SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 1, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Renwick, J.P., Richter, Tom, Gesmer, Oing, JJ.

5582 The People of the State of New York, Respondent, Ind. 1133/12

-against-

Anonymous,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Julia P. Cohen of counsel), for respondent.

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Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered September 10, 2015, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fourth degree, and sentencing him, as a second violent felony offender, to a term of eight years, affirmed.

Defendant pleaded guilty to criminal possession of a controlled substance in the fourth degree. The court agreed to delay sentencing on the condition that defendant was not rearrested or did not commit any new crimes. Prior to sentencing, defendant was arrested for robbery. He testified on his own behalf at the trial and denied the robbery while

admitting to a drug crime. Defendant was acquitted at that trial and the record was sealed. The People in the instant matter sought an order to unseal defendant's testimony during sentencing to show that defendant violated a condition of the plea based on defendant's statements during the robbery trial. The court unsealed the record pursuant to CPL 160.50(1)(d)(ii). The issue on appeal is whether the unsealing order in this case was justified. We conclude that the People were not entitled to an order unsealing the record for the purpose of making a sentencing recommendation. However, defendant is not entitled to a new sentencing proceeding or a reduced sentence.

In *Matter of Katherine B. v Cataldo* (5 NY3d 196 [2005]), the Court of Appeals noted that there are only a few narrow exceptions to the prohibition against releasing sealed records. It held that the "law enforcement agency" exception in CPL 160.50(1)(d)(ii) did not authorize the unsealing of records for sentence recommendation purposes by the prosecution. The People attempt to distinguish *Katherine B.* by arguing that the unsealed testimony here was given while defendant was awaiting sentencing and did not involve conduct that predated the commencement of the instant case. We find this to be a distinction without a meaningful difference in terms of the protections offered by the sealing statute.

The People suggest that the circumstances here are extraordinary and that unsealing was necessary to fulfill the court's general due process duty to sentence based on accurate and reliable information and its statutory duty to "take into consideration the defendant's record of compliance with pre-sentence conditions ordered by the court" (CPL 400.10[4]). However, the sentencing court in *Katherine B.* was under an identical due process duty and a similar statutory duty (*see* CPL 380.50[1]; *see also* CPL 390.40[1]).

We conclude that a distinction may not be drawn between *Katherine B.* and this case on the ground that the unsealed material here did not relate to "acquitted conduct" – i.e., the robbery regarding which defendant was tried and acquitted – but rather involved an uncharged drug crime. The core purpose of the sealing statute is to protect against the disclosure of information directly relating to a charge that terminates in a defendant's favor. Prohibiting the prosecution from obtaining defendant's sealed trial testimony in this case comports with the basic principle that the defendant "suffers no stigma as a result of his having once been the object of an unsustained accusation" (*Matter of Hynes v Karassik*, 47 NY2d 659, 662 [1979]).

However, while we agree with defendant that the unsealing was improper, we reject his request for resentencing. In *People*

v Patterson (78 NY2d 711 [1991]), the Court of Appeals held that suppression was not required where the police obtained identification evidence in violation of CPL 160.50, and the witness then identified the defendant in court. The Court ruled that "there is nothing in the history of CPL 160.50 or related statutes indicating a legislative intent to confer a constitutionally derived 'substantial right', such that the violation of that statute, without more, would justify invocation of the exclusionary rule with respect to subsequent independent and unrelated criminal proceedings" (*id.* at 716; *see also People v Greene*, 9 NY3d 277, 280 [2007]). We conclude that defendant is entitled to no greater relief based on the statutory violation that resulted in the court's consideration of the improperly unsealed information at sentencing than he would have been entitled to had the information been admitted at trial (*see* Barry Kamins, New York Search and Seizure, § 1.01[7][k] ["(c)ourts have uniformly held that in sentencing a defendant, a court may properly consider evidence that was previously suppressed"]; *see e.g. People v Brown*, 281 AD2d 700, 702 [3d Dept 2001], *lv denied* 96 NY2d 826 [2001]). Thus, we are obligated to affirm based on *Patterson*.

We need not address the People's argument that consideration of the unsealed transcript was harmless in light of independent

evidence in the record that defendant engaged in a drug transaction, violating a condition of his promised sentence, while he was awaiting sentencing.

In light of our decision, the record of the robbery trial should be resealed.

All concur except Tom and Oing, JJ. who concur in a separate memorandum by Tom, J. as follows:

TOM, J. (concurring)

I write separately because it is unnecessary to determine whether or not the People were entitled to an order unsealing the record. As the majority recognizes, regardless of whether the unsealing was permissible, defendant is not entitled to a new sentencing proceeding at which the unsealed material would be excluded or a reduced sentence.

Indeed, the "violation of a statute does not, without more, justify suppressing the evidence to which that violation leads" (*People v Greene*, 9 NY3d 277, 280 [2007], citing *People v Patterson*, 78 NY2d 711, 716-717 [1991]). In *Patterson*, the Court of Appeals held that suppression of evidence at trial was not required for violations of CPL 160.50. Similarly, in *Matter of Charles Q. v Constantine* (85 NY2d 571, 575 [1995]), the Court of Appeals found that a violation of CPL 160.50 did not require the exclusion of evidence from a disciplinary proceeding. Thus, if a sealing-statute violation does not entitle a defendant to suppression of improperly unsealed material at trial or a disciplinary hearing, such a violation would not entitle defendant to a resentencing (*see People v Mosquea*, 18 AD3d 228 [1st Dept 2005]).

Moreover, the parties disagree whether any additional circumstances existed which would permit the court to unseal

criminal records, in particular to effect a "legal mandate" that would be "impossible to fulfill without unsealing criminal records" (*Matter of New York State Commn. on Jud. Conduct v Rubenstein*, 23 NY3d 570, 581 [2014]). In this regard, they dispute whether the sentencing court's mandate to determine whether defendant complied with the plea conditions (*see* CPL 400.10 [1]-[4]) warranted the unsealing. The parties further argue over whether the facts of this case - including that the court knew in advance what the records contained, and that the unsealing was only to learn of the crimes defendant admitted committing under oath and not about the crimes he was acquitted of - are distinct enough from *Matter of Katherine B. v Cataldo* (5 NY3d 196 [2005]) to warrant a different result.

While we do not need to make a determination of this issue to decide this appeal, the Court of Appeals has recognized "other sources of authority permitting access to sealed records" beyond those individuals and agencies enumerated in CPL 160.50 (*Rubenstein*, 23 NY3d at 580; *see also Matter of Dondi*, 63 NY2d 331 [1984] [grievance committee entitled to access sealed criminal records]).

It is my opinion that we cannot state whether the Court of Appeals would find that the sentencing court's legal mandate to determine whether a defendant complied with plea conditions would

permit the court to access sealed criminal records for that purpose. As argued by the People, such permission may be appropriate when faced with the circumstances presented here, particularly that the unsealing was limited to discovering admissions made by the defendant about crimes he committed, and not to utilize information about other crimes he was acquitted of after trial under a separate indictment.

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

ENTERED: MAY 1, 2018

CLERK

Renwick, J.P., Mazzarelli, Kahn, Gesmer, Kern, JJ.

6242 Yorgo Valyrakis, et al., Index 152111/16
Plaintiffs-Appellants,

-against-

346 West 48th Street Housing Development Fund Corporation, et al.,
Defendants-Respondents.

_____

Andrea Shapiro, PLLC, New York (Andrea Shapiro of counsel), for appellants.

Abrams Garfinkel Margolis Bergson, LLP, New York (Barry G. Margolis of counsel), for respondents.

