SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

**JANUARY 16, 2018**

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Friedman, J.P., Webber, Gesmer, Kern, Oing, JJ.

4377-
4378N Joshua Watson,
Plaintiff-Respondent,

Index 306472/10

-against-

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

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Zachary W. Carter, Corporation Counsel, New York (Elina Druker of counsel), for appellants.

Rubert & Gross, P.C., New York (Soledad Rubert of counsel), for respondent.

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Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered November 26, 2014 which, to the extent appealed from as limited by the briefs, granted plaintiff's motion to strike the City defendants' answer, and denied their motion for a protective order, and order, same Court and Justice, entered December 1, 2015, which, to the extent appealed from as limited by the briefs, denied defendant Frank Diaz's motion to vacate the default judgment against him and to compel acceptance of the second amended answer, and granted plaintiff's cross motion for monetary sanctions against defendants, modified, on the law, to

grant Diaz's motion to vacate the default judgment and to compel acceptance of the second amended answer, and to deny plaintiff's cross motion for monetary sanctions, and otherwise affirmed, without costs.

In 2010, plaintiff commenced this action for false arrest and malicious prosecution against the City of New York, the police detective who arrested him, the District Attorney, an assistant district attorney of Bronx County (hereinafter referred to as the City defendants) and Frank Diaz (Diaz), the other arresting police detective. The City defendants interposed a timely answer but did not include Diaz.

On November 24, 2010, the motion court granted plaintiff's motion for a default judgment against Diaz for failing to file a timely answer as the City defendants' original answer and first amended answer did not include Diaz. On December 2, 2010, the City defendants served a second amended answer that included Diaz.

On appeal, Diaz raises a new argument not made below, that the default judgment against him is a nullity because his time to answer had not yet expired when the motion court granted the default judgment against him. Specifically, Diaz argues that the affidavit of service, which affirms that service was made on Diaz on September 29, 2010 pursuant to CPLR 308(2), was not filed

until October 18, 2010, and that he had until November 29, 2010 to timely answer the complaint.

Although an argument not raised before the motion court ordinarily may not be asserted on appeal, where "a party does not allege new facts, but, rather, raises a legal argument which appeared upon the face of the record and which could not have been avoided...if brought to [his or her] attention at the proper juncture," such argument may be raised for the first time on appeal (*Gerdowsky v Crain's N.Y. Bus.*, 188 AD2d 93, 97 [1st Dept 1993] [internal quotation marks omitted]). Where a party raises a legal argument for the first time on appeal, as long as the issue is determinative and the record on appeal is sufficient to permit review, this Court may consider the new argument (*Vanship Holdings Ltd. v Energy Infrastructure Acquisition Corp.*, 65 AD3d 405, 408 [1st Dept 2009]; *see also U.S. Bank N.A. v DLJ Mtge. Capital, Inc.*, 146 AD3d 603, 603 [1st Dept 2017] [declining to consider party's new theory, raised for the first time on appeal, which was "not a purely legal argument"]). Further, where a default judgment is entered prematurely because the time to answer has not expired, the judgment is a nullity and must be vacated (*see Dunn v Burns*, 42 AD3d 884, 886 [4th Dept 2007]).

CPLR 308(2) states that service thereunder is not complete until 10 days after the filing of the affidavit of service. CPLR

320 provides that when service is made pursuant to CPLR 308(2), the defendant has 30 days from the time service is complete to answer the complaint.

Here, Diaz's nullity argument may be considered by this Court as it is a purely legal argument and the record on appeal is sufficient to permit review. The record contains a copy of plaintiff's affidavit of service, which plainly states on the first line: "FILED Oct 18 2010 Bronx County Clerk." Thus, service upon Diaz was not complete until October 28, 2010, 10 days after the affidavit of service was filed. Diaz then had 30 days, exclusive of the two holidays during that period, to answer the complaint, i.e., November 29, 2010. The motion court's granting of plaintiff's motion for a default judgment on November 24, 2010 was premature as it was five days before Diaz's time to answer would have expired. Accordingly, the default judgment entered against Diaz should be vacated and plaintiff is directed to accept the City defendants' second amended answer.

We turn now to the more substantive issue of whether this Court should affirm the motion court's decision to strike the City defendants' answer. There is agreement that the City defendants' handling of the pretrial proceedings was deficient. Where we part company with the dissent is the proper sanction for such clear disregard of judicial proceedings and court orders.

The dissent takes the position that a monetary sanction would be sufficient. We respectfully disagree.

Pursuant to CPLR 3126, "[i]f any party . . . refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed, pursuant to this article, the court may make such orders with regard to the failure or refusal as are just." This Court has long held that "the drastic remedy of striking a party's pleading pursuant to CPLR 3126 for failure to comply with a discovery order . . . is appropriate only where the moving party conclusively demonstrates that the non-disclosure was willful, contumacious or due to bad faith" (*Henderson-Jones v City of New York*, 87 AD3d 498, 504 [1st Dept 2011] [internal quotation marks omitted]). "Willful and contumacious behavior can be inferred by a failure to comply with court orders, in the absence of adequate excuses" (*id.*). Although actions should be resolved on the merits whenever possible, the efficient disposition of cases "is not promoted by permitting a party . . . to impose an undue burden on judicial resources to the detriment of . . . other litigants. Nor is the efficient disposition of the business before the courts advanced by undermining the authority of the trial court to supervise the parties who appear before it" (*Arts4All, Ltd. v Hancock*, 54 AD3d 286, 287 [1st Dept 2008], *affd* 12 NY3d 846 [2009], *cert denied*

559 US 905 [2010]). "[I]t generally is within the discretion of the motion court to determine the appropriate penalty to be imposed against an offending party" and "[i]t would not be appropriate . . . for this Court to substitute its discretion for that of the Justice sitting in the IAS Court" (*Spira v Antoine*, 191 AD2d 219, 219 [1st Dept 1993]).

Here, the motion court's finding that the City defendants' conduct was willful and contumacious is supported by the record and was a proper exercise of its discretion.

On May 10, 2011, the motion court issued the preliminary conference order, which required the City defendants to provide various documents within 60 days. However, the City defendants failed to respond or provide any records whatsoever notwithstanding the preliminary conference order.

Nearly a year later, on April 24, 2012, the motion court issued a second order requiring the City defendants to respond to the preliminary conference order and to produce "all documents held by the NYCPD" pertaining to this matter by June 1, 2012.

On June 11, 2012, over a year after they were initially directed to do so, the City defendants served responses to the preliminary conference order but redacted certain material they alleged was privileged and confidential, including personal identifying information such as phone numbers, addresses, dates

of birth and social security numbers for a police officer, the victim and a witness. However, the City defendants failed to provide a privilege log which is required under the discovery rules.

In February 2013, plaintiff moved to compel the City defendants' compliance with the prior discovery orders. Based on the City defendants' substantial delay in complying with the preliminary conference order and their redaction of certain documents without providing a privilege log, on August 9, 2013, the motion court issued an order granting plaintiff's motion to compel and requiring the City defendants to disclose their entire file without redactions.

After that order was issued, the City defendants could have sought to appeal the order or sought a protective order based on the assertion that the order required them to produce privileged and confidential information. However, they did nothing at all to challenge the order and did not even timely respond to the order.

Four months after the August 9, 2013 order was issued, the City defendants still had not responded or provided plaintiff with the unredacted discovery. Thus, in December 2013, plaintiff moved to strike the City defendants' answer based on their failure to comply with multiple discovery orders.

It was not until July 3, 2014, the return date of plaintiff's motion to strike, that the City defendants finally served plaintiff with their very delayed discovery response, which still included redactions and a privilege log. Such response was provided over three years after the City defendants were initially ordered to produce the discovery and nearly a year after the court ordered them to produce the discovery with no redactions.

Additionally, at the same time, almost a year after the order was issued, the City defendants sought a protective order against the August 9, 2013 order arguing that the order required them to produce privileged and confidential information.

Based on such dilatory conduct and the City defendants' failure to comply with multiple court orders, forcing the plaintiff to make multiple motions seeking discovery which the City defendants were ordered to produce years prior, the motion court properly exercised its discretion in striking the City defendants' answer and this Court will not substitute its discretion for that of the motion court.

The dissent contends that striking of the City defendants' answer was not warranted because plaintiff was not prejudiced by defendants' dilatory conduct. However, prejudice is not the standard by which a court determines whether to strike the answer

of a party. Rather, the standard is whether the conduct of the offending party is willful, contumacious and in bad faith. Thus, even if plaintiff has not established prejudice, such factor is not dispositive here.

The dissent also contends that the motion court abused its discretion in striking the City defendants' answer because the City defendants substantially complied with the discovery orders and that they acted in good faith in redacting privileged and confidential material. However, even if the August 9, 2013 order improperly ordered unredacted disclosure of privileged and confidential material and even if the motion court should have instead required an in camera inspection of the records to assess the redactions, the motion court still did not abuse its discretion in striking the City defendants' answer. The City defendants could have appealed from the August 9, 2013 order to the extent they believed that it was issued in error or they could have timely sought a protective order from the court prior to the deadline for providing discovery, but they failed to do so. Instead, they willfully and purposefully ignored the court's order on the ground that they disagreed with the scope of discovery the order required them to produce. However, the law does not leave it up to the litigants to decide which portions of a court order they will follow and which portions they will

ignore. Moreover, the City defendants' very belated attempt to obtain a protective order, nearly a year after the order was issued, was improper as it was untimely.

Although the dissent suggests that the City defendants' dilatory behavior should be overlooked, it was within the discretion of the motion court to strike the City defendants' answer based on the fact that the City defendants disobeyed multiple court orders. Indeed, this Court has consistently upheld the striking of the City's answer under similar circumstances where the City disobeyed multiple court orders directing the production of discovery (*see McHugh v City of New York*, 150 AD3d 561, 561 [1st Dept 2017] ["(t)he City's . . . unexplained noncompliance with a series of court-ordered disclosure mandates over a period of nearly three years constituted willful and contumacious behavior, warranting the striking of (its) answer]; *see also Elias v City of New York*, 87 AD3d 513, 517 [1st Dept 2011] [holding that "the history of defendant's untimely, unresponsive and lax approach to complying with the court's previous orders warrants the striking of defendant's answer"]; *see also Henderson-Jones v City of New York*, 87 AD3d at 504 [concluding that the City's answer should have been stricken on the ground that striking the answer "serves the important function of deterring obstreperous litigation

behavior" particularly where the City fails to comply with court-ordered deadlines]).

As this Court concludes that the motion court did not abuse its discretion in striking the City defendants' answer based on their defiance of multiple court orders, we do not address the merits of the City defendants' belated position that the August 9, 2013 order improperly required them to produce unredacted documents which would reveal information that should not be disclosed. We find, however, that an award of monetary sanctions is unwarranted.

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

FRIEDMAN, J.P. (dissenting in part)

This is an action for malicious prosecution and false arrest, brought by a plaintiff who, although ultimately acquitted at trial, was indicted by a grand jury, based on eyewitness testimony, on a charge of attempted murder in the second degree. The majority today affirms an order striking the answer of the City of New York and the individual police and prosecutorial defendants as a sanction for their counsel's redaction from defendants' document production of personal, confidential and/or privileged information apparently devoid of relevance to the merits of plaintiff's claim. The redacted information included such sensitive material as police officers' personal cell phone numbers (in some cases, numbers that the officers shared with members of their families); nonparty witnesses' social security numbers, dates of birth, addresses and phone numbers; and attorney work product of the Bronx County District Attorney's office. The majority does not deny that this material should have been excluded from the disclosure process, had defendants taken timely steps to obtain such relief, and that no material prejudice to plaintiff has been caused by either the nondisclosure of this information or by defendants' delays in moving for protective relief.

While I acknowledge that the Corporation Counsel's handling

of the defense of this matter was sufficiently flawed to warrant a substantial sanction (and I certainly do not believe that it should be "overlooked"), I cannot agree that these errors — which boil down to a failure to seek an obviously warranted protective order in timely fashion — can justify precluding defendants from presenting their potentially meritorious defense, especially given that plaintiff apparently had no right to the redacted information and, therefore, cannot claim to have been prejudiced by his failure to receive it. Certainly, individual police officers, nonparty witnesses and the victim of the underlying crime — the persons whose privacy and security would be placed at risk by the unrestricted disclosure of the subject information — should not be penalized personally for the deficiencies of the Corporation Counsel's defense of this matter.

To reiterate, I agree that the Corporation Counsel's defense of this matter was sufficiently deficient to warrant a substantial sanction, whether in the form of a fine or a preclusion order. Accordingly, I would affirm the $10,000 monetary sanction that Supreme Court imposed upon the City, and I dissent from the majority's unexplained reversal of the provident exercise of Supreme Court's discretion to impose such a measured penalty. I further dissent, for the reasons summarized above, and more fully explained below, from the majority's affirmance

of the striking of the answer.[1]

Plaintiff was arrested on October 25, 2007, and on November 14, 2007, a grand jury indicted him on the charge of attempted murder in the second degree. At trial, a witness, who had also appeared before the grand jury, testified that he had been standing next to the victim when he saw a third man shoot the victim at point blank range. This witness identified plaintiff as the perpetrator of the crime. The trial resulted in a verdict of acquittal.

In 2010, plaintiff commenced this action for false arrest and malicious prosecution against the City of New York, two police detectives who had arrested him, the District Attorney and an assistant district attorney of Bronx County. The complaint alleged that, in spite of the eyewitness who testified against him, there was no probable cause for plaintiff's arrest or prosecution, purportedly because defendants had failed to "exercise . . . proper procedure and reasonable investigation."

The first discovery order in this action, a preliminary conference order dated May 10, 2011, ordered defendants to

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[1]I concur with the majority's modification to grant the motion to vacate the default judgment that was entered against one of the individual defendants. I note, however, that the majority's granting of this relief will apparently have little effect, given that the majority upholds the striking of the other defendants' answer.

produce various documents within 60 days "*to extent not privileged*" (emphasis added). Defendants did not timely produce the specified documents, and on April 24, 2012, Supreme Court issued a second discovery order, ordering defendants to comply with the May 10, 2011 order by June 1, 2012. In response to the second discovery order, defendants produced 556 pages on June 11, 2012. Defendants' extensive production included complaint and arrest reports, the criminal court affidavit of the witness who testified against the plaintiff before the grand jury and during the criminal trial, and the grand jury indictment.

