SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 15, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Renwick, J.P., Gische, Tom, Oing, Singh, JJ.

5174 In re Celeste Frazier, Index 100580/15
Petitioner-Appellant,

-against-

The New York City Housing Authority,
Respondent-Respondent.

_____

Mobilization for Justice, Inc., New York (Rochelle R. Watson of counsel), for appellant.

David I. Farber, New York (Andrew M. Lupin of counsel), for respondent.

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Order, Supreme Court, New York County (Alexander W. Hunter, Jr., J.), entered April 15, 2016, which denied petitioner's motion for leave to renew the judgment, same court and Justice, entered September 11, 2015, denying the petition and dismissing the proceeding brought pursuant to CPLR article 78, challenging respondent New York City Housing Authority's (NYCHA) determination, dated February 11, 2015, which denied petitioner's application to vacate her default, unanimously reversed, on the law, the facts and in the exercise of discretion, without costs, the motion granted, the judgment entered September 11, 2015 vacated, and the matter remanded to NYCHA for a hearing in

accordance herewith.

On the document entitled "Request to the Hearing Officer for a New Hearing" that petitioner submitted to vacate her default, petitioner stated that she had an emergency at her son's school. The record in the renewal motion indicated that petitioner, a victim of domestic violence and the single mother of a young child, failed to appear for a first-time hearing for chronic nonpayment of rent before respondent NYCHA because she had a court-mandated family conference at her son's school, scheduled for the same day and time as the hearing. Her failure to appear would place in jeopardy her custody of her son. Under these circumstances, petitioner adequately demonstrated a reasonable excuse for the default and the motion court should have granted petitioner's motion for leave to renew in the interest of justice so as not to "defeat substantial fairness" (*Rancho Santa Fe Assn. V. Dolan-King*, 36 AD3d 460, 461 [1st Dept 2007]).

Moreover, petitioner set forth a meritorious defense to the charges against her. Petitioner had applied for a one-shot deal and was awaiting a decision at the time she made her application to vacate the default. The hearing officer's conjecture that the one-shot deal would be denied proved to be an inaccurate prediction, as NYCHA was paid the money representing the rent arrears on February 13, 2015. Based on this payment, the Housing

Court case brought by NYCHA was discontinued by stipulation of settlement dated February 18, 2015 acknowledging that all rent was paid through January 31, 2015. Subsequent to the administrative hearing, an operating procedure known as a Memorandum of Understanding (MOU) was entered into between NYCHA and the New York City Human Resources Administration. The purpose and intent of the policy outlined in the MOU is to work with tenants such as petitioner to obtain payment of rent arrears, to assure future rent payments and to prevent evictions.

Accordingly, the motion court should have exercised its discretion to grant renewal, and upon renewal, vacate the judgment and remand the matter to NYCHA for a hearing.

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

ENTERED: MAY 15, 2018

CLERK

Sweeny, J.P., Manzanet-Daniels, Mazzarelli, Oing, Moulton, JJ.

5947-
5947A Index 155013/15

Tishman Technologies Corporation,
Plaintiff,

BPAC Mechanical Corp., also known as
The BPAC Group Inc.,
Plaintiff-Respondent,

-against-

Travelers Indemnity Company of America,
Defendant-Appellant,

Adria Infrastructure LLC Tertiary, Inc.,
Defendant.

_____

Lazare Potter Giacovas & Moyle LLP, New York (Andrew M. Premisler of counsel), for appellant.

Cornell Grace, P.C., New York (Laura Moletta of counsel), for respondent.

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Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered January 23, 2013, which, to the extent appealed from as limited by the briefs, granted plaintiff BPAC Mechanical Corp.'s motion for summary judgment declaring that defendant Travelers Indemnity Company of America is obligated to defend it in the underlying action, and so declared, and denied Travelers's cross motion for summary judgment declaring that it has no duty to defend or indemnify BPAC in the underlying action, unanimously reversed, on the law, the motion denied, the cross motion granted, and it is declared that Travelers has no duty to defend

or indemnify BPAC in the underlying action. The Clerk is directed to enter judgment accordingly. Appeal from order, same court and Justice, entered May 4, 2017, which denied Travelers' motion to reargue, unanimously dismissed, without costs.

The complaint in the underlying action alleges that certain water damage occurred "as a direct and proximate result of the negligence of [BPAC], including its failure to adequately perform all plumbing and mechanical work ...; in failing to supervise and oversee all plumbing work performed by its sub-contractors ...; in failing to hire competent and experienced sub-contractors ...; and in failing to provide reasonable protection to prevent damage, injury or loss to [the] Plaintiff's property." The complaint also alleges a separate independent negligence claim against Adria Infrastructure LLC (Adria), BPAC's subcontractor.

The commercial general liability insurance policy issued by Travelers to Adria defines an additional insured as follows: "[t]he person or organization [required to be included as an additional insured, i.e., BPAC] does not qualify as an additional insured with respect to the independent acts or omissions of such person or organization. The person or organization is only an additional insured with respect to liability caused by 'your [Adria] work' for that additional insured." BPAC does not qualify as an additional insured because its potential liability

in the underlying action is for its own independent acts or omissions (*see Fireman's Fund Ins. Co. v Travelers Cas. Ins. Co. of Am.*, 2017 NY Slip Op 31068[U] [Sup Ct, NY County 2017]). In addition, BPAC does not qualify as an additional insured merely by virtue of the fact that there is a separate and independent negligence claim asserted against Adria even if Adria is ultimately found solely liable. BPAC would be an additional insured only if it were vicariously liable for Adria's negligence (*id.*), a claim that is not asserted in the underlying complaint (*see A. Meyers & Sons Corp. v Zurich Am. Ins. Group*, 74 NY2d 298 [1989]). Under these circumstances, BPAC is not an additional insured.

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

ENTERED: MAY 15, 2018

CLERK

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

6167 The People of the State of New York, Respondent, SCID 30034/16

-against-

Jean Carlos Delacruz,
Defendant-Appellant.

- - - - -

New York Civil Liberties Union
and Youth Represent,
Amici Curiae.

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

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

New York Civil Liberties Union Foundation, New York (Erin Beth Harrist of counsel), for New York Civil Liberties Union, amicus curiae.

Youth Represent, New York (Saskia Valencia of counsel), for Youth Represent, amicus curiae.

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Order, Supreme Court, New York County (Juan M. Merchan, J.), entered on or about April 5, 2017, which adjudicated defendant a level three sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The principal claim made by defendant and amici curiae is that a person who commits a sex crime between the ages of 16 and 17 should be spared lifetime public registration, and thus should

not be adjudicated a sex offender at a level higher than level one, at least without an individual clinical evaluation. Although defendant and amici raise substantial arguments, they have not established that any aspect of either the applicable statute or the risk assessment instrument is unconstitutional.

We have considered and rejected defendant's further challenges to various point assessments, since clear and convincing evidence supports each of the assessments at issue.

The court providently exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). The mitigating factors cited by defendant were adequately taken into account by the risk assessment instrument or outweighed by aggravating factors, including the seriousness and violent nature of his underlying offenses.

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

ENTERED: MAY 15, 2018

CLERK

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

6241 The People of the State of New York, Ind. 1453/13
Respondent,

-against-

Hasim Thioubu,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered November 15, 2013, convicting defendant, upon his plea of guilty, of conspiracy in the second degree and criminal possession of a weapon in the second degree, and sentencing him to concurrent terms of 4 to 12 years and 7 years, respectively, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence on the weapon conviction to six years, and otherwise affirmed.

Defendant did not make a valid waiver of his right to appeal. In any event, we reject his suppression claim. Defendant was not entitled to a hearing regarding a surveillance

videotape (*see People v Gee*, 99 NY2d 158 [2002]), and his other suppression claims were abandoned or forfeited by his guilty plea.

We find the sentence excessive to the extent indicated.

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

ENTERED: MAY 15, 2018

CLERK

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

6419-
6420

Claudio Pacheco,
Plaintiff-Respondent,

-against-

Almeida Concrete Pumping and Equipment, Inc., et al.,
Defendants-Appellants,

PJS General Construction Inc.,
Defendant.