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Order, Supreme Court, New York County (Barbara Jaffe, J.), entered October 17, 2016, which, insofar as appealed from as limited by the briefs, denied plaintiffs' motion for a preliminary injunction, and granted defendants' cross motion pursuant to CPLR 3211 to dismiss the entire complaint as against defendants to the extent named in their individual capacities, the first, third, seventh, and tenth causes of action in their entirety, and the ninth and twelfth causes of action to the extent asserted individually, unanimously modified, on the law, to deny the cross motion as to the ninth and twelfth causes of action, the tenth cause of action as asserted by plaintiff Adelaide Morro, and the tenth and eleventh causes of action as against defendant Gina Georgiou individually, and otherwise

affirmed, without costs.

This is a dispute among the shareholders of defendant 346 West 48th Street Housing Development Fund Corporation (the corporation), a low-income cooperative. Each apartment, according to the offering plan, was allocated an equal number of shares, regardless of its size. In 1995, defendant Gina Georgiou and her daughter, who held the proprietary lease to apartment 5W (and the 250 shares appurtenant thereto), acquired apartment 5E (and the 250 shares appurtenant thereto) as well.

The first cause of action seeks to reduce the number of Georgiou's shares in the corporation from 500 to 250 – and hence the number of her votes from two to one. Plaintiffs are correct that this is a direct (individual) claim, not a derivative one (*see generally Yudell v Gilbert*, 99 AD3d 108, 114 [1st Dept 2012]). While the corporation is not affected by whether Georgiou owns 250 or 500 shares, plaintiffs' interests – as individual tenant shareholders with one vote each – are reduced by Georgiou's having two votes (*see Danzig v Lacks*, 235 App Div 189 [1st Dept 1932] [plaintiff stated cause of action by alleging that defendants diluted his interest in a corporation from 30% to 15%]).

However, the first cause of action is barred by the statute of limitations. A proceeding challenging an action taken by a

cooperative corporation must be commenced within four months after the action is final (CPLR 217[1]). "In circumstances where a party would expect to receive notification of a determination, but has not, the Statute of Limitations begins to run when the party knows, or should have known, that it was aggrieved by the determination" (*90-92 Wadsworth Ave. Tenants Assn v City of N.Y. Dept. of Hous. Preserv. & Dev.*, 227 AD2d 331, 331–332 [1st Dept 1996]). Plaintiffs Adelaide Morro and Popi Stefanidis and nonparty Ramon Tapia (of whose estate plaintiff Maria Varela is the executrix) knew as of November 1997 that Georgiou had two votes. Based on the corporation's practices, plaintiff Yorgo Valyrakis knew or should have known shortly after November 1997 what had transpired at that meeting of the corporation. Plaintiff Cassandra Gregov would have had access to the cooperative corporation's books and records in connection with the transfer of her unit to her in 2011, and has not claimed that she did not have access to them. Moreover, all of the plaintiffs were aware by November 6, 2015 that Georgiou had cast two votes at the April 2015 election. This suit was commenced on March 10 or 11, 2016 (*see Matter of Magid v Gabel*, 25 AD2d 649 [1st Dept 1966]). Accordingly, plaintiffs' first cause of action brought four years after Gregov should have known that Georgiou had two votes, 19 years after the other plaintiffs knew, and more than

four months after Georgiou cast two votes, is barred by the statute of limitations.

The third cause of action seeks to set aside the April 2015 election because Georgiou cast two votes and Varela was not allowed to vote. The vindication of Varela's voting rights is an individual claim (*see also* Business Corporation Law § 619). However, this cause of action is barred by the four-month statute of limitations applicable to a challenge to a corporate election (*see De Vita v Reab*, 155 AD2d 302, 303 [1st Dept 1989]). While plaintiffs did not know until November 6, 2015 that Georgiou had cast two votes at the April 2015 election, it was obvious as of the date of the election that Varela had been denied a vote. Thus, to the extent the third cause of action is based on the denial of a vote to Varela, it is time-barred. To the extent it is based on Georgiou's casting two votes, it is time-barred because plaintiffs knew, as discussed above, that she could do so at least as early as of November 1997 (except for Gregov, who should have known in 2011), and they knew that she had done so as of November 6, 2015, but did not sue until March 10 or 11, 2016.

The seventh cause of action, which seeks to enjoin defendants from making extraordinary expenditures, is a derivative claim. While plaintiffs' maintenance charges will increase if the corporation makes large expenditures on repairs,

this injury comes about because plaintiffs are shareholders (*see generally Abrams v Donati*, 66 NY2d 951 [1985]).

Plaintiffs (other than Morro, who is a director of the corporation) contend that presuit demand should be excused as futile. However, they do not claim that defendant directors failed to inform themselves appropriately about the challenged transaction or that the challenged transaction was "so egregious on its face that it could not have been the product of sound business judgment of the directors," and they do not allege with particularity that a majority of the board were self-interested (*Bansbach v Zinn*, 1 NY3d 1, 9 [2003] [internal quotation marks omitted]). The only director as to whom plaintiffs allege self-interest with particularity is Georgiou, who is merely one of five directors.

Plaintiffs contend that Morro may bring the seventh and tenth causes of action pursuant to Business Corporation Law § 720 without a presuit demand, because she is a director of the corporation (*see Matter of Tsoukas v Tsoukas,* 125 AD3d 872, 875 [2d Dept 2015]). Since this is an issue of law, it may be raised for the first time on appeal (*see Buttitta v Greenwich House Coop. Apts., Inc.*, 11 AD3d 250, 251 [1st Dept 2004]). It is undisputed that Morro is a director of the corporation, and defendants do not contend that the allegations of the seventh and

tenth causes of action fall outside Business Corporation Law § 720(a)(1). Therefore, Morro has standing to bring those claims.

However, the seventh cause of action was correctly dismissed because defendant directors' decision to repair the facade, and their prospective decisions to repair the roof and boiler, are protected by the business judgment rule (*see e.g. Auerbach v Bennett*, 47 NY2d 619, 629 [1979]). Plaintiffs failed to demonstrate that "the board's action has no legitimate relationship to the welfare of the cooperative, deliberately singles out individuals for harmful treatment, is taken without notice or consideration of the relevant facts, or is beyond the scope of the board's authority" (*Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 540 [1990]).

The ninth cause of action seeks a declaration that defendants are required to have the corporation's books and records audited and to issue an annual verified financial statement prepared by an independent public or certified public accountant. Article III, section 3, of the bylaws provides, "At the close of each fiscal year, the books and records of the Corporation shall be audited by a Certified Public Accountant or such other person approved by the Board or shareholders. *Based on such reports*, the Corporation will furnish the shareholders with an annual financial statement" (emphasis added). Since the

right to an annual financial statement belongs to the shareholders, not the corporation, and it depends on the corporation's having the books and records audited, this cause of action in its entirety is a direct claim.

The twelfth cause of action seeks the legal fees and costs incurred by plaintiffs in this action. Pursuant to the motion court's order, from which defendants have not cross-appealed, at least two of plaintiffs' claims (the eighth and eleventh) will proceed derivatively. If plaintiffs succeed, and if there is a judgment, compromise, or settlement in favor of the corporation, then plaintiffs may be entitled to legal fees (*see* Business Corporation Law § 626[e]; *Glenn v Hoteltron Sys.*, 74 NY2d 386, 393 [1989]). Since this would accrue to their benefit, not the corporation's, the twelfth cause of action is a direct claim.