In compliance with the May 10, 2011 order, which expressly permitted redacting privileged information, defendants redacted privileged, confidential and irrelevant information on 257 pages. Although defendants did not produce a detailed privilege log at that time, each redaction was accompanied by a notation specifying the nature of the redacted information.[2] Defendants correctly assert that their June 11, 2012 production substantially satisfied their obligations under the May 10, 2011, and April 24, 2012 orders to produce relevant discovery "to

[2]For example, the "complaint - follow up informational report" contained redactions blacking out the victim's and witnesses' addresses, dates of birth and cell phone numbers, along with a notation that stated "redacted personal identifying information of victim/witness."

extent not privileged."[3]

The record does not reflect that plaintiff moved under CPLR 3124 to compel disclosure before Supreme Court's next discovery order. Nevertheless, on January 4, 2013, after a compliance conference, Supreme Court issued a third discovery order that simply instructed both parties to comply with the previous two

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[3]Under the 1994 amendment to CPLR 3122, defendants were not required to move for a protective order before redacting privileged information. "Pursuant to CPLR 3122, as amended effective January 1, 1994, it is the obligation of the party seeking disclosure to move to compel disclosure; no longer may the party who served a discovery notice rely upon the recipient's failure to seek a protective order within ten days, as was previously the case" (*Pyron v Banque Francaise du Commerce Exterieur*, 256 AD2d 204, 204-205 [1st Dept 1998]). As the practice commentary to CPLR 3122 explains: "Under the old rule, the burden of objecting to a discovery demand under CPLR 3120 or a demand for a physical or mental examination under CPLR 3121 was on the party receiving the demand, who had ten days in which to object to it by moving for a protective order. If the recipient failed to move for a protective order within this brief period, the objection was generally waived. Under the new rule, a procedure is prescribed whereby the recipient of the notice makes her objections to the serving party in a 'response' instead of to the court in a motion for a protective order. If the parties are then still at odds about their rights and obligations, it is the party who served the notice or subpoena who must bring the dispute to court. A motion to compel the discovery or examination under CPLR 3124 is the proper vehicle if the disclosure is sought from a party" (Patrick M. Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3122:1). Additionally, although under the new rule defendants had an obligation to serve a notice on plaintiff stating their objections within 20 days of receipt of plaintiff's discovery demand, defendants' failure to serve the required notice did not bar their redacting privileged and confidential information (*see Holness v Chrysler Corp.*, 220 AD2d 721, 721-722 [2d Dept 1995]).

orders within 60 days.

The January 4, 2013 order did not include any guidance to defendants as to how their June 11, 2012 production had not complied with the court's previous orders. Further, the order failed to clarify whether any of the redactions were improper or violated proper procedures, nor did it clarify how defendants could remedy any potential errors.

Before the 60-day deadline set by the January 4, 2013 order had expired, on February 13, 2013, plaintiff moved under CPLR 3124 to compel *unredacted disclosure of all of the documents* defendants asserted were subject to privilege. Plaintiff's motion primarily argued that defendants' "bald assertions" of privilege were improper, and that defendants had failed to sufficiently demonstrate that the redacted information was subject to privilege. Plaintiff further argued that defendants had not complied with CPLR 3122's requirement to serve a notice specifying its objections within 20 days of receiving plaintiff's subpoena, had not moved for a protective order, and had noted the asserted privilege on each page containing redactions instead of providing a privilege log.[4]

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[4]As explained in the previous footnote, defendants' failure to file the required notice within 20 days may have waived certain objections but did not waive their right to redact privileged or palpably improper disclosure. The caselaw cited by

In response to plaintiff's motion, defendants provided supplemental disclosure and argued that the redactions were necessary to protect privileged and confidential information, which in any event was largely irrelevant to plaintiff's claims that the City had lacked probable cause to arrest and prosecute plaintiff.

Given defendants' claim that their redactions were necessary to protect privileged and confidential information, it was incumbent upon Supreme Court, at a minimum, to conduct an in camera review before ordering defendants to produce the documents without redactions. Nevertheless, by order dated August 9, 2013 (the August 2013 order), Supreme Court granted plaintiff's motion to compel defendants to disclose the New York City Police Department's (NYPD) entire *unredacted* file of his case within 45 days. The court specifically directed that the documents to be produced "should not be redacted." The court did not allow for any exceptions to its prohibition of redactions, even for the

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plaintiff in the affidavit accompanying his motion does not hold otherwise (*see Anonymous v High School for Envtl. Studies*, 32 AD3d 353, 358-359 [1st Dept 2006] ["Initially, we note that defendants failed to object to the March 24, 2004 document demand within the 20 days set forth in CPLR 3122(a). Such failure to object to the demand generally limits our review to the question of privilege under CPLR 3101(b)"]). Further, as also explained in the previous footnote, defendants did not have a burden to move for a protective order before redacting privileged information.

identifying information of police officers, witnesses, or the victim. By way of explanation, the court stated: "The City has failed to move for a protective order, [has] not particularized the claimed privileges, or provided an affidavit from a representative of the Police Dept [sic] or District Attorney. The conclusory bald assertions of privilege [are] not sufficient to unilaterally redact documents."

On August 20, 2013, plaintiff served defendants with a copy of the August 2013 order and notice of entry thereof. Defendants never took an appeal from the August 2013 order. They also failed either to comply with the order or, on the other hand, to seek relief from it within the 45-day period it provided for compliance.

On December 2, 2013, approximately 3½ months after serving defendants with notice of entry of the August 2013 order, plaintiff moved for an order striking defendants' answer based on their failure to comply with the August 2013 order. In response to this motion, an assistant corporation counsel newly assigned to the case (the originally assigned assistant having resigned) sought to prepare a document production responsive to the August 2013 order and reached out to plaintiff's counsel in an attempt to resolve the pending motion. The assistant corporation counsel suggested that the parties enter into a stipulation allowing for

redaction of only certain categories of information, specifically, (1) the personal and current cell phone numbers of currently employed police officers, (2) the social security numbers of nonparty witnesses, (3) information about the victim protected by the Health Insurance Portability and Accountability Act (HIPAA), and (4) material constituting the work product of the District Attorney's office. The assistant corporation counsel also suggested that the parties jointly request in camera review of the documents. Plaintiff's counsel rejected the proposal and stated that he would accept nothing less than the documents without any redactions.

On July 3, 2014, the date on which the parties appeared for oral argument of the motion to strike, defendants produced the documents called for by the August 2013 order. The July 3, 2014 production comprised 553 pages, with full or partial redactions of only 83 pages, as opposed to the 257 redacted pages of the June 11, 2012 production. In addition, defendants produced a detailed privilege log noting each redacted item and the asserted privilege. Defendants indicated that the redactions were of (1) personal and current cell phone numbers of current police officers, (2) social security numbers of nonparty witnesses, (3) HIPAA-protected material of the victim, and (4) work product of the District Attorney's office. Defendants also disclosed the

criminal histories of nonparty witnesses, which had previously been redacted.

At or about the time of their July 3, 2014 document production, defendants moved for a protective order, and for modification of the August 2013 order to preclude disclosure of work product of the District Attorney's office. This motion was supported by an affidavit by an Assistant District Attorney averring that the redacted pages from the file of the District Attorney's office contained work product not subject to disclosure. Defendants also brought an unredacted copy of their document production to the oral argument and offered it to the court for in camera inspection.

For reasons not germane to the merits of this appeal, upon the parties' appearance on July 14, 2014, the motion was adjourned until July 31, 2014. Defense counsel thereafter made several attempts to contact plaintiff's counsel to discuss an amicable resolution of the pending motions. No substantive discussions resulted from these efforts. However, on July 25, 2014, plaintiff's newly substituted counsel cross-moved for sanctions on the ground that defendants' pending application for relief was frivolous. Defendants opposed the motion.

The parties again appeared before the court for oral argument on the pending applications on September 12, 2014.

Defendants again brought an unredacted copy of their file and again requested an in camera inspection to determine whether the documents were subject to unredacted disclosure. The court declined to receive the documents for an in camera inspection, and took the motions on submission.[5]

By order entered November 26, 2014, Supreme Court granted plaintiff's motion to strike defendants' answer based on their lack of compliance with its discovery orders. Supreme Court held that defendants, by failing either to seek timely relief from the August 2013 order or to comply with that order by providing completely unredacted documents, had engaged in willful and contumacious conduct that supported imposing the extreme sanction of striking their answer. Supreme Court noted that defendants had missed numerous deadlines, opined that plaintiff had acted in "good faith" by allowing defendants additional time to comply with the order, and found that disclosing 553 pages, of which 83 pages contained redactions, did not constitute substantial compliance with the August 2013 order. Notably, *Supreme Court did not address the merits of whether plaintiff was entitled to*

[5]In its order entered November 26, 2014, the court wrote that "the City has yet to provide unredacted copies of the documents even for the court's review." Upon the subsequent motion to renew or reargue, however, defendants contended, and plaintiff did not dispute, that this statement by the court was inaccurate.

*discover current police officer's cell phone numbers or witness's social security numbers.* It is also curious that the court, while asserting that plaintiff had acted "in good faith" by extending discovery deadlines, did not address plaintiff's refusal to agree to stipulate to the redaction of only four categories of plainly privileged information.

After the court granted the motion to strike their answer, defendants moved for renewal or reargument and plaintiff cross-moved for sanctions. By order entered December 1, 2015, the court denied defendants' motion for renewal or reargument and granted plaintiff's cross motion for sanctions to the extent of ordering defendants to pay plaintiff's counsel $10,000.

Upon defendants' appeal from the orders striking their answer and imposing a monetary sanction, the majority affirms the striking of the answer but — without any substantive explanation — vacates the more proportionate penalty of a monetary sanction. Notably, the majority avoids taking a position on the question of whether the August 2013 order properly ordered the City to disclose privileged and confidential information, without first conducting an in camera review to ensure that the disclosure was appropriate. Rather, the majority — sweeping under the rug the sensitive nature of the information in question, and the threat to the public interest, and to particular individuals, that its

disclosure would pose — states simply that it would affirm the striking of the answer "*even if* the August 9, 2013 order improperly ordered unredacted disclosure of privileged and confidential material and *even if* the motion court should have instead required an in camera inspection" (emphasis added). However tardy defense counsel was in raising the public interest concerns implicated by the disclosure that Supreme Court had ordered, I cannot join the majority in condoning the court's peremptory dismissal of those concerns once they had been brought to its attention.

Remarkably, even as it affirms the imposition of such a harsh penalty against defendants, apparently based largely on defendants' delays in responding to discovery demands and in moving for a protective order, the majority appears to concede that defendants' delayed discovery responses did not cause any substantial prejudice to plaintiff. Specifically, rather than identify any substantial prejudice to plaintiff from defense counsel's errors, the majority simply asserts that "prejudice is not the standard by which a court determines whether to strike the answer of a party." The majority ignores the fact that less drastic penalties than the striking of a pleading are available to sanction an error by counsel that causes no prejudice to the opposing party.

Initially, the majority misstates the proper standard of review on this appeal. When reviewing discovery orders or other discretionary determinations, while we of course generally defer to the trial court's exercise of its discretion, "the Appellate Division is vested with its own discretion and corresponding power to substitute its own discretion for that of the trial court, even in the absence of abuse" (*Those Certain Underwriters at Lloyds, London v Occidental Gems, Inc.*, 11 NY3d 843, 845 [2008]; *see also Andon v 302-304 Mott St. Assoc.*, 94 NY2d 740, 745 [2000]; *Small v Lorillard Tobacco Co.*, 94 NY2d 43, 53-54 [1999] ["The Appellate Division, as a branch of Supreme Court, is vested with the same discretionary power and may exercise that power, even when there has been no abuse of discretion as a matter of law by the nisi prius court"]).[6] In my view, the trial

[6]In *Spira v Antoine* (191 AD2d 219, 219 [1st Dept 1993]), we stated that, in resolving a discovery dispute, "it generally is within the discretion of the motion court to determine the appropriate penalty to be imposed against an offending party. It would not be appropriate, *at bar*, for this Court to substitute its discretion for that of the Justice sitting in the IAS Court" (*id.* [internal citations omitted and emphasis added]). The majority, in quoting the foregoing language, uses an ellipsis to replace the italicized words "at bar," leaving the misleading impression that *Spira* stands for the erroneous proposition that this Court does not have the power to substitute its own discretion for that of the trial court. The phrase "at bar," which the majority conveniently chooses to omit from its quotation, indicates that *Spira* stands for no such general proposition, but merely determined that, in the particular case presented, it would not be appropriate to disturb the trial

court's exercise of its discretion to strike defendants' answer, based on their counsel's tardiness in taking steps to protect from disclosure material that plaintiff simply was not entitled to have, was (contrary to the majority's view) an abuse of discretion as a matter of law. But, at a minimum, the court's extreme action was, under the circumstances, an improvident exercise of discretion for which this Court should substitute its own discretion.[7]

It should also be borne in mind that the August 2013 order, defendants' disobedience of which appears to be the primary factor in the majority's affirmance of the striking of their answer, was clearly erroneous. Initially, and of utmost significance, regardless of whether or not Supreme Court was frustrated with defendants' lack of compliance with its previous

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court's exercise of its discretion.

[7]At the same time it affirms the disproportionate penalty of the striking of the answer, the majority sets aside the proportionate penalty of a monetary sanction, with no justification offered beyond the conclusory assertion that the fine was "unwarranted." The majority does not explain how a $10,000 monetary sanction could have been "unwarranted" by the same conduct that the majority finds to have warranted the far more drastic penalty of the striking of the answer. Further, the expansive view the majority takes, in discussing the striking of the answer, of the deference owed to Supreme Court, contrasts jarringly with the majority's peremptory reversal of a monetary penalty that, in any other case presenting similar deficiencies of counsel, would have been held to have been well within Supreme Court's discretion.

orders, the court should not, without first having conducted an in camera review, have ordered defendants to produce the documents without redactions in the face of defendants' claim that the documents contained privileged and confidential information, including identifying information of police officers, the crime victim, and witnesses (*see NAMA Holdings, LLC v Greenberg Traurig LLP*, 133 AD3d 46, 60 [1st Dept 2015] ["we cannot affirm an order directing the production of more than 3,000 purportedly privileged communications without a single one of those communications having been reviewed"]; *Espady v City of New York*, 40 AD3d 475, 476-477 [1st Dept 2007] [Before ordering disclosure of materials affecting the anonymity of police informants "[a]t the very least, the motion court should have conducted an in camera hearing as to whether plaintiffs' interest in obtaining disclosure outweighs defendants' interest in preserving the confidentiality of this material"]; *see also Schindler v City of New York*, 134 AD3d 1013, 1014-1015 [2d Dept 2015] ["Although the defendants failed to produce the subject IAB file in order to substantiate their claim that certain portions of that file are privileged and irrelevant, under the circumstances of this case, the Supreme Court improvidently exercised its discretion in directing the disclosure of the complete IAB file without first requiring its production and

reviewing it, in camera, so that the defendants' assertions of privilege and irrelevance could be evaluated on the merits"]).

