SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 22, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

16336-
16337N Carlos Rodriguez,
Plaintiff-Appellant-Respondent,

-against-

City of New York,
Defendant-Respondent-Appellant.

Index 109444/11

Kelner & Kelner, New York (Joshua D. Kelner of counsel), for appellant-respondent.

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

Upon remittitur from the Court of Appeals (_ NY3d _, 2018 NY Slip Op 02287 [2018]), order, Supreme Court, New York County (Kathryn E. Freed, J.), entered October 22, 2014, which, to the extent appealed from, denied plaintiff's motion for partial summary judgment on the issue of liability, unanimously reversed, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiff, a Department of Sanitation (DOS) garage worker tasked with putting snow chains on truck tires, was injured when a sanitation truck backing into a service bay skidded on ice into

a parked car, propelling it into plaintiff. The truck was driven by Gilbert Ramos and "guided" by Earl Carter, both DOS employees.

Ramos testified that approximately thirty seconds after he started backing up, Carter made an "[a]brupt" signal for him to stop. As soon as Ramos saw Carter's signal, he "hit the brake" and "jerked the truck." Although Ramos pumped the brake, the truck continued skidding and hit the car.

Carter testified that Ramos was driving the truck towards the garage "a bit quicker" than he had with the others he backed in that day. Carter signaled to Ramos to "take it easy" and Ramos slowed down. After Ramos positioned the truck in front of the bay, Carter gave Ramos the signal to start backing into the garage, which he did at approximately five miles per hour. At some point, the truck slid approximately three feet and Carter signaled Ramos to stop. However, Ramos continued to back up and the truck kept sliding. Carter then started waving his hands and yelling at Ramos to stop. Approximately two seconds later, Ramos pressed the brake. Although the truck at first stopped, it then "kind of slid" approximately two more feet before Carter heard a crunching sound and knew that Ramos had hit something.

On a prior appeal, we affirmed the denial of plaintiff's motion for partial summary judgment as to liability on the ground that plaintiff was required to make a prima facie showing of

freedom from comparative fault in order to obtain summary judgment, which he did not do (142 AD3d 778 [1st Dept 2016]). The Court of Appeals reversed that portion of our order, holding that plaintiff was not required to demonstrate absence of his own comparative fault to obtain partial summary judgment on issue of liability (2018 NY Slip Op 02287 [Apr 3, 2018]), and remitted the case to this Court "for consideration of issues raised but not determined on the appeal" (*id.* at *9), namely whether material issues of fact exist as to defendant's negligence, which bar plaintiff from obtaining partial summary judgment.

Plaintiff made out a prima facie showing that defendant was negligent by demonstrating that the sanitation truck driven by Ramos, who was being guided by Carter, backed into the parked car that struck him, shifting the burden to defendant of advancing a non-negligent explanation for the accident (*see Guzman v Schiavone Constr. Co.*, 4 AD3d 150, 150 [1st Dept 2004], *lv dismissed, denied* 3 NY3d 694 [2005] ["A collision with a stationary vehicle amounts to prima facie evidence of negligence on the part of the operator of the moving vehicle"]).

Defendant failed to offer a non-negligent explanation for the accident. It was Ramos's and Carter's responsibility to take into account weather and road conditions and to tailor their actions accordingly to avoid collisions (*see LaMasa v Bachman*, 56

AD3d 340 [1st Dept 2008]). The record demonstrates that the truck hit the parked car either because Ramos reacted to an abrupt hand signal from Carter and hit the brakes while he was driving on ice, causing a skid he could not abate, or because Ramos failed to adequately respond to Carter's directives. Whether there were chains on the tires or not, defendant's employees were obligated to maintain control of the truck and to avoid collisions with parked cars while backing up, and were negligent in failing to do so (*see* Vehicle and Traffic Law § 1211(a); *Garcia v Verizon N.Y., Inc.*, 10 AD3d 339, 340 [1st Dept 2004] ["the evidence submitted by both parties demonstrates that defendants' driver was negligent as a matter of law in backing up the truck into plaintiffs' stopped car without taking adequate precautions . . . . Contrary to defendants' argument, neither the fact that defendants' driver was attempting to clear a path for a bus, nor that he and his coworker looked to see if another vehicle was behind the truck, constitute a legal excuse for their negligent conduct"] [internal citations omitted]). Nor did defendant raise a material issue of fact whether the accident was foreseeable.

Carter acknowledged that it was not an unusual occurrence for a sanitation worker to be performing job duties at the accident location.

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

ENTERED: MAY 22, 2018

CLERK

Acosta, P.J., Tom, Webber, Gesmer, Singh, JJ.

5003 Neil Altman, et al., Index 162752/15
Plaintiffs-Respondents,

-against-

Georgia Properties, Inc.,
Defendant-Appellant.

_____

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Nancy M. Bannon, J.), entered April 24, 2017,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated April 20, 2018,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

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

ENTERED: MAY 22, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Andrias, Kapnick, Webber, JJ.

6207 In re Bernethea Curry, Index 100578/16
Petitioner,

-against-

New York City Housing Authority,
Respondent.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Jamila Wideman of counsel), for petitioner.

David I. Farber, New York (Laura R. Bellrose of counsel), for respondent.

_____

Determination of respondent New York City Housing Authority (NYCHA), dated February 24, 2016, which, after a hearing, terminated petitioner's public housing tenancy upon a finding that she violated a permanent exclusion stipulation, unanimously confirmed, the petition denied and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Shlomo Hagler, J.], entered September 16, 2016), dismissed, without costs.