As plaintiffs did not argue until their reply brief that the fourth and fifth causes of action are direct, we will not consider the argument (*see e.g. Shia v McFarlane*, 46 AD3d 320 [1st Dept 2007]). In any event, defendants consent to the relief requested in those causes of action.

Plaintiffs do not allege that any defendant director, except Georgiou, engaged in individual extra-board wrongdoing separate from the board's collective actions on behalf of the corporation. Thus, the claims against the individual board members other than

Georgiou were correctly dismissed (*see 20 Pine St. Homeowners Assn. v 20 Pine St. LLC,* 109 AD3d 733, 735-736 [1st Dept 2013]). Plaintiffs charge, inter alia, that Georgiou combined apartments 5E and 5W without obtaining the requisite governmental permits (possibly harming the building in the process) and might be using corporate funds to pay for her after-the-fact efforts to get the approval of the New York City Department of Buildings for her apartment combination. Of the surviving causes of action (second, fourth through sixth, and eighth through twelfth), the only ones giving rise to individual liability against Georgiou are the tenth (accounting) and eleventh (damages). Even if plaintiffs were to prevail on their substantive claims, they would not be entitled to make Georgiou pay for their legal fees (*see Glenn*, 74 NY2d at 393).

Plaintiffs argue that the court should have given them an opportunity to conduct discovery. However, the affidavit they submitted in opposition to defendants' cross motion does not satisfy CPLR 3211(d), and, even on appeal, plaintiffs do not specify the discovery they seek (*see Auerbach*, 47 NY2d at 636).

The motion court providently exercised its discretion in denying plaintiffs' application for a preliminary injunction (*see Aetna Ins. Co. v Capasso*, 75 NY2d 860, 862 [1990]). Since the court correctly dismissed the first and seventh causes of action,

plaintiffs failed to show a probability of success as to the parts of their order to show cause (paragraphs a and e) that correspond to those causes of action, and defendants consented to the relief requested in the remaining paragraphs (b-d).

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

ENTERED: MAY 1, 2018

CLERK

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

6381 The People of the State of New York, Ind. 2450/15
Respondent,

-against-

Ronald Franklin,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Rebecca Hausner 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 (Gregory Carro, J.), rendered June 29, 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: MAY 1, 2018

CLERK

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

Renwick, J.P., Tom, Andrias, Webber, Kahn, JJ.

6406- Ind. 1088/12
6406A The People of the State of New York, 1094/12
Respondent,

-against-

Trevis Eubanks,
Defendant-Appellant.

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Christina A. Swarns, Office of the Appellate Defender, New York (Daniel R. Lambright of counsel), for appellant.

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

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An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Rena Uviller, J.), rendered October 15, 2013,

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 judgments so appealed from be and the same are hereby affirmed.

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

ENTERED: MAY 1, 2018

CLERK

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

Renwick, J.P., Tom, Andrias, Webber, Kahn, JJ.

6407-
6408 Index 158600/15

Otsego Mutual Fire Insurance Company,
Plaintiff-Respondent,

-against-

Sally Dinerman, et al.,
Defendants-Appellants,

Tower Insurance Company of
New York, et al.,
Defendants.

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Michael Konopka & Associates, P.C., New York (Michael Konopka of counsel), for Sally Dinerman, appellant.

Melvin B. Berfond, New York, for Ira Dinerman, appellant.

Tell, Cheser & Breitbart, Garden City (Kenneth R. Feit of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Arthur F. Engoron, J.), entered April 28, 2017, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for summary judgment declaring that defendant Sally Dinerman violated the "Misrepresentation, Concealment or Fraud" condition of the homeowners' insurance policy issued by plaintiff, rendering the policy void in its entirety as to her and, other than as to fire insurance coverage, as to her husband, defendant Ira Dinerman, and declaring that Ira Dinerman's failure to file a timely proof of loss is an absolute defense to his

claim for fire insurance coverage; declaring that plaintiff has no obligation to defend or indemnify Sally Dinerman or Ira Dinerman under the policy in connection with pending or future subrogation actions; and awarding plaintiff a sum of money as against Sally Dinerman; and denied Ira Dinerman's motion for summary judgment, for leave to amend his answer, and to reform the policy, except to make it comply with Insurance Law § 3404(e), unanimously affirmed, without costs. Order, same court and Justice, entered September 15, 2017, which, to the extent appealed from as limited by the briefs, denied Sally Dinerman's motion for leave to renew, unanimously affirmed, without costs.

Plaintiff established prima facie that defendant Sally Dinerman (Sally) violated the misrepresentation, fraud and concealment provision of the homeowner's insurance policy it issued to her, that her violation was willful and intentional, and that, accordingly, the policy was properly voided as to her and she is liable to plaintiff for amounts paid thereunder (*see Saks & Co. v Continental Ins. Co.*, 23 NY2d 161, 165 [1968]; *Latha Rest. Corp v Tower Ins. Co.*, 38 AD3d 321 [1st Dept 2007], *lv denied* 9 NY3d 803 [2007], *cert denied* 552 US 1010 [2007]).

In opposition, Sally argues that any misrepresentations were not material given the de minimus amount at issue. However, that she managed to defraud plaintiff of only a relatively small

amount of money before her wrongful conduct came to light does not lend itself to the conclusion that she otherwise intended to stop submitting receipts for "reimbursement" of living expenses that she did not incur. Further plaintiff should not be penalized for its diligent detection of Sally's fraudulent scheme.

Defendant Ira Dinerman's (Ira) motion to reform the policy was properly determined. Under Insurance Law § 3404(e), Ira's fire insurance coverage was not voided by his wife Sally's fraudulent acts. However, as to liability coverage, the policy was properly enforced against him as written (*see Lane v Security Mut. Ins. Co.*, 96 NY2d 1, 6 [2001]). Contrary to his argument, the policy is not ambiguous; its language has a "definite and precise meaning, unattended by danger of misconception" (*see Selective Ins. Co. of Am. v County of Rensselaer*, 26 NY3d 649, 655 [2016]).

Ira's failure to file proof of loss, either within the time specified in plaintiff's demand or otherwise, is a complete defense to any claim for coverage (*see Anthony Marino Constr. Corp. v INA Underwriters Ins. Co.*, 69 NY2d 798 [1987]; *Igbara Realty Corp. v New York Prop. Ins. Underwriting Assn.*, 63 NY2d 201 [1984]; Insurance Law § 3407[a]). Sally's two proofs of loss cannot be deemed to have been submitted "for the benefit of all"

(*Della Porta v Hartford Fire Ins. Co.*, 118 AD2d 1045, 1047 [3d Dept 1986]), given her sworn statement in each that no person other than she had a right, title, claim to, or interest in the lost property or insurance proceeds (*cf. Kenneth v Nationwide Mut. Fire Ins. Co.*, 2007 WL 3533887, *10-11, 2007 US Dist LEXIS 83973, *29-33 [WD NY, Nov. 13, 2007]).

Ira's proposed amendments to his answer do not overcome these barriers to coverage.

The new facts offered on Sally's motion for leave to renew do not change the prior determination (CPLR 2221[e][2]).

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

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

ENTERED: MAY 1, 2018

CLERK

Renwick, J.P., Tom, Andrias, Webber, Kahn, JJ.

6409-
6409A In re Montrell A.D., etc., and Another,

Dependent Children Under Age
Eighteen, et al.,

Miguel D.,
Respondent-Appellant,

Sheltering Arms Children and Family Services,
Petitioner-Respondent,

Cinnamon Nyree P.,
Respondent.

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Larry S. Bachner, New York, for appellant.

Dawn M. Shammas, New York, for respondent.

