent-Appellant.

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Sivin & Miller, LLP, New York (Edward Sivin of counsel), for appellant-respondent.

Havkins Rosenfeld Ritzert & Varriale, LLP, Mineola (Gail L. Ritzert of counsel), for the City of New York and D'Onofrio General Contractors Corp., respondents-appellants.

Churbuck Calabria Jones & Materazo, P.C., Hicksville (Nicholas P. Calabria of counsel), for Yukon Enterprises, Inc., respondent-appellant.

Newman Myers Kreines Gross Harris, P.C., New York (Olivia M. Gross and Adrienne Yaron of counsel), for Diego Construction, Inc., respondent-appellant.

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Order, Supreme Court, New York County (Carol R. Edmead, J.), entered April 19, 2016, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for summary judgment on the Labor Law §§ 240(1) and 241(6) claims against defendants City of New York and D'Onofrio General Contractors Corp., unanimously affirmed, without costs. Order, same court and Justice, entered June 29, 2017, which, upon renewal of the City and D'Onofrio's, and third-party and second third-party defendants' motions for summary judgment dismissing the complaint and all claims as against them, adhered to the original determination denying the motions, unanimously reversed, on the law, without costs, and the summary judgment motions granted. The Clerk is directed to enter judgment accordingly.

Contrary to plaintiff's argument, a fall through an unguarded opening in the floor of a construction site constitutes a violation of Labor Law § 240(1) only where a safety device adequate to prevent such a fall was not provided (*Burke v Hilton Resorts Corp.*, 85 AD3d 419 [1st Dept 2011]; *Kielar v Metropolitan Museum of Art*, 55 AD3d 456, 458 [1st Dept 2008]; *John v Baharestani*, 281 AD2d 114, 118-119 [1st Dept 2001]). A safety line and harness may be an adequate safety device for a person working over an open area or near an elevated edge (*see e.g. Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35 [2004]; *cf.*

Kielar, 55 AD3d at 458 [statute violated where, inter alia, safety lines did not reach area of skylights]; *Anderson v MSG Holdings, L.P.*, 146 AD3d 401 [1st Dept 2017] [harness supplied but no place to tie off], *lv dismissed* 29 NY3d 1100 [2017]).

Defendants established prima facie that plaintiff's decedent was the sole proximate cause of his accident with evidence that a harness and safety rope system was in place on the roof, that the decedent had been instructed to remain tied off at all times while on the roof, and that he could not have reached the skylight through which he fell if he had remained tied off. In opposition, plaintiff offered nothing more than speculation that the decedent unhooked his harness to reach the lift that transported workers to and from the roof or that the system of harness, lanyard, and safety rope failed.

In view of the foregoing, any violation of Labor Law § 241(6) was not a proximate cause of the decedent's accident (*see Eddy v John Hummel Custom Bldrs., Inc.*, 147 AD3d 16, 24-25 [2d Dept 2016], *lv denied* 29 NY3d 913 [2017]).

Plaintiff's notice of appeal limited his appeal to the denial of his motion for summary judgment on the Labor Law §§

240(1) and 241(6) claims. Accordingly, we do not reach his arguments addressed to the Labor Law § 200 and common-law negligence claims (*see D'Mel & Assoc. v Athco, Inc.*, 105 AD3d 451, 453 [1st Dept 2013]).

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

ENTERED: FEBRUARY 13, 2018

CLERK

Renwick, J.P., Andrias, Kapnick, Gesmer, Moulton, JJ.

5683-
5683A Index 652409/15

Dae Associates, LLC doing business as Danese Gallery,
Plaintiff-Appellant,

-against-

AXA Art Insurance Corporation, et al.,
Defendants-Respondents.

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Carter Reich, PC, New York (Carter Reich of counsel), for appellant.

Wade Clark Mulcahy, New York (Dennis M. Wade and Michael A. Gauvin of counsel), for AXA Art Insurance Corporation, respondent.

Furman Kornfeld & Brennan LLP, New York (Andrew R. Jones of counsel), for Arthur J. Gallagher & Co. and Ellen Ross, respondents.