In November 2007, NYCHA charged petitioner, a tenant at the Red Hook West Houses in Brooklyn, with non-desirability and breach of NYCHA's rules and regulations, alleging that her son Darryl possessed and sold crack cocaine on or near the complex's grounds. By stipulation dated December 17, 2007 (2007 stipulation), petitioner admitted the charges and agreed to

permanently exclude Darryl from her apartment. Specifically, petitioner agreed that she would not permit Darryl to reside in or visit the apartment, and acknowledged that her tenancy would be terminated if he were found there.

In September 2009, NYCHA charged petitioner with violating the 2007 stipulation, alleging that investigators had found Darryl in the apartment on June 16, 2009. At a subsequent hearing, petitioner admitted that she had allowed Darryl to spend the night in her apartment. The hearing officer sustained the charge, but declined to terminate petitioner's tenancy, and instead placed her on probation for one year.

In January 2015, NYCHA again charged petitioner with violating the terms of the 2007 stipulation, alleging that on or about September 6, 2013, investigators found Darryl in petitioner's apartment. After a hearing, the hearing officer sustained the charge, and concluded that petitioner's tenancy should be terminated. The hearing officer noted that termination was the appropriate disposition because petitioner had previously violated the 2007 stipulation. Petitioner then commenced this article 78 proceeding challenging the termination of her tenancy on the ground that it was based on a "false allegation." The petition court transferred the matter to this Court pursuant to CPLR 7804(g) because the petition raised the issue of substantial

evidence.

The hearing officer's determination that petitioner violated the 2007 stipulation is supported by substantial evidence (*Matter of Quinones v New York City Hous. Auth.*, 129 AD3d 537, 537 [1st Dept 2015]). The record shows that on September 6, 2013, an investigator visited the apartment, and an individual matching Darryl's photograph answered the door. Petitioner, who was present in the apartment, claimed that the man who had answered the door was her son David. The man, however, was unable to produce any identification. The investigator later obtained David's photograph and confirmed that Darryl, not David, was present in the apartment. Petitioner's presence in the apartment that day, and her false claim that the man who was with her was not Darryl, support a finding that she permitted Darryl to enter the apartment. Although petitioner testified that no investigator had ever visited the apartment in 2013, the hearing officer found petitioner's testimony, considered with her demeanor, was not credible. No basis exists to disturb this credibility determination (*see Latoni v New York City Hous. Auth.*, 95 AD3d 611 [1st Dept 2012]).

Petitioner's contentions about the conduct of the hearing officer and the performance of her representative are unpreserved since they were not raised at the administrative level (*see*

Matter of Jenkins v New York City Hous. Auth., Amsterdam Houses, 129 AD3d 432, 432 [1st Dept 2015]). Nor did petitioner raise these complaints in her article 78 petition (*see Matter of Boyd v Perales*, 170 AD2d 245 [1st Dept 1991], *lv denied* 78 NY2d 851 [1991]). Because these claims are unpreserved, "this Court has no 'discretionary authority' to reach [them] in the interest of justice" (*Matter of OTR Media Group v Board of Stds. & Appeals of the City of N.Y.*, 141 AD3d 417, 417-418 [1st Dept 2016], *lv denied* 28 NY3d 912 [2017], quoting *Matter of Khan v New York State Dept. of Health*, 96 NY2d 879, 880 [2001]; *see Matter of SCE Group Inc. v New York State Liq. Auth.*, — AD3d —, 2018 NY Slip Op 01661, *1 [1st Dept 2018]; *Green v New York City Police Dept.*, 34 AD3d 262 [1st Dept 2006]).

Under the circumstances presented, including petitioner's previous violation of the 2007 stipulation and her attempt to deceive the investigator, the penalty of termination does not

shock our sense of fairness (*see Matter of Gibbs v New York City Hous. Auth.*, 82 AD3d 412, 413 [1st Dept 2011]).

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

ENTERED: MAY 22, 2018

CLERK

Sweeny, J.P., Renwick, Mazzarelli, Gesmer, Singh, JJ.

6494 The People of the State of New York, Respondent, Ind. 1551/15

-against-

Christopher Cori, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Jill Konviser, J.), rendered March 1, 2016, unanimously affirmed.

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

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

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

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

ENTERED: MAY 22, 2018

CLERK

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

6621 The People of the State of New York, Ind. 560/15
Respondent,

-against-

Anthony Scott,
Defendant-Appellant.

_____

Cardozo Criminal Appeals Clinic, New York (Stanley Neustadter of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Michael J. Yetter of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Juan M. Merchan, J.), rendered December 15, 2015, convicting defendant, after a jury trial, of burglary in the second degree, criminal possession of a weapon in the third degree and possession of burglar's tools, and sentencing him, as a second felony offender, to an aggregate term of six years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The evidence plainly established that defendant unlawfully entered a store with intent to commit a crime therein. Defendant entered the store in violation of a trespass notice, while carrying a tinfoil-lined bag designed to thwart the store's security system. He then secreted several expensive items in the bag, which were

recovered by security personnel. Although defendant had approached a cash register and presented some inexpensive items for purchase, the evidence supports the conclusion that he never intended to pay for the items concealed in the bag, regardless of whether he was carrying sufficient funds to do so. The evidence also established that "while in the building or in immediate flight therefrom," defendant "[used] or threaten[ed] the immediate use of a dangerous instrument" (Penal Law 140.25[1][c]) when he grabbed a knife and pointed it at the security guard and pursuing police officers.