Second, regardless of any potential harm to innocent parties, defendants' failures to provide a privilege log and an affidavit from an individual with personal knowledge as part of their June 11, 2012 production, while not to be condoned, did not justify deeming defendants to have effected a blanket waiver of any and all privileges, particularly in light of defendants' efforts to note the asserted privilege on each page containing redactions. At a minimum, Supreme Court should have given defendants advance warning that failure to provide a privilege log and an affidavit with personal knowledge would constitute a blanket waiver of any and all privileges.

Third, as to defendants' failure to move for a protective order, under the 1994 amendments to CPLR 3122 (as previously discussed), defendants were entitled to serve a production redacting privileged information without first moving for a protective order. The burden was then on plaintiff to move to compel unredacted disclosure, as plaintiff did (*see Pyron*, 256 AD2d at 204-205).

Finally, as also previously mentioned, the City's failures to comply with CPLR 3122's requirement to serve a notice stating its objections within 20 days did not waive its right to redact

privileged or otherwise palpably improper disclosure (*see Lea v New York City Tr. Auth.*, 57 AD3d 269, 269 [1st Dept 2008] ["Concerning the demands that do remain in issue on appeal, they are all palpably improper . . . , and thus production thereof should not be compelled despite defendant's failure to timely object thereto"]; *Holness*, 220 AD2d at 721-722 [2d Dept 1995] ["The failure of a party to challenge the propriety of a notice for discovery and inspection pursuant to CPLR 3120 within the time prescribed by CPLR 3122 forecloses inquiry into the propriety of the information sought *except with regard to material that is privileged pursuant to CPLR 3101 or requests that are palpably improper . . .* plaintiff's first request for documents is palpably improper since it seeks information of a confidential and private nature that is not relevant to the issues in this case" (emphasis added)]).

In support of its finding that defendants' delays, and their lack of full compliance with the clearly erroneous August 2013 order, amount to conduct so willful and contumacious as to justify striking their answer, the majority cites to three of our precedents (*McHugh v City of New York*, 150 AD3d 561 [1st Dept 2017]; *Elias v City of New York*, 87 AD3d 513 [1st Dept 2011]; *Henderson-Jones v City of New York*, 87 AD3d 498 [1st Dept 2011]). While I agree that defense counsel's handling of this matter

leaves much to be desired (particularly, the failures to respond to plaintiff's discovery demands and to seek an appropriate protective order in timely fashion), this case law simply does not support striking defendants' answer based on the deficiencies of their counsel's handling of discovery appearing from this record. To the contrary, a review of the relevant case law makes it plain that the conduct at issue here, even though deserving of a penalty, does not warrant the drastic sanction of the striking of their answer — in effect, granting plaintiff judgment as to liability without the trouble and inconvenience of having to prove a case.

With regard to the untimeliness of defendants' discovery responses, it is well established that mere delay in responding to discovery requests does not justify the extreme sanction of striking an answer. Applicable here is the following statement we made in an earlier case presenting a similar issue:

> "Defendant's behavior in this matter cannot be excused. Their exhibited pattern of noncompliance and their failure to account for their actions over a period of a year and a half warrant a penalty pursuant to CLR 3126. . . . While the conduct of defendants here was unsupportable, we cannot find that it rose to the level that would justify striking the answer" (*De Socio v 136 E. 56th St. Owners, Inc.*, 74 AD3d 606, 608 [1st Dept 2010]; *see also Viruet v Mount Sinai Med. Ctr. Inc.*, 143 AD3d 558 [1st Dept 2016]; *Banner v New York City Hous. Auth.*, 73 AD3d 502 [1st Dept 2010]).

Here, defendants' counsel was certainly remiss in failing to move

in timely fashion for a protective order authorizing the redaction of the aforementioned sensitive or privileged material from production, and in tardily producing documents in response to the May 20, 2011 order and the August 2013 order. But, in view of the majority's inability to identify any prejudice to plaintiff resulting from these delays, and also in view of the problem created by plaintiff's counsel's refusal to reasonably accommodate the privacy and security concerns raised by plaintiff's discovery demands, the striking of defendants' answer — effectively granting plaintiff a default judgment in the absence of any indication that he could shoulder the burden of rebutting the presumption of probable cause arising from his indictment — is unjustified on this record.

Nor, under these circumstances, was defendants' redaction of 83 pages out of the 553-page production they made on July 3, 2014, so willful and contumacious as to justify striking their answer. The aforementioned three cases cited by the majority do not hold otherwise and are, in any event, readily distinguishable. In *McHugh v City of New York*, we held it was appropriate to strike the defendants' answer after the defendants violated five discovery orders ordering them to produce a witness for deposition, and upon finally producing a witness, produced an admittedly unprepared witness who was unable to provide any

relevant testimony (150 AD3d at 562). Under even more extreme facts, in *Elias v City of New York*, we ordered the defendant's answer to be stricken after the defendant had previously been sanctioned by this Court for failure to comply with its discovery obligations, and had additionally failed to comply with nine of Supreme Court's orders (87 AD3d at 517). Finally, in *Henderson-Jones v City of New York*, we reversed Supreme Court and granted the plaintiff's motion to strike the defendants' answer based upon our finding that the "defendants failed to demonstrate that they even attempted to comply with their discovery obligations" merely to identify the police officers involved in the subject incident, and that their efforts were so "lacking in diligence that it is hard to characterize them as anything other than willfully designed to thwart plaintiff" (87 AD3d at 505).

Here, unlike the defendants in *McHugh* and *Elias*, who respectively violated five and nine discovery orders, defendants in this case were merely untimely on two occasions, neither of which prejudiced plaintiff. Unlike the defendants in *Henderson-Jones*, who did not even attempt to comply with their discovery obligations, defendants in this case went to considerable lengths to comply with the August 2013 order. Defendants produced 470 pages of unredacted documents, and for the 83 pages containing redactions, defendants provided a privilege log and specific

written notations indicating the asserted privilege for each redaction. Further, defendants note that they twice brought the entire unredacted file to court and asked Supreme Court to conduct an in camera inspection. Additionally, defendants attempted on numerous occasions to negotiate a stipulation with plaintiff to redact only four narrow categories of information. Finally, defendants moved for a protective order — albeit, again, later than the motion should have been made.

Above all, *McHugh*, *Elias* or *Henderson-Jones* are inapposite because there is no indication that the defendants' answers were stricken in those cases based on failures to disclose privileged information, the disclosure of which would pose risks to private citizens, and which had no relevance to the merits of the action. Unlike the three cases relied upon by the majority, in this case the primary error of defendants' counsel was in being late to take steps to exclude privileged and sensitive information from the scope of the disclosure process, in which such information plainly did not belong. In particular, defendants' failure to disclose identifying information of police officers or private citizens, even if the court had — plainly, in error — directed such disclosure, cannot be characterized as "cavalier noncompliance" (*Elias*, 87 AD3d at 517) that warrants the striking of a pleading.

Finally, the majority is correct in pointing out that, once the concededly erroneous August 2013 order was issued, rather than simply fail to comply with it to the extent it was in error, defendants' counsel should have sought immediate judicial relief from it. Specifically, defendants should have moved for a protective order before the deadline for production set by the order and, given the interests at stake, they should also have filed an appeal and made an application for interim relief from this Court. Defense counsel plainly erred in unilaterally failing to comply fully with the August 2013 order, erroneous though it was, and I agree that defendants must be penalized for this error of their counsel. But I do not agree that, in determining the penalty, we must ignore the serious — and dangerous — error that tainted the August 2013 order in the first place, or the lack of prejudice to plaintiff from defendants' failure to produce irrelevant information to which he was not entitled. Under these particular circumstances, I believe that the penalty of striking defendants' answer — thereby granting plaintiff judgment as to liability when he has not proved his case — is far too drastic, and its imposition constitutes an abuse of discretion.

In sum, the relevant conduct of defendants' counsel, while undeniably deficient, does not constitute willful and

contumacious conduct of the kind that would justify the striking of defendants' answer (*see Viruet*, 143 AD3d at 559; *Banner*, 73 AD3d at 503; *Catarine v Beth Israel Med. Ctr.*. 290 AD2d 213, 215-216 [1st Dept 2002]). Just as not every crime deserving of punishment warrants a life sentence, not every failing of counsel in litigation — not even every failing of counsel that deserves a substantial sanction — warrants the imposition of the ultimate penalty available to the court, namely, the direction of judgment against the client of the errant attorney. This drastic sanction is plainly disproportionate to the conduct at issue here, especially when one considers that the information withheld is irrelevant to the merits of the case and, if disclosed without restriction (as Supreme Court inexplicably demanded), would threaten the personal interests of police officers, their families, and other private citizens. The disproportion becomes even more glaring when one considers that plaintiff's counsel rejected out of hand a number of reasonable overtures by the Corporation Counsel to resolve this discovery dispute amicably. Moreover, the interests of the real party in interest in the defense of this matter — the taxpaying public of the City of New York — should not be disregarded in weighing the penalty to be imposed for the substantial — but ultimately nonprejudicial — procedural mistakes of their counsel.

For all of the foregoing reasons, I believe that we should modify the orders appealed from to reinstate defendants' answer — whether as a correction of an abuse of Supreme Court's discretion or as a substitution of this Court's own discretion for an improvident exercise of discretion by Supreme Court — and that we should affirm the imposition of the monetary sanction. To the extent the majority does otherwise, I dissent.

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

ENTERED: JANUARY 16, 2018

CLERK

Gische, J.P., Webber, Oing, Singh, Moulton, JJ.

5227- Index 102184/10
5228- 590573/10
5229 Michael Casalini, et al., 590224/11
Plaintiffs-Appellants,

-against-

Alexander Wolf & Son, etc., et al.,
Defendants-Respondents.

Manhattan Mall Eat, LLC, et al.,
Defendants.

- - - - -

Manhattan Mall Eat, LLC, et al.,
Third-Party Plaintiffs,

Strawberry Stores, Inc., et al.,
Third-Party Plaintiffs-Respondents,

-against-

Florin Painting, Inc.,
Third-Party Defendant-Respondent.

- - - - -

Alexander Wolf & Son a Division, etc.,
Second Third-Party Plaintiff-Respondent,

-against-

Florin Painting, Inc.,
Second Third-Party Defendant-Respondent.

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Silboitz, Garafola, Silbowitz, Schatz & Frederick, LLP, New York (Jill B. Savedoff of counsel), for appellants.

Marshall Dennehey Warner Coleman & Goggin, New York (Richard Imbrogno of counsel), for respondents.

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Order, Supreme Court, New York County (Carol R. Edmead, J.), entered March 17, 2016, which granted defendants Alexander Wolf &

Son (Wolf), VNO West 100 West 33rd Street, LLC (VNO), and Gimstraw, LLC, s/h/a Strawberry Stores, Inc.'s (Strawberry, and together with VNO, the Owner Entities) in limine motion, made pursuant to CPLR 4401, and dismissed the complaint in its entirety, unanimously reversed, on the law, without costs, the motion denied, and the complaint reinstated. Appeals from orders, same court (Saliann Scarpulla, J.), entered July 19, 2012, and March 21, 2013, unanimously dismissed, without costs, as subsumed in the appeal from the March 17, 2016 order.

Plaintiff Michael Casalini was allegedly injured at work on the renovation of a Strawberry store when he slipped and fell on a pile of debris that he maintains was either created or left unremedied by Wolf. Plaintiff testified that the pile of construction materials included sheetrock, pieces of wire and pipes. It also included garbage such as soda cans, a coffee cup and pizza boxes. Plaintiff testified that the floor where he slipped was wet. Plaintiff contends that he slipped on the debris after descending a ladder, that the debris had not been there 10 or 15 minutes earlier, when he ascended the ladder, and that he saw the debris for the first time when he stepped into it.

A project manager for Wolf testified that the general contractor was responsible for removing debris from the site on

an as needed basis. Debris would be removed more than once a day depending on the pace of the project. As part of the daily cleaning, moist green sawdust was spread on the floor. Workers would throw their own garbage on the floor that was swept into piles by laborers and removed by carts.

In March 2012, the Owner Entities moved for summary judgment on their crossclaims against Wolf for common-law indemnity. Wolf opposed and cross-moved seeking conditional summary judgment on its contractual indemnity claim against plaintiff's employer, Florin Paintings, LLC (Florin). By order entered July 19, 2012, the motion court, as relevant to this appeal, denied the Owner Entities' motion with respect to the common-law indemnification claim by finding that they "failed to show that . . . Wolf was negligent in failing to remove the debris that allegedly caused [plaintiff's] accident ... [,and] there [was] no evidence in the record that [Wolf] had notice of, or created, the pile of debris."

Subsequently, Florin, on behalf of the Owner Entities, moved for summary judgment dismissing only plaintiff's causes of action predicated upon violations of Labor Law § 241(6). Wolf cross-moved for summary judgment dismissing plaintiff's Labor Law § 241(6) as against it. Plaintiff cross-moved for an order granting him leave to reargue the July 19, 2012 order denying the

Owner Entities common-law indemnification claim as against Wolf.

On March 21, 2013, the motion court held that Wolf and the Owner Entities were entitled to summary judgment only as to those Labor Law § 241(6) claims that were predicated on abandoned Industrial Code provisions. The motion court, however, denied Florin's motion and Wolf's cross motion for summary judgment as to 12 NYCRR 23-1.7(d), 23-1.7(e)(1) and 23-1.7(e)(2), finding that plaintiff adequately pleaded a violation of these codes that was sufficiently specific to support a Labor Law § 241(6) claim.