Index 302407/14

Law Office of Christopher P. DiGiulio, P.C., New York (William Thymius of counsel), for appellant.

The Law Office of Bruce E. Cohen & Associates, PC, Melville (Bruce E. Cohen of counsel), for respondent.

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered on or about June 30, 2017, which, to the extent appealed from as limited by the briefs, denied the cross motion of defendant Almeida Concrete Pumping and Equipment, Inc. (Almeida) for summary judgment dismissing plaintiff's Labor Law §§ 200 and 241(6) claims as against it, unanimously affirmed, without costs.

The court properly denied Almeida's cross motion for summary judgment, as issues of fact exist as to whether Almeida was a subcontractor of the subject renovation project or a mere materialman not owing plaintiff a duty under the Labor Law. The record shows that Almedia leased equipment and two employees to operate the equipment, for the pouring of concrete on the subject

construction project, purportedly under the supervision of defendant subcontractor Paul J. Scariano, Inc. (Scariano). Although Almeida's employees controlled the equipment, they were told where and when to pour the concrete. Thus, under the facts of this case, it is not at all clear as a matter of law that Almeida's employees did not control, or partially control, the cleanup of the equipment, during which the accident occurred (*see Erickson v Cross Ready Mix, Inc.*, 75 AD3d 519 [2d Dept 2010], *lv dismissed* 16 NY3d 794 [2011]; *Dorn v Johnson Corp.*, 16 AD2d 1009, 1010 [3d Dept 1962]).

Furthermore, there are issues of fact as to whether Almeida was a statutory agent of the owner or general contractor, with supervisory control and authority over the work being performed at the time of plaintiff's injury (see *Walls v Turner Constr. Co.*, 4 NY3d 861, 864 [2005]; *compare Orofino v 388 Realty Owners, LLC*, 146 AD3d 532 [1st Dept 2017]).

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

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

ENTERED: MAY 15, 2018

CLERK

Richter, J.P., Andrias, Webber, Gesmer, Moulton, JJ.

6552 The People of the State of New York, Respondent, Ind. 5101/14

-against-

Jesse Ward, Defendant-Appellant.

_____

Christina A. Swarns, Office of the Appellate Defender, New York (Joseph M. Nursey of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered January 21, 2016, convicting defendant, after a jury trial, of attempted assault in the first degree and assault in the second degree, and sentencing him to concurrent terms of five years, unanimously affirmed.

The court properly denied defendant's suppression motion. The police had, at least, reasonable suspicion to stop and pat down defendant. The officers had a radioed description of a person who had just committed an assault. When they arrived at the scene, an eyewitness directed them to an alley that the assailant had entered. On the street at the other end of the alley, the police immediately found defendant, who matched the description. Although the description was somewhat general, it was sufficient to justify the police actions because the spatial

and temporal factors made it "highly unlikely that the suspect had departed and that . . . an innocent person of identical appearance coincidentally arrived on the scene" (*People v Johnson*, 63 AD3d 518, 518 [2009], *lv denied* 13 NY3d 797 [2009]).

During the frisk, an officer felt a hard object in defendant's jacket pocket. The officer properly removed the object, because he had reason to believe defendant had committed a violent crime and could be armed, and because defendant's clothing could have easily concealed a weapon. The officer did not have to be certain that the hard object was a weapon before removing it for further inspection (*see People v Johnson*, 22 AD3d 371 [1st Dept 2005], *lv denied* 6 NY3d 754 [2005]).

We perceive no basis for reducing the sentence.

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

ENTERED: MAY 15, 2018

CLERK

Richter, J.P., Andrias, Webber, Gesmer, Moulton, JJ.

6554 In re Calvin B.,
Petitioner-Respondent,

-against-

Tikema M.,
Respondent-Appellant.

_____

Leslie S. Lowenstein, Woodmere, for appellant.

Kenneth M. Tuccillo, Hastings on Hudson, for respondent.

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

Karen Freedman, Lawyers for Children, Inc., New York (Linda Diaz of counsel), attorney for child Sarajia B.

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Order, Family Court, New York County (Emily M. Olshansky, J.), entered on or about June 26, 2017, which, inter alia, awarded physical and legal custody of the subject children to petitioner, unanimously affirmed, without costs.

Respondent offers no grounds on which to disturb Family Court's determination that it is in the children's best interests to be in petitioner's custody (*see Matter of James Joseph M. v Rosana R.*, 32 AD3d 725 [1st Dept 2006], *lv denied* 7 NY3d 717 [2006]; Domestic Relations Law § 240[a]). The determination is based on the court's credibility assessments and has a sound and substantial basis in the record, and therefore is entitled to great deference (*see Eschbach v Eschbach*, 56 NY2d 167, 173

[1982]; *Matter of Conforti v Conforti*, 46 AD3d 877 [2d Dept 2007]). The court properly assessed the relevant factors, which include the maintenance of stability in the children's lives, the parents' relative fitness, the quality of the home environment, and the competence of parental guidance (*see Matter of McGivney v Wright*, 298 AD2d 642, 643 [3d Dept 2002], *lv denied* 99 NY2d 508 [2003]; *see also Matter of Whitley v Whitley*, 33 AD3d 810 [2d Dept 2006], *lv denied* 8 NY3d 809 [2007]). Respondent's argument that the court did not adequately account for her loving relationship or bond with the children is belied by the court's decision to maintain the existing visitation arrangement, which gives respondent time with the children nearly equal to petitioner's, and not to disturb respondent's significant involvement in the children's medical care and education.

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

ENTERED: MAY 15, 2018

CLERK

Richter, J.P., Andrias, Webber, Gesmer, Moulton, JJ.

6555 Robyn Pena, Index 303162/11
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent.

_____

Pollack, Pollack, Isaac & DeCicco, LLP, New York (Brian J. Isaac of counsel), for appellant.

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

_____

Order, Supreme Court, Bronx County (Julia I. Rodriguez, entered on or about November 12, 2015, which granted defendant City of New York's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The City established entitlement to judgment as a matter of law in this action for personal injuries sustained when plaintiff slipped and fell on "black ice," while crossing a cleared crosswalk, eight days after there was a snowfall of about 20 inches. The City submitted evidence showing it neither created nor had actual or constructive notice of the black ice that allegedly caused plaintiff's fall, including deposition testimony from a Department of Sanitation supervisor detailing the City's extensive snow and ice removal efforts in the area of the accident in the days preceding the accident. The City also

submitted climatological records showing temperature fluctuations above and below freezing in the two days before the date of the accident, and freezing temperatures in the hours immediately preceding plaintiff's fall. Thus, the City demonstrated that it would be speculative to conclude that it caused or had sufficient time to remedy the subject icy condition (*see Saavedra v City of New York*, 137 AD3d 421 [1st Dept 2016]). The City further showed lack of constructive notice by submitting plaintiff's deposition testimony that the crosswalk appeared to have been cleared for safe crossing and that she did not observe the black ice until after she fell (*see Keita v City of New York*, 129 AD3d 409 [1st Dept 2015]; *Killeen v Our Lady of Mercy Med. Ctr.*, 35 AD3d 205 [1st Dept 2006]).

In opposition, plaintiff failed to raise an issue of fact. She provided no evidence of actual or constructive notice of the black ice in the crosswalk, which she admittedly did not see. Plaintiff also failed to provide any nonspeculative basis for finding that the City's snow clearing efforts were negligent or that they exacerbated the dangerous conditions that were created by the blizzard (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 142 [2002]; *Katz v City of New York*, 11 AD3d 391 [1st Dept 2004]). The opinion of plaintiff's expert that the City should

have checked the crosswalk twice daily for possible "thaw and refreeze," was unsupported by reference to any authority, standard, or other corroborating evidence (*see Cassidy v Highrise Hoisting & Scaffolding, Inc.*, 89 AD3d 510, 511 [1st Dept 2011]).

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

ENTERED: MAY 15, 2018

CLERK

Richter, J.P., Andrias, Webber, Gesmer, Moulton, JJ.