Moreover, there was no reasonable view of the evidence, viewed in a light most favorable to defendant, that he unlawfully entered the store without larcenous intent. Accordingly, the court properly declined, on that ground, to charge third-degree trespass as a lesser included offense. We note also that third-degree trespass does not qualify as a lesser included offense of

burglary (*see People v Santiago*, 143 AD3d 545, 546 [1st Dept 2016], *lv denied* 28 NY3d 1127 [2016]).

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

ENTERED: MAY 22, 2018

CLERK

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

6622 Confederación Sudamericana de Fútbol, Index 655619/16
Plaintiff-Appellant,

-against-

International Soccer Marketing, Inc., etc., et al.,
Defendants-Respondents,

Libertad Marketing Deportivo, et al.,
Defendants.

_____

Dewey Pegno & Kramarsky LLP, New York (David S. Pegno of counsel), for appellant.

Walden Macht & Haran LLP, New York (Sean Haran of counsel), for respondents.

_____

Order, Supreme Court, New York County (Barry Ostrager, J.), entered November 14, 2017, which granted defendants International Soccer Marketing, Inc. and Zorana Danis's motion to dismiss the complaint as against them on the grounds of a Paraguayan forum selection clause and forum non conveniens, unanimously affirmed, with costs.

Inasmuch as it was plaintiff that demanded that the forum selection clause in the agreement between itself, defendant International Soccer Marketing, Inc. (ISM), and defendant Bridgestone Corporation be revised to establish the courts of Paraguay as the forum for the hearing of any dispute related to the agreement, plaintiff will not be heard to complain that there

was no mutual assent to the revision. To the extent the assent of Bridgestone, which is no longer a party to this action, remains relevant, the record supports ISM and its president defendant Danis's claims of having apprised Bridgestone of the need to revise the clause and contains internal Bridgestone communications reflecting its assent to the revisions. That Bridgestone apparently made the decision not to re-execute the agreement after the revisions were made does not undermine the validity of the revised clause, given that Bridgestone has not called the validity of the clause into question. The fact that certain discrete provisions of the agreement would go into effect only after Bridgestone had signed the agreement is not relevant, since those provisions are not at issue here, and there is no analogous language either in Article 17 of the agreement, which contains the choice of law provision, or in a clause applicable to all terms of the contract (*cf. Naderi v North Shore-Long Is. Jewish Health Sys.*, 135 AD3d 619 [1st Dept 2016] [breach of contract claims premised on denial of procedural due process rights dismissed where contract contained express provisions barring procedural rights]).

Notwithstanding the larger backdrop of fraud against which this dispute arises, plaintiff failed to show that the forum selection clause should be invalidated on grounds of fraud. It

was plaintiff that demanded the revisions to the forum selection clause, and plaintiff knew all along that the revisions were being made. Nor does the record show that Bridgestone was defrauded, given the evidence of Danis's communications with Bridgestone representative Matias Borges about the need to revise the forum selection clause. Moreover, Danis attested that she understood that Borges was the appropriate Bridgestone contact, and plaintiff failed to show that she knew, or should have known, otherwise.

We see no reason to disturb the trial court's determination that New York is not a convenient forum for the resolution of this dispute (*see Norex Petroleum Ltd. v Blavatnik*, 151 AD3d 647, 648 [1st Dept 2017], *lv denied* 30 NY3d 906 [2017]). As plaintiff's own pleading shows, no party resides or has its principal place of business in New York. Danis, who lives in New Jersey, may own property in New York, but the property is not related to this dispute. Even if Danis used New York bank accounts to make unlawful payments, that is not sufficient for New York courts to retain the action (*see Mashreqbank PSC v Ahmed Hamad Al Gosaibi & Bros. Co.*, 23 NY3d 129, 137 [2014]). Danis and others may be involved in criminal proceedings in the United States District Court for the Eastern District of New York, but

plaintiff failed to identify individuals located here who would be witnesses in this dispute.

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

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

ENTERED: MAY 22, 2018

CLERK

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

6623 In re David R.,

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

_____

Dawne Mitchell, The Legal Aid Society, New York (Marcia Egger of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Jason Anton of counsel), for presentment agency.

_____

Order of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about March 21, 2017, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he had committed acts that, if committed by an adult, would constitute attempted criminal sexual act in the first degree, sexual abuse in the first and third degrees, attempted sexual abuse in the first and third degrees, forcible touching, and attempted sexual misconduct, and placed him on level two probation for 12 months, unanimously modified, on the law, to the extent of vacating the finding as to attempted third-degree sexual abuse and dismissing that count, and otherwise affirmed, without costs.

The court's finding was based on legally sufficient evidence and 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 court's credibility determinations. With regard to attempted crimes, the evidence satisfied the requirement that the offenses come dangerously close to completion (*see People v Naradzay*, 11 NY3d 460, 466-468 [2008]).

As the presentment agency concedes, the attempted third-degree sexual abuse count should be dismissed as a lesser included offense. However, we decline to dismiss any other counts.

Probation was the least restrictive dispositional alternative consistent with appellant's needs and the community's need for protection (*see Matter of Katherine W.*, 62 NY2d 947 [1984]). The underlying incident was a violent sexual attack. Furthermore, appellant did not take responsibility for his actions or express remorse, and his school disciplinary and academic record was poor.

