SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 5, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Friedman, J.P., Sweeny, Kahn, Singh, Moulton, JJ.

5820N Yoram Finkelstein, Index 309125/13
Plaintiff-Appellant,

-against-

Bat-El Yishay Finkelstein,
Defendant-Respondent.

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Eran Regev, Manhasset, for appellant.

Elayne Kesselman, New York, for respondent.

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Order, Supreme Court, New York County (Deborah A. Kaplan, J.), entered on or about April 11, 2017, which, to the extent appeal from as limited by the briefs, granted defendant wife's motion to confirm, and denied plaintiff husband's motion to reject, the report of a special referee, dated September 30, 2016, which, after a hearing, awarded the parties' frozen embryo to the wife, unanimously reversed, on the law and the facts, without costs, the wife's motion denied, the husband's motion granted, and the husband awarded the embryo, but only for the purposes of disposal by the New Hope Fertility Center (NHF) in accordance with NHF procedures as set forth in the parties'

consent agreement.

The parties were married in Israel in December 2011. They attempted in vitro fertilization (IVF) in Israel without success. After moving to New York in 2012, they engaged the services of NHF in the hope of conceiving a child via implantation of cryopreserved embryos in the wife's uterus. In July 2012 they signed an agreement with NHF entitled "Consent for the Cryopreservation of Human Embryo(s)" (the Consent Agreement). The Consent Agreement provided three options concerning use of frozen embryos created from the parties' genetic donations. The parties selected "Choice A": "consent to the cryopreservation of embryos for our own use."

Paragraph 7 of the Consent Agreement is entitled "Voluntary Participation" and provides "I/We may withdraw my/our consent and discontinue participation at any time . . . ." Paragraph 16, entitled "Authorization," provides, "This consent will remain in effect until such time as I notify NHF in writing of my/our wish to revoke such consent."

After five or six further unsuccessful IVF attempts with NHF, the husband, then 58 years old, filed for divorce and requested sole custody of the one remaining cryopreserved embryo. He also moved to enjoin the wife, then 47 years old, from destroying, using, or preserving the embryo. The husband

obtained an ex parte temporary restraining order embodying that relief. However, in an order entered on or about January 23, 2014, Supreme Court found, inter alia, that the husband had not demonstrated a likelihood of success on the merits, as there was nothing in the Consent Agreement that would prevent the wife from going ahead with implantation unilaterally, and issued a preliminary injunction enjoining NHF and the wife from "destroying or transferring the cryopreserved embryo to anyone other than the wife."

On March 5, 2014, the husband executed and had notarized a pre-printed NHF form entitled "Notice of Disposition of Frozen Human Sperm/Testicular Tissue." He checked off the space for "other," and handwrote: "revoking my consent to use of any of my genetic material, including the embryo created with Batel Yishay Finkelstein." On the same date he also signed a notarized statement revoking his consent, which states: "I, Yoram Finkelstein, hereby revoke my consent to any use of any of my genetic material, including the embryo created with Bat-El Yishay Finkelstein, pursuant to the Consent for the Cryopreservation of client Deposit or Sperm/semen, and pursuant to Consent for The Cryopreservation of Human Embryo."

Supreme Court subsequently granted an injunction to preserve the status quo, preventing any destruction or implantation of the

embryo, and referred the question of equitable distribution of the embryo to a special referee to hear and report, along with other issues.[1] After a hearing, the special referee issued a report that narrowly read the consent provisions of the Consent Agreement to refer only to the terms and conditions of NHF's storage of cryopreserved embryos, and found that the husband did not have a right to revoke his consent to the wife's use of the embryo. The special referee awarded the embryo to the wife, concluding that the balance of equities favored the wife because this represented her last chance to become a biological parent.

Supreme Court granted the wife's motion to confirm the special referee's report and denied the husband's motion to reject it. We now reverse.

In *Kass v Kass* (91 NY2d 554 [1998]), the Court of Appeals determined that agreements between donors participating in IVF should be enforced pursuant to general rules of contract interpretation. Here, the special referee's interpretation of the Consent Agreement is contrary to its plain meaning, and the report therefore should not be confirmed (*see Kaplan v Einy*, 209 AD2d 248, 250-251 [1st Dept 1994]). The Consent Agreement

[1]Before the commencement of the hearing before the special referee, the parties resolved all issues except ownership of the embryo.

specifies that participation in the procedures involving cryopreservation of embryos is voluntary and that either party may withdraw consent at any time. The Consent Agreement is not limited to cryopreservation or storage of the embryos, but includes the future transfer of cryopreserved embryos to the wife's uterus. The provisions permitting either party to revoke consent are not limited to cryopreservation, but permit either party to withdraw consent to participation in the entire IVF process. Contrary to the finding of Supreme Court, the Consent Agreement does not indicate that the court has plenary authority to determine ownership of the embryo in the event of divorce.[2] Additionally, contrary to Supreme Court's finding, the husband's revocation of consent did not violate the automatic orders served pursuant to Domestic Relations Law § 236(B)(2)(b). Rather, the revocation comported with the orders by seeking to maintain the status quo pending equitable distribution of the parties' marital assets, which the parties understood to include the embryo.

[2]In coming to this conclusion, Supreme Court relied on a provision in paragraph 12 of the Consent Agreement, which is entitled "Costs." The relevant passage in that section reads: "In the event of divorce, I/we agree together and/or separately to bear any and all costs of storage until disposition is decided by a court of law." That provision is best understood as a means for NHF to know who to bill for storage upon the conclusion of the divorce. The passage does not purport to supercede the consent revocation rights available to the parties in the Consent Agreement.

Since "the document makes clear the parties' over-all intention" (*Kass v Kass*, 91 NY2d at 567), we are required to choose the construction that "will carry out the plain purpose and object of the [agreement]" (*id.* [internal quotation marks omitted]). The husband's broadly worded revocation of consent to the continued use of any of his genetic material, including the embryo created with the wife, definitively revoked his consent to the continuation of the IVF process, including implantation by the wife of the embryo at issue here.

As one party has withdrawn consent, the remaining cryopreserved embryo may not be used for any purpose by either party. The parties also did not agree to the use of the embryo by any other person, at least under the facts that obtain here. Accordingly, the husband, as prevailing party on this appeal, is awarded the remaining embryo, but only for the purpose of ensuring that NHF disposes of the embryo as provided in the Consent Agreement.

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

ENTERED: JUNE 5, 2018

CLERK

Friedman, J.P., Tom, Webber, Kern, JJ.

5898 Julio Bermeo, Index 305754/12
Plaintiff-Respondent,

-against-

Time Warner Entertainment Co.,
et al.,
Defendants-Appellants.

_____

Mauro Lilling Naparty, LLP, Woodbury (Seth M. Weinberg of counsel), for appellants.

Kelner and Kelner, New York (Gail S. Kelner of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered on or about August 4, 2017, which, insofar as appealed from as limited by the briefs, granted plaintiff's motion for partial summary judgment on the issue of liability, unanimously affirmed, without costs.