6556 Christopher Brown, Index 159252/14
Plaintiff-Respondent, 595628/16

-against-

Wendy Webb-Weber,
Defendant-Appellant.

- - - - -

Wendy Webb-Webber,
Third-Party Plaintiff-Appellant,

-against-

Steven Thau,
Third-Party Defendant-Respondent.

_____

Law Offices of Richard A. Fogel, P.C., Islip (Richard A. Fogel of counsel), for appellant.

Levy Konigsberg LLP, New York (Brendan E. Little of counsel), for Christopher Brown, respondent.

Lewis Johns Avallone Aviles, LLP, Islandia (Robert A. Lifson of counsel), for Steven Thau, respondent.

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Order, Supreme Court, New York County (Erika M. Edwards, J.), entered October 3, 2017, which denied defendant's motion for summary judgment dismissing the complaint, granted third-party defendant's motion for summary judgment dismissing the third-party complaint, and denied defendant's motion to consolidate the actions as moot, unanimously affirmed, without costs.

The record demonstrates that lead abatement in the premises owned by defendant in which plaintiff resided between the ages of

one and five did not start for more than seven months after plaintiff was diagnosed with an elevated blood-lead level and the Westchester County Department of Health confirmed the existence of lead-based paint at the premises. Contrary to defendant's contention, the fact that she obtained a grant and Westchester County managed the abatement, without more, does not entitle her to judgment as a matter of law (*compare Kimball v Normandeau*, 132 AD3d 1340, 1342 [4th Dept 2015] ["Defendants demonstrated that they took reasonable precautionary measures to remedy the hazardous lead condition after they received actual notice thereof"]). Plaintiff's medical and school records demonstrate that as a child he suffered developmental delays, learning disabilities, and behavioral issues consistent with exposure to lead (*Parker v Mobil Oil Corp.*, 7 NY3d 434, 448 [2006]).

Third-party defendant (Thau) established prima facie that he cannot be held liable for plaintiff's injuries. Before moving to the premises owned by defendant, plaintiff lived in an apartment owned by Thau for approximately one year, during which his blood-lead levels were well within normal range and he did not exhibit any developmental delays readily attributable to exposure to lead. In opposition, defendant failed to raise an issue of fact. Her argument that courts have found that even low blood-lead levels can be injurious is without merit (*see Veloz v*

Refika Realty Co., 38 AD3d 299 [1st Dept 2007], *lv denied* 9 NY3d 817 [2008]).

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

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

ENTERED: MAY 15, 2018

CLERK

Richter, J.P., Andrias, Webber, Gesmer, Moulton, JJ.

6557 Kenneth Simington, Index 26969/03
Plaintiff-Appellant,

-against-

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

The New York City Health and
Hospital Corporation,
Defendant-Respondent.

_____

Pollack, Pollack, Isaac & DeCicco, LLP, New York (Brian J. Isaac of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Tahirih M. Sadrieh of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered October 23, 2015, which granted the motion of New York City Health & Hospitals Corporation (HHC) for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

HHC established its entitlement to judgment as a matter of law by submitting evidence showing that plaintiff's injury occurred at the moment of his assault by two other inmates, and that there was no treatment they could have been rendered that would have prevented his blindness that was caused by the blunt force trauma he sustained during the assault (*see e.g. Bullard v St. Barnabas Hosp.*, 27 AD3d 206 [1st Dept 2006]). In opposition,

plaintiff failed to raise a triable issue of fact. The evidence plaintiff submitted was speculative and insufficient to raise an issue of fact as to whether HHC had departed from the standard of care or whether such alleged departures were a proximate cause of the blindness (*see Jackson v Montefiore Med. Center/The Jack D. Weiler Hosp. of the Albert Einstein Coll. of Medicine*, 146 AD3d 572 [1st Dept 2017]; *Rodriguez v Montefiore Med. Ctr.*, 28 AD3d 357 [1st Dept 2006]).

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

ENTERED: MAY 15, 2018

CLERK

Richter, J.P., Andrias, Webber, Gesmer, Moulton, JJ.

6558 Linda Greene Easley, Index 158328/12
Plaintiff-Appellant,

-against-

The Animal Medical Center,
Defendant-Respondent,

Brenna Zortman, et al.,
Defendants.

_____

Iannuzzi and Iannuzzi, New York (John Nicholas Iannuzzi of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Shlomo Hagler, J.), entered on or about November 28, 2016, which granted defendants' motions for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Because the dog that bit plaintiff had no known vicious propensities, no liability will attach to either of the defendant dog owners (*see Doerr v Goldsmith*, 25 NY3d 1114 [2015]; *Collier v Zambito*, 1 NY3d 444 [2004]), or defendant Animal Medical Center, the veterinary hospital where the dog bite occurred (*Petrone v*

Fernandez, 12 NY3d 546, 550 [2009]; *Bernstein v Penny Whistle Toys, Inc.*, 40 AD3d 224 [1st Dept 2007], *affd* 10 NY3d 787 [2008]; *Christian v Petco Animal Supplies Stores, Inc.*, 54 AD3d 707 [2d Dept 2008]).

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

ENTERED: MAY 15, 2018

CLERK

Richter, J.P., Andrias, Webber, Gesmer, Moulton, JJ.

6559 Herbert Moskowitz, doing business as Manhattan Realty Company,
Plaintiff-Appellant,

-against-

Tory Burch LLC, et al.,
Defendants-Respondents,

New York City Department of Buildings,
Defendant.

Index 159599/15

_____

Peluso & Touger, LLP, New York (Robert R. Moore, Jr. of counsel), for appellant.

Wasserman Grubin & Rogers, L.L.P., New York (Richard Wasserman of counsel), for Tory Burch LLC, respondent.

Fabiani Cohen & Hall, LLP, New York (Kevin B. Pollak of counsel), for Skanska USA Building Inc., respondent.

Kennedys CMK LLP, New York (Joseph P. McNulty of counsel), for Thornton Tomasetti, Inc., respondent.

Lewis Brisbois Bisgaard & Smith LLP, New York (Steven R. Montgomery of counsel), for Langan Engineering Environmental Surveying & Landscaping Architecture PPC, respondent.

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Order, Supreme Court, New York County (Robert R. Reed, J.), entered July 11, 2017, which denied plaintiff's motion for partial summary judgment on the claims for breach of contract, strict liability, and attorneys' and experts' fees, unanimously modified, on the law, to grant the motion as against defendant Tory Burch LLC (TBLLC) with respect to the strict liability claim

and the part of the breach of contract claim premised on the obligation contained in section 9(a) of the license agreement between plaintiff, TBLLC and defendant Skanska USA Building Inc., and otherwise affirmed, without costs.

Plaintiff alleges that damage was caused to a building he owns, at 153 Mercer Street in Manhattan, as a result of work performed at an adjacent property, at 151 Mercer Street, leased to defendant Tory Burch LLC (TBLLC) for the planned construction of a four-story retail building. In connection with the construction project, TBLLC retained defendant Skanska USA Building Inc. as the construction manager, defendant Langan Engineering, Environmental, Surveying and Landscape Architecture, PPC as the geotechnical engineer, and defendant Thornton Tomasetti, Inc. (TT) as the structural engineer.

Plaintiff established prima facie that TBLLC "cause[d]" soil or foundation work to be made, pursuant to the license agreement,[1] and that the work proximately caused damage to his building (*see* NY City Building Code [Administration Code of City of NY tit 28, ch 7] § BC 28-3309.4; *Coronet Props. Co. v L/M*

[1] In a related proceeding brought by TBLLC, this Court reversed an order that had granted TBLLC a judicial license to enter plaintiff's property to take steps to protect it (*see Matter of Tory Burch LLC v Moskowitz*, 146 AD3d 528 [1st Dept 2017]).

Second Ave., 166 AD2d 242, 243 [1st Dept 1990] [deciding motion for summary judgment on claim under Administrative Code former § 27-1031, now § 28-3309.4]). Plaintiff's evidence included an affidavit by Robert Moskowitz, an employee, who asserted on the basis of personal knowledge that the building was damaged after pile drilling was performed on TBLLC's behalf on the side of the 151 Mercer lot adjacent to 153 Mercer. TT's subsequent investigation on TBLLC's behalf concluded that the work on the project had caused damage to plaintiff's building. In opposition to plaintiff's motion, TBLLC failed to raise an issue of fact; its objections to plaintiff's evidence merely raise issues as to the nature and the extent of the damage to plaintiff's building attributable to the construction work.