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

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Orders, Family Court, Bronx County (Robert D. Hettleman, J.), entered on or about July 24, 2017, which, to the extent appealed from as limited by the briefs, after a hearing, found that respondent father's consent to the subject children's adoption was not required, unanimously affirmed, without costs.

Clear and convincing evidence supports the finding that respondent has not maintained the requisite substantial and continuous or repeated contact with the children to require his consent to their adoption (*see* Domestic Relations Law § 111[1][d]). Respondent failed to provide financial support for

the children for at least the two years during which the children were in foster care and failed to communicate with the children or petitioner agency on at least a monthly basis (*see id.; Matter of Lynik Jomae E. [Lynik Jomae E.]*, 112 AD3d 513 [1st Dept 2013], *lv dismissed* 23 NY3d 1007 [2014]). The court orders suspending visitation, which resulted from his own deliberate conduct, did not absolve respondent of his obligations to maintain contact (*see Matter of Lori QQ. v Jason OO.*, 118 AD3d 1084, 1085 [3d Dept 2014], *lv denied* 23 NY3d 909 [2014]; *Matter of Dominique P.*, 24 AD3d 335 [1st Dept 2005], *lv denied* 6 NY3d 712 [2006]). The agency was not required to instruct respondent to provide support for his children (*see Matter of Savannah Love Joy F. [Andrea D.]*, 110 AD3d 529, 530 [1st Dept 2013], *lv denied* 22 NY3d 858 [2014]; *Matter of Marc Jaleel G. [Marc E.G.]*, 74 AD3d 689, 690 [1st Dept 2010]). Respondent's unsubstantiated testimony that he gave the children money and toys does not establish that he was a "consistent or reliable source of support" or "that he provided the [children] with financial assistance that was a fair and reasonable amount according to his means" (*Matter of Star Natavia B. [Douglas B.]*, 141 AD3d 430, 431 [1st Dept 2016]).

Respondent's due process arguments are unavailing in view of the fact that his court-appointed attorneys were relieved due to his own misconduct; "he effectively exhausted his right to

assigned counsel" (*see Matter of Rodney W. v Josephine F.*, 126 AD3d 605, 606 [1st Dept 2015], *lv dismissed* 25 NY3d 1187 [2015]). Further, Family Court sufficiently advised respondent of the risks of self-representation.

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

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

ENTERED: MAY 1, 2018

CLERK

Renwick, J.P., Tom, Andrias, Webber, Kahn, JJ.

6410 Robert Nadella, Index 109643/11
Plaintiff-Appellant,

-against-

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

Andrew Allen, et al.,
Defendants.

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Sacks & Sacks, LLP, New York (Scott N. Singer of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Janet L. Zaleon of counsel), for respondents.

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Order, Supreme Court, New York County (James E. d'Auguste, J.), entered on or about February 6, 2017, which granted the motion of defendants City of New York, New York City Department of Sanitation, and Mark Lambert (the City defendants) for summary judgment dismissing the complaint as against them, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff was a passenger in a van driven by his son, defendant Allen, when it swerved to the right to avoid hitting the rear of a tour bus that braked suddenly in front of it, and then crashed into the rear of a City sanitation truck that was double-parked in a traffic lane on the Westside Highway. In support of their motion for summary judgment, the City defendants

argued that Allen was solely at fault in connection with the accident because he hit the rear of another vehicle, and failed to present a non-negligent explanation for the accident (*see Cabrera v Rodriguez*, 72 AD3d 553, 553 [1st Dept 2010]). However, the City defendants did not establish their own driver's absence of fault. It is well-settled that a vehicle improperly double-parked in violation of applicable traffic regulations (*see* 34 RCNY § 4-08[f][1]) may be found to be at fault in connection with a rear-end accident, since "a reasonable jury could find that a rear-end collision is a reasonably foreseeable consequence of double parking ... on a busy Manhattan street" (*White v Diaz*, 49 AD3d 134, 140 [1st Dept 2008]; *see Pickett v Verizon N.Y. Inc.*, 129 AD3d 641 [1st Dept 2015]).

While, as a matter of common sense, a City sanitation truck may under certain circumstances need to double park in order to perform its job of removing refuse, the City did not point to any regulation exempting sanitation trucks from City traffic rules, and therefore did not establish prima facie their lack of liability. On appeal, the City defendants bring to the Court's attention a City traffic regulation, applicable at the time of the accident, that excepts City refuse trucks from double parking rules under certain conditions, and we take judicial notice of that regulation (*see Angueira v Brooklyn & Queens Tr. Corp.*, 263

AD 43, 46 [1st Dept 1941]). The regulation provides that the "operator of a refuse collection vehicle working on behalf of the City" is allowed to "temporarily stand on the roadway side of a vehicle parked at the curb, provided that no curb space is available within fifteen feet, while loading refuse . . ." (former 34 RCNY § 4-02[d][1][iii][B], now 34 RCNY § 4-02[d][1][iii][A]).

It is well-settled that "[w]here a party . . . raises [for the first time on appeal] a new legal argument which appeared upon the face of the record and which could not have been avoided . . . [s]o long as the issue is determinative and the record on appeal is sufficient to permit our review, [this Court may consider the argument]" (*Vanship Holdings Ltd. v Energy Infrastructure Acquisition Corp.*, 65 AD3d 405, 408 [1st Dept 2009]). Here, however, the City's argument that the regulation allowed their operator to double park is not a pure question of law, but depends on disputed facts in the record concerning whether there was a parking space available within fifteen feet of the pick up location. While the two sanitation employees assigned to the truck testified that there was no curb space available to park when they arrived, one of them acknowledged that a post-accident photograph, which is in the record, appears to show an open space between the double-parked truck and the

curb. The testimony of one of the employees that it would have been unsafe to attempt to parallel park the truck under the existing traffic conditions also presents an issue of fact to be resolved by a fact-finder. We therefore decline to consider the City defendants' newly-raised argument for the first time on appeal (*see Lindgren v New York City Hous. Auth.*, 269 AD2d 299, 303 [1st Dept 2000]).

Stated otherwise, the City defendants failed to meet their "heavy burden of establishing 'a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact'" (*DeLeon v New York City Sanitation Dept.*, 25 NY3d 1102, 1106 [2015], *quoting Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

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

ENTERED: MAY 1, 2018

CLERK

Tom, J.P., Andrias, Webber, Kahn, JJ.

6411 Manuele Verdi, etc., Index 158747/16
Plaintiff-Respondent,

-against-

Jeffrey Dinowitz, etc.,
Defendant-Appellant.

_____

Stroock & Stroock & Lavan LLP, New York (Charles G. Moerdler, Daniel Bertaccini and Pamela S. Takefman of counsel), for appellant.

Conde & Glaser, L.L.P., New York (Ezra B. Glaser of counsel), for respondent.

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Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered October 2, 2017, which, to the extent appealed from as limited by the briefs, denied defendant's motion to dismiss plaintiff's causes of action for defamation and punitive damages, unanimously modified, on the law, to dismiss the seventh and ninth causes of action, and otherwise affirmed, without costs.

The motion court correctly determined that some of the complained-of statements were susceptible of a defamatory meaning. Considering the context of the statements, the court properly determined that they signaled that defendant was asserting a fact rather than opinion (*see Gross v New York Times Co.*, 82 NY2d 146, 153 [1993]).

Although the court struck some of the complained-of

statements as responsive to allegations made against defendant in a separate lawsuit brought by plaintiff, the court properly rejected defendant's argument that all of the complained-of statements were privileged on that ground. Nevertheless, the court should have dismissed the seventh cause of action, since it contained only an allegation related to a responsive statement to that lawsuit, which statements the court had stricken.