Plaintiff established his entitlement to judgment as a matter of law on the issue of liability. While traveling on a bicycle, plaintiff collided with the passenger side of defendants' northbound truck as it turned left into plaintiff's path at the intersection of St. Nicholas Avenue and 155th Street in New York County. Plaintiff submitted evidence showing that defendant was negligent by making a left turn without ensuring that it was safe to do so (*see* Vehicle and Traffic Law § 1141;

Abboud v Pawelec, 141 AD3d 438 [1st Dept 2016]).

Moreover, plaintiff is not required to demonstrate the absence of his own comparative fault to obtain partial summary judgment on defendant's liability (*Rodriguez v City of New York*, __NY3d__, 2018 NY Slip Op 02287 [2018]). Accordingly, plaintiff was entitled to summary judgment on the issue of liability.

The Decision and Order of this Court entered herein on March 6, 2018 is hereby recalled and vacated (*see* M-1757 decided simultaneously herewith).

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

ENTERED: JUNE 5, 2018

CLERK

Sweeny, J.P., Webber, Gesmer, Singh, Moulton, JJ.

6634 Omar Villanueva, Index 161658/14
Plaintiff-Respondent,

-against-

114 Fifth Avenue Associates LLC,
et al.,
Defendants-Appellants.

_____

Barry, McTiernan & Moore LLC, New York (Laurel A. Wedinger of counsel), for appellants.

Morgan Levine Dolan, P.C., New York (Glenn P. Dolan of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered April 3, 2017, which, to the extent appealed from, denied defendants' motion for summary judgment dismissing the claims for common-law negligence and violation of Labor Law §§ 200 and 240(1), and granted plaintiff's motion for partial summary judgment on the issue of liability on the Labor Law § 240(1) claim, unanimously modified, on the law, to grant defendants' motion to the extent of dismissing the common-law negligence and Labor Law § 200 claims, and otherwise affirmed, without costs.

Plaintiff was injured at a construction site owned by defendant 114 Fifth Avenue Associates LLC (114 Fifth Avenue) and managed by defendant Structure Tone Inc. (Structure Tone), when he and three other workers were attempting to load a 500-pound

steel I-beam into an internal freight elevator at a construction site in order to transport it from the 18th floor to the ground floor. The elevator was four feet wide and five feet deep, with an eight foot ceiling, while the beam was 12 feet long. The workers opened a hatch on top of the elevator, and were attempting to stand the beam on its end, with the high end extending through the open hatch, when the beam fell down half a foot onto plaintiff's shoulder.

Plaintiff established his entitlement to judgment as a matter of law on the issue of liability on the § 240(1) claim. Plaintiff submitted evidence showing that he was engaged in an activity covered by the statute, that defendants failed to provide an adequate safety device to protect him, and that such violation was a proximate cause of the accident (*Barreto v Metropolitan Transp. Auth.*, 25 NY3d 426, 433 [2015]). The half foot that the steel I-beam dropped onto plaintiff's shoulder is not de minimis, given the I-beam's weight and since the hazard was one directly flowing from the application of the force of gravity to a person (*see Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 [2009]; *Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 9 [1st Dept 2011]).

We modify Supreme Court to the extent that it denied defendants' motion for summary judgment dismissing the claims for

common-law negligence and violation of Labor Law § 200. Section 200 of the Labor Law "is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (*Prevost v One City Block LLC*, 155 AD3d 531, 533 [1st Dept 2017] citing *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Claims under Labor Law § 200 and under th common law either arise from an alleged defect or dangerous condition existing on the premises or from the manner in which the work was performed (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143-144 [1st Dept 2012]).

There is no evidence that the Labor Law § 200 claim arises from an alleged defect or dangerous condition existing on the premises. Where a defect is not inherent but is created by the manner in which the work is performed, the claim under Labor Law § 200 is one for means and methods and not one for a dangerous condition existing on the premises (*see Cappabianca*, 99 AD3d at 144; *Dalanna v City of New York*, 308 AD2d 400, 400 [1st Dept 2003]). Here, there is nothing in the record that shows there was a defect inherent in the elevator. Plaintiff argues that the interior of the elevator was insufficient to carry the heavy I-beams, which goes to the means and methods in which the work was performed. Accordingly, liability cannot be imposed on

defendants based on an alleged defect or dangerous condition existing on the premises.

Plaintiff has also not raised a triable issue of fact as to whether Structure Tone exercised adequate supervision or control over the injury-producing work. The subcontract between Structure Tone and plaintiff's employer, All Safe, LLC, provides that All Safe "will furnish all labor, materials, supervision and items required for the proper and complete performance of the Work." Structure Tone's project superintendent testified that he was responsible for basic job safety, walked the job site daily, conducted weekly safety meetings with the subcontractors, and had the ability to stop work if he observed an unsafe condition. "Where the injury was caused by the manner and means of the work, including the equipment used, the owner or general contractor is liable if it actually exercised supervisory control over the injury producing work" (*Cappabianca*, 99 AD3d at 144).

Although Structure Tone had the authority to stop work at the construction site for safety reasons, this is "insufficient to raise a triable issue of fact with respect to whether [Structure Tone] exercised the requisite degree of supervision and control over the work being performed to sustain a claim under Labor Law § 200 or for common-law negligence" (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 309 [1st Dept 2007]).

Accordingly, there is no evidence that Structure Tone exercised any control over the manner and means of plaintiff's work.

114 Fifth Avenue established its entitlement to judgment as a matter of law on the Labor Law § 200 and common-law negligence claims as against it. 114 Fifth Avenue submitted evidence showing that there was no indication that it controlled the manner and means of plaintiff's and All Safe's work, and plaintiff failed to raise an issue of fact in this regard.

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

ENTERED: JUNE 5, 2018

CLERK

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

6725-
6726 Index 651942/15

In re Country-Wide Insurance Company,
Petitioner-Appellant,

-against-

Bay Needle Care Acupuncture, P.C.,
as assignee of Rosa Corona,
Respondent-Respondent.

_____

Thomas Torto, New York (Jason Levine of counsel), for appellant.

Gary Tsirelman, P.C., Brooklyn (Gary Tsirelman of counsel), for respondent.

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Judgment, Supreme Court, New York County (Joan M. Kenney, J.), entered February 23, 2017, in favor of respondent, unanimously affirmed, without costs, and the matter is remanded for a determination of respondent's reasonable attorney's fees for this appeal. Appeal from judgment entered February 14, 2017, unanimously dismissed, without costs, as superseded by the appeal from the February 23, 2017 judgment.

Respondent commenced an arbitration against petitioner seeking reimbursement of bills for health care services it had rendered to an individual injured in a motor vehicle accident. Petitioner asserted a *Mallela* defense (*see State Farm Mut. Auto. Ins. Co. v Mallela* (4 NY3d 313 [2005]), i.e., that it could withhold payment for the services because respondent was

fraudulently incorporated. After a hearing, an arbitrator found that petitioner failed to meet its burden of providing clear and convincing evidence of fraudulent incorporation, and awarded respondent full reimbursement. The award was affirmed by the master arbitrator.