The motion court also denied plaintiff's cross motion to reargue. In denying the cross motion, the motion court reiterated that the July 19, 2012 order merely held that no party had established that Wolf's negligence caused the accident. None of the defendants moved for summary judgment on the Labor Law § 200 or the common-law negligence claims. Four years later, prior to commencing a bench trial, the trial court, upon a motion in limine by defendants, dismissed the entire action with prejudice. The trial court found that the motion court's July 19, 2012 order held that Wolf "(1) did not have sufficient notice of; and (2) did not cause or create the debris condition that resulted in plaintiff[']s] ... accident" and dismissed the complaint because "plaintiffs place the alleged violation of the Industrial Code squarely only on and with defendant [Wolf]."

The trial court erred in granting defendants' motion in limine because, as defendants' acknowledge in their brief, it was one for summary judgment. As such, it was untimely as it was brought more than 120 days from the filing of the note of issue (CPLR 3212[a]). Further, an issue of material fact cannot form the basis for granting a motion in limine because it is an "inappropriate device to obtain [summary] relief" (*Downtown Art Co. v Zimmerman*, 232 AD2d 270, 270 [1st Dept 1996]; *see also State of New York v Metz*, 241 AD2d 192 [1st Dept 1998]; *Matter of PCK Dev. Co., LLC v Assessor of Town of Ulster*, 43 AD3d 539, 540 [2d Dept 2007]).

To the extent that the motion was made pursuant to CPLR 4401, defendants could only make the application after the close of plaintiff's case. Here, plaintiffs were not given an opportunity to make an evidentiary showing before dismissal was granted. Therefore, defendants' CPLR 4401 motion was premature

and should not have been granted (*Nieves v City of New York*, 95 AD3d 612 [1st Dept 2012]).

Accordingly, the complaint is reinstated in its entirety.

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

ENTERED: JANUARY 16, 2018

CLERK

Gische, J.P., Webber, Oing, Singh, Moulton, JJ.

5234 In re Antoinette T.,
Petitioner-Appellant,

-against-

Michael J.M.,
Respondent-Respondent.

_____

Cahill Gordon & Reindel LLP, New York (Kerry A. Burns of counsel), for appellant.

Law Office of Cabelly & Calderon, Jamaica (Lewis S. Calderon of counsel), for respondent.

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Order of fact-finding and disposition (one paper), Family Court, New York County (George L. Jurow, JHO), entered on or about September 28, 2016, which determined, after a hearing, that respondent father had committed, among other things, the family offense of attempted assault in the third degree and that there were no aggravating circumstances, and issued an order of protection against respondent for two years, unanimously modified, on the law and the facts, to vacate the finding of attempted assault in the third degree, find that respondent had committed the family offense of assault in the third degree and that aggravating circumstances exist, and extend the expiration date of the order of protection until September 28, 2021, and otherwise affirmed, without costs.

Family Court found that respondent had at most committed the

family offense of attempted assault in the third degree. We agree with the Family Court's findings of fact, but we find that the facts support a finding that respondent committed the family offense of completed assault in the third degree. Under Penal Law § 120.00(1), a person is guilty of assault in the third degree when "with intent to cause physical injury to another person, he causes such injury." "Physical injury" is defined as "impairment of physical condition or substantial pain" (Penal Law § 10[9]). Substantial pain requires "more than slight or trivial pain. Pain need not, however, be severe or intense to be substantial" (*People v Chiddick*, 8 NY3d 445, 447 [2007]).

Here, a fair preponderance of the evidence supports a finding that respondent committed the family offense of assault in the third degree, including infliction of physical injury (*see* Family Ct Act §§ 812[1]; 832; Penal Law § 120.00[1]). Petitioner's testimony, which the trier of fact found credible, establishes that on February 1, 2009, respondent inflicted a physical impairment and substantial pain upon petitioner when he punched her in the head and face with a closed fist, causing bruising and pain that lasted for two days and which she testified left a permanent mark on her nose. In a separate series of incidents, on June 6, 2010, respondent punched petitioner several times in her face and once on her left

shoulder resulting in intense pain to the face and left shoulder. Later, respondent pushed petitioner down five concrete stairs, causing severe pain for approximately 24 hours, and requiring an overnight hospitalization where she was prescribed pain medication (*see* Penal Law § 10.00[9]; *People v Tejeda*, 78 NY2d 936 [1991]; *Matter of Coumba F. v Mamdou D.*, 102 AD3d 634, 634-635 [1st Dept 2013]).

Given the evidence that respondent inflicted these numerous substantial physical injuries upon petitioner, Family Court also improvidently exercised its discretion in declining to find aggravating circumstances based on physical injury (Family Ct Act § 827[a][vii]). While the more serious conduct occurred in 2009 and 2010, offending conduct putting petitioner at risk continued (Family Ct Act § 842 ["The fact that abuse has not occurred during the pendency of an order shall not, in itself, constitute sufficient ground for denying or failing to extend the order"]). Under all the circumstances, we find that a five-year order of protection is warranted (*see* Family Ct Act § 842; *Matter of*

*Coumba F.*, 102 AD3d at 634; *Matter of Holder v Francis*, 67 AD3d 679 [2d Dept 2009], *lv denied* 15 NY3d 707 [2010]; *Matter of Muller v Muller*, 221 AD2d 635, 637 [2d Dept 1995]).

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

ENTERED: JANUARY 16, 2018

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Andrias, Gesmer, Oing, JJ.

5329-
5330 Index 156497/15

Terry Lang-Salgado,
Plaintiff-Appellant,

-against-

The Mount Sinai Medical Center, Inc.,
Defendant-Respondent.

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Yadgarov & Associates, PLLC, New York (Ronald S. Ramo of counsel), for appellant.

Kennedys CMK, New York (Frank J. Wenick of counsel), for respondent.

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Judgment, Supreme Court, New York County (Martin Shulman, J.), entered June 14, 2016, dismissing the complaint, and bringing up for review an order, same court and Justice, entered April 12, 2016, which granted defendant's motion to dismiss the complaint, and denied plaintiff's cross motion for leave to amend the complaint, unanimously affirmed, without costs. Appeal from order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff seeks to recover damages for injuries she allegedly sustained on July 5, 2012, as a result of her fall from a hospital stretcher while she was being positioned by an X-ray technician for a chest Xray. As described by plaintiff in her affidavit, the technician's conduct in placing plaintiff's body

in a certain position, so as to obtain accurate imaging in an Xray directed by a physician at defendant hospital, bore a "substantial relationship to the rendition of medical treatment by a licensed physician" (*Weiner v Lenox Hill Hosp.*, 88 NY2d 784, 788 [1996]; *Chaff v Parkway Hosp.*, 205 AD2d 571 [2d Dept 1994], *lv dismissed in part, denied in part* 84 NY2d 966 [1994]; *see also Lewis-Burnett v West Side Radiology Assoc.*, 106 AD3d 637 [1st Dept 2013]). Accordingly, plaintiff's complaint sounds in medical malpractice and was correctly dismissed as untimely (*see* CPLR 214-a). The cases relied on by plaintiff are inapposite since the accidents therein did not occur in the course of rendering medical treatment, but involved simple common sense and judgment (*see Friedmann v New York Hosp.-Cornell Med. Ctr.*, 65 AD3d 850 [1st Dept 2009]; *Reardon v Presbyterian Hosp. in City of N.Y.*, 292 AD2d 235 [1st Dept 2002]).

The court providently exercised its discretion in denying plaintiff's cross motion to amend the complaint to assert claims that defendant's "negligent hiring," "disregard of rules on the use of stretchers/hospital beds in the X-Ray room," and failure to "promulgate rules and regulations for the use of stretchers/hospital beds in the X-Ray room" caused her injuries.

The proposed claim of failing to follow protocol, stated "[u]pon information and belief," implicates questions of medical

competence or judgment linked to the treatment of plaintiff and sounds in medical malpractice. Hence, it is time-barred for the same reasons for which the original complaint was dismissed (*see Hazel v Montefiore Med. Ctr.*, 243 AD2d 344, 345 [1st Dept 1997] [claims that are "merely reformulations" of malpractice claims were properly dismissed as time-barred where malpractice claim was time- barred]*; Glasgow v Chou*, 33 AD3d 959, 961 [2d Dept 2006]).

The proposed claims for negligent hiring and the failure to promulgate rules and regulations, also stated "[u]pon information and belief," are time-barred unless the relation back doctrine, codified in CPLR 203(f), applies. CPLR 203(f) provides, "A claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading" (*see also Giambrone v Kings Harbor Multicare Ctr.*, 104 AD3d 546, 548 [1st Dept 2013]).

The original complaint asserts one cause of action that arose from plaintiff's Xray on July 5, 2012. The proposed negligent hiring and failure to promulgate regulations claims arise from different facts and implicate different duties based

on conduct preceding, and separate and different from, the alleged negligence of the Xray technician on that date. Thus, the relation back doctrine is inapplicable because the facts alleged in the original complaint failed to give notice of the facts necessary to support the amended pleading (*see Cady v Springbrook NY, Inc.*, 145 AD3d 846 [2d Dept 2016]; *Calamari v Panos*, 131 AD3d 1088 [2d Dept 2015]) *Infurna v City of New York*, 270 AD2d 24 [1st Dept 2000]; *Ceneus v Beechmont Bus Serv.*, 272 AD2d 499 [2d Dept 2000]). "The mere reference to 'negligence' in the original complaint did not give [defendant] notice of the transactions, occurrences, or series of transactions or occurrences, to be proved with respect to the proposed causes of action alleging negligent hiring and negligent supervision" (*Calamari*, 131 AD3d at 1089).

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

ENTERED: JANUARY 16, 2018

CLERK

Friedman, J.P., Mazzarelli, Kapnick, Webber, Moulton, JJ.

5448 The People of the State of New York, Respondent, Ind. 3724/11

-against-

Dystell Jarrett, Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Beth R. Kublin of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Nicholas Iacovetta, J.), rendered April 11, 2013, convicting defendant, after a jury trial, of criminal possession of a weapon in the second degree, and sentencing him to a term of 3½ years, unanimously affirmed.

The court properly denied defendant's suppression motion. The officers were justified in stopping defendant's vehicle for a traffic infraction, after seeing him make a left turn without signaling (*see People v Robinson*, 97 NY2d 341, 354 [2001]). In order to complete their investigation of the traffic infraction, it was reasonable for the officers to prevent defendant from leaving, and they "did not inordinately prolong the detention beyond what was reasonable under the circumstances to address the traffic infraction" (*see People v Edwards*, 14 NY3d 741, 742 [2010]). Furthermore, in response to an officer's initial

question, defendant admitted that he had been driving with a suspended license, which was an additional offense requiring police investigation and action. Another officer then saw a bulge near defendant's hip, which was not "unidentified," as defendant asserts. Instead, the officer recognized the outline of a pistol grip, and this provided reasonable suspicion justifying a frisk (*see People v Henderson*, 85 AD3d 663 [1st Dept 2011], *lv denied* 17 NY3d 953 [2011]).

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no reason to overturn the credibility determinations of the jury, which could reasonably have rejected, as a complete fabrication, defendant's claim of temporary and innocent possession of the weapon.

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

ENTERED: JANUARY 16, 2018

CLERK

Friedman, J.P., Mazzarelli, Kapnick, Webber, Moulton, JJ.

5449-
5450 Index 21440/13E

Carlton DePass,
Plaintiff-Appellant,

-against-

Mark M. Mohrmann, M.D., et al.,
Defendants-Respondents.

_____

Burns & Harris, New York (Jason Steinberg of counsel), for appellant.

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

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Judgment, Supreme Court, Bronx County (Stanley Green, J.), entered October 3, 2016, dismissing the complaint, pursuant to an order, same court and Justice, entered August 1, 2016, which had granted defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the judgment vacated, and the first cause of action for medical malpractice reinstated. Appeal from the order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff alleges that he sustained a ruptured tendon in his forearm after defendant doctor gave him steroid injections on two occasions, once in the area of the thumb joint and about two weeks later, in the elbow area. Defendants made a prima facie

showing of their entitlement to summary judgment, through the opinion of their medical expert, that the injections were given in accordance with the applicable standard of care and did not cause the tendon rupture (*Anyie B. v Bronx Lebanon Hosp.*, 128 AD3d 1, 3 [1st Dept 2015]). Defendants also submitted evidence demonstrating that plaintiff consented to the procedures after proper disclosure of risks and benefits.

In opposition, plaintiff raised an issue of fact through his orthopedic expert, who opined that defendant doctor administered a steroid in an excessive concentration, and that injectable steroids pose a well-known risk of tendon rupture in tendons near the injection site due to damaging effects of the steroid on the tendon. Plaintiff's expert opined that the steroid was long-lasting, and that the injection in the small thumb joint contributed to the rupture that occurred some time after the second injection. The expert's opinion was detailed regarding the departure from the standard of care, and was based on the record, acknowledging that the two injections were at different sites (*see generally Roques v Noble*, 73 AD3d 204, 207 [1st Dept 2010]).

Plaintiff's expert, however, did not opine on the issue of the adequacy of defendants' disclosure and informed consent (*see Shkolnik v Hospital for Joint Diseases Orthopaedic Inst.*, 211

AD2d 347, 350 [1st Dept 1995], *lv dismissed in part and denied in part* 87 NY2d 895 [1995]). Accordingly, the cause of action alleging lack of informed consent was correctly dismissed.

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

ENTERED: JANUARY 16, 2018

CLERK

Friedman, J.P., Mazzarelli, Kapnick, Webber, Moulton, JJ.

5451 In re Ashley S., and Others,

Children Under the Age of Eighteen Years, etc.

Rebecca S.-C.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Neal D. Futerfas, White Plains, for appellant.

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

Tamara A. Steckler, The Legal Aid Society, New York (Riti P. Singh of counsel), attorney for the children.

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Order of disposition, Family Court, Bronx County (Ruben A. Martino, J.), entered on or about August 8, 2016, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about June 7, 2016, which, after a hearing, found that respondent mother neglected three of her children and derivatively neglected the fourth child, unanimously affirmed, without costs.