Plaintiff's independent cause of action for punitive damages should also have been dismissed (*see Steinberg v Monasch*, 85 AD2d 403, 405-406 [1st Dept 1982]).

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

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

ENTERED: MAY 1, 2018

CLERK

Renwick, J.P., Tom, Andrias, Webber, Kahn, JJ.

6413 The People of the State of New York, Ind. 1478/14
Respondent,

-against-

Gabriel Polanco,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Susan Epstein 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 (Laura Ward, J.), rendered December 15, 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: MAY 1, 2018

CLERK

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

Renwick, J.P., Tom, Andrias, Webber, Kahn, JJ.

6414-6415 In re Andrew Sinzheimer, et al., Petitioners-Appellants,

-against-

Bank of America, N.A., Respondent-Respondent.

File 1418/15

Andrew Sinzheimer, New York, appellant pro se, and for Marsha Sinzheimer, appellant.

Bressler, Amery & Ross, P.C., New York (Jordan S. Weitberg of counsel), for respondent.

Order, Surrogate's Court, New York County (Rita Mella, S.), entered on or about April 14, 2016, which, to the extent appealed from as limited by the briefs, denied petitioners' motion for permission to file a jury demand, unanimously affirmed, without costs. Order, same court and Surrogate, entered on or about June 28, 2017, which, to the extent appealed from as limited by the briefs, granted respondent's application for an order directing petitioner Andrew Sinzheimer to appoint a successor corporate trustee, denied petitioners' application to direct respondent to deliver the trust's assets to Andrew, and denied petitioners' request for punitive damages, unanimously affirmed, without costs.

The Surrogate properly construed the subject trust instrument as written (*see e.g. Matter of Chase Manhattan Bank*, 6

NY3d 456, 460 [2006]) to require Andrew to appoint a successor corporate trustee. The agreement states, "If after the death of Ronald, the individual Trustee removes the corporate Trustee ..., the individual Trustee *shall* appoint another bank or trust company ... to serve in its place" (emphasis added).

It is true that Andrew has contacted three financial institutions, all of which refused to serve as corporate trustee, due to the small size of the trust. However, the Surrogate's decision is not inflexible; it denies petitioners' application for respondent to be directed to deliver the Trust assets to Andrew "until such time as Andrew complies with this order *or until further order of the court upon his demonstrating to the court's satisfaction that compliance is impossible"* (emphasis added).

Under the circumstances of this case, in which the trust instrument requires one individual and one corporate trustee, Andrew may not act by himself until a corporate trustee is appointed. By contrast, in *Lane v Hustace* (154 App Div 636 [1st Dept 1913]), there were multiple individual trustees (*see id.* at 637-638).

The Surrogate correctly found that petitioners failed to state a claim for conversion. Respondent was rightfully in possession of the trust funds, and its continued custody of the

funds and refusal to surrender them to Andrew until Andrew proved his right to them was not an assertion of dominion or control over the funds (*see Bradley v Roe*, 282 NY 525, 531 [1940]; *see also id.* at 533-534).

In an order entered on or about March 31, 2017, the Surrogate ruled that respondent's use of trust funds to pay attorneys' fees was not an act of conversion. Petitioners did not appeal from that order.

The Surrogate correctly denied petitioners' request for punitive damages. Respondent's conduct does not "evince[] a high degree of moral turpitude" or "demonstrate[] such wanton dishonesty as to imply a criminal indifference to civil obligations" (*Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 489 [2007] [internal quotation marks omitted]).

We have considered petitioners' remaining arguments and find them unavailing. For example, there is no basis for reassigning this matter to a Justice of the Supreme Court.

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

ENTERED: MAY 1, 2018

CLERK

Renwick, J.P., Tom, Andrias, Webber, Kahn, JJ.

6417 In re Daryl D.,
Petitioner-Appellant,

-against-

Shameeka W., and Another,
Respondents-Respondents.

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Geoffrey P. Berman, Larchmont, for appellant.

_____

Order, Family Court, New York County (Gail A. Adams, Referee), entered on or about April 12, 2016, which, sua sponte, dismissed the petition, with prejudice, for lack of jurisdiction, unanimously modified, on the law, the decretal language "with prejudice" and "for lack of jurisdiction" deleted, and otherwise affirmed, without costs.

As the Family Court did not reach the merits of the petition, it erred in dismissing the proceeding with prejudice (*Matter of Mildred S.G. v Mark G.*, 62 AD3d 460, 462 [1st Dept 2009]; Family Court Act §§ 651; 652).

Petitioner should be permitted to re-file the petition in Kings County, provided he include both the Administration for Children's Services and the attorney for the child as parties in the next proceeding, as directed in the underlying custody order.

While the proceeding would be more appropriately held in Kings County, it is not apparent from the record before us that

the Family Court, New York County, lacks jurisdiction, particularly in light of the child's residence in New York County. Thus, the proceeding is dismissed without prejudice and not for lack of jurisdiction.

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

ENTERED: MAY 1, 2018

CLERK

Renwick, J.P., Tom, Andrias, Webber, Kahn, JJ.

6418 Irma Pacheco, Index 308870/11
Plaintiff-Appellant,

-against-

Serviam Gardens Associates, L.P., et al.,
Defendants-Respondents,

_____

Budin, Reisman, Kupferberg & Bernstein, LLP, New York (Gregory C. McMahon of counsel), for appellant.

Burke, Conway & Dillion, White Plains (Martin Galvin of counsel), for Serviam Gardens Associates, L.P. and Serviam Towers, LLC, respondents.

Costello, Shea & Gaffney, LLP, New York (Steven E. Garry of counsel), for Kone, Inc., respondent.

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Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered on or about June 23, 2017, which granted the motion of defendant Kone, Inc. for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Kone established its entitlement to judgment as a matter of law in this action where plaintiff alleges that she was injured when the elevator in the building in which she lived closed unexpectedly on her. Kone, which serviced the elevators in the building, demonstrated that it did not create the alleged defect or have actual or constructive notice of its existence, by submitting its service records showing that the elevator was

regularly inspected and was operating properly before the accident. Kone also submitted the affidavit of its employee who averred that there had been no prior complaints about the subject elevator (*see Sanchez v New Scandic Wall L.P.*, 145 AD3d 643 [1st Dept 2016]).

In opposition, plaintiff failed to raise a triable issue of fact. The doctrine of res ipsa loquitur is not applicable under the circumstances presented as the evidence shows that Kone was not negligent and plaintiff's deposition testimony does not rule out the possibility that her own voluntary actions resulted in the accident. Plaintiff testified that when the elevator stopped at the lobby of her building, she stood at the entranceway of the elevator and spoke to her friend for about a minute when the elevator door closed on her and struck her before retracting. There is also no indication that plaintiff was watching the elevator door as she was speaking to her friend (*see Graham v Wohl*, 283 AD2d 261 [1st Dept 2001]). Furthermore, the conclusory offerings of plaintiff's expert do not warrant a different result (*see e.g. Santoni v Bertelsmann Prop., Inc.*, 21 AD3d 712, 715 [1st Dept 2005]).

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: MAY 1, 2018

CLERK

Renwick, J.P., Tom, Andrias, Webber, Kahn, JJ.

6421 The People of the State of New York, Ind. 4824/14
Respondent,

-against-

Bryant Brown,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered August 11, 2015, convicting defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree, and sentencing him to a term of two years, with three years postrelease supervision, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the term of postrelease supervision to two years, and otherwise affirmed.