Goldberg Segalla LLP, New York (Peter J. Biging of counsel), for Wells Fargo Insurance Services of New York, Inc., respondent.

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Orders, Supreme Court, New York County (Jeffrey K. Oing, J.), entered on or about September 14, 2016, which granted defendants' motions to dismiss the complaint, and denied plaintiff's cross motion as moot, unanimously affirmed, with costs.

The all-risk policy at issue, which covered insured property for "all loss or damage to insured property," did not apply to plaintiff art gallery's contractual liability to purchasers of

stolen artwork that was returned to its rightful owner (*see HRG Dev. Corp. v Graphic Arts Mut. Ins. Co.*, 527 NE2d 1179, 1179 [Mass Ct App 1988]). "[D]efective title is clearly not a 'physical loss or damage . . . from any external cause" (*Nevers v Aetna Ins. Co. Inc.*, 14 Wash App 906, 907 [1976]). Despite the fact that the phrase "loss or damage" in the policy was not qualified by terms such as "direct" or "physical," "[w]e may not, under the guise of strict construction, rewrite a policy to bind the insurer to a risk that it did not contemplate and for which it has not been paid" (*Commercial Union Ins. Co. v Sponholz*, 866 F2d 1162, 1163 [9th Cir 1989]). "Title insurance has been regarded as a separate type of contract not falling within any of the three basic classes of insurance. . . . It is not reasonable to interpret a policy so broadly that it becomes another type of policy altogether" (*id.*). Even if a possessory interest in stolen artwork that was returned to its rightful owner was sufficient to establish an insurance interest (*see Scarola v Insurance Co. of N. Am.*, 31 NY2d 411, 413 [1972]), plaintiff did not possess the artwork at the time the purchasers demanded a refund that was guaranteed under their contract with plaintiff's representative.

The fifth and sixth causes of action, against the insurance broker defendants, were properly dismissed, with leave to replead

the sixth cause of action for a "special relationship" with the broker defendants in a second amended complaint. "Although the parties' relationship lasted a considerable period of time and defendant [broker] assured plaintiff that his insurance needs were being met, these circumstances are not so exceptional as to support imposition of a fiduciary duty upon defendant" (*Hersch v DeWitt Stern Group, Inc.*, 43 AD3d 644, 645 [1st Dept 2007]). A longstanding relationship alone is insufficient to establish a special relationship between plaintiff and the broker defendants. The amended complaint contains no specific allegations that plaintiff would meet with its broker every year to discuss the types of policies purchased, the limits to purchase, or what optional coverages should be purchased.

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

ENTERED: FEBRUARY 13, 2018

CLERK

Renwick, J.P., Andrias, Kapnick, Gesmer, Moulton, JJ.

5684 Retirement Plan for General Employees of the City of North Miami Beach, et al., Plaintiffs-Appellants,

-against-

Harold McGraw III, et al., Defendants-Respondents,

McGraw Hill Financial, Inc., Nominal Defendant-Respondent.

Index 652695/15

_____

Spector Roseman & Kodroff, P.C., Philadelphia, PA (Daniel J. Mirarchi of the bar of the State of Pennsylvania, admitted pro hac vice, of counsel), for appellants.

Cahill Gordon & Reindel LLP, New York (Brian T. Markley of counsel), for Harold McGraw III, Charles E. Halderman, Jr., Pedro Aspe, Robert P. McGraw, Hilda Ochoa-Brillembourg, Edward B. Rust Jr., Sir Winfried Bischoff, William D. Green, Douglas N. Daft, Linda Koch Lorimer, James H. Ross, Kurt L. Schmoke, Sidney Taurel, Sire Michael Rake, Rebecca Jacoby, Douglas L. Peterson, Richard E. Thornburgh, Deven Sharma, Kathleen Corbet and Vicki Tillman, respondents.

Davis Polk & Wardell LLP, New York (Charles S. Duggan of counsel), for McGraw Hill Financial, Inc., respondent.

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Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered December 29, 2016, which granted defendants' motions to dismiss the complaint, unanimously affirmed, with costs.