TT's reports should have been considered as party admissions (*see Buckley v J.A. Jones/GMO*, 38 AD3d 461, 463 [1st Dept 2007], citing *Penn v Kirsh*, 40 AD2d 814 [1st Dept 1972]) and as admissions by an agent, since TT prepared the reports as TBLLC's agent to assess damage to plaintiff's building and recommend how to proceed (*see Rosasco v Cella*, 124 AD3d 447 [1st Dept 2015], citing *Georges v American Export Lines*, 77 AD2d 26, 33 [1st Dept 1980]). However, the reports are inadmissible against Skanska and Langan. Thus, plaintiff failed to meet his prima facie burden as to them.

Plaintiff established through evidence of the nature and timing of the damage that the damage was sustained after the license agreement was entered into, on April 2, 2015 (*see New Life Holding Corp. v Turner Constr. Co.*, 2014 NY Slip Op 32590[U] [Sup Ct, NY County 2014]). This evidence was consistent with the pile drilling schedule and TT's report that "[t]he majority of the movement at [plaintiff's building] appears to have taken place between June 10, 2015 and June 29, 2015" (*compare O'Hara v New School*, 118 AD3d 480 [1st Dept 2014] [no prima facie case under BC § 3309.4 where no evidence proffered that the requisite license under the statute was granted]).

Contrary to TBLLC's contention, the statute imposes strict liability (*see Yenem Corp. v 281 Broadway Holdings*, 18 NY3d 481, 491 [2012]; *American Sec. Ins. Co. v Church of God of St. Albans*, 131 AD3d 903, 905 [2d Dept 2015]). As to TT and Langan, plaintiff failed to establish that either of them was a "person who cause[d]" soil or foundation work to be made (BC § 3309.4; *see 87 Chambers, LLC v 77 Reade, LLC*, 122 AD3d 540 [1st Dept 2014]).

Plaintiff is correct that the terms of section 4(g) of the license agreement impose a reporting obligation on TBLLC and Skanska. However, while he established that the obligation was breached, he failed to establish any damages flowing from the

breach (*see Viacom Outdoor, Inc. v Wixon Jewelers, Inc.*, 82 AD3d 604 [1st Dept 2011]; *Lexington 360 Assoc. v First Union Natl. Bank of N. Carolina*, 234 AD2d 187, 189-190 [1st Dept 1996]).

Plaintiff is also correct that section 4(h) of the license agreement imposes a consulting obligation in connection with "any work potentially affecting the elevator shaft." This provision is unambiguous on its face (*see Chimart Assoc. v Paul*, 66 NY2d 570 [1986]). Had the parties desired to limit its application to masonry voids, they could have done so. However, plaintiff failed to establish damages resulting from the alleged breach of this provision, merely stating conclusorily that, had he been notified, pursuant to the provision, the damages would have been avoided.

Plaintiff failed to establish a breach of the provision requiring TBLLC and Skanska to indemnify him for attorneys' fees and professional fees. He did not identify the nature of the legal or expert fees sought. Nor did he allege, much less establish, that he made a demand for payment and the demand was refused.

Plaintiff established prima facie his entitlement to recovery under article 9 of the license agreement, which required TBLLC to pay him "$100.00 ... for each calendar day that site protection or monitoring devices remain ... after April 30, 2016

..., unless delay is caused *solely* by Moskowitz's unreasonable action or unreasonable delay" (emphasis added). In opposition, TBLLC failed to submit admissible evidence showing that the delay in removing the equipment was attributable "solely" to plaintiff.

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

ENTERED: MAY 15, 2018

CLERK

Richter, J.P., Andrias, Webber, Gesmer, Moulton, JJ.

6560 In re Jacqueline Ploss, etc., Index 101380/14
Petitioner-Appellant,

-against-

William J. Bratton, etc., et al.,
Respondents-Respondents.

_____

Law Office of Jeffrey L. Goldberg, Port Washington (Jeffrey L. Goldberg of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Eric Lee of counsel), for respondents.

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Order and judgment (one paper), Supreme Court, New York County (Gerald Lebovits, J.), entered July 7, 2016, denying the petition to annul respondents' determination, dated August 13, 2014, which denid petitioner's application for accidental death retirement benefits pursuant to General Municipal Law § 207-k (Heart Bill), and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The statutory presumption in petitioner's favor that her husband's heart condition and resulting death were service-related was rebutted by affirmative credible evidence (*see e.g. Matter of Titza v Kelly*, 138 AD3d 498 [1st Dept 2016]). The record supports respondents' finding that Officer Ploss's death was attributable to ventricular arrhythmia that he was predisposed to as a result of his severely reduced left

ventricular function, and that he did not suffer from coronary artery disease or hypertension (*see e.g. Matter of Modlin v Kelly*, 121 AD3d 464 [1st Dept 2014], *lv denied* 25 NY3d 907 [2015] *Matter of McNamara v Kelly*, 32 AD3d 747 [1st Dept 2006], *lv denied* 8 NY3d 810 [2007]). Such evidence was sufficient to rule out occupational stress as the cause of his poor cardiovascular health.

Following this Court's remand on petitioner's prior article 78 proceeding, respondents have done more than "point[] to gaps in petitioner's evidence" (113 AD3d 531, 531 [1st Dept 2014]). The assertion of Officer Ploss's cardiologist that Ploss's ventricular rate was very difficult to control, and this was possibly secondary to increased catecholamines resulting from job-related stress, was properly discredited. Respondents addressed this Court's prior concerns, explaining what catecholamines are and why they could not have been responsible for Officer Ploss's death.

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

ENTERED: MAY 15, 2018

CLERK

Richter, J.P., Andrias, Webber, Gesmer, Moulton, JJ.

6561 The People of the State of New York, Respondent, Ind. 3726/12

-against-

Angel Delgado, Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (Samuel E. Steinbock-Pratt of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Kristian D. Amundsen of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Ethan Greenberg, J. at speedy trial motion; Miriam R. Best, J. at suppression hearing, plea, and sentencing), rendered March 31, 2015, convicting defendant of two counts of robbery in the first degree, and sentencing him, as a second violent felony offender, to concurrent terms of 12 years, unanimously affirmed.

After balancing the relevant factors (*see People v Taranovich*, 37 NY2d 442 [1975]), we conclude that the court properly denied defendant's constitutional speedy trial motion relating to one of the robbery charges. There was a 3½-year delay between the arrest, upon which the People chose to defer prosecution because the victim had departed from the United States, and defendant's indictment. This delay was substantial, and the People failed to provide adequate reason for a

significant portion of it. However, this home invasion robbery was very serious, defendant was not incarcerated during the relevant period, and he has failed to demonstrate any prejudice resulting from the delay. Furthermore, the delay was not so egregious as to warrant dismissal regardless of specific prejudice (*see People v Wiggins*, __NY3d__, 2018 NY Slip Op 01111, *5-*6 [2018]). We also find no violation of defendant's federal rights to a speedy trial (*see Barker v Wingo*, 407 US 514, 530 [1972]), or to due process (*see United States v Lovasco*, 431 US 783 [1977]).

We find that defendant did not make a valid waiver of his right to appeal. Even though the language of the written waiver was not improper (*see People v Thomas*, 158 AD3d 434 [1st Dept 2018]), the court's oral colloquy was misleading, suggesting that a constitutional speedy trial claim was merely one example of a constitutional claim that could be raised notwithstanding the waiver, while other constitutional claims, such as suppression claims, would also survive the waiver. Accordingly, the purported waiver does not foreclose review of defendant's suppression claims. However, we reject defendant's suppression claims on the merits.

The record supports the hearing court's finding that the police had probable cause to arrest defendant for the home

invasion robbery at issue (*see generally People v Bigelow*, 66 NY2d 417, 423 [1985]).