We modify the sentence to conform to the plea agreement, but perceive no basis for a further reduction.

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

ENTERED: MAY 1, 2018

CLERK

Renwick, J.P., Tom, Andrias, Webber, Kahn, JJ.

6422 Anthony Gordon, Index 103951/12
Plaintiff,

Martina Gordon,
Plaintiff-Appellant,

-against-

476 Broadway Realty Corp., et al.,
Defendants-Respondents.

_____

Ronald A. Hollander, Hastings-on-Hudson, for appellant.

Gallet Dreyer & Berkey, LLP, New York (Beatrice Lesser of counsel), for respondents.

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Order, Supreme Court, New York County (Debra A. James, J.), entered March 23, 2017, which denied plaintiff Martina Gordon's (plaintiff) motion to renew defendants' motion for summary judgment on their counterclaim for ejectment, unanimously affirmed, without costs.

Plaintiff failed to satisfy her heavy burden on this post-appeal renewal motion to show that, by exercising due diligence, she could not have obtained the purported new facts at the time of the original motion (*see Matter of Weinberg*, 132 AD2d 190 [1st Dept 1987], *lv dismissed* 71 NY2d 994 [1988]). In any event, the allegedly newly discovered documents would not change the prior determination (*see* CPLR 2221[e][2]). Plaintiff's arguments in relation to the documents require impermissible speculation as to

what the mortgagee would have done if defendants had been more timely in notifying it of the cooperative's proposed action to terminate plaintiffs' proprietary lease, as called for under a recognition agreement, and whether plaintiffs would have heeded any advice from the mortgagee about amending their conduct, which they exhibited no willingness to do before the lease was terminated (*see generally Sherwood Group v Dornbush, Mensch, Mandelstam & Silverman*, 191 AD2d 292 [1st Dept 1993]).

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: MAY 1, 2018

CLERK

Renwick, J.P., Tom, Andrias, Webber, Kahn, JJ.

6423 Carol Henry, Index 309820/11
Plaintiff-Appellant,

-against-

Hamilton Equities, Inc., et al.,
Defendants-Respondents-Appellants,

Rafae Construction Corp., et al.,
Defendants-Respondents.

_____

Alan S. Friedman, New York, for appellant.

Kennedys CMK LLP, New York (Michael J. Tricarico of counsel), for respondents-appellants.

Ahmuty, Demers & McManus, Albertson (Glenn A. Kaminska of counsel), for Rafae Construction Corp., respondent.

O'Toole Scrivo Fernandez Weiner Van Lieu LLC, New York (Sean C. Callahan of counsel), for AP Construction, Inc., respondent.

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Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered on or about August 25, 2017, which, insofar as appealed from as limited by the briefs, granted the motion of defendants Hamilton Equities, Inc., Hamilton Equities Company, and Suzan Chait-Grandt, as administrator of the estate of Joel Chait, for summary judgment dismissing the complaint and all cross claims as against them, unanimously affirmed, without costs.

An out-of-possession landlord is generally not liable for negligence with respect to the condition of the demised premises unless it: (1) is contractually obligated by lease or otherwise

to make repairs or maintain the premises, or (2) has a contractual right to re-enter, inspect and make needed repairs, and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision (*see Johnson v Urena Serv. Ctr.*, 227 AD2d 325, 326 [1st Dept 1996], *lv denied* 88 NY2d 814 [1996]).

Here, the motion court properly declined to impose a duty to plaintiff on Hamilton based on the HUD Agreement that guaranteed defendant Hamilton Equities Company's mortgage. As plaintiff's expert indicated, the purpose of paragraph 7 of the HUD Agreement was to protect the integrity of the building that was subject to the mortgage guaranteed by HUD. Thus, the intention was to benefit HUD and the bank, not third-parties injured on the premises.

Moreover, the HUD Agreement's requirement to establish an escrow fund for repairs that was accessible by the tenant suggests that HUD and Hamilton Equities intended to delegate the duty to repair to the tenant. The social policy considerations cited by the Court of Appeals in *Putnam v Stout* (38 NY2d 607, 617-618 [1976]), are promoted only where the landlord had a contractual obligation directly to the tenant.

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: MAY 1, 2018

CLERK

Tom, J.P., Andrias, Webber, Kahn, JJ.

6424 The People of the State of New York, Ind. 225/15
Respondent,

-against-

Abu Saho,
Defendant-Appellant.

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

Darcel D. Clark, District Attorney, Bronx (Kyle R. Silverstein 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, Bronx County (Nicholas Iacovetta J. at plea; Jeanette Rodriguez-Morick J. at sentencing), rendered November 13, 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: MAY 1, 2018

CLERK

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

Renwick, J.P., Tom, Andrias, Webber, Kahn, JJ.

6425-
6426N Index 656158/16

In re Cynthia Zamora Daniel, et al.,
Petitioners-Respondents,

-against-

Lehman Brothers Holdings Inc., etc.,
Respondent-Appellant.

- - - - -

In re Goran Puljic, et al.,
Petitioners-Respondents,

-against-

Lehman Brothers Holdings Inc., etc.,
Respondent-Appellant.

_____

Paul Hastings LLP, New York (Kurt W. Hansson of counsel), for appellant.

Hoguet Newman Regal & Kenney, LLP, New York (John P. Curley of counsel), for Cynthia Zamora Daniel and Christopher Montalvo, respondents.

Venable LLP, New York (Edward P. Boyle of counsel), for Goran Puljic, T.K. Narayan and Scott Snell, respondents.

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Orders, Supreme Court, New York County (O. Peter Sherwood, J.), entered May 9 and 10, 2017, which granted the petitions to stay arbitration, and denied respondent's cross motions to compel arbitration, unanimously reversed, on the law, with costs, the petitions denied, and the cross motions to compel arbitration granted.

The court erred in failing to enforce the arbitration

provision contained in the Lehman Brothers CDO Associates 2004 L.P. Limited Partnership Agreement (LPA). By executing Interest Schedules that were "substantially in the form" of the Form Interest Schedule attached as Exhibit A to the LPA, petitioners are deemed to have executed the LPA, which we find is the "Agreement" referenced in the Interest Schedules. Having been validly executed by petitioners, the provisions of the LPA that are definite and complete, including the arbitration provision, are enforceable (*see Kolchins v Evolution Mkts., Inc.*, 128 AD3d 47, 61 [1st Dept 2015] ["all the terms contemplated by the agreement need not be fixed with complete and perfect certainty for a contract to have legal efficacy"], *affd* __ NY3d __ , 2018 NY Slip Op 02209 [2018]).

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

ENTERED: MAY 1, 2018

CLERK

Renwick, J.P., Tom, Andrias, Webber, Kahn, JJ.

6427N Kristine Leary, et al., Index 150773/12
Plaintiffs-Respondents,

-against-

Carolyn Bendow, et al.,
Defendants-Appellants.

_____

Picciano & Scahill, P.C., Bethpage (Andrea E. Ferrucci of counsel), for appellants.

Law Offices of Joseph F. Dunne, Rockville Centre (Joseph F. Dunne of counsel), for respondents.

_____

Order, Supreme Court, New York County (Leticia M. Ramirez, J.), entered November 10, 2016, which granted plaintiffs' motion to renew and, upon renewal, denied defendants' motion to strike the note of issue, unanimously affirmed, without costs.