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

ENTERED: MAY 22, 2018

CLERK

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

6624 The People of the State of New York, Respondent, Ind. 1723/13

-against-

Trent Patterson, Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (John Vang of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Ellen N. Biben, J.), rendered November 9, 2015, convicting defendant, after a jury trial, of burglary in the second degree, robbery in the second degree (two counts) and criminal impersonation in the first degree, and sentencing him, as a second felony offender, to an aggregate term of 10 years, unanimously reversed, on the law, and the matter remanded for a new trial.

The court erred in denying defense counsel's for-cause challenges to two prospective jurors whose statements during voir dire suggested that they were predisposed to believe that an indictment is an indication of guilt (*see People v Barber*, 269 AD2d 758, 760 [4th Dept 2000]; *People v Brown*, 111 AD2d 248, 249 [2d Dept 1985]). While this possibility of bias might well have been dispelled if the court had sought to elicit unequivocal

assurances of impartiality from the prospective jurors (*see e.g. People v Knight*, 29 AD3d 306 [1st Dept 2006], *lv denied* 7 NY3d 813 [2006]), the court did not do so.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342 [2007]). Because we are ordering a new trial, we do not reach defendant's remaining contention.

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

ENTERED: MAY 22, 2018

CLERK

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

6625 The People of the State of New York, Respondent, Ind. 6455/09

-against-

Nathalie Ambroise, Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Samuel Z. Goldfine of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Lewis Bart Stone, J.), rendered January 6, 2011, convicting defendant, upon her plea of guilty, of grand larceny in the fourth degree, and sentencing her, as a second felony offender, to a term of 1½ to 3 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of vacating the second felony offender adjudication and remanding for further sentencing proceedings, and otherwise affirmed.

Defendant's challenge to the voluntariness of her plea is unpreserved (*see People v Conceicao*, 26 NY3d 375 [2015]), and we decline to review it in the interest of justice. As an alternative holding, we find that the record, viewed as a whole, establishes the voluntariness of the plea. When defendant replied affirmatively to a question about being "under the

influence of alcohol, drugs or medication," the court asked, "Are you alert and aware of where you are and what you are doing?" Defendant again responded affirmatively. Although it would have been the better practice to have inquired into what substance defendant had taken, and when she had last taken it, the court's followup question was sufficient under the circumstances. The plea colloquy cast no doubt on defendant's competency, and the court was able to view her demeanor and assess her capacity to plead guilty (*see People v Alexander*, 97 NY2d 482, 486 [2002]).

Because it is undisputed that defendant was improperly sentenced as a second felony offender based on a Florida conviction, we exercise our interest of justice jurisdiction accordingly. On remand, the People may submit additional materials bearing on defendant's predicate status, or allege a different prior felony conviction, if there is one, as the basis for a predicate felony adjudication.

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

ENTERED: MAY 22, 2018

CLERK

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

6626 Anthony Campbell, Index 306388/14
Plaintiff-Appellant,

-against-

Momodou S. Drammeh, et al.,
Defendants-Respondents.

_____

Felix Kozak, Brooklyn (Jeff Henle of counsel), for appellant.

Baker, McEvoy, Morrissey & Moskovits, P.C., Brooklyn (Stacy R. Seldin of counsel), for Momodou S. Drammeh and Paraboth Cars, Inc., respondents.

Russo & Tambasco, Melville (Yamile Al-Sullami of counsel), for Kirby Rikona Joseph McKinley, respondent.

_____

Order, Supreme Court, Bronx County (Paul L. Alpert, J.), entered on or about July 7, 2017, which granted defendants' motions for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Defendants established prima facie that plaintiff did not sustain serious injury within the meaning of Insurance Law § 5102(d) to his cervical or lumbar spine or right shoulder as a result of the motor vehicle accident through the affirmed reports of their radiologist, who found that any claimed injury was the result of preexisting degenerative conditions (*see Thomas v NYLL Mgt. Ltd.*, 110 AD3d 613 [1st Dept 2013]). Defendants submitted plaintiff's orthopedist's findings that the ranges of motion in

the allegedly injured right shoulder and the uninjured left shoulder were the same (*see Camilo v Villa Livery Corp.*, 118 AD3d 586 [1st Dept 2014]). In addition, defendants pointed to the evidence that plaintiff ceased all treatment for his claimed injuries within four months after the accident (*see Pommells v Perez*, 4 NY3d 566, 572 [2005]). They also submitted an MRI report and an operative report contained in plaintiff's own medical records showing shoulder conditions such as bursitis and hypertrophy, which their expert explained were degenerative in nature (*see Franklin v Gareyua*, 136 AD3d 464 [1st Dept 2016], *affd* 29 NY3d 925 [2017]; *Walker v Whitney*, 132 AD3d 478 [1st Dept 2015]).