Petitioner argues that it was held to an incorrect standard of proof and that the correct standard is a preponderance of the evidence. However, the award is not subject to vacatur under either standard (*see Country-Wide Ins. Co. v TC Acupuncture, P.C.*, 140 AD3d 643 [1st Dept 2016]; *Nationwide Affinity Ins. Co. of Am. v Acuhealth Acupuncture, P.C.*, 155 AD3d 885, 886-887 [2d Dept 2017]). Petitioner failed to present any evidence that respondent was fraudulently incorporated.

We reject petitioner's contention that the master arbitrator's determination affirming the award was irrational because the arbitrator's failure to set forth his reasons for rejecting petitioner's *Mallela* defense precluded meaningful review of the award (*see Matter of Guetta [Raxon Fabrics Corp.]*, 123 AD2d 40 [1st Dept 1987]; *Matter of Nationwide Mut. Ins. Co. v Steiner*, 227 AD2d 563 [2d Dept 1996]; *see also Purpura v Bear Stearns Cos.*, 238 AD2d 216 [1st Dept 1997], *lv denied* 90 NY2d 806 [1997]). In any event, the master arbitrator's determination, which considered the arbitrator's familiarity with similar cases

and past decisions on the issues presented, was rational.

Respondent is entitled to reasonable attorney's fees for this appeal. Supreme Court has authority to award attorneys fees as this is an appeal from a master arbitration award pursuant to 11 NYCRR 65-4.10(j)(4), which, in pertinent part, provides: "The attorney's fee for services rendered in connection with ... a court appeal from a master arbitration award and any further appeals, shall be fixed by the court adjudicating the matter" *(see also Matter of GEICO Ins. Co. v AAAMG Leasing Corp.*, 148 AD3d 703 [2d Dept 2017], recalling and vacating *Matter of GEICO Ins. Co. v AAAMG Leasing Corp.*, 139 AD3d 947 [2d Dept 2016]). Accordingly, we remand the matter to Supreme Court for a determination of respondent's reasonable attorney's fees for this appeal. To the extent *Country-Wide Ins. Co. v Valdan Acupuncture, P.C.* (150 AD3d 560, 561 [1st Dept 2017]) takes a different approach to calculating attorneys' fees, we decline to follow it.

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

ENTERED: JUNE 5, 2018

CLERK

Friedman, J.P., Sweeny, Gische, Mazzarelli, Gesmer, JJ.

6759 Gil-Ad Schwartz, Index 154570/16
Plaintiff-Appellant,

-against-

Regina Chan,
Defendant-Respondent.

Sweetbaum & Sweetbaum, New York (Marshall D. Sweetbaum of counsel), for appellant.

Satterlee Stephens LLP, New York (Mario Aieta of counsel), for respondent.

Order, Supreme Court, New York County (Erika M. Edwards, J.), entered on or about June 12, 2017, which granted defendant's motion to dismiss the complaint, with prejudice, and denied plaintiff's motion to extend the time to serve process, with prejudice, unanimously affirmed, with costs.

Plaintiff's claims are time-barred since they were brought more than a year after the allegedly offending statements were published (CPLR 215[3]). Plaintiff argues, for the first time on appeal, that his time to commence the action was tolled by CPLR 207. This argument is unpreserved and in any event unavailing, since plaintiff failed to show that jurisdiction over defendant could not be obtained without personal service to her within the state (*see* CPLR 207[3]), i.e., that it was or would have been a "practical impossibility" for him to serve her while she was

outside the state, either in England or in New Jersey (Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, CPLR C207:1). Plaintiff's contention that defendant lied about her address in an effort to evade service is unsubstantiated by the record.

As plaintiff's claims were already time-barred under the statute of limitations for libel and slander actions (CPLR 215[3]) when he filed the summons, CPLR 306-b is unavailable to him to extend his time to serve the complaint (*see Baptiste v "John Doe,"* 89 AD3d 436, 437 [1st Dept 2011], *lv denied* 18 NY3d 806 [2012]). Nor is an extension warranted in the interest of justice, since the claims not only are time-barred but also lack merit (*see Johnson v Concourse Vil., Inc.*, 69 AD3d 410 [1st Dept 2010], *lv denied* 15 NY3d 707 [2010]). The statements of which plaintiff complains are protected by the litigation privilege, since they were prepared in connection with a threatened litigation, at the direction of a potential defendant, by an individual who, at a minimum, was a potential witness (*see e.g. Front, Inc. v Khalil*, 24 NY3d 713 [2015]).

Contrary to plaintiff's contention, the common interest privilege also applies to the subject statements. Moreover, given the context in which the statements were prepared, namely, in response to plaintiff's threats of litigation, plaintiff

cannot show that the only cause for the statements was malice on defendant's part (*see Liberman v Gelstein*, 80 NY2d 429, 439 [1992]; *Frechtman v Gutterman*, 115 AD3d 102, 107-108 [1st Dept 2014]).

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

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

ENTERED: JUNE 5, 2018

CLERK

Friedman, J.P., Sweeny, Gische, Mazzarelli, Gesmer, JJ.

6760 In re Khiry A.N.B., Jr.,

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

Khiry A.N.B.,
Respondent-Appellant,

Cardinal McCloskey Community
Services,
Petitioner-Respondent.

_____

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

Geoffrey P. Berman, Larchmont, for respondent.

Law Office of Ava G. Gutfriend, Bronx (Ava G. Gutfriend of counsel), attorney for child.

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Order, Family Court, Bronx County (Robert D. Hettleman, J.), entered on or about May 4, 2017, which, inter alia, found that respondent father's consent was not required for the adoption of the subject child, unanimously affirmed, without costs.

Respondent was not entitled to more than notice of the child's adoption in light of the evidence that he failed to pay fair and reasonable support for the child according to his means (*see* Domestic Relations Law § 111[1][d]; *Matter of Sydney A.B. [Felicia M.]*, 151 AD3d 533 [1st Dept 2017], *lv denied* 29 NY3d 917 [2017]; *Matter of Mya Anaya M. [Barry M.]*, 138 AD3d 569 [1st Dept 2016]). Even assuming that respondent provided financial support

for the child while the child briefly was discharged to his care, from May 13 to July 5, 2015, he failed to show that he was a source of consistent support for the child, because he did not provide financial support prior to that time (*see Matter of Jayvon Jose R. [Francisco S.]*, 154 AD3d 600 [1st Dept 2017]). Neither respondent's subsequent incarceration nor any failure on the part of the agency to inform him of his obligations absolved him of his responsibility to support and regularly communicate with the child (*see Matter of Jonathan M.H. [Reginald H.]*, 135 AD3d 493 [1st Dept 2016], *lv denied* 27 NY3d 904 [2016]).

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

ENTERED: JUNE 5, 2018

CLERK

Friedman, J.P., Sweeny, Gische, Mazzarelli, Gesmer, JJ.

6761 M.L.C. Construction, Inc., et al., Index 300251/12
Plaintiffs-Respondents,

-against-

Hui Ru Zhang, et al.,
Defendants-Appellants,

Regina Palazzo, et al.,
Defendants.

_____

Mitchell Pollack & Associates, PLLC, Tarrytown (Eileen M. Burger of counsel), for appellants.