Although plaintiffs failed to include a copy of defendants' original motion to strike with the renewal motion, this did not violate CPLR 2214(c) because the original motion had been electronically filed and therefore was available to the parties and the court (*see also Studio A Showroom, LLC v Yoon*, 99 AD3d 632 [1st Dept 2012]). There is no evidence that the record was not sufficiently complete to allow the court to render a decision on the renewal motion and to exercise its discretion in considering any improperly submitted document (*see Washington Realty Owners, LLC v 260 Wash. St. LLC*, 105 AD3d 675 [1st Dept

2013]; *Loeb v Tanenbaum*, 124 AD2d 941, 942 [3d Dept 1986] ["under CPLR 2214©, the court *may* refuse to consider improperly submitted" documents (emphasis added)]).

In any event, the court did not improvidently exercise its discretion in granting renewal (*see* CPLR 2221[e]). Unbeknownst to the court at the time it decided the original motion, the parties had entered a stipulation agreeing to adjourn the motion. Both parties concede the motion was accidentally submitted to the court in contravention of the stipulation. Thus, the equities of this matter, and the interests of justice, were properly served by permitting renewal, especially because denial would defeat substantial fairness (*see Jorge v Conlon*, 134 AD3d 480 [1st Dept 2015]; *Scott v Brickhouse*, 251 AD2d 397 [2d Dept 1998]; *Metcalfe v City of New York*, 223 AD2d 410, 411 [1st Dept 1996]). Finally, in denying defendants' motion to strike upon renewal, the court was permitted to take judicial notice of the so-ordered stipulations where both parties agreed that discovery had been

completed (*see Matter of Khatibi v Weill*, 8 AD3d 485 [2d Dept 2004] ["this court may take judicial notice of undisputed court records and files"]; Jerome Prince, Richardson on Evidence § 2-209 at 45 [Farrell 11th ed 1995]).

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

ENTERED: MAY 1, 2018

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
John W. Sweeny, Jr.
Ellen Gesmer
Cynthia S. Kern
Anil C. Singh, JJ.

6187N
Index 157525/16

_____x

In re Grace Rauh, et al.,
Petitioners-Respondents,

-against-

Bill de Blasio, etc., et al.,
Respondents-Appellants.
_____x

Respondents appeal from the judgment (denominated a decision and order) of the Supreme Court, New York County (Joan B. Lobis, J.), entered March, 23, 2017, granting the petition brought pursuant to CPLR article 78 to compel respondents to disclose documents requested by petitioners pursuant to the Freedom of Information Law to the extent of directing respondents to produce all withheld responsive records, granting attorney's fees, and referring the matter to a special referee to hear and report on the amount of attorney's fees to be awarded.

Zachary W. Carter, Corporation Counsel, New York (Richard Dearing, Devin Slack and John Moore of counsel), for appellants.

Akin Gump Strauss Hauer & Feld, LLP, New York (Douglass B. Maynard, Estela Diaz and Jessica Oliff Daly of counsel), for Grace Rauh, TWC News and Local Programming LLC, respondents.

Davis Wright Tremaine LLP, New York (Jeremy A. Chase and Elizabeth A. McNamara of counsel), for Yoav Gonen and NYP Holdings, Inc., respondents.

SINGH, J.

At issue on this appeal is whether communications between respondents Mayor Bill de Blasio and/or the Office of the Mayor of the City of New York and outside consultants that were not retained by a government agency fall within the statutory exemption for inter-agency and intra-agency materials under New York State's Freedom Of Information Law (Public Officers Law § 87[2][g]). We agree with Supreme Court that the communications are not exempt and that attorney's fees should be awarded because petitioners substantially prevailed in this article 78 proceeding and the Office of the Mayor lacked a reasonable basis for withholding its communications.

This proceeding arises from two FOIL requests seeking correspondence exchanged between the Mayor and/or certain members of his administration and various private consultants, including Jonathan Rosen, a principal of BerlinRosen, Ltd. BerlinRosen was retained by the Campaign for One New York (CONY), a nonprofit organization created by the Mayor's campaign in December 2013, between his initial election as Mayor and his January 1, 2014 inauguration. In 2016, it was reported that CONY was shutting down and would not be participating in the Mayor's 2017 reelection campaign as it had achieved its goals, advocating for the Mayor's policy agenda.

The First FOIL Request

On February 18, 2015, petitioner Grace Rauh, a reporter at NY1 News, submitted a FOIL request to respondent Office of the Mayor of the City of New York (the Office of the Mayor) seeking "copies of correspondence that Mayor de Blasio and/or senior members of his administration conducted with Jonathan Rosen in the [M]ayor's first year in office."

On August 7, 2015, and April 1, 2016, the Office of the Mayor stated that records responsive to that request were being disclosed, while others were being withheld pursuant to Public Officers Law § 87(2)(g), which generally exempts "inter-agency or intra-agency materials" (the agency exemption).

On April 29, 2016, petitioner Rauh appealed from the partial denial of her request, and sought a "more detailed" explanation of why the withheld records were exempt from FOIL. The Office of the Mayor denied Rauh's appeal on or about May 13, 2016, finding that the withheld records were covered by the agency exemption.[1]

[1]In relevant part, a letter dated May 13, 2016, from the Office of the Mayor to Rauh regarding the FOIL request states, "[T]he advice Mr. Rosen offered was part of the deliberative process. The withheld documents relate to communications in which Mr. Rosen was not acting on behalf of any clients nor interests they represent. In these particular communications Mr. Rosen's advice represents solely the interests of the Mayoralty and the City. As such, he meets that test and his advice is protected under the exemption. I therefore find that the determination to withhold the documents as exempt under the

The Second FOIL Request

On April 3, 2015, petitioner Yoav Gonen, a reporter for the New York Post, requested "a copy of any and all email communications to or from Mayor de Blasio -- using his city-issued or private email account[s] -- and any and all employees in the Mayor's Office, to or from Jonathan Rosen or any and all employees of BerlinRosen, between Jan. 1, 2014 and April 3, 2015."

On August 7, 2015 the Office of the Mayor stated that responsive records were being disclosed, while other records were being withheld pursuant to the agency exemption, and extended the time to search for additional responsive records to November 6, 2015.

On May 22, 2016, Gonen appealed from the partial denial of his FOIL request. The Office of the Mayor responded, by letter dated June 10, 2016, that further responsive records were being provided, but "some responsive materials ha[d] been redacted in part or withheld in entirety" pursuant to the agency exemption.

On June 16, 2016, Gonen appealed from the decision to withhold some responsive documents, arguing that the agency exemption is inapplicable because "Rosen is a member of the

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inter- and intra-agency exemption was correct and deny your appeal."

public not paid by the administration and, as such, his and his firm's communications with and advice to the [M]ayor's [O]ffice should be provided under [FOIL]."

On June 30, 2016, the Office of the Mayor denied Gonen's appeal on the same grounds as in the previous appeal. Petitioners brought this article 78 proceeding in September 2016, seeking disclosure of all responsive records being withheld. Alternatively, petitioners sought an in camera review of the records to determine the applicability of the agency exemption. Petitioners also requested attorney's fees.

In November 2016, the Office of the Mayor disclosed more than 1,500 pages of previously withheld communications between respondents and BerlinRosen, and stated that the Office of the Mayor had by that point disclosed "all responsive email communications with Jonathan Rosen and BerlinRosen which involve[d] any other client of BerlinRosen." Respondents estimated to have disclosed over 18,000 pages of responsive records and offered to turn over the remaining records for an in camera review.