The Family Court's finding that the mother medically neglected Nayleen by failing to seek prompt medical attention for her serious, second-degree burn and then failing to comply with the doctor's instructions for follow-up care, was supported by

the record (*see* Family Ct Act [FCA] § 1012[f][i][A]; *Matter of Hofbauer*, 47 NY2d 648, 654-655 [1979]; *Matter of R./C. Children*, 303 AD2d 172, 172 [1st Dept 2003]). Unlike the cases cited by respondent mother (*see Matter of Vallery P. [Jondalla P.]*, 106 AD3d 575, 575 [1st Dept 2013]; *Matter of Alexander D.*, 45 AD3d 264, 264-265 [1st Dept 2007]), the injuries at issue here were not "minor."

The finding that the mother medically neglected the infant Juan by failing to ensure that he consistently received proper dosages of medication, which was prescribed in relation to a potentially serious or terminal illness, was also supported by the record (*see Matter of Joelle T. [Laconia W.]*, 140 AD3d 513, 514 [1st Dept 2016]). The mother failed to preserve for appellate review her contention that the Family Court improperly granted the agency's request to conform the pleadings to the proof and, in any event, her argument is unavailing (*see Matter of Madison M. [Jennifer P.]*, 140 AD3d 631, 632 [1st Dept 2016]; *Matter of Richard S. [Lacey P.]*, 130 AD3d 630, 632-633 [2d Dept 2015], *lv denied* 26 NY3d 906 [2015]; *Matter of Michelle S.*, 195 AD2d 721, 722 [3d Dept 1993]).

Because the medical neglect findings as to Nayleen and Juan were proper, the finding of derivative neglect as to Shawn based thereon was likewise proper (*see Matter of R./C. Children* at

172).

Finally, the finding that the mother educationally neglected Ashley was supported by the record (*see* FCA § 1012[f][i][A]). Ashley was absent 22 times and late 36 times between September 2014 and February 2014, and only 11 of these absences were attributable to illness (*see Matter of Aliyah B. [Denise J.]*, 87 AD3d 943, 943 [1st Dept 2011]). Unlike the cases relied upon by the mother, here, there was no evidence of any obstacles to attendance or other explanation for the absences (*see Matter of Chastity O.C. (Angie O.C.)*, 136 AD3d 407, 407 [1st Dept 2016]; *Matter of Nashawn Dezmen C. (Temikia C.)*, 133 AD3d 434, 434-435 [1st Dept 2015]; *Alexander D.*, 45 AD3d at 264). Moreover, the record reflects that Ashley was demonstrating developmental and academic delays (*see Matter of Jonathan M. (Gilda L.)*, 139 AD3d 438, 438-439 [1st Dept 2016]). It is reasonable to conclude that

these delays were exacerbated by her excessive absences (*see Matter of Annalize P. (Angie D.)*, 78 AD3d 413, 414 [1st Dept 2010]).

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

ENTERED: JANUARY 16, 2018

CLERK

Friedman, J.P., Mazzarelli, Kapnick, Webber, Moulton, JJ.

5452 Jhonny Gutierrez, Index 158284/12
Plaintiff-Respondent,

-against-

Harco Consultants Corp., et al.,
Defendants-Appellants.
- - - - -
[And a Third Party Action]

Gallo Vitucci Klar LLP, New York (Daniel Mevorach of counsel), for appellants.

Lurie, Ilchert, MacDonnell & Ryan, LLP, New York (Dennis A. Breen of counsel), for respondent.

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered February 9, 2017, which, to the extent appealed from, granted plaintiff's motion for partial summary judgment on the issue of liability on his Labor Law § 240(1) claim, and denied defendants' motion for summary judgment dismissing the section 240(1) claim, unanimously modified, on the law, to deny plaintiff's motion, and otherwise affirmed, without costs.

According to plaintiff's testimony in this action, he was exposed to elevation-related hazards (*see Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 9 [2011]). Assuming that the piece of rebar that allegedly struck plaintiff weighed what defendants claimed it weighed, it still presented an elevation-related risk even if it may have traveled only a short distance

before striking plaintiff (*see Marrero v 2075 Holding Co., LLC*, 106 AD3d 408, 409 [1st Dept 2013]; *Cardenas v One State St., LLC*, 68 AD3d 436, 437 [1st Dept 2009]). We reject defendants' contention that the rebar being passed to plaintiff did not require a safety device of the type contemplated by Labor Law § 240 because it was being carried by hand (*see e.g. Rutkowski v New York Convention Ctr. Dev. Corp.*, 146 AD3d 686 [1st Dept 2017]). However, plaintiff was not entitled to summary judgment as to liability on the claim under § 240(1) because the records of his medical treatment create an issue of fact as to whether his injury was incurred in the manner described in his testimony.

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

ENTERED: JANUARY 16, 2018

CLERK

Friedman, J.P., Mazzarelli, Kapnick, Webber, Moulton, JJ.

5453 Ron Dirschneider, Index 113834/11
Plaintiff-Respondent-Appellant, 590301/13

-against-

Rolex Realty Company LLC,
Defendant-Appellant-Respondent,

Rolex Realty Company, Inc., et al.,
Defendants,

PWI Construction, Inc., et al.,
Defendants-Respondents.

- - - - -

[And a Third-Party Action]

_____

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Louise M. Cherkis of counsel), for appellant-respondent and respondents.

Edelman, Krasin & Jaye, PLLC, Westbury (Kara M. Rosen of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Richard F. Braun, J.), entered on or about July 14, 2016, which, to the extent appealed from, granted defendants Rolex Realty Company LLC, PWI Construction, Inc., and St. John Apparel, LLC's motion for summary judgment dismissing the Labor Law § 240(1) claim as against them and the Labor Law § 200 and common-law negligence claims as against PWI and St. John, and denied plaintiff's cross motion for partial summary judgment as to liability on the Labor Law § 240(1) claim, unanimously reversed, on the law, without

costs, to deny defendants' motion to the extent it sought summary dismissal of the Labor Law § 240(1) claim as against all defendants and dismissal of the Labor Law § 200 and common-law negligence claims as against PWI and St. John, to grant defendants' motion to the extent it sought summary dismissal of the Labor Law § 200 and common-law negligence claims as against Rolex, and to grant plaintiff's cross motion for partial summary judgment as to liability on the Labor Law § 240(1) claim.

Plaintiff, while working on a renovation project, fell and sustained injuries to his right foot while helping to transport a 600-pound, 14-foot-long steel I-beam down a staircase. Based on this incident, plaintiff asserts, as relevant to this appeal, claims for violation of Labor Law §§ 240(1) and 200 and for common-law negligence against the general contractor for the project (PWI), the lessee of the premises for which the work was being performed (St. John), and the out-of-possession landlord of the premises (Rolex). In the order appealed from, Supreme Court granted defendants' motion for summary judgment to the extent of dismissing the Labor Law § 240(1) as against all defendants and the common-law negligence and Labor Law § 200 claims as against PWI and St. John, and denied plaintiff's cross motion for summary judgment as to liability on the Labor Law § 240(1) claim. Plaintiff and Rolex each has taken an appeal from the order to

the extent aggrieved thereby.

The Labor Law § 200 and common-law negligence claims were incorrectly dismissed as against PWI and St. John. To the extent plaintiff's claim is based on allegations that his fall was due to the defective condition of the premises (including the presence of debris on the staircase, inadequate lighting, and the lack of a handrail), defendants can be held liable for plaintiff's injuries only if they created or had notice of the dangerous conditions on the premises (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143-144 [1st Dept 2012]). Even assuming that PWI and St. John established a prima facie entitlement to summary judgment on these claims, plaintiff raised an issue of fact through his testimony that there was debris in the form of chopped concrete, pieces of wire, and trim studs on the steps, that there was no handrail, and that the lighting was dim. Further, the witness who testified that he recalled seeing a temporary handrail being installed could not recall when the handrail was installed.

However, the Labor Law § 200 and common-law negligence claims should be dismissed as against Rolex. The record demonstrates that Rolex, an out-of-possession landlord with a right of re-entry to maintain and repair, was not involved with the project and was not on site and thus that it had no actual

notice of the dangerous conditions (*see Torres v West St. Realty Co.*, 21 AD3d 718, 721 [1st Dept 2005], *lv denied* 7 NY3d 703 [2006]). The record demonstrates further that Rolex cannot be held liable under a theory of constructive notice because the dangerous conditions did not constitute significant structural or design defects that violated specific safety statutes (*see Kittay v Moskowitz*, 95 AD3d 451 [1st Dept 2012], *lv denied* 20 NY3d 859 [2013]; *Heim v Trustees of Columbia Univ. in the City of N.Y.*, 81 AD3d 507 [1st Dept 2011]).

Finally, defendants were not entitled to summary judgment dismissing the claim under Labor Law § 240(1), and plaintiff was entitled to summary judgment as to liability on that claim. The record establishes a failure to provide plaintiff and his coworker with devices offering adequate protection against the gravity-related risks of moving an extremely heavy object down a staircase, leading to the workers' loss of control over the

object's descent and plaintiff's injuries (*see Runner v New York Stock Exch., Inc.*, 13 NY3d 599 [2009]).

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

ENTERED: JANUARY 16, 2018

CLERK

Friedman, J.P., Mazzarelli, Kapnick, Webber, Moulton, JJ.

5454-
5454A The People of the State of New York, Respondent,

SCI 4530/13
Ind. 1761/14

-against-

Derryan J.,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Laura Boyd 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 (Jill Konviser, J.), rendered January 6, 2015, convicting defendant, upon his plea of guilty, of robbery in the first degree, adjudicating him a youthful offender, and sentencing him to a term of 1⅓ to 4 years, and judgment, same court (Larry R.C. Stephen, J. at plea; Jill Konviser, J. at sentencing), rendered January 16, 2015, as amended March 9, 2015, convicting defendant of two counts of burglary in the third degree, and sentencing him to a concurrent aggregate term of 2⅓ to 7 years, unanimously affirmed.

The sentencing court's comments, read in context, establish that it properly and explicitly considered defendant's request for youthful offender treatment, and declined to extend such treatment to the burglary convictions (*see People v Rudolph*, 21

NY3d 497 [2013]). The sentencing court, which had all the necessary information before it, expressly decided to grant YO treatment for defendant's robbery conviction, but deny it as to his burglary convictions, for reasons independent of any plea agreement.

Defendant made a valid waiver of his right to appeal from the burglary convictions (*see People v Lopez*, 6 NY3d 248, 257 [2006]). The court adequately explained that the right to appeal was separate from the trial rights forfeited upon a guilty plea. To the extent there was any ambiguity in the court's explanation, the written waiver ensured that defendant understood that in addition to the rights he was giving up by pleading guilty, he was separately giving up his right to appeal as a bargained-for condition of the plea (*see People v Bryant*, 28 NY3d 1094 [2016]).

Although waiver of the right to appeal does not foreclose review of a court's failure to comply with the requirements of *Rudolph*, a "valid waiver of the right to appeal forecloses appellate review of a sentencing court's discretionary decision to deny youthful offender status" (*People v Pacherille*, 25 NY3d

1021, 1024 [2015]). As an alternative holding, we find that the court providently exercised its discretion in denying YO treatment.

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

ENTERED: JANUARY 16, 2018

CLERK

Friedman, J.P., Mazzarelli, Kapnick, Webber, Moulton, JJ.

5455 Roxanne Gayle, Index 805105/14E
Plaintiff-Respondent,

-against-

Janet C. Body DDS, et al.,
Defendants-Appellants.

_____

Schiavetti, Corgan, DiEdwards, Weinberg & Nicholson, LLP, White Plains (Kenneth J. Burford of counsel), for appellants.

Scott & Liburd, New York (Kofi D. Scott of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan B. Lobis, J.), entered December 11, 2015, which, inter alia, denied defendants' motion to dismiss the complaint for failure to file a note of issue after service of a CPLR 3216 demand, unanimously affirmed, without costs.

The court providently exercised its discretion in denying defendants' motion to dismiss this action alleging dental malpractice. Despite the inadequacy of plaintiff's papers opposing dismissal, the record indicates only a minor delay to complete discovery. The circumstances presented also do not suggest an intent to abandon prosecution, persistent neglect on the part of plaintiff, or particular prejudice to defendants. Furthermore, "a credibly meritorious claim can be gleaned from

the record" (*Espinoza v 373-381 Park Ave. S. LLC*, 68 AD3d 532, 533 [1st Dept 2009]; *see Di Simone v Good Samaritan Hosp.*, 100 NY2d 632 [2003])

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

ENTERED: JANUARY 16, 2018

CLERK

Friedman, J.P., Mazzarelli, Kapnick, Webber, Moulton, JJ.

5456 Fixed Income Shares: Series M, et al., Plaintiffs-Respondents, Index 653891/15

-against-

Citibank, N.A., Defendant-Appellant.

_____

Mayer Brown LLP, New York (Christopher J. Houpt of counsel), for appellant.

Bernstein Litowitz Berger & Grossman LLP, New York (Robert S. Trisotto and Timothy A. Delange of the bar of the State of California, admitted pro hac vice, of counsel), for respondents.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered June 27, 2017, which, insofar as appealed from as limited by the briefs, denied defendant's motion to dismiss the cause of action for breach of the covenant of good faith and the breach of contract cause of action based on representations and warranties and on "robosigning," unanimously modified, on the law, to grant the motion as to the cause of action for breach of the covenant of good faith and the breach of contract cause of action based on "robosigning," and otherwise affirmed, without costs.

Plaintiffs are the holders of certificates issued by residential mortgage-backed securities trusts of which defendant is the trustee. The cause of action for breach of the implied

covenant of good faith and fair dealing should be dismissed because the governing Pooling and Service Agreement (PSA) states, "[N]o implied covenants or obligations shall be read into this Agreement against the Trustee" (*see STS Partners Fund, LP v Deutsche Bank Sec., Inc.*, 149 AD3d 667, 669 [1st Dept 2017], *lv dismissed in part, denied in part* __ NY3d __, 2017 NY Slip Op 92892 [Nov. 21, 2017]).

The contract cause of action alleges that defendant violated the PSA by failing to give written notice of certain breaches of mortgage loan representations and warranties upon its discovery of such breaches. Contrary to defendant's argument, plaintiffs were not required to allege that defendant had actual knowledge of a loan-specific breach. The PSA uses the word "discovery" in section 2.04 and the term "actual knowledge" in section 8.01, which implies that these terms have different meanings (*Platek v Town of Hamburg*, 24 NY3d 688, 696 [2015]). Nor were plaintiffs required to allege loan-specific breaches. Defendant relies on *Retirement Bd. of the Policemen's Annuity & Ben. Fund of the City of Chicago v Bank of N.Y. Mellon* (775 F3d 154 [2d Cir 2014], *cert denied* 577 US __, 136 S Ct 796 [2016]). However, we have concluded that *Retirement Bd.* does not apply to motions to dismiss for failure to state a cause of action (*Commerce Bank v Bank of N.Y. Mellon*, 141 AD3d 413, 414 [1st Dept 2016]).