The Law Firm of William G. Sayegh, P.C., Carmel (Michael B. Karlsson II of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Elizabeth A. Taylor, J.), entered on or about July 9, 2016, which, in this action where plaintiffs challenge the sale of certain properties, denied the motion of defendants purchasers Hui Ru Zhang, Zhi Ming Zhang, Yee Ching Li and Guang Yao Li (collectively defendants) for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

"A bona fide purchaser or encumbrancer for value is protected in its title unless it had previous notice of the fraudulent intent of its immediate grantor" (*Commandment Keepers Ethiopian Hebrew Congregation of the Living God, Pillar & Ground of Truth, Inc. v 31 Mount Morris Park, LLC*, 76 AD3d 465, 465 [1st

Dept 2010]; Real Property Law § 266). The protections of Real Property Law § 266, however, apply only to fraud situations that are voidable, not those that are void (*see Fan-Dorf Props., Inc. v Classic Brownstones Unlimited, LLC*, 103 AD3d 589, 590 [1st Dept 2013]). In addition, violations of Business Corporation Law § 909(a), which applies to the "sale, lease, exchange or other disposition of all or substantially all the assets of a corporation, if not made in the usual or regular course of the business actually conducted by such corporation," have been held to void a transaction (*see Bear Pond Trail, LLC v American Tree Co., Inc.*, 61 AD3d 1195 [3d Dept 2009]; *see also Theatre Dist. Realty Corp. v Appleby*, 117 AD3d 596 [1st Dept 2014], *lv denied* 25 NY3d 907 [2015]).

Here, defendants point to the certificate of incorporation of plaintiff M.L.C. Construction, LLC (MCL) which, they argue, does not specifically prohibit the corporation from selling real estate, and to the minutes of MCL's first board meeting, in which it was resolved, upon motion, that the corporation would "purchase property for the construction and resale of homes at premises known as 526-530 Logan Avenue, Bronx, New York." However, Business Corporation Law § 909(a) applies to sales "not made in the usual or regular course of the business actually conducted by such corporation." Since MLC derived all of its

income from the rental of three homes on Logan Avenue, the transaction may not have been in the usual and regular course of business actually conducted by MLC. Triable issues also exist as to whether such sales constituted all or substantially all of MLC's assets.

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

ENTERED: JUNE 5, 2018

CLERK

Friedman, J.P., Sweeny, Gische, Mazzarelli, Gesmer, JJ.

6762 Illuminada Entrada, Index 306052/12
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent.

_____

Rosales Del Rosario, P.C., Flushing (Leo L. Rosales of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Barbara Graves-Poller of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered on or about April 6, 2017, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant established its entitlement to judgment as a matter of law in this action for personal injuries sustained by plaintiff when she slipped and fell on snow and ice on a sidewalk on an overpass of the Cross Bronx Expressway. Defendant submitted evidence showing it did not have actual or constructive notice of the condition. The record also demonstrates that defendant did not have a reasonable amount of time to clear the sidewalk of the icy condition that developed in the six hours from the end of the storm until the accident (*see Moss v City of New York*, 5 AD3d 312 [1st Dept 2004]).

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

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

ENTERED: JUNE 5, 2018

CLERK

Friedman, J.P., Sweeny, Gische, Mazzarelli, Gesmer, JJ.

6763-		Ind. 21/15
6763A-		4302/15
6763B-		1947/15
6763C-		518/12
6763D	The People of the State of New York, Respondent,	2701/11
	-against-	
	Albert Acosta, Defendant-Appellant.	

_____

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

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

_____

Judgment, Supreme Court, New York County (Abraham Clott, J.), rendered January 13, 2016, convicting defendant, after a jury trial, of two counts of criminal possession of a weapon in the second degree, and sentencing him, as a second violent felony offender, to an aggregate term of 10 years, and judgments, same court and Justice, rendered January 13, 2016, as amended March 7 and April 14, 2016, convicting defendant, upon his pleas of guilty of criminal possession of a controlled substance in the third degree, criminally using drug paraphernalia in the second degree, conspiracy in the fourth degree and criminal sale of a controlled substance in the third degree, and revoking sentences of probation imposed on two prior convictions, and sentencing him

to a concurrent aggregate term of 10 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The evidence supports the conclusion that defendant discarded the pistol that the police recovered. The evidence, viewed in light of the Penal Law § 265.15(4) presumption, established the unlawful intent requirement of defendant's conviction under Penal Law § 265.03(1)(b).

The prosecutor's summation remark explaining why no forensic testing was conducted on the pistol was not so egregious as to warrant reversal (*see People v D'Alessandro*, 184 AD2d 114, 118-119 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]).

Defendant's remaining challenges to the summation, and to background evidence provided by police witnesses, are unpreserved (*see People v Tevaha*, 84 NY2d 879 [1974]), and we decline to review them in the interest of justice. As an alternative holding, we likewise find no basis for reversal. We have considered and rejected defendant's ineffective assistance of counsel claims relating to the lack of preservation (*see People v*

Benevento, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 5, 2018

CLERK

Friedman, J.P., Sweeny, Gische, Mazzarelli, Gesmer, JJ.

6764 Danco Electrical Contractors, Inc., Index 450633/13
Plaintiff-Appellant,

-against-

Dormitory Authority of the State
of New York,
Defendant-Respondent.

_____

Law Office of Eric M. Jaffe, Huntington (Eric M. Jaffe of counsel), for appellant.

Holland & Knight, New York (Timothy B. Froessel of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered May 9, 2017, which, insofar as appealed from, granted defendant's motion for summary judgment dismissing the second and third causes of action to the extent based on change order proposals 24, 46R, 54, 61, 91, 97, 99, 125, 133, 148, 152, 153, 155, 157, 159, 161, 162, 163, 167, 174, 193, 197, 199, 202, 210, 211, and 213, unanimously reversed, on the law, without costs, and the motion denied.

It is undisputed that plaintiff failed to satisfy a condition precedent to recovering disputed costs for extra work on which defendant forced price reductions. Although plaintiff gave detailed written statements contesting defendant's determinations of the fair and reasonable value of the extra work

pursuant to section 8.01(B), it failed to give verified statements pursuant to section 11.03(A) of the contractual General Conditions.

Nevertheless, we conclude that plaintiff should be excused from the non-occurrence of that condition, because otherwise it would suffer a disproportionate forfeiture, and the occurrence of the condition was not a material part of the agreed exchange (*see Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 691 [1995], citing Restatement [Second] of Contracts § 229). Defendant does not argue that plaintiff failed to document the costs of the claimed extra work, to provide timely notice of its claims for extra work, or to provide timely notice of its objections to defendant's rejections of and price reductions on the claimed extra work. Nor does it contend other than in conclusory terms that plaintiff's failure to submit verified written statements was prejudicial to it. Moreover, the cases on which defendant relies did not consider whether the failure to strictly comply with a condition precedent should be excused to avoid a disproportionate forfeiture under the circumstances of a case such as this, where the noncompliance is de minimis and defendant has shown no prejudice whatsoever (*see e.g. Mezzacappa Bros., Inc. v City of New York*, 29 AD3d 494 [1st Dept 2006], *lv denied* 7 NY3d 712 [2006]; *Schindler El. Corp. v Tully Constr.*

Co., Inc., 139 AD3d 930 [2d Dept 2016]).