At the lineup, the victim's husband, who did not witness the crime but admittedly suspected defendant of committing it and also provided some of the information leading to defendant's arrest, translated the prelineup instructions into Arabic for the victim, who had limited command of English. While this was far from ideal, and should have been avoided, under the circumstances of this case it did not render the lineup unduly suggestive. Most notably, and in contrast to the situation in *People v Delamota* (18 NY3d 107, 117-119 [2011]), the husband was not present during the identification procedure, and the sequence of events leading to the identification procedure rendered it unlikely that the husband had the ability to coach the victim in advance on whom to identify. Further, the husband testified at the hearing, and his testimony refuted any suggestion that he gave the victim any instructions or suggestions as to whom to identify.

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

ENTERED: MAY 15, 2018

CLERK

Richter, J.P., Andrias, Webber, Gesmer, Moulton, JJ.

6562 Mario Galvez, Index 300059/13
Plaintiff-Appellant, 83941/13

-against-

Columbus 95th Street LLC, et al.,
Defendants-Respondents.
- - - - -
[And a Third-Party Action]

_____

Gorayeb & Associates, P.C. New York (John M. Shaw of counsel), for appellant.

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Joel M. Simon of counsel), for Columbus 95th Street LLC, respondent.

Capehart & Scatcgard, P.A., New York (Alyson L. Knipe of counsel), for Xuncas Restoration Corp., respondent.

Weiner, Milo, Morgan & Bonanno, LLC, New York (Benjamin A. Jacobson of counsel), for Pinnacle Restoration Ltd, LLC, respondent.

_____

Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered November 28, 2016, which, insofar as appealed from as limited by the briefs, granted defendants' motions for summary judgment dismissing the Labor Law § 240(1) and 241(6) claims, granted defendant Pinnacle Restoration Ltd, LLC's motion for summary judgment dismissing the common-law negligence and Labor Law § 200 claims as against it, and denied plaintiff's motion for partial summary judgment on the Labor Law § 240(1) claim and leave to amend the bill of particulars to allege violations of

the 2008 Building Code of New York City (Administrative Code of City of NY), unanimously modified, on the law, to deny defendants' motions as to the Labor Law § 240(1) claim, and to grant plaintiff's motion for leave to amend the bill of particulars to allege a violation of § 3314.10.1 of the 2008 Building Code, and otherwise affirmed, without costs.

Plaintiff was injured while ascending to the top of a building on a motorized suspended scaffold. Plaintiff testified that the scaffold had swung into a recessed area between two horizontal concrete beams (spandrels) and, to clear the top spandrel, plaintiff and his coworker had to press their backs against the wall and use their legs to push the scaffold out as they moved it up. In pressing against the wall and pushing the scaffold with his legs, plaintiff injured his lower back.

Contrary to defendants' argument, the incident in which plaintiff was injured falls within the ambit of Labor Law § 240(1), because the scaffold proved inadequate to shield plaintiff from "'harm directly flowing from the application of the force of gravity to an object or person'" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 [2009] [emphasis removed], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]; *see also Dominguez v Lafayette-Boynton Hous. Corp.*, 240 AD2d 310 [1st Dept 1997]). The force of gravity caused the

scaffold to swing into the recessed areas between the spandrels, necessitating that plaintiff and his coworker use their backs to exert force to swing the scaffold out again. Nevertheless, neither side is entitled to summary judgment, because an issue of fact exists as to whether plaintiff's negligence was the sole proximate cause of his injuries (*see Montgomery v Federal Express Corp.*, 4 NY3d 805 [2005]). The testimony of plaintiff and his foreman conflict as to whether plaintiff had been instructed to push off the scaffold in the manner described.

Defendants are entitled to summary judgment dismissing the Labor Law § 241(6) claim, because Industrial Code (12 NYCRR) § 23-5.8(c)(2), which is concerned with the horizontal displacement of suspended scaffold platforms, is inapplicable to the facts of this case. While, contrary to defendants' contention, plaintiff's expert's calculations may be considered because the expert's conclusions are supported by evidence (*see e.g. Cuevas v City of New York*, 32 AD3d 372, 374 [1st Dept 2006]), they do not avail plaintiff, because it was not the horizontal displacement of the scaffold that caused his injury but the use of his back to push the scaffold.

Defendant Pinnacle Restoration Ltd, LLC, which supplied the suspended scaffold, is entitled to summary judgment dismissing the Labor Law § 200 and common-law negligence claims as against

it because the evidence fails to show either that it had notice of a dangerous or defective condition on the work site or that it controlled the means and methods of plaintiff's work (*see Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 [1st Dept 2012]). Although Pinnacle supplied the scaffold, defendant Xuncas Restoration Corp., plaintiff's employer, installed it, and there is no evidence that Pinnacle's president or his son, who were the only Pinnacle personnel on site, and only periodically, had notice that it was inadequate or defective (*cf. Higgins v 1790 Broadway Assoc.*, 261 AD2d 223, 225 [1st Dept 1999]). There is also no evidence that Pinnacle supervised, directed, or controlled plaintiff's work (*see Ross*, 81 NY2d at 505). Indeed, it is undisputed that Pinnacle did not direct Xuncas's work and that plaintiff received directions from his foreman only. The mere fact that Pinnacle had the authority to stop unsafe work does not show that it had the requisite degree of control and actually exercised that control (*Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 AD3d 446, 449 [1st Dept 2013]).

The court improvidently exercised its discretion in denying plaintiff's motion for leave to amend his bill of particulars to add allegations that 2008 Building Code of New York City (Administrative Code of City of NY) § 3314.10.1 was violated (*see*

Cherebin v Empress Ambulance Serv., Inc., 43 AD3d 364, 365 [1st Dept 2007]; *Noetzell v Park Ave. Hall Hous. Dev. Fund Corp.*, 271 AD2d 231, 232-233 [1st Dept 2000]). Although plaintiff did not provide an excuse for his delay in seeking leave, the delay was relatively short, and defendants demonstrated no prejudice. The allegation that section 3314.10.1 was violated is consistent with plaintiff's original theory that the scaffold, as installed, was deficient and inadequate. That section mandated that suspended scaffolds "be erected and operated in such a manner that suspension elements are vertical and in a plane parallel to the wall at all times." Further, the evidence required to support this new allegation is contained in the record. The court properly denied plaintiff leave to add allegations that the other sections of the building code he cited were violated.

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

ENTERED: MAY 15, 2018

CLERK

Richter, J.P., Andrias, Webber, Gesmer, Moulton, JJ.

6563 The People of the State of New York, Respondent, Ind. 5207/13

-against-

Daryl Elliot, Defendant-Appellant.

_____

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

Daryl Elliot, appellant pro se.

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

_____

Judgment, Supreme Court, New York County (Daniel FitzGerald, J.), rendered October 9, 2014, convicting defendant, after a jury trial, of two counts of robbery in the third degree, and sentencing him to concurrent terms of 2⅓ to 7 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, including its evaluation of any effects of the victim's intoxication.

Defendant's pro se ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters outside the record. Accordingly, since defendant has not made a

CPL 440.10 motion, the merits of these claims may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*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: MAY 15, 2018

CLERK

Richter, J.P., Andrias, Webber, Gesmer, Moulton, JJ.

6564-
6565 In re Robert Toussie, et al.,
Petitioners-Respondents,

-against-

Coastal Development, LLC,
et al.,
Respondents-Appellants.

- - - - -

Hal Lieberman,
Amicus Curiae.

Index 650227/16

Storch Amini PC, New York (Steven G. Storch of counsel), for appellants.

Lupkin PLLC, New York (Jonathan D. Lupkin of counsel), for respondents.

Emery Celli Brinckerhoff & Abady LLP, New York (Daniel J. Kornstein of counsel), for amicus curiae.