The breach of contract cause of action also alleges that defendant failed to provide the mortgage loan servicers with notice of robosigning (a servicing failure) and demand that the breach be remedied within a specified time period. However, section 7.01(ii) does not require defendant to give that notice to cure (*see Stern v Gepo Realty Corp.*, 289 NY 274, 276 [1942]); it merely defines "Event of Default."

We reject plaintiffs' apparent argument that, since section 8.01 of the PSA imposes additional duties on defendant after an Event of Default, defendant may not prevent an Event of Default from occurring by failing to give the notice to cure that would cause the servicers' failure to perform to ripen into an Event of Default. First, as indicated, the PSA bars covenants from being implied in the PSA against defendant. Second, application of the doctrine that "a party cannot insist upon a condition precedent, when its non-performance has been caused by himself" (*Amies v Wesnofske*, 255 NY 156, 163 [1931] [internal quotation marks omitted]) requires the party's "active conduct ... preventing or hindering the fulfillment of the condition" (*id.*). Defendant's failure to send a notice to cure to the servicers is not "active conduct." Plaintiffs seek to "compel positive action" by defendant (*id.*), i.e., the sending of a notice to cure. In any event, under the PSA, "the Holders of Certificates entitled to at

least 25% of the Voting Rights" could have sent notice of the servicers' failure.

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

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

ENTERED: JANUARY 16, 2018

CLERK

Friedman, J.P., Mazzarelli, Kapnick, Webber, Moulton, JJ.

5457 Rimrock High Income Plus (Master) Fund, Ltd., et al., Plaintiffs-Respondents-Appellants, Index 652338/17

-against-

Avanti Communications Group PLC, et al., Defendants-Appellants-Respondents.

_____

Milbank Tweed Hadley & McCloy LLP, New York (Alan J. Stone of counsel), for appellants-respondents.

Dechert LLP, New York (Gary Mennitt of counsel), for respondents-appellants.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered September 21, 2017, which granted defendants' motion to dismiss as to the first cause of action, for breach of contract, and denied the motion as to the second cause of action, for breach of the implied covenant of good faith and fair dealing, unanimously modified, on the law, to grant the motion in its entirety, and, otherwise affirmed, without costs. The Clerk is directed to enter judgment dismissing the complaint.

Plaintiffs, holders of certain notes, claim that defendants breached an indenture issued by defendant Avanti Communications Group PLC. The indenture contains a "no action" clause, which provides that no noteholder may pursue any remedy with respect to the indenture or notes unless certain specified conditions are

met.

Plaintiffs failed to comply with the no action clause, and thus lack standing to pursue their claims (*Quadrant Structured Prods. Co., Ltd. v Vertin*, 23 NY3d 549, 560-561 [2014]; *STS Partners Fund, LP v Deutsche Bank Sec., Inc.*, 149 AD3d 667, 668 [1st Dept 2017], *lv dismissed in part and denied in part* 2017 NY Slip Op 92892 [2017]).

Even if plaintiffs had standing, the claims fail to state a cause of action. The breach of contract claim is based on conclusory allegations of collusion (*Bodum USA, Inc. v Perez*, 148 AD3d 644, 625 [1st Dept 2017]), and the claim for breach of the implied covenant of good faith and fair dealing is duplicative of the breach of contract claim.

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: JANUARY 16, 2018

CLERK

Friedman, J.P., Mazzarelli, Kapnick, Webber, Moulton, JJ.

5458 The People of the State of New York, Ind. 2331/15
Respondent,

-against-

Carol Bond,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Jonathan Garelick 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 (Bonnie Wittner, J.), rendered October 1, 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: JANUARY 16, 2018

CLERK

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

Friedman, J.P., Mazzarelli, Kapnick, Webber, Moulton, JJ.

5459 In re Lisa B.,
Petitioner-Appellant,

-against-

Bruce C.,
Respondent-Respondent.

_____

Lisa B., appellant pro se.

_____

Order, Family Court, New York County (Adetokunbo O. Fasanya, J.), entered on or about August 24, 2016, which denied petitioner mother's objections to an order (same court, Cheryl Weir-Reeves, Support Magistrate), entered on or about June 17, 2016, unanimously affirmed, without costs.

The mother shows no grounds to challenge Family Court's denial of her objections to the order entered on or about June 17, 2016, which was supported by comprehensive findings of fact issued after a lengthy hearing. We cannot assess the merits of the mother's argument that she did not waive a hearing on the issue of whether respondent father willfully violated a so-ordered stipulation regarding child support. The record contains no excerpts from the hearing transcript to rebut the clear finding of waiver. Moreover, as Family Court observed in its findings of fact, the mother was represented by counsel throughout the proceedings below.

The mother, moreover, does not show how any separate hearing would have changed the eventual outcome, given that her arguments concerning willfulness involved issues already addressed and rejected by Family Court.

The mother's argument that the father's refusal to pay child support add-on expenses, standing alone, establishes a willful violation of his support obligation is unavailing. Family Court properly determined that many of those add-on expenses were not covered by the parties' stipulation, or that the mother had failed to consult with the father before incurring them, as required. Expenses beyond the scope of the parties' so-ordered agreements cannot be said to have been "ordered" and therefore cannot support a finding of willfulness, regardless of the father's ability to pay (*see Matter of Powers v Powers*, 86 NY2d 63, 69 [1995]). Moreover, the mother offers no reason to disturb the finding that she was not credible regarding notice to the father.

The mother's remaining arguments concerning the father's alleged willfulness were already raised in her counsel fee application, and rejected by Family Court, and the mother offers no facts to show the court's denial of that motion was an improvident exercise of its discretion (*see* Family Ct Act § 438; *Matter of Westergaard v Westergaard*, 106 AD3d 926 [2d Dept

2013]).

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

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

ENTERED: JANUARY 16, 2018

CLERK

Friedman, J.P., Mazzarelli, Kapnick, Webber, Moulton, JJ.

5460 The People of the State of New York, Ind. 5361/12
Respondent,

-against-

William Rivera,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County, (Thomas Farber, J.), rendered July 16, 2013, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of 2½ years, unanimously affirmed.

The court providently exercised its discretion in allowing the prosecution to present evidence of the amount of cash recovered from defendant after the alleged drug sale (*see People v Panchon*, 93 AD3d 446 [1st Dept 2012], *lv denied* 19 NY3d 866 [2012]). The amount recovered, $170, "was not unduly prejudicial" (*id.* at 447). Furthermore, in this observation sale case, the People were entitled to show that defendant possessed at least an amount of money consistent with the likely proceeds of the charged sale of two bags of heroin. Therefore, informing

the jury that he possessed $170 was not significantly more prejudicial than leaving the total amount unspecified. In any event, any error in admitting evidence of the amount of money defendant was carrying at the time of his arrest was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

The prosecutor's summation did not deprive defendant of a fair trial. In those instances where the court sustained objections, its curative actions were sufficient to prevent any prejudice. Defendant's remaining challenges to the summation are unpreserved (*see People v Romero*, 7 NY3d 911, 912 [2006]), and we decline to review them in the interest of justice. As an alternative holding, we find that the remarks at issue generally constituted fair comment on the evidence and appropriate responses to the defense summation, and that there was nothing so egregious as to warrant reversal (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1992]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]).

The court providently exercised its discretion in denying defense counsel's request, made at sentencing, for an adjournment to allow the defense to further investigate alleged premature deliberation by the jury (*see generally Matter of Anthony M.*, 63 NY2d 270, 283 [1984]). The court acted appropriately under all

the circumstances. An employee of defense counsel allegedly overheard a conversation among jurors suggesting premature deliberation during the trial, at a time when the court could have addressed it had the issue been raised. Instead, he only reported this to defense counsel after the verdict. Furthermore, there was a delay of several months between the verdict and the request for an adjournment on the day of sentencing, there was no motion to set aside the verdict, and there was only a fragmentary investigation by the defense that had yielded no evidence of juror misconduct. Further, there was no prejudice, because even if the denial of the adjournment prevented defendant from making a CPL 330.30(2) motion to set aside the verdict, it does not prevent him from making a CPL 440.10(1)(f) motion in the event he uncovers evidence outside the record demonstrating juror misconduct.

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

ENTERED: JANUARY 16, 2018

CLERK

Friedman, J.P., Mazzarelli, Kapnick, Webber, Moulton, JJ.

5461 Lydia Livingston, Index 103084/10
Plaintiff-Appellant,

-against-

New York City Transit
Authority, et al.,
Defendants-Respondents.

_____

The Law Office of Judah Z. Cohen, PLLC, Woodmere (Judah Z. Cohen of counsel), for appellant.

Lawrence Heisler, Brooklyn (Timothy J. O'Shaughnessy of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Robert R. Reed, J.), entered July 25, 2016, upon a jury verdict, dismissing the complaint, unanimously affirmed, without costs.

The record demonstrates that the complained of comments by the trial court, and its decision not to provide a missing document charge, were not prejudicial or in error. In any event, any such perceived error would be harmless in light of the evidence adduced at trial supporting the verdict (*see e.g. Siagha*

*v Salant-Jerome, Inc.*, 271 AD2d 274 [1st Dept 2000], *lv denied* 96 NY2d 714 [2001]).

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

ENTERED: JANUARY 16, 2018

CLERK

Friedman, J.P., Mazzarelli, Kapnick, Webber, Moulton, JJ.

5462-
5463 Jeanette Westphal, etc., Index 7844/07
381176/07
Plaintiff-Respondent,

Leroy Famous,
Plaintiff,

-against-

Real Estate International,
Ltd., et al.,
Defendants-Appellants,

Frank Giordano,
Defendant.

- - - -

[And Another Action]

_____

Mischel & Horn, P.C., New York (Scott T. Horn of counsel), for appellants.

Jeanette M. Westphal, P.C., New York (Jeanette M. Westphal of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered on or about September 9, 2015, which, after a nonjury trial, found for plaintiff's decedent Ella Reid, and rescinded the contract at issue, and order, same court and Justice, entered on or about November 18, 2015, which, inter alia, sua sponte modified the court's prior order to direct that title to the property at issue reverted to decedent, unanimously affirmed, without costs.

There is no basis to disturb the court's conclusion that

defendants engaged in overreaching by taking advantage of the plaintiff's decedent and inducing her to execute an unfavorable contract, warranting rescission of the contract (*see generally Skolnick v Goldberg*, 297 AD2d 18, 20 [1st Dept 2002]).

The order entered November 18, 2015 is not void. Decedent's sister had been appointed administrator of decedent's estate prior to the order, and defendants have not demonstrated prejudice (*see e.g. Caridi v Durst*, 228 AD2d 396 [1st Dept 1996]).

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

ENTERED: JANUARY 16, 2018

CLERK

Friedman, J.P., Mazzarelli, Kapnick, Webber, Moulton, JJ.

5464 The People of the State of New York, Respondent, SCI. 1548/15

-against-

Gary Stuckey,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (James J. 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, Bronx County (Marc J. Whiten, J. at plea; Lester B. Adler, J. at sentencing), rendered February 4, 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: JANUARY 16, 2018

CLERK

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

Friedman, J.P., Mazzarelli, Kapnick, Webber, Moulton, JJ.

5465-
5465A Index 20428/06

U.S. Bank National Association,
as Trustee for the Structured
Asset Investment Loan Trust,
2006-BNC2,
Plaintiff-Respondent,

-against-

Nancy Thompson,
Defendant-Appellant,

Lagoon Estates Condominium, et al.,
Defendants.

_____

The Wilson Law Firm LLC, Brooklyn (Earl A. Wilson of counsel), for appellant.

Reed Smith LLP, New York (Zalika T. Pierre of counsel), for respondent.

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Judgment of foreclosure and sale, Supreme Court, Bronx County (Kenneth L. Thompson, J.), entered February 4, 2016, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered February 4, 2016, which granted plaintiff's motion for a judgment of foreclosure, and denied defendant Nancy Thompson's cross motion to vacate a default and file a late answer, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Defendant waived her defense of lack of standing by failing to appeal from a July 2015 order that denied her prior motion to

vacate a default and file a late answer to assert that defense (*see Trinidad v Lantigua*, 2 AD3d 163 [1st Dept 2003]). In any event, defendant failed to demonstrate a reasonable excuse for her delay in appearing or answering the complaint (*see Wells Fargo Bank, N.A. v Jones*, 139 AD3d 520, 524 [1st Dept 2016]).

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

ENTERED: JANUARY 16, 2018

CLERK

Friedman, J.P., Mazzarelli, Kapnick, Webber, Moulton, JJ.

5466 The People of the State of New York, Ind. 5431/15
Respondent,

-against-

Sedgrick Jacob,
Defendant-Appellant.

_____

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Larry Stephen, J.), rendered September 21, 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: JANUARY 16, 2018

CLERK

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

Friedman, J.P., Mazzarelli, Kapnick, Webber, Moulton, JJ.

5467 Loretta Schulman, et al., Index 154798/12
Plaintiffs-Respondents,

-against-

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

New York City Department
of Transportation, et al.,
Defendants,

Fra-Ming Realty Corp.,
Defendant-Appellant.

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Mauro Lilling Naparty, LLP, Woodbury (Anthony F. Destefano of counsel), for appellant.

William Schwitzer & Associates, P.C., New York (Howard R. Cohen of counsel), for Loretta Schulman and Leonard Schulman, respondents.

Zachary W. Carter, Corporation Counsel, New York (John Moore of counsel), for City of New York, respondent.

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Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered December 30, 2016, which denied defendant Fra-Ming Realty Corp.'s motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiff Loretta Schulman alleges that she tripped and fell on a metal protrusion and/or sign post "stump" on a public sidewalk located in front of 123-125 East 90th Street, which is

owned by defendant Fra-Ming Realty Corp. and maintained by its managing agent, nonparty Wallack Management Co., Inc.