In opposition, plaintiff failed to raise an issue of fact as to his claimed spinal injuries, since he submitted no opinion about whether those injuries were caused by the accident, rather than degeneration (*see Walker*, 132 AD3d at 478–79), and no evidence of treatment (*see Pommells*, 4 NY3d at 572). As for his right shoulder claim, plaintiff's orthopedic surgeon opined before performing surgery that any injuries were causally related to the accident. However, he failed to address or explain either the findings in plaintiff's own MRI of hypertrophic changes and of no acute fracture or dislocation. He also did not address his own operative finding of bursitis (*see Franklin v Gareyua*, 136

AD3d at 465-466; *Walker*, 132 AD3d at 478-479). Moreover, plaintiff provided no explanation for his complete cessation of treatment after the surgery (*see Pommells*, 4 NY3d at 574; *Baez v Rahamatali*, 24 AD3d 256 [1st Dept 2005], *affd* 6 NY3d 868 [2006]; *Frias v Son Tien Liu*, 107 AD3d 589, 590 [1st Dept 2013]).

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

ENTERED: MAY 22, 2018

CLERK

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

6627 Philip Shawe, Index 153375/16
Plaintiff-Appellant,

-against-

Elizabeth Elting, et al.
Defendants-Respondents.

_____

Alan M. Dershowitz, Cambridge, MA, of the bar of the Commonwealth of Massachusetts, admitted pro hac vice, for appellant.

Kramer Levin Naftalis & Frankel LLP, New York (Jeffrey S. Trachtman of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered July 25, 2017, dismissing the action with prejudice, and bringing up for review an order, same court and Justice, entered June 30, 2017, insofar as it granted defendants' motion pursuant to CPLR 3211(a) to dismiss the amended complaint, unanimously affirmed, with costs.

Plaintiff Philip Shawe (Shawe) has failed to plead any malicious prosecution claim. Neither in his complaint nor in the reworked theory presented in his appellate brief does he identify any proceeding favorably terminated for purposes of a malicious prosecution claim (*see Facebook, Inc. v DLA Piper LLP (US)*, 134 AD3d 610, 613 [1st Dept 2015], *lv denied* 28 NY3d 903 [2016]). In his complaint, Shawe alleges that defendant Elizabeth Elting (Elting) and the attorney defendants herein commenced the

underlying action (the 2014 action) (seeking removal of Shawe as a director in the principals' corporation) in Supreme Court, New York County, and obtained a TRO and sought a preliminary injunction based on trumped-up claims of a payroll crisis which they knew was not really an emergency. The complaint is clear in alleging that the TRO, which was ultimately vacated, and the preliminary injunction application, which was ultimately denied, were the "proceeding" which was terminated in favor of Shawe, giving rise to his cause of action for malicious prosecution. This theory suffers from two insurmountable defects. In the first place, a ruling on an interim or preliminary application, being non-final, does not constitute a "proceeding" for purposes of maintaining a malicious prosecution claim (*see Hudson Val. Mar., Inc. v Town of Cortlandt*, 79 AD3d 700, 703 [2d Dept 2010]). Moreover, if the "favorable termination" was the denial of Elting's preliminary injunction motion, which occurred in August 2014, then Shawe's malicious prosecution claim, brought in 2016, is time-barred under the applicable one-year limitations period (*see* CPLR 215[3]; *Syllman v Nissan*, 18 AD3d 221, 222 [1st Dept 2005]).

Shawe's new theory is that the "proceeding" is the breach of fiduciary duty claim which Elting first brought in the 2014 action. That claim, with the rest of the 2014 action, was stayed

in September 2015, with the understanding that it would be resolved in related litigation in Delaware (the Delaware action), where it was asserted by Elting. Elting ultimately dropped her fiduciary duty claim in the Delaware action. Shawe thus contends that Elting's fiduciary duty claim was the "proceeding" which terminated in his favor when she withdrew it in Delaware.

This theory is meritless. In the first place, Shawe provides no authority for the idea that a single substantive claim, traveling from one state court to another in multiple proceedings amidst a host of other claims, can constitute a "proceeding" for purposes of a malicious prosecution claim. To the contrary, "the falsity of one allegation of a complaint does not support" a claim for malicious prosecution "where there existed probable cause for the underlying action as a whole" (*Wilhelmina Models, Inc. v Fleisher*, 19 AD3d 267, 270 [1st Dept 2005]). If anything, viewed as a whole, Elting won the Delaware action, since she was awarded relief while all of Shawe's claims were denied. Moreover, even parsing out the single fiduciary duty claim, the chancellor in the Delaware action went out of his way to state that he was making no finding on the merits of that claim, other than to note that he had found Elting's claim to be colorable at an earlier stage of the litigation.

The granting of the TRO in the 2014 action likewise

militates against any finding of lack of probable cause (*see Hornstein v Wolf*, 67 NY2d 721, 723 [1986]; *Facebook*, 134 AD3d at 614). Moreover, when the preliminary injunction motion was finally denied, it was only because Supreme Court found that Elting had failed to make a showing of irreparable harm. The motion court expressly noted that, due to the lack of irreparable harm, it was *not* reaching the issues of Elting's "likelihood of success on the merits and balancing of the equities."

Hence, viewed in their entireties, the records in both the 2014 action and in the Delaware action conclusively dispose of any finding of lack of probable cause on Elting's part: Elting was granted a TRO in the 2014 action, and was ultimately denied preliminary injunctive relief without any finding on the merits. In the Delaware action, the court noted that it was not passing on the merits of Elting's breach of fiduciary duty claim, noting only that she had withdrawn it, while emphasizing that it had found the claim to be "colorable" at an earlier stage of the proceeding. Finally, viewing the Delaware action — the final forum for the merits of the parties' claims — as a whole further compels the conclusion that Shawe cannot establish any lack of probable cause, because Elting can only be viewed as the victor in that case.