Judgment, Supreme Court, New York County (Charles E. Ramos, J.), entered August 15, 2017, in favor of petitioners, against respondents, in the total sum of $7,857,642.50, unanimously affirmed, without costs. Appeal from amended order, same court and Justice, entered June 16, 2017, which, to the extent appealed from as limited by the briefs, granted petitioners' motion to confirm the arbitration award, and denied respondents' motion to vacate the award, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Because respondents raised the alleged limitation on the

arbitrator's authority during the arbitration, as well as in opposition to petitioners' motion to confirm and in support of their motion to vacate, they did not wave their right to challenge the award (*Matter of Silverman [Benmor Coats]*, 61 NY2d 299, 309 [1984]; *Matter of Campbell v New York City Tr. Auth.*, 32 AD3d 350, 352 [1st Dept 2006]; *Matter of City of New York v Local 1549 of Dist. Council 37, Am. Fedn. of State, County & Mun. Empls.*, 248 AD2d 125, 126 [1st Dept 1998]).

Having reviewed the record, however, we conclude that the arbitrator did not exceed his powers by maintaining jurisdiction over the parties' dispute, the scope of which fell within the parties' agreements concerning arbitrable controversies (*see Silverman*, 61 NY2d at 308).

The damages award was appropriate, because specific performance was impossible (*see Matter of Wynyard v Antique Co. of N.Y.*, 214 AD2d 344, 344-345 [1st Dept 1995]; *see also Nicholson v 300 Broadway Realty Corp.*, 7 NY2d 240, 242 [1959]).

The guaranty expressly provides for petitioners' recovery of attorneys' fees, and the Settlement Agreement, pursuant to which the parties arbitrated, expressly incorporates the terms of the guaranty. Accordingly, petitioners could recover attorneys' fees in the arbitration.

We have considered respondents' remaining contentions and find them to be unavailing.

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

ENTERED: MAY 15, 2018

CLERK

Richter, J.P., Andrias, Webber, Gesmer, Moulton, JJ.

6566- SCI 3641/12
6566A- Ind. 556/12
6566B- 3458/12
6566C The People of the State of New York, Dkt. 6717/12
Respondent,

-against-

Denny Santos,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Nicole Neckless of counsel), for respondent.

_____

Judgments, Supreme Court, Bronx County (Leonard Livote, J. at plea; Raymond Bruce, J. at sentencing), rendered October 22, 2015, unanimously affirmed.

Although we find that defendant did not make a valid waiver of the right to appeal, we perceive no basis for reducing the sentence.

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

ENTERED: MAY 15, 2018

CLERK

Richter, J.P., Andrias, Webber, Gesmer, Moulton, JJ.

6567 In re Rebecca Spencer-Cedeno, Index 452521/16
Petitioner,

-against-

Howard Zucker, etc., et al.,
Respondents.

_____

The Bronx Defenders, Bronx (Megan K. O'Byrne of counsel), for petitioner.

Eric T. Schneiderman, Attorney General, New York (Seth M. Rokosky of counsel), for respondents.

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Determination of respondent New York State Department of Health, dated September 1, 2016, which upheld a determination of respondent New York State Office for People With Developmental Disabilities that petitioner failed to demonstrate that prior to age 22, she suffered from an intellectual disability that constituted a substantial handicap, unanimously annulled, on the law and the facts, without costs, the petition granted and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Manuel J. Mendez, J.], entered May 12, 2017), remanded to respondents to process petitioner's application for Medicaid-based services.

In order to obtain Medicaid-reimbursed home and community based services, an applicant must demonstrate that he or she suffers from a "developmental disability." An "intellectual

disability" that originated before age 22, is expected to continue indefinitely, and constitutes a "substantial handicap" to the person's ability to function normally in society, is a qualifying condition (Mental Hygiene Law § 1.03[22] [a][1], [b], [c] and [d]). The American Psychiatric Association Diagnostic and Statistical Manual of Mental Disorders (5th ed 2013) (Manual) defines "intellectual disability" as a disorder characterized by, inter alia, (1) general deficits in areas such as reasoning, problem solving and abstract thinking and (2) deficits in adaptive functioning, such as how well the person meets community standards of personal independence and social responsibility as compared to others of similar age and social responsibility. The term "intellectual disability" replaced the term "mental retardation."

Here, respondent's determination is not supported by substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-181 [1978]). Rather, the record demonstrates that petitioner met the qualifications as all of the evaluations that were performed before petitioner was 22 years old demonstrated an I.Q. below 70, which was the rough cut off for normal intellectual function. Deficits in her adaptive functioning were also noted repeatedly over the years. Moreover, it was entirely speculative to opine

that petitioner's I.Q. would have been higher but for co-occurring conditions.

Furthermore, it appears from the record that the Administrative Law Judge was confused by the change in nomenclature for petitioner's qualifying developmental condition.

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

ENTERED: MAY 15, 2018

CLERK

Richter, J.P., Andrias, Webber, Gesmer, Moulton, JJ.

6568-
6569 In re R.F. Lafferty & Co., Inc.,
Petitioner-Respondent,

-against-

Antonia Winter,
Respondent-Appellant.

Index 655013/16

_____

Antony Hilton, New York, for appellant.

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

_____

Order and judgment (one paper), Supreme Court, New York County (Manual J. Mendez, J.), entered April 11, 2017, confirming an arbitration award, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered September 6, 2017, which, to the extent appealable, denied respondent's motion for renewal, unanimously dismissed, without costs, as abandoned.

Respondent argues that the article 75 court erred in confirming the arbitration award because the award conflicted with a default judgment she had obtained against petitioner in a replevin action in Civil Court. The default judgment directed petitioner to turn over a certificate reflecting respondent's ownership of shares in Bancorp International Group Inc. (BCIT). The arbitration award directed petitioner to make good faith efforts to cause a certificate of respondent's shares in BCIT to

be issued in the event that the Depository Trust Company (DTC) lifted the global lock on the issuance of physical certificates for BCIT shares that it had imposed before respondent purchased the shares. Thus, the default judgment and the arbitration award do not conflict; they reflect the parties' circumstances. After respondent realized that petitioner did not possess the certificate - the BCIT shares being held by DTC - she commenced arbitration to compel petitioner to obtain the certificate for her. Contrary to respondent's contention, in view of the global lock on the issuance of BCIT certificates, the arbitration award directing petitioner to make good faith efforts to have the certificate issued in the event the global lock is lifted is not arbitrary and capricious. Respondent has not shown that the award should be vacated upon any of the grounds for vacatur set forth in CPLR 7511.

Respondent also argues that the arbitration award should be vacated based on the doctrines of comity and res judicata. However, she waived these arguments by commencing the arbitration proceeding (*see e.g. Bortman v Lucander*, 150 AD3d 417 [1st Dept 2017]).

Respondent argues that the award of attorneys' fees to petitioner exceeded the arbitrator's power because the arbitration agreement did not expressly provide for attorneys'

fees (*see* CPLR 7513; *Kidder, Peabody & Co. v McArtor*, 223 AD2d 502, 503 [1st Dept 1996]). However, both parties demanded attorneys' fees, and "mutual demands for counsel fees in an arbitration proceeding constitute, in effect, an agreement to submit the issue to arbitration, with the resultant award being valid and enforceable" (*Matter of Goldberg v Thelen Reid Brown Raysman & Steiner LLP*, 52 AD3d 392, 392-393 [1st Dept 2008], *lv denied* 11 NY3d 749 [2008]; *see also Matter of Cantor Fitzgerald & Co. v Pritchard*, 107 AD3d 476 [1st Dept 2013]).

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

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

ENTERED: MAY 15, 2018

CLERK

Richter, J.P., Andrias, Webber, Gesmer, Moulton, JJ.

6572- Index 151136/14
6573-
6574N Shane McMahon, etc., et al.,
Plaintiffs-Appellants-Respondents,

-against-

The Cobblestone Lofts Condominium, et al.,
Defendants-Respondents-Appellants,

Nova Restoration of NY Inc., et al.,
Defendants.

- - - - -

[And Other Actions]

- - - - -

Shane McMahon, etc., et al.,
Plaintiffs-Respondents,

-against-

The Cobblestone Lofts Condominium, et al.,
Defendants-Appellants,

Nova Restoration of NY Inc., et al.,
Defendants.

_____

Gordon Law LLP, New York (Michael R. Gordon of counsel), for appellants-respondents/respondents.

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New York (I. Elie Herman of counsel), for respondents-appellants/appellants.