In this derivative action, plaintiff shareholders of nominal defendant McGraw Hill Financial, Inc. (McGraw Hill) allege breaches of fiduciary duty, mismanagement, and waste of corporate assets by McGraw Hill's board of directors and officers, in

connection with McGraw Hill's former subsidiary Standard & Poor's Ratings Services' (S&P) rating of subprime-backed residential mortgage-backed securities (RMBS) and collateralized debt obligations (CDOs).

The motion court correctly dismissed the complaint, as plaintiffs failed to adequately plead, with particularity, that the demand requirement, pursuant to Business Corporation Law § 626(c), was excused (*see Bansbach v Zinn*, 1 NY3d 1, 8 [2003]).

Plaintiffs' claim that six of the 12 members of the then current board of directors were self-interested is insufficient (*see id.* at 9). Four of these director defendants are alleged to be interested based solely on ties with companies that received credit ratings from S&P, with no explanation as to how these affiliations compromised their independence in evaluating a demand (*see Security Police & Fire Professionals of Am. Retirement Fund v Mack*, 93 AD3d 562, 564 [1st Dept 2012]). The mere fact of director defendant Robert McGraw's fraternal relationship with director defendant Harold McGraw III, whom the complaint does not directly implicate in any misconduct, is insufficient to establish control (*compare Voluto Ventures, LLC v Jenkens & Gilchrist Parker Chapin LLP*, 46 AD3d 354, 356 [1st Dept 2007] [futility demonstrated by allegations that chairman of board was the father of a criminal involved in a company project

and that he dominated two of the other four members of the board]). The claim of self-interest for the sixth director defendant, based upon a role at S&P which began in 2011, long after the alleged misconduct, is also insufficient.

Plaintiffs' claims that the board of directors failed to fully inform themselves about S&P's ratings of RMBS and CDOs, that they turned a blind eye to various "red flags," and that their abdication of oversight of S&P's business practices was so egregious that it could not constitute a valid exercise of business judgment, also lack the requisite particularity (*see generally Bansbach*, 1 NY3d at 9). The board's regular meetings demonstrate that they were fulfilling their fiduciary obligations (*see e.g. Fink v Komansky*, 2004 WL 2813166, *5, 2004 US Dist LEXIS 24660, *13 [SD NY, Dec. 8, 2004, No. 03-CV-0388(GBD)]). Further, S&P took responsive action to the subpoenas and lawsuits filed, beginning in August 2007, concerning S&P's rating of RMBS and CDOs, by, among other things, downgrading thousands of securities and announcing new measures to strengthen their ratings criteria and improve transparency.

In any event, plaintiffs' claims, to the extent they accrued prior to August 2009, are time-barred (*see* CPLR 213[7]; *Blake v Blake*, 225 AD2d 337 [1st Dept 1996]). Additionally, the breach of fiduciary duty claims were not alleged with the requisite

particularity (*see* CPLR 3016[b]; *Aetna Cas. & Sur. Co. v Merchants Mut. Ins. Co.*, 84 AD2d 736 [1st Dept 1981]). Moreover, the exculpatory provision of the certificate of incorporation, which does not run afoul of Business Corporation Law § 402(b)(1), shields the director defendants from liability (*see Teachers' Retirement Sys. of La. v Welch*, 244 AD2d 231, 231-232 [1st Dept 1997]).

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

ENTERED: FEBRUARY 13, 2018

CLERK

Renwick, J.P., Andrias, Kapnick, Gesmer, Moulton, JJ.

5685 The People of the State of New York, Ind. 181/15
Respondent,

-against-

Yuraina Lindsey,
Defendant-Appellant.

_____

Christina A. Swarns, Office of the Appellate Defender, New York (Margaret E. Knight of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Courtney Wen 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 (Robert Stolz, J. at plea; Edward McLaughlin, J. at sentencing), rendered October 14, 2015,

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

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

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

ENTERED: FEBRUARY 13, 2018

CLERK

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

Renwick, J.P., Andrias, Kapnick, Gesmer, Moulton, JJ.