Moreover, our rulings in *Elting v Shawe* (129 AD3d 648 [1st

Dept 2015]) and *Elting v Shawe* (136 AD3d 536 [1st Dept 2016]), in which we held that the payroll access and corporate ownership assertions, made in support of the TRO and preliminary injunction applications in the 2014 action, were not material, collaterally estop Shawe from relying on those misstatements. Since those misstatements form the entire basis of Shawe's current malicious prosecution claim, collateral estoppel constitutes a second, independent basis for dismissal of that cause of action.

The payroll access misstatements likewise form a substantial portion of Shawe's current claim for violation of Judiciary Law § 487. Given especially that Elting was granted a TRO, the payroll access misstatements, which we have determined to be immaterial, "were not sufficiently egregious to support this claim" of § 487 violation (*Mintz v Rosenberg, Minc, Falkoff & Wolff, LLP*, 53 Misc3d 132{A} [App Term 1st Dept 2016]). Shawe's allegations that the attorney defendants deceptively backdated a retainer agreement primarily relates to privilege assertions in the Delaware action, and not in New York, and, as such, is not actionable under § 487 (*see Doscher v Manatt, Phelps & Phillips, LLP*, 148 AD3d 523, 524 [1st Dept 2017]). The remaining basis of Shawe's claim under § 487 — the allegedly knowing filing of a baseless defamation counterclaim — is a "single alleged act of deceit ... not sufficiently egregious to support a claim under" §

487 (*Strumwasser v Zeiderman*, 102 AD3d 630, 631 [1st Dept 2013]).

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

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

ENTERED: MAY 22, 2018

CLERK

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

6628 Adolf Radeljic, et al., Index 158995/12
Plaintiffs-Appellants-Respondents,

-against-

Certified of N.Y., Inc., etc.,
Defendant-Respondent-Appellant,

326 West 80th Associates, LLC,
Defendant.
- - - - -
Certified of N.Y., Inc.,
Third-Party Plaintiff-Appellant-Respondent,

-against-

Prokraft C.S., Inc.,
Third-Party Defendant-Respondent-Appellant.
- - - - -
326 West 80th Associates LLC,
Second Third-Party Plaintiff,

-against-

Prokraft C.S., Inc.,
Second Third-Party Defendant-Appellant.

_____

Gair, Gair, Conason, Rubinowitz, Bloom, Hershenhorn, Steigman & Mackauf, New York (Howard S. Hershenhorn of counsel), for Adolf Radeljic and Donna Ann Spadafino-Radeljic, appellants-respondents.

Carol R. Finocchio, New York (Marie R. Hodukavich of counsel), for Certified of N.Y., Inc, respondent-appellant/appellant-respondent.

Armienti, DeBellis, Guglielmo & Rhoden, LLP, New York (Vanessa M. Corchia of counsel), for Prokraft C.S., Inc., respondent-appellant/appellant.

_____

Order, Supreme Court, New York County (Arlene P. Bluth, J.),

entered December 21, 2017, which, insofar as appealed from, denied defendant Certified of N.Y., Inc.'s motion for summary judgment dismissing the complaint as against it and on its contractual indemnification claim against third-party defendant (Prokraft), denied plaintiffs' cross motion for partial summary judgment on the Labor Law § 240(1) claim and on the Labor Law § 241(6) claim to the extent it is based on violations of Industrial Code (12 NYCRR) § 23-1.7(b) and (e), and denied Prokraft's motion for summary judgment dismissing the Labor Law §§ 240(1) and 241(6) claims and the third-party contractual indemnification claim, unanimously affirmed, without costs.

Issues of fact as to whether the injured plaintiff's own conduct was the sole proximate cause of his accident preclude summary judgment on the Labor Law § 240(1) claim. While it is undisputed that a safety harness with permanently attached lanyards was available on the first floor of the building near the elevator shaft into which plaintiff fell, there is conflicting evidence is conflicting as whether the harness would have allowed plaintiff to reach and perform his work (*see e.g. Cordeiro v TS Midtown Holdings, LLC*, 87 AD3d 904 [1st Dept 2011]; *Gonzalez v Rodless Props., L.P.*, 37 AD3d 180 [1st Dept 2007]). The witnesses' conflicting statements about who was responsible for removing a plywood barricade positioned in front of the

elevator shaft opening also present issues of fact as to whether plaintiff, a foreman who had the authority to order his subordinate who was present at the time of the accident to replace the barricade, was the sole proximate cause of his accident. To establish the defense of sole proximate cause, defendant was not required to show that plaintiff received an instruction about using the harness immediately before commencing the work in question or on the same day as the accident (*see Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004] [recalcitrant injured worker "was not the less recalcitrant because there was a lapse of weeks between the instructions and his disobedience of them"]).

All of these issues of fact as to the safety harness and the barricade preclude summary judgment as to the Labor Law § 241(6) claim to the extent it is based on violations of 12 NYCRR 23-1.7(b)(1). The conflicting evidence as to whether plaintiff tripped and fell on rope on the floor presents issues of fact as to the section 241(6) claim to the extent it is based on violations of 12 NYCRR 23-1.7(e).