Supreme Court granted the petition, without conducting an in camera inspection and ordered respondents to disclose "all previously withheld correspondence that the Mayor and senior members of his administration conducted with Jonathan Rosen and

any and all employees of BerlinRosen, Ltd., between January 1, 2014 and April 3, 2015." The court reasoned that in order to be covered by the agency exemption, the outside consultants "must be formally retained by the agency that they were advising." Supreme Court also found that "respondents did not have a reasonable basis for considering the correspondence with Rosen and his public relations firm to be covered by the inter-agency or intra-agency exemption" and granted petitioners' request for attorney's fees.

Respondents argue that in finding that CONY was not a governmental agency, Supreme Court erred in limiting its inquiry to "a formalistic analysis where a practical, functional inquiry" would have been more appropriate. Respondents urge that the focus of the inquiry should be a review of the consultant's function as opposed to what entity paid the consultant. While CONY was not a governmental agency, it worked with the Office of the Mayor to promote the Mayor's agenda. BerlinRosen was retained by CONY to provide consulting services to promote the Mayor's policy agenda.

This argument is without merit. At the outset we emphasize that "[t]he Legislature enacted FOIL to provide the public with a means of access to governmental records in order to encourage public awareness and understanding of and participation in

government and to discourage official secrecy" (*Matter of Alderson v New York State Coll. of Agric. & Life Sciences at Cornell Univ.*, 4 NY3d 225, 230 [2005]). Access to records of governmental agencies may be withheld if they fall within one of the enumerated exemptions of Public Officers Law § 87(2).

However, the Court of Appeals instructs that FOIL is to be "liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to the records of government" (*Matter of Town of Waterford v New York State Dept. of Envtl. Conservation*, 18 NY3d 652, 657 [2012]; *Matter of Buffalo News v Buffalo Enter. Dev. Corp.*, 84 NY2d 488, 492 [1994]; *Matter of Russo v Nassau County Community Coll.*, 81 NY2d 690, 697 [1993]; *Matter of Capital Newspapers, Div. of Hearst Corp. v Whalen*, 69 NY2d 246, 252 [1987]). "When reviewing the denial of a FOIL request, a court . . . is to presume that all records of a public agency are open to public inspection and copying, and must require the agency to bear the burden of showing that the records fall squarely within an exemption to disclosure" (*Matter of New York Comm. for Occupational Safety & Health v Bloomberg*, 72 AD3d 153, 158 [1st Dept 2010]; *see also Matter of Town of Waterford*, 18 NY3d at 657).

The exemption relevant to this appeal provides that a governmental agency may deny access to records that are inter-

agency or intra-agency materials (Public Officers Law § 87[2][g][2]). The purpose behind the exemption is to "permit people within an agency to exchange opinions, advice and criticism freely and frankly, without the chilling prospect of public disclosure" (*Matter of New York Times Co. v City of N.Y. Fire Dept.*, 4 NY3d 477, 488 [2005]).

It is well settled that for communications between a governmental agency and an outside consultant to fall under the agency exemption, the outside consultant must be retained by the governmental agency (*Matter of Xerox Corp. v Town of Webster*, 65 NY2d 131, 133 [1985] [records may be considered intra-agency material when prepared by an outside consultant retained by agency]; *see also Matter of Town of Waterford*, 18 NY3d at 658 [declining to extend the inter- and intra-agency exemption to a federal agency collaborating with the Department of Environmental Conservation because the federal agency "was not retained by the DEC and [did] not function as its employee or agent"]; *Matter of*

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[2]Public Officers Law § 87(2)(g) provides that a governmental agency may deny access to records that "are inter-agency or intra-agency materials which are not:
i. statistical or factual tabulations or data;
ii. instructions to staff that affect the public;
iii. final agency policy or determinations;
iv. external audits, including but not limited to audits performed by the comptroller and the federal government."

Hernandez v Office of the Mayor of the City of N.Y., (100 AD3d 555 [1st Dept 2012], *lv denied* 21 NY3d 854 [2013] [Office of the Mayor required to disclose emails to or from a former nominee for New York City School Chancellor where the nominee "was not an agent of the City since she had not yet been retained as Chancellor"]; *Matter of Tuck-It-Away Assoc., L.P. v Empire State Dev. Corp.*, 54 AD3d 154, 163 [1st Dept 2008] *affd sub nom. West Harlem Bus Group v Empire State Dev. Corp.*, 13 NY3d 882 [2009] [exemption does not apply to a retained outside consultant where "consultant is communicating with the agency in its own interest or on behalf of another client whose interests might be affected by the agency action addressed by the consultant"]).

Respondents seek to broaden the agency exemption to shield communications between a governmental agency and an outside consultant retained by a private organization and not the agency. This attempt expands the agency exemption and closes the door on government transparency. Requiring an agency to retain an outside consultant to protect its communications comports with the fundamental principle that FOIL exemptions should be "narrowly interpreted so that the public is granted maximum access" to public records (*see Matter of Town of Waterford*, 18 NY3d at 657). Accordingly, we find that the communications between the respondents and BerlinRosen should be disclosed.

Next, turning to the issue of attorney's fees, Supreme Court granted petitioners attorney's fees under an earlier enactment of Public Officers Law § 89(4)(c), which provided that the court "may assess" attorney's fees and costs. The court providently exercised its discretion in granting attorney's fees.

We note that during the pendency of this appeal, the Legislature amended the provision which now provides that the court "*shall* assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed and the court finds that the agency had no reasonable basis for denying access" (Public Officers Law § 89[4][c][ii] [emphasis added][3]). The language of the statute is mandatory and not precatory, if the statutory requirements are met (*see* McKinney's Consolidated Laws of NY, Book 1, Statutes § 171, Comment at 334 [1971 ed] ["where the word 'may' appearing in an act was changed to 'shall', the court would construe the amendment as being mandatory"]). Significantly, this evinces an unmistakable legislative intent that attorney's fees are to be assessed against an agency when

[3]The Legislature also removed the need for parties to show that the record was of "clearly significant interest to the general public" (L. 2006, c. 492, § 1, eff. Aug. 16, 2006).

the other party has substantially prevailed and the agency had no reasonable basis for denying access.

Here, there is no dispute that the petitioner has substantially prevailed (*see Matter of Madeiros v New York State Educ. Dept* 30 NY3d 67, 78-81 [2017]). Both in this appeal and in Supreme Court, the respondents have been directed to produce the documents requested by petitioners on the ground that the agency exemption does not apply.

Based on the substantial body of law discussed above, respondents had no reasonable basis to withhold the documents. Indeed, after the proceeding had commenced and more than a year after the FOIL requests were made, respondents produced approximately 1500 pages of previously withheld documents. These documents include examples of the Mayor and Mr. Rosen discussing issues important to BerlinRosen's private clients. The documents are the types of communications that the FOIL meant to make available to the public. Respondents' attempts to withhold these communications run counter to the public's interest in transparency and the ability to participate on important issues of municipal governance.

Accordingly, the judgment (denominated a decision and order) of the Supreme Court, New York County (Joan B. Lobis, J.), entered March, 23, 2017, granting the petition brought pursuant

to CPLR article 78 to compel respondents to disclose documents requested by petitioners pursuant to the Freedom of Information Law, to the extent of directing respondents to produce all withheld responsive records, granting attorney's fees, and referring the matter to a special referee to hear and report on the amount of attorney's fees to be awarded, should be affirmed, without costs.

All concur

Judgment (denominated a decision and order), Supreme Court, New York County (Joan B. Lobis, J.), entered March, 23, 2017, affirmed, without costs.

Opinion by Singh, J. All concur.

Friedman, J.P., Sweeny, Gesmer, Kern, Singh, JJ.

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

ENTERED: MAY 1, 2018

CLERK