5686 The People of the State of New York, Ind. 3677/11
Respondent,

-against-

Kaubar Dobbins,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Noreen M. Stackhouse of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered November 22, 2011, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of two years, unanimously affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the hearing court's credibility determinations (*see People v Prochilo*, 41 NY2d 759, 761 [1977]). Testimony credited by the court established that, regardless of

their motivation, the police officers made a lawful vehicle stop based on traffic violations (*see People v Robinson*, 97 NY2d 341 [2001]), and then smelled marijuana emanating from the car, which provided probable cause (*see e.g. People v Rivera*, 127 AD3d 622 [1st Dept 2015], *lv denied* 27 NY3d 968 [2016]).

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

ENTERED: FEBRUARY 13, 2018

CLERK

Renwick, J.P., Andrias, Kapnick, Gesmer, Moulton, JJ.

5687 The People of the State of New York, Ind. 925N/15
Respondent,

-against-

Andre O'Neal,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Alan Gadlin 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 (James Burke, J.), rendered October 14, 2015,

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

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

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

ENTERED: FEBRUARY 13, 2018

CLERK

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

Renwick, J.P., Andrias, Kapnick, Gesmer, Moulton, JJ.

5688-
5689 &
M-178
M-190

Index 452464/15
452966/15

Samuel Pfeiffer,
Plaintiff-Appellant,

-against-

Edward G. Imperatore, et al.,
Defendants-Respondents.

- - - - -

Samuel Pfeiffer,
Plaintiff-Appellant,

-against-

Mid-Town Development Limited Partnership, et al.,
Defendants-Respondents.

_____

Schlam Stone & Dolan LLP, New York (Jeffrey M. Eilender of counsel), for appellant.

Phillips Nizer LLP, New York (Mark M. Elliott of counsel), for Edward G. Imperatore, Edward W. Ross, Arthur E. Imperatore, Maurice L. Stone, John Doe(s) 1-10, XYZ Corporation and Mid-Town Development Limited Partnership also sued herein as Midtown Development, L.P., respondents.

Fried, Frank, Harris, Shriver & Jacobson LLP, New York (Janice Mac Avoy of counsel), for Tishman Speyer, respondent.

_____

Judgments, Supreme Court, New York County (Charles E. Ramos, J.), entered June 21, 2016 and June 29, 2016, dismissing the amended complaint in the first action and the complaint in the second action upon orders, same court and Justice, entered March 3, 2016 and March 21, 2016, which, among other things, granted defendants' motions to dismiss the aforesaid complaints for the

reasons set forth in a hearing transcript, and awarded sanctions and issued a litigation injunction, unanimously affirmed, with costs.

Although the prior dismissed actions filed in 2013 and 2014 did not seek the same relief as in this case, they alleged the same facts in support of claims of a fraud on the court. Accordingly, plaintiff's current claims for equitable relief based on allegations of a fraud on the court could and should have been raised in the prior actions and are thus barred by the doctrine of res judicata (*see Matter of Hunter*, 4 NY3d 260, 269 [2005]).

Given the history of litigation by this plaintiff against these parties, the motion court providently exercised its discretion in issuing the litigation injunction and financial sanctions against plaintiff (*see* 22 NYCRR 130-1.1).

M-178 ***Samuel Pfeiffer v Mid-Town Development Limited Partnership***

M-190 ***Samuel Pfeiffer v Edward G. Imperatore***

Motions to withdrawn appeals denied.

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

ENTERED: FEBRUARY 13, 2018

CLERK

Renwick, J.P., Andrias, Kapnick, Gesmer, Moulton, JJ.

5690 The People of the State of New York, Ind. 5395/14
Respondent,

-against-

Benjamin John,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Lee M. Pollack 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 (Patricia Nuñez, J.), rendered November 5, 2015,

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

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

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

ENTERED: FEBRUARY 13, 2018

CLERK

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

Renwick, J.P., Andrias, Kapnick, Gesmer, Moulton, JJ.

5691 The People of the State of New York, Respondent, SCI 305N/16

-against-

Simone Broadnax,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Richard M. Weinberg, J.), rendered January 15, 2016, 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: FEBRUARY 13, 2018

CLERK

Renwick, J.P., Andrias, Kapnick, Gesmer, Moulton, JJ.