After reviewing the record, we find that defendant established that its employees did not create the alleged defect by submitting the deposition testimony of its part-owner that defendant performed no work to the subject section of the sidewalk before the accident (*see Nepomuceno v City of New York*, 137 AD3d 646, 646-647 [1st Dept 2016]). The part-owner's testimony also established that defendant lacked actual or constructive notice of the alleged condition, because he testified that prior to plaintiff's accident, he was unaware of any complaints or accidents on the sidewalk, and had received no violations concerning the sidewalk (*see Parra v City of New York*, 137 AD3d 532, 533 [1st Dept 2016], citing *Gomez v Congregation K'Hal Adath Jeshurun, Inc.*, 104 AD3d 456, 456 [1st Dept 2013]). In opposition, plaintiff and codefendant City of New York failed to raise a triable issue of fact.

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

ENTERED: JANUARY 16, 2018

CLERK

Friedman, J.P., Mazzarelli, Kapnick, Webber, Moulton, JJ.

5468 Jamie Ng, etc., Index 109403/10
Plaintiff-Respondent,

-against-

NYU Langone Medical Center, et al.,
Defendants-Appellants,

NYU Transplant Associates, et al.,
Defendants.

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Aaronson Rappaport Feinstein & Deutsch, LLP, New York (Elliott J. Zucker of counsel), for appellants.

Kelner & Kelner, New York (Gerard K. Ryan, Jr. of counsel), for respondent.

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Order, Supreme Court, New York County (Joan B. Lobis, J.), entered July 25, 2016, which, inter alia, denied the motion of defendants NYU Langone Medical Center (NYU) and Devon G. John, M.D. for summary judgment dismissing the complaint as against them, unanimously modified, on the law, to the extent of dismissing the claim for lack of informed consent, and otherwise affirmed, without costs.

On July 23, 2008, defendant Dr. John, a general surgeon, performed a kidney transplant on decedent, then 59-years old, at defendant NYU, after which decedent was transferred to the transplant intensive care unit (ICU). Plaintiff alleges malpractice in connection with the post-operative monitoring and

care that decedent received at the ICU, leading to her death approximately 4½ hours later.

Defendants' submission of deposition transcripts, medical records, and expert affidavits based upon the same established a prima facie defense entitling them to summary judgment (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 [1986]). These submissions showed that decedent's treatment did not depart from accepted medical practices or proximately cause her injuries or death. Significantly, defendants' expert general surgeon opined that it was appropriate for a third-year resident to be in charge of decedent's post-operative care, that decedent was properly monitored in the ICU, and decedent's rising blood pressure was appropriately treated, as was the subsequent hypotensive episode. There is also no issue as to the course of medication administered to decedent in the ICU, notwithstanding plaintiff's attempt to create one by reliance on an attorney's misreading of a nurse's notation while asking a question at a deposition.

However, plaintiff's expert general surgeon did raise an issue of fact as to whether defendants deviated from the standard of care in treating decedent's symptom of rising blood pressure, without addressing the alleged root cause, namely, pain and/or agitation as her anesthesia wore off and she became more alert.

Indeed, the resident caring for decedent recognized signs of aggravation from the endotracheal tube and felt that it was a contributing factor to decedent's hypertension.

The court properly denied so much of the motion as sought dismissal of the wrongful death claim. Plaintiff's submission of a funeral expense bill evidenced the existence of pecuniary loss damages (*see* EPTL 5-4.3[a]; *Gonzalez v New York City Hous. Auth.*, 77 NY2d 663, 668 [1991]; *Zelizo v Ullah*, 2 AD3d 273, 274 [1st Dept 2003]).

Plaintiff's failure to oppose so much of the motion as sought dismissal of the lack of informed consent claim, constituted an abandonment of the claim (*see Josephson LLC v Column Fin., Inc.*, 94 AD3d 479, 480 [1st Dept 2012]).

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

ENTERED: JANUARY 16, 2018

CLERK

Friedman, J.P., Mazzarelli, Kapnick, Webber, Moulton, JJ.

5469 The People of the State of New York, Respondent, Ind. 3808/11

-against-

Devon Andrew, Defendant-Appellant.

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

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Judgment, Supreme Court, New York County (Larry Stephen, J.), rendered April 19, 2012, unanimously affirmed.

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

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

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

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

ENTERED: JANUARY 16, 2018

CLERK

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

5099 Avril Nolan, Index 123283/10
Claimant-Respondent,

-against-

The State of New York,
Defendant-Appellant.

_____

Eric T. Schneiderman, Attorney General, New York (Eric Del Pozo of counsel), for appellant.

Lloyd Patel LLP, New York (Erin Lloyd of counsel), for respondent.

_____

Order, Court of Claims of the State of New York (Thomas H. Scuccimarra, J.), entered October 8, 2015, modified, on the law, to deny claimant summary judgment on the Civil Rights Law claims, grant summary judgment dismissing these claims, and, upon a search of the record, grant summary judgment dismissing the standard defamation claim, and otherwise affirmed, without costs.

Opinion by Mazzarelli, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Dianne T. Renwick, J.P.
Sallie Manzanet-Daniels
Angela M. Mazzarelli
Marcy L. Kahn
Peter H. Moulton, JJ.

5099
Claim No. 123283

_____x

Avril Nolan,
Claimant-Respondent,

-against-

The State of New York,
Defendant-Appellant.
_____x

Defendant appeals from the order of the Court of Claims of the State of New York (Thomas H. Scuccimarra, J.), entered October 8, 2015, which, to the extent appealed from as limited by the briefs, granted claimant's motion for summary judgment on the issue of liability on her defamation per se and Civil Rights Law claims, and denied defendant's cross motion for partial summary judgment dismissing the Civil Rights Law claims.

Eric T. Schneiderman, Attorney General, New York (Eric Del Pozo and Anisha S. Dasgupta of counsel), for appellant.

Lloyd Patel LLP, New York (Erin Lloyd of counsel), for respondent.

MAZZARELLI, J.

In this appeal we confront two separate issues arising out of a claim for defamation per se. First, we must determine whether one making such a claim must prove actual harm to her reputation or whether she must establish merely that she has been actually *injured* although her reputation remains intact. In addition, we are confronted with the question whether an imputation of HIV qualifies for the "loathsome disease" category of written or spoken material that constitutes defamation per se, relieving the target of the statement from having to prove special damages. The Court of Appeals has endorsed the definition of a "loathsome disease" as one that is "contagious [or] attributed in any way to socially repugnant conduct" (*Golub v Enquirer/Star Group*, 89 NY2d 1074, 1077 [1997], quoting *Chuy v Philadelphia Eagles Football Club*, 595 F2d 1265, 1281 [3d Cir 1979]). We must decide whether, given modern societal views towards those with HIV or AIDS, and given the context of the specific statement at issue here, which was sympathetic towards those with the virus, it was reasonable for the court to characterize it as "loathsome."

The statement at issue was a print advertisement conceived by the New York State Division of Human Rights (DHR). The ad was

part of a broad-based educational campaign that DHR had launched in conjunction with the New York State Department of Health's (DOH) AIDS Institute. DOH provided funding to DHR to run public service announcements in local media apprising HIV-positive New Yorkers of their right not to be discriminated against. DHR's idea for the ad was to display a photograph of a person next to copy reading, "I AM POSITIVE(+)" and "I HAVE RIGHTS," and stating, in smaller print, "People who are HIV positive are protected by the New York State Human Rights Law. Do you know your rights? Contact the NYS Division of Human Rights."

The person appearing in the ad was claimant. She had posed for the photograph two years earlier in connection with an online magazine article about New Yorkers' music interests. Unbeknownst to claimant, the person who took the photograph for the magazine sold it to Getty Images, which compiles and sells stock images. DHR licensed the image from Getty. While the email receipt DHR received from Getty stated that the model in the image had signed a release, an assurance also given to DHR over the telephone, it is undisputed that claimant had not signed a release or even given the photographer permission to sell the photo. Further, the license agreement expressly prohibited "defamatory or otherwise unlawful use" of the photo and barred any use "that

would be unflattering or controversial to a reasonable person," unless accompanied by a disclaimer that the photo was "used for illustrative purposes" and that the person depicted was a model. No such disclaimer appeared in the ad at issue.

The ad was published in three local general interest newspapers and as a banner ad on three websites. Upon learning of the ad from a friend on the first day it ran, claimant contacted the photographer, who contacted DHR on her behalf and requested that the ad be pulled from circulation. DHR's deputy commissioner for external affairs agreed to pull the spots and to not use the photograph in future advertisements. The next morning, DHR pulled the ad from all outlets.

Claimant filed a verified claim against the State asserting causes of action for defamation, defamation per se, and violation of Civil Rights Law §§ 50 and 51, which bar the nonconsensual use of a person's image for commercial purposes.[1] The claim alleged that the ad caused impairment of claimant's reputation, as well as "emotional distress" and "anguish," and sought $1.5 million in damages. After the completion of discovery claimant moved for

[1] Claimant commenced a plenary action against Getty Images, and reached a confidential settlement with it.

summary judgment, arguing that the undisputed material facts established that DHR defamed her by recklessly publishing the ad, and that its behavior constituted defamation per se because the ads indicated that she suffered from a "loathsome disease." She further argued that, by using her image in an advertisement without her written consent, DHR violated the Civil Rights Law.

The State opposed claimant's motion and cross-moved for partial summary judgment dismissing the Civil Rights Law claim. It argued that claimant's general defamation cause of action failed because she was unable to show an actual loss of something of economic or pecuniary value. In addition, the State contended that claimant should not be awarded summary judgment on her defamation per se claim, because HIV was not a "loathsome disease," and because she failed to establish that DHR acted with actual malice or that she suffered reputational harm. The State further argued that summary judgment on the Civil Rights Law claim must be denied because DHR was not a commercial enterprise engaged in trade when it published the public service announcement in which claimant was featured, and that partial summary judgment dismissing the claim should be granted. Claimant countered with the argument that the very fact that DHR saw the need to launch an antidiscrimination campaign for HIV-

positive people showed that much of society continues to view such individuals with suspicion and judgment, if not contempt, ridicule, aversion, or disgrace, and so HIV qualified as a "loathsome disease." She disputed the State's argument that she had to show damage to her reputation. With respect to the Civil Rights Law claim, claimant responded that the ad was a paid-for advertisement intended to promote the use of DHR's services, and so the State could not hide behind the public service nature of the ad.

The court granted claimant's motion on the defamation per se and Civil Rights Law claims, and denied the State's motion for partial summary judgment dismissing the Civil Rights Law claims. Initially, the court found it self-evident that DHR was negligent based on the evidence adduced in discovery showing that the person involved in the purchase of the stock image had failed to read the license agreement, that no one had thought through the implications of using the image in the context in which it would be used, and that no one had sought legal advice. However, finding that no special damages were apparent based on the evidence showing that claimant only suffered some discomfort and embarrassment, the court held that she was not entitled to summary judgment on the standard defamation causes of action

asserted in the claim.

The court found that claimant was entitled to summary judgment on the defamation per se claims, because "[n]ot just sexually transmitted diseases fall under the loathsome disease category, but any disease that arouses some intense disgust in society, in part because it is viewed as incurable or chronic." The court noted that "[i]t would be hoped that an indication that someone ... has been diagnosed as HIV positive would not be viewed as indicative of some failure of moral fiber, or of some communicable danger, [but] our society is not so advanced." Given the above, the court concluded that from the perspective of the average person, the defamatory content clearly subjected claimant "to public contempt, ridicule, aversion or disgrace and constitutes defamation *per se*."

Finally, the court found that claimant demonstrated her entitlement to judgment as a matter of law on the Civil Rights Law causes of action, because she established that her photograph was used, within the State of New York, for purposes of advertising or trade, without her written consent.

Preliminarily, claimant does not seriously contest the State's argument that, because she concedes that she only suffered intangible damage in the form of emotional distress, she

cannot sustain her general defamation claim, which requires allegations of special damages, i.e., "the loss of something having economic or pecuniary value, which must flow directly from the injury to reputation caused by the defamation and not from the effects of the defamation" (*Franklin v Daily Holdings, Inc.*, 135 AD3d 87, 93 [1st Dept 2015], quoting *Agnant v Shakur*, 30 F Supp 2d 420, 426 [SD NY 1998]). Accordingly, the court erred in merely denying her summary judgment and not dismissing that claim (*see Galasso v Saltzman*, 42 AD3d 310, 311 [1st Dept 2007]).

Assuming, without yet deciding, that plaintiff has a defamation per se claim, she need not establish special damages. However, the State argues that claimant's embarrassment and discomfort at having appeared in DHR's ad is still below the threshold of damages required for a defamation per se case. It asserts that she was required to plead and prove actual damage to reputation (or actual malice[2]), contending that under the relevant case law in New York, her allegations of emotional

[2] "Actual malice" is the standard used to assess potential liability in cases involving alleged defamation against public figures or against private figures whose speech was of public concern. It requires the plaintiff to establish that the defendant acted "with knowledge that [the statement] was false or with reckless disregard of whether it was false or not" (*New York Times Co. v Sullivan* (376 US 254, 280 [1964]).

distress are not enough to sustain the claim, even if the claim fits within one of the traditional defamation per se categories. Claimant responds that the weight of the applicable case law shows that in claims for defamation per se, there is no need for a plaintiff to prove specific reputational injury.

The State rests its argument on *Gertz v Robert Welch, Inc.* (418 US 323 [1974]), in which the Supreme Court considered for the first time the standard to be applied in a defamation case brought by a private person, as opposed to the public official who was the subject of *New York Times Co. v Sullivan* (376 US 254 [1964]) or the public figure at issue in *Curtis Publ. Co. v Butts* (388 US 130 [1967]). The *Gertz* Court left it to the states to establish the elements necessary to sustain a defamation claim by a private individual (376 US at 347). However, it made clear that the states could not provide for liability without fault (*id.*), and must limit recovery to damages for "actual injury" (*id.* at 349-350). The Court deferred to the states' own definitions of "actual injury," but made clear that actual injury is not limited to out-of-pocket loss, and noted that "more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, *personal humiliation, and mental anguish and suffering*" (*id.* at

350 [emphasis added]). Several years later, the Court held that, even in cases not involving actual malice, states may permit damages to be presumed in defamation cases where there is no public interest at stake (*Dun & Bradstreet, Inc. v Greenmoss Bldrs., Inc.*, 472 US 749 [1985]).