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Orders, Supreme Court, New York County (Geoffrey D.S. Wright, J.), entered August 2, 2016 and April 25, 2017, which, respectively, granted in part and denied in part defendants' motion to dismiss the complaint, and granted in part and denied in part defendants' motion to resettle and reargue the prior

order, and order, same court (Erika M. Edwards, J.), entered October 10, 2017, which granted plaintiffs' motion for a preliminary injunction directing defendants to make the requested repairs to common elements of the building, unanimously affirmed, with costs.

Although so much of defendants' post-answer motion as sought to dismiss plaintiffs' claims under CPLR 3211(a)(1) was untimely, the court properly decided so much of the motion as sought dismissal under CPLR 3211(a)(7) for failure to state a cause of action, which may be made at any time (*see* CPLR 3211(e); *see e.g. Chuqui v Church of St. Margaret Mary*, 39 AD3d 397 [1st Dept 2007]). The record does not show that the court improperly relied upon documentary evidence in deciding the motion (*see generally Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976]).

The court properly dismissed the tort and contract claims against the managing agent defendant, Andrews, who was at all times acting as agent for a disclosed principal, the condominium defendant, Cobblestone. There was no evidence of Andrews' intention to substitute or superadd its liability for, or to, that of Cobblestone, and it was not in exclusive control of the building (*see Brasseur v Speranza*, 21 AD3d 297, 299 [1st Dept 2005]).

The court properly declined to dismiss the causes of action

relating to Cobblestone's contractual and statutory duties to repair and maintain the roof over the plaintiffs' penthouse (*see Daitch v Naman*, 25 AD3d 458 [1st Dept 2006]), and properly dismissed the negligence cause of action against it. The allegations concerning Cobblestone's defective work sound in breach of contract, not negligence (*see Board of Mgrs. of Soho N. 267 W. 124th St. Condominium v NW 124 LLC*, 116 AD3d 506, 507 [1st Dept 2014]). The complaint also fails to allege conduct that approaches the level of outrageousness or extremity necessary to support a claim of intentional infliction of emotional distress (*see Howell v New York Post Co.*, 81 NY2d 115, 121-122 [1993]). Plaintiffs' cause of action seeking an abatement fails since their unit did not suffer a "casualty loss" as required under the bylaws (*see Schottenstein v Windsor Tov, LLC*, 85 AD3d 546 [1st Dept 2011], *lv dismissed* 18 NY3d 879 [2012]).

The court properly denied dismissal of the injunctive relief claim and properly granted plaintiffs' subsequent motion for a preliminary injunction requiring Cobblestone to make all necessary repairs to prevent further infiltration of water in plaintiffs' unit. Plaintiff demonstrated a likelihood of success

on the merits, the prospect of irreparable harm absent an injunction and a balance of equities in their favor (*see Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839 [2005]).

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

ENTERED: MAY 15, 2018

CLERK

Richter, J.P., Andrias, Webber, Gesmer, Moulton, JJ.

6575N In re Amtrust Group, etc., Index 654453/16
Petitioner-Appellant,

-against-

American Transit Insurance Company,
Respondent-Respondent.

_____

Marchhausen & Fitzpatrick, P.C., Hicksville (Kevin P. Fitzpatrick of counsel), for appellant.

Marjorie E. Bornes, Brooklyn, for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Erika M. Edwards, J.), entered April 24, 2017, which denied the petition to vacate an arbitration award, dismissed the petition, and confirmed the arbitrator's award in favor of respondent American Transit Insurance Company, unanimously affirmed, without costs.

Where, as here, arbitration is compulsory pursuant to Insurance Law § 5105(b), "the arbitrator's findings are subject to 'closer judicial scrutiny' than a voluntary arbitration, and the award 'must have evidentiary support and cannot be arbitrary and capricious'" (*Matter of DTG Operations, Inc. v AutoOne Ins. Co.*, 144 AD3d 422, 422 [1st Dept 2016], quoting *Matter of Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 214, 223 [1996]). Here, petitioner did not meet its burden of

establishing its prima facie entitlement to benefits (*see Matter of DiNapoli v Peak Automotive, Inc.*, 34 AD3d 674, 675 [2d Dept 2006]). The arbitrator's finding was based upon petitioner's failure to comply with the PIP rules, namely, the absence of a proper payment ledger, which was a threshold issue, and was therefore rational, as it was based on the evidence before him (*see Matter of Public Serv. Mut. Ins. Co. v Fiduciary Ins. Co. of Am.*, 123 AD2d 933, 934 [2d Dept 2014]).

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

ENTERED: MAY 15, 2018

CLERK

Richter, J.P., Andrias, Webber, Gesmer, Moulton, JJ.

6576N Jose Marin, et al., Index 111531/07
Plaintiffs,

-against-

Constitutional Realty, LLC,
et al.,
Defendants.

- - - - -

Sheryl Menkes, Esq.,
Nonparty Appellant,

-against-

David B. Golomb, Esq.,
Nonparty,

Barbara Manheimer, etc.,
Nonparty Respondent.

_____

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

Parker Waichman, LLP, New York (Jay L. T. Breakstone of counsel), for respondent.

_____

Order, Supreme Court, New York County (Kathryn E. Freed, J.), entered April 12, 2017, which, to the extent appealed from as limited by the briefs, in granting nonparty David B. Golomb, Esq.'s motion insofar as it sought to authorize disbursal of attorneys' fees to the Estate of Jeffrey A. Manheimer, granted prejudgment interest from May 31, 2013, unanimously affirmed, without costs.

Following settlement of plaintiffs' personal injury action

in May 2013 for $8 million, nonparty Sheryl Menkes, Esq., disputed claims made by Manheimer and Golomb that they were entitled to receive a percentage of the net attorneys' fees awarded in the action under their respective fee-sharing agreements. The Court of Appeals ultimately determined that Manheimer's estate is entitled to receive 20% of net attorneys' fees, and Golomb is entitled to 12% (*Marin v Constitution Realty, LLC*, 28 NY3d 666, 669 [2017]). Thereafter, Golomb, who had been holding the fees in escrow, sought court approval for his accounting and permission to distribute the funds in accordance with the Court of Appeals' order. In response to that motion, Manheimer's estate supported Golomb's motion, and asked that it be awarded prejudgment interest on the amount due from the date of the settlement, which was the earliest ascertainable date the cause of action existed (CPLR 5001[b]).

The court correctly determined that Manheimer's estate was entitled to prejudgment interest on his attorneys' fees from the date of settlement of the personal injury action (*see 1199 Hous. Corp. v Jimco Restoration Corp.*, 77 AD3d 502, 503 [1st Dept 2010]; *Solow Mgmt. Corp. v Tanger*, 19 AD3d 225, 226-227 [1st Dept 2005]). Although Manheimer was entitled to 20% of net attorneys' fees under the "plain language" of his agreement with Menkes (*Marin*, 28 NY3d at 669), Menkes resisted his claim and moved to

limit him to quantum meruit recovery. Under the circumstances, Manheimer's estate was appropriately awarded prejudgment interest in order to make it whole (*see J. D'Addario & Co., Inc. v Embassy Indus., Inc.*, 20 NY3d 113, 117-118 [2012]; *Samuel v Druckman & Sinel, LLP*, 12 NY3d 205, 210 [2009]).

The Court has considered Menkes's other arguments and finds them unavailing.

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

ENTERED: MAY 15, 2018

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Dianne T. Renwick, J.P.
Sallie Manzanet-Daniels
Marcy L. Kahn
Cynthia S. Kern
Anil C. Singh, JJ.

6090
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_____x

In re the Center for Discovery, Inc.,
Petitioner-Appellant,

-against-

NYC Department of Education,
Respondent-Respondent.
_____x

Petitioner appeals from a judgment of the Supreme Court, New York County (Erika Edwards, J.), entered August 2, 2017, granting respondent's cross motion to deny the petition seeking to annul respondent's purported determination, dated August 18, 2016, which denied petitioner's request for reimbursement for special services it is providing to a child with disabilities on the ground of failure to exhaust administrative remedies, and dismissing the proceeding brought pursuant to CPLR article 78.