5695- Ind. 2432/13
5696 The People of the State of New York,
Respondent,

-against-

Spencer Weber,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Michael J. Obus, J.), rendered October 31, 2013, convicting defendant, upon his plea of guilty, of forcible touching, and sentencing him to a term of 30 days and 6 years' probation, unanimously affirmed. Order, same court and Justice, entered on or about January 9, 2014, which adjudicated defendant a level two predicate sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously modified, on the law, to the extent of reducing the adjudication to level one, and otherwise affirmed, without costs.

As to the appeal from the judgment of conviction, we perceive no basis for reducing the sentence.

As to defendant's civil appeal from his sex offender

adjudication, the People failed to establish by clear and convincing evidence that defendant should be assessed points for abusing drugs (*see People v Palmer*, 20 NY3d 373, 378-379 [2013]). There was evidence that defendant possessed bags of marijuana at the time of the instant arrest and on a prior occasion. However, he was not convicted of marijuana possession in either instance, and there was no evidence that he had smoked marijuana at the time of the offense. There was also no evidence that he had ever been screened or treated for substance abuse. Even assuming he could be found to have been a marijuana user, such use was not established to be more than occasional social use, and thus would not warrant the assessment of points under the risk factor for drug abuse (*see id.* at 378).

Because subtraction of the points at issue reduces defendant's classification to level one, we do not reach his remaining contention.

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

ENTERED: FEBRUARY 13, 2018

CLERK

Renwick, J.P., Andrias, Kapnick, Gesmer, Moulton, JJ.

5697 Michael Avramides, etc., Index 155420/15
Plaintiff-Appellant,

-against-

Sherif Moussa, et al.,
Defendants-Respondents,

319 E. 50th St. Owners Corp., et al.,
Nominal Defendants-Respondents.

_____

Knox Law Group, P.C., New York (Daniel Knox of counsel), for appellant.

Kagan Lubic Lepper Finklestein & Gold, LLP, New York (Jesse P. Schwartz of counsel), for respondents.

_____

Order, Supreme Court, New York County (Debra A. James, J.), entered on or about February 24, 2017, which, to the extent appealed from as limited by the briefs, granted defendants' motion to dismiss the amended complaint, unanimously affirmed, with costs.

Plaintiff did not sufficiently plead that a pre-suit demand on the director defendants would have been futile (*Marx v Akers*, 88 NY2d 189, 200-201 [1996]). The amended complaint lacks the necessary particularity to support plaintiff's futility allegations (*see* Business Corporation Law § 626[c]; *Barr v Wackman*, 36 NY2d 371, 379 [1975]).

The motion court also correctly found that the amended

complaint failed to state a claim against the individual directors, because there are no allegations that the directors committed any independent tortious acts (*see Murtha v Yonkers Child Care Assn.*, 45 NY2d 913, 915 [1978]). In urging that this requirement now constitutes "abrogated law," plaintiff relies on *Fletcher v Dakota, Inc.* (99 AD3d 43 [1st Dept 2012]), which held that there is no "safe harbor from judicial inquiry for directors who are alleged to have engaged in conduct not protected by the business judgment rule" (*id.* at 49). In that case, the directors were alleged to have engaged in racially discriminatory conduct which is not protected by the business judgment rule (*id* at 50). In contrast, the allegations in this case, however, fall squarely within the protections of the business judgment rule (*Konrad v 136 E. 64th St. Corp.*, 254 AD2d 110 [1st Dept 1998], *lv dismissed in part and denied in part* 92 NY2d 1042 [1999]).

In the alternative, the motion court correctly held that the

language of an earlier release between plaintiff and the defendant cooperative precluded plaintiff's claims related to the building's storm drainage system.

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

ENTERED: FEBRUARY 13, 2018

CLERK

Renwick, J.P., Andrias, Kapnick, Gesmer, Moulton, JJ.

5698 Lynn Chu, et al., Index 153594/14
Plaintiffs-Appellants,

-against-

Deborah Klatskin, et al.,
Defendants-Respondents.

_____

Gallet Dreyer & Berkey, LLP, New York (Pamela Gallagher of counsel), for appellants.