In view of the foregoing, we do not reach plaintiff's remaining contentions.

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

ENTERED: JUNE 5, 2018

CLERK

Friedman, J.P., Sweeny, Gische, Mazzarelli, Gesmer, JJ.

6765 Michelle Penhaskashi, Index 151965/15
Plaintiff-Respondent,

-against-

EQR-East 27th Street Apartments, LLC, et al.,
Defendants-Appellants,

Duane Reade, Inc., et al.,
Defendants.

_____

Molod Spitz & Desantis, P.C., New York (Marcy Sonneborn of counsel), for appellants.

Block O'Toole & Murphy, New York (David L. Scher of counsel), for respondent.

_____

Order, Supreme Court, New York County (Kelly O'Neill Levy, J.), entered August 15, 2017, which, to the extent appealed from as limited by the briefs, denied the motion of defendants EQR-East 27th Street Apartments, LLC and Equity Residential Management LLC for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Triable issues of fact exist as to whether defendants were negligent in the removal of ice from the sidewalk adjacent to the premises, creating the alleged dangerous condition (*see Vargas v Central Parking Sys.*, 35 AD3d 255 [1st Dept 2006]). Contrary to defendants' contention that they were entitled to summary judgment because plaintiff could not identify the cause of her

fall, plaintiff clearly testified that she fell on a slippery surface. Furthermore, photographs taken of the area only minutes after plaintiff fell raise an issue of fact as to whether plaintiff slipped on ice created by runoff of melting snow and were properly considered on the motion (*see Denyssenko v Plaza Realty Servs., Inc.*, 8 AD3d 207, 208 [1st Dept 2004]).

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

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

ENTERED: JUNE 5, 2018

CLERK

Friedman, J.P., Sweeny, Gische, Mazzarelli, Gesmer, JJ.

6766 Angel O. Sosa-Sanchez, Index 302213/14
Plaintiff-Appellant,

-against-

Rolando Reyes, et al.,
Defendants-Respondents,

_____

Mark E. Weinberger, P.C., Rockville Centre (Eric M. Parchment of counsel), for appellant.

Baker, McEvoy, Morrissey & Moskovits, P.C., Brooklyn (Stacy R. Seldin of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Armando Montano, J.), entered on or about May 4, 2017, which granted defendants' motion for summary judgment dismissing the complaint based on plaintiff's inability to meet the serious injury threshold within the meaning of Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendants met their initial burden by submitting the affirmed reports of a neurologist, an emergency medicine specialist, and a radiologist. Defendants' neurologist found full range of motion in plaintiff's spine and normal results on diagnostic tests, and opined that plaintiff's alleged injuries had resolved (*Frias v Son Tien Liu*, 107 AD3d 589 [1st Dept 2013]). Defendants' expert in emergency medicine opined that the records of plaintiff's emergency room visit demonstrated that any

claimed injuries could not be causally related to the subject accident, and defendants' radiological expert opined that plaintiff's spinal conditions, including osteophytes and bony overgrowth, were degenerative in nature, and unrelated to the accident (*see Khanfour v Nayem*, 148 AD3d 426, 426-427 [1st Dept 2017]).

In opposition, plaintiff failed to raise an issue of fact. Plaintiff submitted his own unaffirmed MRI reports, which showed bulging and herniated discs, but also documented degenerative conditions such as bony ridge and spur formations and loss of disc hydration. Plaintiff's physician provided only a conclusory opinion that plaintiff's injuries were caused by the accident, without addressing the preexisting and degenerative conditions documented in plaintiff's own MRIs or explaining why plaintiff's current reported symptoms were not related to the preexisting conditions (*see Alvarez v NYLL Mgt. Ltd.*, 120 AD3d 1043, 1044 [1st Dept 2014], *affd* 24 NY3d 1191 [2015]; *De La Rosa v Okwan*, 146 AD3d 644 [1st Dept 2017], *lv denied* 29 NY3d 908 [2017]).

Defendants' initial demonstration that plaintiff's conditions were not causally related to the accident also met their prima facie burden on plaintiff's 90/180-day claim (*see Paulling v City Car & Limousine Servs., Inc.*, 155 AD3d 481, 482

[1st Dept 2017]; *and see Simpson v Montag*, 81 AD3d 547, 548 [1st Dept 2011]). In opposition, plaintiff's expert failed to raise an issue of fact as to causation (*see Barry v Arias*, 94 AD3d 499, 500 [1st Dept 2012]).

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

ENTERED: JUNE 5, 2018

CLERK

Friedman, J.P., Sweeny, Gische, Mazzarelli, Gesmer, JJ.

6767 The People of the State of New York, Respondent, Ind. 3532/12

-against-

Demari Greene, Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (R. Jeannie Campbell-Urban of counsel), respondent.

_____

Judgment, Supreme Court, New York County (Edward J. McLaughlin J.), rendered September 17, 2013, convicting defendant, after a jury trial, of assault in the third degree and aggravated criminal contempt, and sentencing him to an aggregate term of two to six years, unanimously affirmed.

The court properly permitted the People to introduce evidence of uncharged physical confrontations between defendant and the victim before the incident at issue. This conduct was relevant to defendant's motive and intent (*see People v Dorm*, 12 NY3d 16 [2009], and it provided necessary background regarding the couple's relationship that tended to explain aspects of the victim's testimony that might otherwise have seemed less than

believable to the jury (*see People v Steinberg*, 170 AD2d 50, 72-74 [1991], *affd* 79 NY2d 673 [1992]). The probative value of this evidence outweighed its prejudicial effect, which the court minimized by means of thorough limiting instructions.

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

ENTERED: JUNE 5, 2018

CLERK

Friedman, J.P., Sweeny, Gische, Mazzarelli, Gesmer, JJ.

6768 Lisa Byas, Index 151694/14
Plaintiff-Respondent,

-against-

Cornell University,
Defendant-Appellant,

Guy Mazza,
Defendant.

_____

Venable LLP, New York (Brian J. Clark of counsel), for appellant.

Tuckner, Sipser, Weinstock & Sipser, LLP, New York (William J. Sipser of counsel), for respondent.

_____

Order, Supreme Court, New York County (Shlomo Hagler, J.), entered on or about September 19, 2017, which denied the motion of defendant Cornell University for summary judgment dismissing the amended complaint, unanimously modified, on the law, to grant the motion to the extent of dismissing the second cause of action for aiding and abetting discrimination, and otherwise affirmed, without costs.

Defendant asserted that it laid plaintiff off as part of a legitimate, nondiscriminatory departmental restructuring in which it effectively eliminated her position by transferring responsibility for her duties to its partner hospital. Viewing the record in the light most favorable to plaintiff as nonmovant, we find that in opposition, plaintiff raised issues of fact as to

whether defendant's proffered reason was a pretext for disability discrimination.