With respect to the Labor Law § 200 and common-law negligence claims, there is conflicting testimony as to who was responsible for removing the barrier from the elevator shaft opening and whether plaintiff tripped on rope that defendant's

employees allowed to accumulate on the floor. Thus, issues of fact exist as to whether plaintiff's accident was caused by a dangerous condition created by defendant or by the means or methods of plaintiff's or his employer's work (*see Prevost v One City Block LLC*, 155 AD3d 531, 533-534 [1st Dept 2017]; *Masiello v 21 E. 79th St. Corp.*, 126 AD3d 596 [1st Dept 2015]).

Contrary to Prokraft's argument, the accident is covered by the Labor Law notwithstanding plaintiff's position as a foreman (*see e.g. Pipia v Turner Constr. Co.*, 114 AD3d 424, 427 [1st Dept 2014], *lv dismissed* 24 NY3d 1216 [2015]).

In light of the issues of fact that exist as to the extent of defendant's liability for causing plaintiff's injuries, summary judgment on defendant's contractual indemnification claim against Prokraft would be premature (*see Correia v Professional Data Mgt.*, 259 AD2d 60, 64 [1st Dept 1999]). Contrary to Prokraft's contention, the indemnification provision of its contract with defendant, which has a savings clause limiting any indemnification to the extent permitted by law, does not violate General Obligations Law § 5-322.1 (*see Callan v Structure Tone,*

Inc., 52 AD3d 334, 335 [1st Dept 2008]; *see also Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 12 [1st Dept 2011]).

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

ENTERED: MAY 22, 2018

CLERK

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

6629 George B. Gibbons III, et al., Index 8182/07
Plaintiffs-Appellants,

-against-

Cornelius Grondahl, et al.,
Defendants-Respondents.

_____

Novick, Edelstein, Lubell, Reisman, Wasserman & Leventhal, P.C., Yonkers (Lawrence Schiro of counsel), for appellants.

Law Offices of Edmond J. Pryor, Bronx (Edmond J. Pryor of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered on or about November 6, 2017, which granted defendants' motion for summary judgment dismissing the complaint as barred by the statute of limitations, unanimously affirmed, without costs.

The motion court correctly dismissed the complaint, since the claim accrued in 1984, and was discovered at the latest in 2002. Plaintiffs' reliance on the "continuing wrong" doctrine is misplaced, as that doctrine "may only be predicated on continuing unlawful acts and not on the continuing effects of earlier unlawful conduct. The distinction is between a single wrong that has continuing effects and a series of independent, distinct wrongs" (*Henry v Bank of Am.*, 147 AD3d 599, 601 [1st Dept 2017] [internal quotation marks omitted]). Here, there is no evidence of any alleged fraudulent acts on the part of defendants after

the tax map discrepancy was discovered in 2002 (*compare Harvey v Metropolitan Life Ins. Co.*, 34 AD3d 364 [1st Dept 2006]).

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

ENTERED: MAY 22, 2018

CLERK

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

6630 The People of the State of New York, Respondent, Ind. 3191/13

-against-

Sean Smith, Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Patrick J. Hynes of counsel), respondent.

_____

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered February 5, 2014, convicting defendant, upon his plea of guilty, of two counts of burglary in the third degree, and sentencing him, as a second felony offender, to an aggregate term of 5 to 10 years, unanimously affirmed.

Defendant made a valid waiver of his right to appeal. The court's explanation of the waiver was nearly identical to the colloquy that was upheld by the Court of Appeals in *People v Bryant* (28 NY3d 1094 [2016). Defendant also signed a detailed written waiver, which clarified that he could not challenge his sentence on appeal as excessive. The waiver forecloses review of his claim relating to presentencing procedure (*People v Davis*, 145 AD3d 623 [1st Dept 2016], *lv denied* 28 NY3d 1183 [2017]), and his excessive sentence claim.

Regardless of the validity of defendant's waiver of the right to appeal, we perceive no basis for reducing the sentence, or remanding for resentencing. Defendant did not preserve his claim that his negotiated sentence was improperly based on a presentence report for which he was not interviewed, and we decline to review it in the interest of justice. As an alternative holding, we find it unavailing. We have repeatedly rejected claims similar to defendant's procedural and substantive arguments (*see e.g. People v Serrano*, 158 AD3d 467, 468 [1st Dept 2018]).

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

ENTERED: MAY 22, 2018

CLERK

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

6635 In re Sabino Guzman, Index 100032/14
Petitioner-Appellant,

-against-

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

_____

The De Leon Firm, PLLC, New York (Edgar De Leon of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Susan Paulson of counsel), for respondents.

_____

Order and judgment (one paper), Supreme Court, New York County (Joan B. Lobis, J.), entered on or about August 15, 2014, insofar as it denied in part the petition seeking to annul respondents' determination, dated September 10, 2013, terminating petitioner's employment as a police officer, unanimously vacated, on the law, without costs, the petition treated as one transferred to this Court for de novo review, and upon such review, the challenged determination confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order, same court and Justice, entered on or about August 15, 2014), dismissed.

The subject petition raised an issue of substantial evidence, and the entire proceeding should have been transferred to this Court pursuant to CPLR 7804(g). Accordingly, we will

"treat the substantial evidence issues de novo and decide all issues as if the proceeding had been properly transferred" (*Matter of Cruz v New York City Hous. Auth.*, 106 AD3d 631, 631 [1st Dept 2013], quoting *Matter of Jimenez v Popolizio*, 180 AD2d 590, 591 [1st Dept 1992]).