Moritt Hock & Hamroff LLP, Garden City (Robert L. Schonfeld of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Qian Julie Wang and Deborah A. Brenner of counsel), for respondent.

MANZANET-DANIELS, J.

This case presents the question of whether petitioner the Center for Discovery has exhausted its administrative remedies as to respondent NYC Department of Education (NYCDE) in a case where respondent specifically ordered the amendment of the Individualized Education Plan (IEP) of D.P., a 12-year-old child with autism and other disabilities, to mandate that petitioner provide additional services to D.P., yet declined to reimburse petitioner for those same services.

Petitioner operates a private residential school for children with intellectual and developmental disabilities and complex medical conditions in Sullivan County, New York. The facility is comprised of both a school and an intermediate care facility where the students live during non-school hours. Petitioner's program is jointly overseen by respondent, which licenses the school component part of the program, and the New York State Office for People with Developmental Disabilities (OPWDD), which licenses the residential program.

D.P. has been residing at petitioner's facility since December 2015. His primary diagnosis is autism spectrum disorder, but he also suffers from obsessive compulsive disorder and ADHD. D.P. has engaged in a pattern of aggressive and self-injurious behavior since entering the facility. On one occasion

he pulled out four of his own teeth, necessitating that he be physically restrained by staff.

Believing D.P. to present a danger to staff, other children, and himself, petitioner brought an action in the United States District Court for the Eastern District of New York seeking to have D.P. removed from its school.

Following institution of the action, respondent's Committee on Special Education (CSE) held a meeting on August 12, 2016, with respect to D.P.'s IEP. Petitioner's representatives participated via telephone.

At the meeting, respondent proposed that D.P. receive additional therapeutic and safety services in order to safely remain at petitioner's facility, including an around-the-clock one-on-one crisis management paraprofessional, and psychological and behavioral services by a board-certified analyst to monitor and oversee implementation of the behavior intervention plan. The additional services were not part of D.P.'s initial IEP, and the tuition rate set and paid by respondent did not include reimbursement for any of the additional services.

Dr. Ellen Fleishman, the chairperson of respondent's CSE, allegedly advised petitioner's staff that respondent would pay for the additional services. Respondent amended the IEP to mandate that petitioner provide the additional services, and

petitioner has provided (and continues to provide) such services in accordance with the amended IEP. Petitioner asserts that notwithstanding the amendment of the IEP, and the alleged assurances by respondent's chair as to payment, respondent immediately reneged on its promise to pay for the additional services, except as to 30 hours per week of one-on-one crisis management paraprofessional services during the school day.

Petitioner filed this article 78 proceeding seeking to compel respondent to reimburse it for the additional services mandated by the amended IEP. Petitioner argued that respondent was required by law to arrange for appropriate services for a child with a disability and had recognized its obligations to pay for these services at the meeting; that this representation induced petitioner to provide the services; that respondent's failure to pay was manifestly unjust because petitioner had changed its position in reliance on the representation; and that respondent was estopped from arguing that it had no responsibility for reimbursing petitioner for the services petitioner rendered pursuant to the amended IEP.

Respondent moved to dismiss the proceeding, asserting that it was not responsible for reimbursing petitioner for the additional services mandated by the amended IEP. Respondent asserted, inter alia, that petitioner had failed to exhaust its

administrative remedies.

The Supreme Court dismissed the proceeding, accepting respondent's argument that petitioner had failed to exhaust its administrative remedies. We now reverse.

As an initial matter, we disagree that the doctrine of "exhaustion of remedies" precludes review of this case (*see Matter of Ward v Bennett*, 79 NY2d 394, 400 [1992] [since there were no further administrative avenues available for review of the denial of a building permit, "the exhaustion doctrine is not implicated here"]).

A "final and binding" determination is one where the agency "reached a definitive position on the issue that inflicts actual, concrete injury," and the injury may not be "significantly ameliorated by further administrative action or by steps available to the complaining party" (*Walton v New York State Dept. of Correctional Servs.*, 8 NY3d 186, 194 [2007]).

Respondent reached a definitive position concerning reimbursement for the additional services mandated by the amended IEP that inflicted concrete injury on petitioner. Counsel's August 18, 2016 email clearly stated that the City would not be reimbursing petitioner for the additional services mandated by the amended IEP. Petitioner had no available means of seeking review of respondent's decision from respondent or any other City

or State agency empowered to review, overturn, or reverse the City's determination concerning reimbursement for the services explicitly mandated by the City in the amended IEP. The email was thus the "final" determination of respondent City on the issue (*see New York Assn. of Counties v Axelrod*, 78 NY2d 158, 165-166 [1991] [determination informing the petitioner that it was aggrieved by a government action was "final" for purposes of judicial review]; *Matter of Spyhalsky v Cross Constr.*, 294 AD2d 23, 25 [3d Dept 2002] [Workers' Compensation Board determination final where "[t]he Board articulated its final position on the issue"]; *Compass Adjusters & Investigators v Commissioner of Taxation & Fin. of State of N.Y.*, 197 AD2d 38, 41 [3d Dept 1994] [allegedly nonbinding opinion letter which expressed the agency's definitive position on the question of whether the services rendered by the plaintiffs were taxable was "final"]; *see also Matter of Essex County v Zagata*, 91 NY2d 447, 454 [1998] [letter from agency that set forth "its definitive position and signaled the completion of agency activity" was "final"]).

We thus conclude that petitioner has exhausted its administrative remedies as to respondent City on the question of whether the City must reimburse petitioner for the additional services mandated by respondent City in the amended IEP.

Since the motion court erred in granting the cross motion to

dismiss the proceeding on the ground of exhaustion of remedies, we are obliged to remand the matter to the Supreme Court to permit respondent to file an answer pursuant to CPLR 7804(f) (*see Matter of Kickertz v New York Univ.*, 25 NY3d 942 [2015]).

On remand, the Supreme Court is to determine whether respondent, having expressly amended the IEP to mandate that respondent provide the additional services, must reimburse petitioner for the additional services it explicitly required that petitioner furnish. We note that under relevant NYSED regulations, respondent "shall . . . arrange for the appropriate special education programs and services to be provided to a student with a disability as recommended by the committee on special education" (8 NYCRR 200.2[d][1]). Among the stated purposes of the Individuals with Disabilities Education Act (20 USC § 1400 *et seq.*) are to "ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs," and to assist the state and localities to "provide for the education of all children with disabilities" (§ 1400[d][1][A][C]). The Act requires that an appropriate "interagency agreement or other mechanism for agency coordination" be in place among the relevant agencies to ensure that all appropriate educational services are provided, and that

such mechanism defines the financial responsibility of each agency, the conditions under which a local educational agency shall be reimbursed, and the procedures for resolving interagency disputes concerning reimbursement (§ 1412[a][12][A][i-iii]).

Petitioner also alleges that it relied on respondent's representation that it would be reimbursed for the additional services mandated and provided under the amended IEP. While estoppel is generally not available in an action against a government agency, this case presents a factual dispute as to the applicability of the doctrine that must be determined upon remand (*see Bender v NYC Health & Hosp. Corp.,* 38 NY2d 662, 668 [1976]).

Accordingly, the judgment of the Supreme Court, New York County (Erika Edwards, J.), entered August 2, 2017, granting respondent's cross motion to deny the petition seeking to annul respondent's purported determination, dated August 18, 2016, which denied petitioner's request for reimbursement for special services it is providing to a child with disabilities on the ground of failure to exhaust administrative remedies, and dismissing the proceeding brought pursuant to CPLR article 78, should be reversed, on the law, without costs, and the matter remanded for the filing of an answer pursuant to CPLR 7804(f) and for further proceedings.

All concur.

Judgment, Supreme Court, New York County (Erika Edwards, J.), entered August 2, 2017, reversed, on the law, without costs, and the matter remanded for the filing of an answer pursuant to CPLR 7804(f) and for further proceedings.

Opinion by Manzanet-Daniels, J. All concur.

Renwick, J.P., Manzanet-Daniels, Kahn, Kern, Singh, JJ.

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

ENTERED: MAY 15, 2018

CLERK