Since the only individual defendant has already been dismissed from the action, there is no basis for maintenance of the aiding and abetting theory pleaded in the amended complaint's second cause of action (*see* Administrative Code of City of NY § 8-107[6]; *see also Priore v New York Yankees*, 307 AD2d 67, 74 [1st Dept 2003], *lv denied* 1 NY3d 504 [2003]).

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

ENTERED: JUNE 5, 2018

CLERK

Friedman, J.P., Sweeny, Gische, Mazzarelli, Gesmer, JJ.

6769-
6770 In re Nafees F.,

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

_____

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

Zachary W. Carter, Corporation Counsel, New York (Dona B. Morris of counsel), for presentment agency.

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Appeals from orders of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about January 31, 2017, which adjudicated appellant a juvenile delinquent upon his admissions that he committed acts that, if committed by an adult, would constitute the crime of sexual abuse in the third degree (two counts), and imposed a conditional discharge for a period of 12 months, unanimously dismissed, without costs.

Each "dispositional order was entered upon appellant's consent and thus he is not an aggrieved party within the meaning of CPLR 5511" (*Matter of Desmond S.*, 97 NY2d 693, 693 [2002]; *see Matter of Raven L.*, 105 AD3d 424 [1st Dept 2013]). In any event,

the disposition was the least restrictive alternative and a provident exercise of the court's discretion.

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

ENTERED: JUNE 5, 2018

CLERK

Friedman, J.P., Sweeny, Gische, Mazzarelli, Gesmer, JJ.

6774 & M-2081 — Index 350053/10, 84025/10

D.H., an Infant, by Her Mother and Natural Guardian, Maria R.,
Plaintiff-Respondent,

-against-

New Latham Hotel Corp.,
Defendant-Appellant,

Icahn House East, LLC, et al.,
Defendants-Respondents.

- - - - -

Icahn House East, LLC, et al.,
Third-Party Plaintiffs-Respondents,

-against-

4 East 28th Street Corp.,
Third-Party Defendant-Appellant.

_____

Landman Corsi Ballaine & Ford P.C., New York (William G. Ballaine of counsel), for appellants.

The Fitzgerald Law Firm, P.C., Yonkers (John M. Daly of counsel), for D.H., respondent.

Gordon & Rees, LLP, New York (Douglas E. Motzenbecker of counsel), for Icahn House East, LLC and The Children's Rescue Fund, respondents.

_____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered on or about April 5, 2017, which, insofar as appealed from, denied defendant New Latham Hotel Corp. and third-party defendant's motion for summary judgment dismissing the complaint and the cross claim for common-law indemnification as against New

Latham and dismissing the third-party claim for contractual indemnification, unanimously affirmed, without costs.

Plaintiff seeks damages for lead poisoning she sustained between July 25, 2008 and January 25, 2009, while residing in a homeless shelter operated by defendants Icahn House East, LLC and The Children's Rescue Fund, pursuant to a contract with the New York City Department of Homeless Services, and located in a building owned by defendant New Latham Hotel Corp. and managed by third-party defendant, 4 East 28th Street Corp.

Defendant New Latham failed to establish prima facie that it lacked actual or constructive notice that plaintiff was living in Room 517 of the shelter (*see Juarez v Wavecrest Mgt. Team*, 88 NY2d 628 [1996]). The motion court correctly determined that the knowledge of 4 East's hotel manager, Stephen DeFazio, that the shelter was for women and their children up to the age of 13 could be imputed to New Latham, because, contrary to New Latham and 4 East's contention, the record does not establish that 4 East was a separate legal entity from New Latham. Although DeFazio testified that he was employed by 4 East when plaintiff lived in Room 517, he also testified that New Latham owned 4 East and that it had assigned 4 East to operate the property. DeFazio's errata sheet also does not establish that New Latham and 4 East were separate legal entities. Moreover, DeFazio's

testimony notwithstanding, New Latham's president's affidavit in support of the motion does not address whether New Latham owned 4 East.

Moreover, DeFazio testified that he was aware that lead paint presented hazards and that all the units leased by Icahn would have children staying in them, and he testified that he had arranged for Room 517 to be cleaned and inspected for lead before plaintiff sustained any injury from exposure to lead. Thus, it is unnecessary to determine the sufficiency of Icahn's opposition to summary judgment dismissing its cross claim against New Latham for common-law indemnification.

In view of the foregoing, it is unnecessary to determine the sufficiency of plaintiff's opposition to New Latham's motion for summary judgment.

The court correctly denied dismissal of the third-party claim for contractual indemnification, since the record fails to demonstrate that plaintiff's injuries were not caused by 4 East's breach of its sublease with defendant Icahn, which, inter alia, required it to indemnify and hold Icahn harmless for bodily injury arising out of its negligence in keeping Room 517 compliant with all relevant New York State, New York City, and federal laws, regulations, and codes, or by any negligent performance of that agreement on its part (*see 291 Broadway*

Realty Assoc. v Weather Wise Conditioning Corp., 118 AD3d 469 [1st Dept 2014]; *Taylor v Lehr Constr. Corp.*, 15 AD3d 242 [1st Dept 2005]).

M-2081 - ***D.H. v New Latham Hotel Corp***

Motion for stay of trial pending appeal denied as academic.

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

ENTERED: JUNE 5, 2018

CLERK

Friedman, J.P., Sweeny, Gische, Mazzarelli, Gesmer, JJ.

6775-
6776 Index 652592/15

RKA Film Financing, LLC,
Plaintiff-Appellant,

-against-

Ryan Kavanaugh, et al.,
Defendants,

Steven Mnuchin,
Defendant-Respondent.

_____

Latham & Watkins LLP, New York (Christopher J. Clark of counsel), and Michael E. Bern of the bar of the state of Maryland and District of Columbia, admitted pro hac vice, for appellant.

Sullivan & Cromwell LLP, New York (Robert A. Sacks of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Charles E. Ramos, J.), entered July 28, 2017, dismissing the complaint as against defendant Steven Mnuchin, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered June 27, 2017, which granted Mnuchin's motion to dismiss, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The allegations underlying the fraud causes of action do not give rise to a reasonable inference that defendant Mnuchin participated in, or had knowledge of, the alleged fraud scheme (*see Pludeman v Northern Leasing Systems, Inc.*, 10 NY3d 486, 492 [2008]; *Prudential-Bache Metal Co. v Binder*, 121 AD2d 923, 926

[1st Dept 1986]). The allegation that the board of directors of Relativity Media, LLC was involved in the company's day-to-day operation and financial transactions is insufficient to raise an inference that Mnuchin, by virtue of his position on the board, personally participated in or had knowledge of the other defendants' alleged fraud (*see High Tides, LLC v DeMichele*, 88 AD3d 954, 959 [2d Dept 2011]; *Northern Valley Partners, LLC v Jenkins*, 23 Misc 3d 1112[A], 2009 NY Slip Op 50721[U], *6-8 [Sup Ct, New York County 2009]). The allegation that Mnuchin became aware, through due diligence conducted by companies he owned in conjunction with previous transactions with Relativity, that the funds that plaintiff had invested were used for working capital, and not for print and advertising expenses only, as it had been promised by the other defendants, is insufficient to raise the inference that he was aware that misrepresentations had been made or that they were part of a fraud scheme.