Braverman Greenspun, P.C., New York (Kelly A. Ringston of counsel), for respondents.

_____

Order, Supreme Court, New York County (Robert R. Reed, J.), entered November 18, 2016, which granted defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7), unanimously affirmed, without costs.

Documentary evidence conclusively refutes plaintiffs' claim that, as the owners of the only units on the 11th floor of the condominium building, they have exclusive rights to the 11th-floor portion of the elevator shaft that accommodated the decommissioned and ultimately removed freight elevator adjacent to the wall of their joined residential units. Paragraph 6.1 of the condominium "Declaration" defines "Common Elements" as "the entire Property including the Land and all parts of the Building and improvements thereon," and section 6.15.4 of the by-laws gives the owner of any two or more units that benefit exclusively

from an adjacent or appurtenant common element the "exclusive right of use of such Common Element" on certain conditions. However, paragraph 6.2.7 of the Declaration provides that all elevators and elevator shafts are Common Elements, except, in pertinent part, that "two of the elevators are reserved for the exclusive use of the Residential Unit Owners and one elevator is reserved for the exclusive use of the Commercial Unit Owners." At the time of plaintiffs' purchase of the 11th-floor units, the exclusive right of use of the freight elevator belonged to the commercial unit owners, and the language of the governing documents has remained unchanged through the present.

Plaintiffs do not argue that the documents precluded the board from converting certain commercial units to residential use, and from dividing the common interest appurtenant to those commercial units (*see* Real Property Law § 339-i[2]). Nor do they sufficiently allege injury resulting from the board's licensing of the use of portions of the freight-elevator shaft to residential unit owners.

Plaintiffs' request for leave to replead, made for the first time on appeal, is improper (*see Channel Chiropractic, P.C. v Country-Wide Ins. Co.*, 38 AD3d 294 [1st Dept 2007]). In any event, plaintiffs failed to submit a proposed amended complaint and to offer extrinsic proof to demonstrate the validity of the

unspecified derivative causes of action they propose to assert (*see Fletcher v Boies, Schiller & Flexner, LLP*, 75 AD3d 469 [1st Dept 2010]).

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

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

ENTERED: FEBRUARY 13, 2018

CLERK

Renwick, J.P., Andrias, Kapnick, Gesmer, Moulton, JJ.

5699N In re Ronald Grassel, Index 600009/14
Petitioner-Appellant,

-against-

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

_____

Ronald Grassel, appellant pro se.

Zachary W. Carter, Corporation Counsel, New York (Antonella Karlin of counsel), for respondents.

_____

Order, Supreme Court, New York County (Michael D. Stallman, J.), entered September 18, 2015, which denied the petition to vacate an arbitrator's determination terminating petitioner's employment as a tenured school teacher, and dismissed the proceeding brought pursuant to CPLR article 75, unanimously affirmed, without costs.

The arbitrator's determination was rational and not arbitrary and capricious (*Bolt v NYC Dept. of Educ*, 2018 *NY Slip Op* 00090 [Jan 9, 2018], *see generally City School Dist*. of the City of N.Y. v McGraham, 75 AD3d 445, 450, 1st Dept 2010], *affd* 17 NY3d 917 [2011]), and Supreme Court properly concluded that petitioner failed to demonstrate by clear and convincing evidence that the arbitrator was biased against him (*see Matter of Moran v New York City Tr. Auth.*, 45 AD3d 484 [1st Dept 2007]).

Testimony by five students who witnessed the incidents supported the conclusion that petitioner took a knife from the desk in the classroom and waved it around in order to get control of his class. Moreover, there was testimony by a student and a paraprofessional that supported the finding that petitioner also pulled a stool out from under a student in a separate incident on the same day.

Petitioner's due process rights were not violated by the arbitrator's denial of his late motions for additional discovery and request to call dozens of vaguely identified witnesses. Furthermore, petitioner was afforded additional time to obtain substitute counsel when his attorney, who was present and active during most of the proceedings, withdrew.

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

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

ENTERED: FEBRUARY 13, 2018

CLERK

Renwick, J.P., Andrias, Kapnick, Gesmer, Moulton, JJ.