Here, the matter is unquestionably of public interest, so the *Gertz* rule applies. Further, none of the circumstances surrounding the publication of the ad suggest that DHR acted with actual malice, so claimant's claim hinges on her ability to prove actual injury. The State asserts that, in defining "actual injury" as directed by the *Gertz* Court, New York courts have declined to permit recovery for emotional distress without a showing of actual reputational injury. It primarily relies on three cases from this Court in support of that proposition. In *Salomone v MacMillan Publ. Co.* (77 AD2d 501 [1st Dept 1980], this Court stated:

> "As to the claim for mental anguish, it has long been held in this State that such damage is compensable only when it is concomitant with loss of reputation. While the United States Supreme Court, in *Gertz*, would appear to have allowed the States sufficient latitude to include in the definition of 'actual injury' mental anguish unaccompanied by loss of reputation, this has not occurred in this State" (77 AD2d at 502 [internal citations omitted]).

In *France v St. Clares Hosp. & Health Ctr.* (82 AD2d 1 [1st Dept 1981] *appeal withdrawn* 56 NY2d 593 [1982]), this Court quoted *Salomone* in holding that the plaintiff's defamation claim failed on the basis that "the record is barren of any evidence whatsoever tending to show that his reputation in the community was in any way diminished by publication of the alleged defamatory letter" (82 AD2d at 5-6). Finally, the State relies on *Sager v Local 1199 Drug, Hosp. & Health Care Empls. Union* (238 AD2d 152, 152 [1st Dept 1997]), which rejected the plaintiff's defamation claim because he "had not offered anything more than inadequate boilerplate allegations of general impairment of reputation" and so could not recover for alleged emotional distress.

Claimant argues that *Sager* is at best inapplicable and at worst wrongly decided. Moreover, she contends that *Salomone* and *France* were implicitly overruled by *Hogan v Herald Co.* (58 NY2d 630 [1982], *affg* 84 AD2d 470 [4th Dept 1982]). As described by the Fourth Department, the defendants in *Hogan* relied on *Gertz* and on *France* in arguing that the action should be dismissed because the plaintiff had not pleaded injury to his reputation. The Fourth Department rejected this argument as reading *Gertz* too

narrowly:

> "[I]t is now established that even in cases of libel per se, damage may not be presumed in the absence of *Times* malice but must be proved. That is not the same, however, as saying that special damages, as the term is used by New York courts, i.e., as the loss of something having economic or pecuniary value (see discussion of special damages, 2 NY PJI 29, 32, 1981 Supp; see, also, Restatement, Torts 2d, § 575) must be pleaded or proved. While special damages as so defined are included in the term actual damages used in *Gertz* (*supra*), the Supreme Court did not limit actual damages to out-of-pocket or pecuniary damage: loss of reputation, humiliation and mental anguish are also compensable (see Restatement, Torts 2d, § 621; 2 NY PJI 29, 32, 1981 Supp). Thus, contrary to defendants' contention, plaintiff need not establish either actual malice or special damages before he may recover" (84 AD2d at 480-481).

The State counters that *Hogan* actually supports its position insofar as the plaintiff there had pleaded an injury to his reputation.

Claimant has alleged that as a result of DHR's publication of the ad she suffered "impairment of reputation." However, her deposition testimony did not bear that out; she testified vaguely about how the ad affected her in her professional and personal lives, stating only that it made some encounters "awkward" or "uncomfortable." Nevertheless, we agree with claimant that her

claim survives under *Hogan* because there is sufficient evidence in the record that she suffered emotional distress.

Contrary to the State's contention, nothing in *Hogan* supports the State's argument that reputational harm is the sine qua non of the "actual injury" required by *Gertz*. Quite the opposite, in stating that, in addition to pecuniary damage, "loss of reputation, humiliation and mental anguish are also compensable," the Fourth Department signaled that any one of those things is sufficient to sustain a defamation claim. Indeed, the model charge for compensatory damages in defamation cases in the Pattern Jury Instructions provides that the jury "may not presume that plaintiff has been damaged. Rather, plaintiff must prove damage to (his, her) reputation or standing in the community, *or damages such as personal humiliation, mental anguish and suffering*" (PJI 3:29B). The use of the word "or" clearly indicates that the state of the law in New York is such that mental anguish is an alternative to reputational injury in establishing damages in a defamation case. Notably, the official comment to the excerpted model charge cites to *Hogan* and references *Salomone* and *France* with a "but see" signal, indicating that these cases contradict the holding in *Hogan*. Since *Hogan* was affirmed by the Court of Appeals, we consider it

the prevailing view of the state of the law in New York. To the extent that *Sager*, the third case cited by the State, relies on *Salomone* and *France* and not *Hogan*, we decline to follow it.

This conclusion is consistent with *Gertz*. In *Time, Inc. v Firestone* (424 US 448 [1976]), the Supreme Court held that the plaintiff's defamation claim was not hampered by her decision on the eve of trial to withdraw her claim for damage to reputation. Interpreting Florida law, the Court observed:

> "Florida has obviously decided to permit recovery for other injuries without regard to measuring the effect the falsehood may have had upon a plaintiff's reputation. This does not transform the action into something other than an action for defamation as that term is meant in *Gertz*. In that opinion we made it clear that States could base awards on elements other than injury to reputation, specifically listing 'personal humiliation, and mental anguish and suffering' as examples of injuries which might be compensated consistently with the Constitution upon a showing of fault. Because respondent has decided to forgo recovery for injury to her reputation, she is not prevented from obtaining compensation for such other damages that a defamatory falsehood may have caused her" (424 US at 460).

At least one scholar who has studied the issue has observed that, after *Hogan*, "New York has apparently moved away from the *France* and *Salomone* approach and adopted the *Firestone* approach, indicating that failure to show actual damages to reputation will no longer support summary judgment for defendants" (T. Michael

Mather, *Experience with Gertz "Actual Injury" in Defamation Cases*, 38 Baylor L Rev 917, 933 n93 [1986]).

Of course, because claimant alleges that she was the victim of defamation per se, we must decide whether she is indeed entitled to recover under that theory. A defamation plaintiff must plead special damages unless the defamation falls into any one of four per se categories: (1) statements charging the plaintiff with a serious crime; (2) statements that tend to injure the plaintiff in her trade, business or profession; (3) statements that impute to the plaintiff a "loathsome disease"; and (4) statements that impute unchastity to a woman (*see Liberman v Gelstein*, 80 NY2d 429, 435 [1992]; *Harris v Hirsh*, 228 AD2d 206, 208 [1st Dept 1996], *lv denied* 89 NY2d 805 [1996]). Claimant purports to qualify under the "loathsome disease" category. Whether HIV infection falls under that category appears to be a question of first impression. The State argues that prevailing community attitudes towards those with HIV militate against such a finding, as does the specific message of the ad in which claimant's image appeared, which was an implicit criticism of those who would deprive HIV-positive individuals of their legal rights. Claimant, on the other hand, while taking issue with the archaic term "loathsome," argues that it is

legally operative and historically applicable in the case of medical conditions such as HIV that are communicable and can still, in claimant's opinion, result in societal ostracism.

The baseline for any discussion about what constitutes defamatory material is that it "'tends to expose a person to hatred, contempt or aversion, or to induce an evil or unsavory opinion of him in the minds of a substantial number of the community', even though it may impute no moral turpitude to him'" *(Mencher v Chesley*, 297 NY 94, 100 [1947]). It can safely be said that, if an imputation of being infected with HIV does not meet that standard, it cannot be defamatory under any analysis. Critical to the determination is understanding the "temper of the times" and the "current of contemporary public opinion" (*Mencher v Chesley*, 297 NY at 100). The State urges that it is helpful to view the impact of the advertisement at issue through the prism of cases addressing statements falsely characterizing a person as "homosexual," a term used by the courts. All four Departments of the Appellate Division have held, or at least suggested, that an imputation of homosexuality effectively constitutes a fifth defamation per se category (*see Nacinovich v Tullet & Tokyo Forex*, 257 AD2d 523 [1st Dept 1999]; *Klepetko v Reisman*, 41 AD3d 551 [2d Dept 2007]; *Tourge v City of Albany*, 285 AD2d 785 [3d

Dept 2001]; *Privitera v Town of Phelps*, 79 AD2d 1 [4th Dept 1981], appeal dismissed 53 NY2d 796 [1981]). These views were heavily criticized by the Third Department in *Yonaty v Mincolla* (97 AD3d 141 [3d Dept 2012, *lv denied* 20 NY3d 855 [2013]). *In Yonaty*, the court considered the Supreme Court decision in *Lawrence v Texas* (539 US 558 [2003]) striking down laws criminalizing homosexual conduct, as well as this state's own legislation and judicial pronouncements recognizing and extending equal rights to all persons, including "lesbians, gays and bisexuals" (97 AD3d at 145, citing Executive Law § 296, Domestic Relations Law § 10-a, and *Hernandez v Robles*, 7 NY3d 338 [2006]). The court concluded that because of these advancements, any lingering prejudice towards homosexuals was insufficient to warrant the inclusion of a false imputation of homosexuality in the categories of material that give rise to a finding of defamation per se.

The State analogizes to *Yonaty* in arguing that it has similarly ameliorated the treatment of people with HIV so that HIV is no longer a shameful condition worthy of heightened treatment under the defamation laws. It points to Court of Appeals cases and statutes mandating the equal treatment of people with disabilities. It further cites to society's

acceptance of celebrities who have revealed their HIV status, such as the actor Charlie Sheen and the basketball-player-turned-business-executive Magic Johnson.

We disagree that the treatment of those with HIV has progressed to that degree. First, it should be noted that HIV affects a broad spectrum of the population, including intravenous drug users. Thus, to the extent that the State attempts to create an analogy with *Yonaty*, it is a false one. Further, while there is no question that society has taken great steps to protect those with disabilities from discrimination, the State points to no legislation specifically seeking to improve the lot of people with HIV or AIDS. Further, claimant, in countering the State's anecdotal evidence regarding public figures with HIV, cites several sociological studies establishing that HIV continues to be a significant stigma. For example, she cites to academic studies from 2014 and 2015 that conclude that people fear getting tested for HIV because of the perceived social repercussions of a positive result. Since it can still be said that ostracism is a likely effect of a diagnosis of HIV, we hold that the defamatory material here falls under the traditional "loathsome disease" category and is defamatory per se. Further, to the extent that certain medical conditions such as HIV

unfortunately continue to subject those who have them to a degree of societal disapproval and shunning, we decline to entertain the State's argument that the entire "loathsome disease" category is archaic and has no place in our jurisprudence.

This is not to imply that we in any way regard HIV or any other disease to be "loathsome," and we disfavor the use of that word. Society aspires to embrace people with various medical conditions, as reflected in the Americans with Disabilities Act and the myriad state and local statutes and ordinances requiring accommodations for and equal treatment of such persons. Accordingly, we prefer a formulation that makes clear that an imputation of a particular disease is actionable as defamation per se not because the disease is objectively shameful, but because a significant segment of society has been too slow in understanding that those who have the disease are entitled to equal treatment under the law and the full embrace of society. Such a reworking of the category reflects the reality that those who suffer from the condition are the unfortunate targets of outmoded attitudes and discrimination.

Indeed, we recognize that the very campaign in which claimant was unwittingly enmeshed was designed to correct such outmoded attitudes toward people infected with HIV. However, we

disagree with the State that this somehow provides safe harbor from the defamation claim at issue. Regardless of DHR's intentions, nothing about the ad suggested that the person depicted in it – claimant – was not infected with HIV. That context would have mattered only if the ad had signaled to reasonable readers that she was not. Further, the State's argument can very easily be turned on its head, because the very fact that DHR highlighted the need for people with AIDS to not feel stigmatized is a recognition that they do.

Finally, we agree with the State's argument that the court incorrectly awarded summary judgment to claimant on her causes of action under 50 and 51 of the Civil Rights Law and erred in denying its cross motion for partial summary judgment dismissing those claims. The Civil Rights Law sections at issue provide a civil remedy for the use by a "person, firm or corporation" of an individual's likeness "for advertising purposes" or "for the purposes of trade" unless consent has been obtained (Civil Rights Law §§ 50; 51). However, as the State notes, since its sovereign rights, prerogatives and interests were implicated when DHR decided to run the ad, the statute does not apply to it (see generally Matter of Leonard v Masterson, 70 AD3d 697, 698 [2d Dept 2010]). Enforcement of the Human Rights Law is an "exercise

of the police power of the state for the protection of the ... people of this state" (Executive Law § 290[2]), and DHR is tasked with issuing "publications" "to inform persons of the[ir] rights" against unlawful discrimination (id. § 295[9]).

Claimant is correct that sovereign functions have been described as those activities "in which no private citizen engages" (*Seidelman v State of New York*, 202 Misc 817, 818 [Ct Cl 1952]). However, the functions of the sovereign plainly stretch beyond things such as suppressing an insurrection, and cross over into areas of activity in which private citizens engage. Thus, the fact that private citizens may also publish writings that educate the public about HIV antidiscrimination laws is not dispositive of the instant claim (*see Matter of Warren*, 53 NY2d 118 [1981] [State Department of Mental Hygiene is performing sovereign function in caring for the mentally ill]). We reject claimant's reliance on *Seidelman* (202 Misc 817), which involved the State's plainly commercial and nonsovereign operation of a ski facility. The contrast here is stark: DHR was engaged in a decidedly noncommercial campaign designed to advance its mission of promoting civil rights. We note that the same concepts governing applicability of the Civil Rights Law to the State serve to defeat claimant's argument that the waiver of sovereign

immunity in Section 8 of the Court of Claims Act subjects the State to liability.

Accordingly, the order of the Court of Claims of the State of New York (Thomas H. Scuccimarra, J.), entered October 8, 2015, which, to the extent appealed from as limited by the briefs, granted claimant's motion for summary judgment on the issue of liability on her defamation per se and Civil Rights Law claims, and denied defendant's cross motion for partial summary judgment dismissing the Civil Rights Law claims, should be modified, on the law, to deny claimant summary judgment on the Civil Rights Law claims, grant the State summary judgment dismissing those claims, and, upon a search of the record, grant the State summary judgment dismissing the standard defamation claim, and otherwise affirmed, without costs.

All concur.

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

ENTERED: JANUARY 16, 2018

CLERK