The negligent misrepresentation cause of action fails to allege any direct contact between Mnuchin and plaintiff that could give rise to the requisite special relationship (*see Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 180-181 [2011]; *see also MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 87 AD3d

287, 296 [1st Dept 2011]). Moreover, Mnuchin's alleged superior knowledge of the other defendants' alleged wrongdoing does not constitute "unique or specialized expertise" (*Greentech Research LLC v Wissman*, 104 AD3d 540, 540-541 [1st Dept 2013]).

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

ENTERED: JUNE 5, 2018

CLERK

Friedman, J.P., Sweeny, Gische, Mazzarelli, Gesmer, JJ.

6777 Aerotek, Inc., et al., Index 654294/16
Plaintiffs-Respondents,

-against-

757 3rd Avenue Associates, LLC,
Defendant-Appellant,

MEPT 757 Third Avenue, LLC,
Defendant.

_____

Ganfer & Shore, LLP, New York (Mark A. Berman of counsel), for appellant.

Welby Brady & Greenblatt, LLP, White Plains (Gregory J. Spaun of counsel), for respondents.

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered October 23, 2017, which, to the extent appealed from, denied defendant 757 3rd Avenue Associates, LLC's motion to dismiss the complaint as against it, unanimously affirmed, without costs.

Plaintiffs seek to recover tenant improvement costs pursuant to two leases. Defendant landlord and seller, 757 3rd Avenue Associates, LLC, argues that plaintiffs are estopped to assert their right to reimbursement because they executed tenant estoppel certificates stating that defendant 757 was not in material default of the leases and that they had no further rights to receive landlord contributions for tenant improvements.

Since the tenant estoppel certificates state that they are being made with the knowledge that defendant 757 (among others) will rely upon them, defendant 757 is an appropriate party to seek to enforce these certificates.

However, the complaint alleges that defendant 757 was aware of the reimbursement request beginning in December 2014, and that from that date until April 2015, when it received the tenant estoppel certificates, plaintiffs took no action to suggest that they were withdrawing their reimbursement request or that they were willing to forgo payment. Accepted as true for purposes of this motion to dismiss, the allegations of the complaint show that defendant 757 cannot enforce the estoppel certificates, because it accepted them knowing "the contrary, and true," fact that plaintiffs were still seeking reimbursement for the improvement costs (*see JRK Franklin, LLC v 164 E. 87th St. LLC*, 27 AD3d 392, 393 [1st Dept 2006], *lv denied* 7 NY3d 705 [2006]; *Peach Parking Corp. v 346 W. 40th St., LLC*, 44 AD3d 417 [1st Dept

2007]; *NHS Natl. Health Servs. v Kaufman*, 250 AD2d 528 [1st Dept 1998]; *Flatbush Portfolio SPE, LLC v Taro Sushi N.Y., Inc.*, 2016 NY Slip Op 31207[U] [Sup Ct, Kings County, June 27, 2016]).

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

ENTERED: JUNE 5, 2018

CLERK

Friedman, J.P., Sweeny, Gische, Mazzarelli, Gesmer, JJ.

6778-
6778A-
6778B-
6778C &
M-2402

Index 162016/15

Lawrence Kingsley,
Plaintiff-Appellant,

-against-

300 W. 106th St. Corp.,
Defendant-Respondent.

- - - - -

[And a Third-Party Action]

_____

Lawrence Kingsley, appellant pro se.

Adam Leitman Bailey, P.C., New York (Jeffrey R. Metz of counsel), for respondent.

_____

Order, Supreme Court, New York County (Shlomo Hagler, J.), entered on or about July 6, 2016, which granted defendant's motion for outstanding use and occupancy from March 2015 through June 2016 and ongoing use and occupancy pendente lite, unanimously affirmed, without costs. Order, same court and Justice, entered March 23, 2017, which denied plaintiff's motion to renew defendant's motion and plaintiff's motion to dismiss defendant's counterclaim, unanimously affirmed, without costs. Orders, same court and Justice, entered March 23, 2017, which denied plaintiff's motion to amend his prior motion to renew and to dismiss defendant's counterclaim, and granted defendant's

motion for leave to amend its answer, affirmative defenses, counterclaim, and third-party complaint, unanimously affirmed, without costs.

The court providently exercised its broad discretion in requiring plaintiff, who occupies the apartment and claims to have succession rights, to pay use and occupancy equal to the monthly rent under the lease for the subject rent stabilized apartment during the pendency of this action (*see 43rd St Deli, Inc v Paramount Leasehold, L.P.*, 107 AD3d 501 [1st Dept 2013]). Indeed, plaintiff conceded on the record that defendant was entitled to use and occupancy (*see Eli Haddad Corp. v Redmond Studio*, 102 AD2d 730, 731 [1st Dept 1984]). Such interim payments are a condition to plaintiff remaining in the apartment until his claim to succession rights is resolved, and they are without prejudice to either party's rights. We do not need to address at this point in the litigation who, as between the estate and plaintiff individually, owes these monies. It is sufficient, for now, that plaintiff actually remains living in the apartment.

Plaintiff's motions to renew and to amend his motion to renew were properly denied. Whether or not the evidence of his relationship with Schoener is relevant to his entitlement to succession rights, it has no bearing on the use and occupancy

issue. Contrary to plaintiff's contention, defendant's counterclaim does not violate the "capacities" rule (see *Corcoran v National Union Fire Ins Co. of Pittsburgh*, 143 AD2d 309, 311 [1st Dept 1988]). While the third-party complaint asserts claims against plaintiff in his representative capacity, the counterclaim is properly asserted against plaintiff in his individual capacity.

Defendant demonstrated that plaintiff was unlikely to be surprised and is not prejudiced by the ejectment claims in its amended pleadings (*see Kocourek v Booz Allen Hamilton Inc.*, 85 AD3d 502, 504 [1st Dept 2011]). Plaintiff understands that defendant contests his asserted right to remain in the apartment.

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

M-2402 - *Lawrence Kingsley v 300W 106th St. Corp.*

Motion to amend brief and for related relief granted.

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

ENTERED: JUNE 5, 2018

CLERK

Friedman, J.P., Sweeny, Gische, Mazzarelli, Gesmer, JJ.

6779 The People of the State of New York, Ind. 1451/14
Respondent,

-against-

Tyrone Rash,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Sheila L. Bautista 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 (Charles H. Solomon, J.), rendered December 4, 2014,

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

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

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

ENTERED: JUNE 5, 2018

CLERK

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

Friedman, J.P., Sweeny, Gische, Mazzarelli, Gesmer, JJ.

6780 Neil Miller, Index 156110/12
Plaintiff-Appellant,

-against-

News American also known as
The N.Y. Post,
Defendant-Respondent.

_____

Neil Miller, appellant pro se.

Mintz & Gold LLP, New York (Steven G. Mintz of cousnel), for respondent.