5700N Fulton Market Retail Fish Inc., doing business as Simply Seafood, et al.,
Plaintiffs-Appellants,

-against-

Todtman, Nachamie, Spizz & Johns, P.C., et al.,
Defendants-Appellants.

Index 151002/15

_____

John L. O'Kelly, East Williston, for appellants.

London Fischer, LLP, New York (Jason M. Myers of counsel), for Todtman, Nachamie Spizz & Johns, P.C. and Robert A. Rubenfeld, respondents.

Vouté, Lohrfink, Margo & McAndrew, LLP, White Plains (Howard S. Jacobwitz of counsel), for Rosenberg Feldman Smith, LLP, Stephen M. Rosenberg, Richard B. Feldman and Michael H. Smith, respondents.

_____

Order, Supreme Court, New York County (Shlomo S. Hagler, J.), entered June 21, 2016, which denied plaintiffs' motion for leave to renew their prior motion for recusal, unanimously affirmed, without costs.

The court acted within its discretion in denying plaintiffs' motion for leave to renew their recusal motion (*see People v Moreno*, 70 NY2d 403, 405 [1987]; *People v Glynn*, 21 NY3d 614, 618-619 [2013]; *Mehulic v New York Downtown Hosp.*, 140 AD3d 417 [1st Dept 2016]; CPLR 2221[e]). The new facts arising from the court's conduct at three hearings that post-date the filing of

the prior recusal motion would not change the prior determination (CPLR 2221[e][2], [3]). No bias is demonstrated by the court's comments upon learning of the grounds for the recusal motion and its conduct at oral argument on that motion and at the sanctions hearing, either standing alone or in combination with credibility rulings in the landlord-tenant litigation that gave rise to the instant legal malpractice action and that were cited in the prior recusal motion. The court was at times annoyed by plaintiffs' counsel's disrespectful attitude and by the grounds raised in the recusal motion, which plaintiffs never proved or adequately investigated. However, the record does not demonstrate that the court was so vexed that it could not be impartial (22 NYCRR 100.3[E][1]*; see Liteky v United States*, 510 US 540, 555-556 [1994]; *Hass & Gottlieb v Sook Hi Lee*, 55 AD3d 433, 434 [1st Dept 2008]; *People v A.S. Goldmen, Inc.*, 9 AD3d 283, 285 [1st Dept 2004], *lv denied* 3 NY3d 703 [2004]). The court also acted within its discretion in ordering a sanctions hearing to ascertain whether the recusal motion was frivolous (*see* 22 NYCRR 130-1.1[a], [c]*; see also* 22 NYCRR 130-1.1[a][b]).

Plaintiffs' claims are undermined by the fact that, while they argue that the court made biased rulings in the underlying landlord-tenant litigation, they never moved for recusal in that lawsuit, which lasted over a decade (*see Glatzer v Bear, Stearns*

& Co., Inc., 95 AD3d 707 [1st Dept 2012]). Even after the same justice was assigned to the instant action, plaintiffs did not move for recusal until 10 months after the case commenced, and then only after the court, at oral argument on a motion to dismiss, questioned the viability of plaintiffs' legal malpractice claim on collateral estoppel grounds.

The record also demonstrates that the court adequately reviewed the motion for leave to renew before denying it. The court thoroughly reviewed the prior recusal motion, which was discussed further at the sanctions hearing, and it presided over the three proceedings that prompted the motion to renew. The court also stated that it had reviewed the renewal motion papers and discussed them with staff, and it heard oral argument on the motion. The court's comments at oral argument on the prior motion and the renewal motion show that it understood the applicable standard, namely, that recusal would be warranted in this case if there were any bias, impropriety, or appearance of impropriety (22 NYCRR 100.3[E][1][a][i]; 22 NYCRR 100.2). The

court's comments in citing the informal advice from the Advisory Committee on Judicial Ethics, which concluded that recusal was not necessary, show that the court understood that the decision was within its discretion (*People v Moreno*, 70 NY2d at 405).

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

ENTERED: FEBRUARY 13, 2018

CLERK