_____

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered January 6, 2016, which, to the extent appealed from as limited by the briefs, granted defendant's motion for summary judgment dismissing the age discrimination and retaliation claims under the State and City Human Rights Laws, unanimously affirmed, without costs.

Plaintiff minimally established a prima facie case of age discrimination by demonstrating that he was a member of a protected class, that he was qualified to work as a freelance sports photographer, and that defendant reduced the number of assignments it offered him under circumstances giving rise to a an inference of age discrimination (*see* Executive Law § 296[1][a]; *Stephenson v Hotel Empls. & Rest. Empls. Union Local 100 of AFL-CIO*, 6 NY3d 265, 270 [2006]; *see* Administrative Code

of City of NY § 8-107[1][a]; *Hudson v Merrill Lynch & Co., Inc.*, 138 AD3d 511, 514 [1st Dept 2016], *lv denied* 28 NY3d 902 [2016]).

To rebut this prima facie case, defendant established a legitimate, nondiscriminatory reason for reducing the number of assignments it offered plaintiff (*see Stephenson*, 6 NY3d at 270-271; *Hudson*, 138 AD3d at 514). The managing editor testified about his longstanding, documented dissatisfaction with the quality of plaintiff's work and plaintiff's lack of professionalism, which he discussed with plaintiff on several occasions. Plaintiff concedes that the number of his assignments was decreased after July 2010, when he abandoned a critical assignment. Defendant also demonstrated that it employed other freelance sports photographers who were as old as, and older than, plaintiff and that these photographers did not suffer a reduction in the number of assignments they were offered.

Plaintiff failed to raise an issue of fact as to whether defendant's stated reasons for reducing the number of assignments it offered him were pretextual (*Stephenson*, 6 NY3d at 271) or whether discrimination was one of the motivating factors for the adverse employment action (*Hudson*, 138 AD3d at 514-515). Indeed, plaintiff testified that no manager, supervisor or anyone responsible for job assignments had ever made a derogatory comment about his age. In addition, he had considerable

difficulty recollecting the July 28, 2010 conversation in which, the complaint alleges, an employee of defendant, who, in any event was not responsible for assigning freelance projects, suggested that plaintiff was getting too old to do his job.

Similarly, while plaintiff minimally established a prima case of retaliation (Executive Law § 296[7]; Administrative Code § 8-107[7]), defendant demonstrated a nondiscriminatory or nonretaliatory reason for decreasing the number of assignments it offered to him, and plaintiff failed to raise an inference as to a causal connection between his protected activity and defendant's adverse action (*see Albunio v City of New York City*, 16 NY3d 472, 478-479 [2011]; *cf. Krebaum v Capital One, N.A.*, 138 AD3d 528, 528-529 [1st Dept 2016] ["The temporal proximity of plaintiff's complaint and the termination of his employment one month later indirectly shows the requisite causal connection"]).

We do not address the issue whether plaintiff, a freelance photographer, may be considered an employee of defendant under either the State or the City Human Rights Law.

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

ENTERED: JUNE 5, 2018

CLERK

Friedman, J.P., Sweeny, Gische, Mazzarelli, Gesmer, JJ.

6782 Inez N. Holloman, Index 300743/14
Plaintiff-Appellant,

-against-

American United Transportation Inc., et al.,
Defendants-Respondents.

_____

Mark E. Weinberger, P.C., Rockville Centre (Eric M. Parchment of counsel), for appellant.

Marjorie E. Bornes, Brooklyn, for respondents.

_____

Order, Supreme Court, Bronx County (Joseph Capella, J.), entered on or about April 20, 2017, which granted defendants' motion for summary judgment dismissing the complaint based on plaintiff's inability to establish a serious injury within the meaning of Insurance Law § 5102(d), unanimously modified, on the law, the motion denied as to the claims of serious injury to the cervical and lumbar spine, and otherwise affirmed, without costs.

Defendants satisfied their initial burden of showing that plaintiff did not suffer serious injury to her cervical and lumbar spine through the affirmed report of their neurologist, who found normal ranges of motion and no objective evidence of injury (*see Reyes v Se Park*, 127 AD3d 459 [1st Dept 2015]; *Rickert v Diaz*, 112 AD3d 451 [1st Dept 2013]). Defendants also submitted the affirmed report of a radiologist, who opined that

the bulging discs and focal disc protrusions shown on the MRI films were symptomatic of chronic degenerative disc disease, unrelated to the accident (*see Paulling v City Car & Limousine Servs., Inc.*, 155 AD3d 481 [1st Dept 2017]).

In opposition, plaintiff raised an issue of fact through the affirmed report of her physiatrist, who found continuing range of motion limitations in the cervical and lumbar spine and causally related plaintiff's conditions to the accident (*see Moreira v Mahabir*, 158 AD3d 518, 518-519 [1st Dept 2018]; *Encarnacion v Castillo*, 146 AD3d 600 [1st Dept 2017]). Plaintiff's physiatrist adequately addressed the issue of causation by opining that the injuries were the direct result of the accident, and offering a different, yet equally plausible, explanation for them (*see Yuen v Arka Memory Cab Corp.*, 80 AD3d 481, 482 [1st Dept 2011]). Defendants' contention that plaintiff did not adequately address her gap or cessation of treatment was waived because it was raised for the first time in reply (*see Moreira* at 519; *Paulling* at 481).

Defendants satisfied their initial burden on plaintiff's 90/180-day claim through plaintiff's bill of particulars and

deposition testimony admitting that she was only out of work for four weeks post-accident, and plaintiff's opposition failed to raise an issue of fact (*see Komina v Gil*, 107 AD3d 596, 597 [1st Dept 2013]).

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

ENTERED: JUNE 5, 2018

CLERK

Friedman, J.P., Sweeny, Gische, Mazzarelli, Gesmer, JJ.

6783N Katherine Kelly, Index 402887/08
Plaintiff-Respondent,

-against-

New York City Transit Authority,
Defendant-Appellant.

_____

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

Law Office of Feder & Rodney, PLLC, New York (Michael T. Altman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered April 25, 2017, which denied defendant's motion to enforce a stipulation to preclude plaintiff from offering any evidence at trial in the event of failure to provide certain post-note of issue discovery, unanimously affirmed, without costs.

Defendant's motion was properly denied because it related to discovery, and defendant failed to submit an affirmation demonstrating its good faith effort to resolve the issues raised in the motion or that there was "good cause why no such conferral

. . . was held" (Uniform Rules for Trial Cts [22 NYCRR] § 202.7[a][2], [c]; *see Perez De Sanchez v Trevz Trucking LLC*, 124 AD3d 527 [1st Dept 2015]; *Molyneaux v City of New York*, 64 AD3d 406 [1st Dept 2009]).

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

ENTERED: JUNE 5, 2018

CLERK

Friedman, J.P., Sweeny, Gische, Mazzarelli, Gesmer, JJ.

6784 In re Corey Reid, Ind. 4445/17
[M-1735] Petitioner, OP 143/18

-against-

Hon. Laura A. Ward,
Respondent.

_____

Corey Reid, petitioner pro se.

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

_____

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

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

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

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

ENTERED: JUNE 5, 2018

CLERK