Petitioner, a NYPD officer, challenges his termination after a disciplinary hearing. He and another officer, Carney, were tried in a hearing concerning the incident. Petitioner was charged with falsifying an accident report. The report alleged that a third officer was driving the car when the accident occurred; in fact the third officer had loaned his car to his girlfriend, who allegedly was driving while intoxicated. In addition, petitioner was charged with official misconduct in failing to arrest the actual driver of the vehicle who a fellow police officer believed was intoxicated.

The hearing officer applying the preponderance of the evidence standard, found petitioner was guilty of both specifications. He recommended that petitioner be dismissed from employment. The police commissioner approved the determination. The preponderance of the evidence standard followed by the hearing officer is a higher standard than the substantial evidence standard petitioner asserts should have been employed. Thus, contrary to petitioner's claim, respondents were found to

have satisfied a higher, rather than lower, standard of proof.

The hearing officer did not improvidently exercise his discretion in not severing petitioner's case from the case against Officer Carney, since petitioner never requested such relief; the evidence against each of them overlapped; and their defenses were not in conflict (*see People v Mahboubian*, 74 NY2d 174, 183 [1989]). Severance is required only where the "core" of each defense is in irreconcilable conflict with the other and there is a significant danger that the conflict alone would lead a jury to infer the guilt of one defendant. Where proof against both defendants is supplied by the same evidence, "only the most cogent reasons warrant a severance" (*id.* at 183-184)).

Here, there was no jury, and the core of each defense was not in conflict. Officer Carney's testimony that he never made any statements concerning the accident and never told petitioner not to arrest the driver benefitted petitioner, who was investigated because of statements made by Officer Carney that were repeated in a wiretapped phone conversation. Moreover, the evidence against them was overlapping (*see id.* at 183).

Substantial evidence, including the testimony of petitioner's partner, other police officers, and the conversations about the incident that were intercepted on a wiretap, supports respondents' determination (*see 300 Gramatan*

Ave Assocs. v State Div. of Human Rights, 45 NY2d 176, 181 [1978]). With respect to calling the driver as a witness, respondents were not required to call witnesses petitioner deemed relevant. He was free to subpoena her if he chose. The credibility of the witnesses who testified against him is not reviewable by the court (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443 [1987]). The second specification provided petitioner with an adequate description of the charged misconduct, including the date.

A court reviewing administrative action must uphold the sanction imposed unless it is so disproportionate to the offense that it "shocks the judicial conscience and, therefore, constitutes an abuse of discretion as a matter of law" (*see Matter of Featherstone v Franco*, 95 NY2d 550, 554 [2000]). Here, the penalty of termination of employment is not disproportionate to the misconduct and does not shock the conscience. Petitioner was found guilty of two acts of serious misconduct, which adversely affected the integrity of the Police Department.

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

ENTERED: MAY 22, 2018

CLERK

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

6636 The People of the State of New York, Respondent, Ind. 2342/13

-against-

Moises Martinez, Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (John Vang of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Paul A. Andersen of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Peter J. Benitez, J. at suppression hearing; Alvin M. Yearwood, J. at plea and sentencing), rendered July 7, 2016, convicting defendant of manslaughter in the first degree, and sentencing him to a term of 20 years, unanimously affirmed.

Defendant made a valid waiver of his right to appeal. The oral colloquy, which avoided conflating the right to appeal with the rights forfeited by pleading guilty, met the minimum standards for such a colloquy (*see People v Bryant*, 28 NY3d 1094 [2016]). Defendant also signed a written waiver, and the court confirmed that defendant understood the document and had discussed it with counsel.

The valid waiver forecloses review of defendant's suppression and excessive sentence claims. Regardless of whether

defendant made a valid waiver of his right to appeal, we find that the hearing court properly denied defendant's suppression motion, and we perceive no basis for reducing the sentence.

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

ENTERED: MAY 22, 2018

CLERK

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

6637 Paul Yablon, et al., Index 157327/16
Plaintiffs-Respondents-Appellants,

-against-

Nicholas S. G. Stern,
Defendant-Appellant-Respondent.

_____

Wallison & Wallison LLP, New York (Jeremy Wallison of counsel), for appellant-respondent.

Wasserman Grubin & Rogers, LLP, New York (Douglas J. Lutz of counsel), for respondents-appellants.

_____

Order, Supreme Court, New York County (David B. Cohen, J.), entered March 30, 2017, which granted defendant's motion pursuant to CPLR 3211(a)(7) insofar as it dismissed the first and second causes of action, and denied it as to the third, unanimously modified, on the law, to deny so much of defendant's motion as sought dismissal of the second cause of action, for conversion, and otherwise affirmed, without costs.

Plaintiffs retained defendant's company to renovate their apartment and have sufficiently alleged that defendant, the principal of the company, personally engaged in fraudulent conduct by eliciting downpayments and deposits for the purported purposes of making advance payments to subcontractors and material suppliers. However, in certain instances, defendant did not make these payments, and falsely recorded in the corporate

business's documentation that the payments had been made (*see 277 Mott St., LLC v Fountainhead Constr. LLC*, 83 AD3d 541 [1st Dept 2011]; *Delta Dallas Omega Corp. v Wair Assoc.*, 189 AD2d 701 [1st Dept 1993]). Plaintiffs justifiably relied on the misrepresentations and were induced to make additional deposits to ensure timely performance, resulting in injury.

When plaintiffs terminated the contract mid-construction and demanded a return of $400,000 of the $840,000 they had paid, defendant allegedly returned only $84,622.65, without providing an accounting, and allegedly diverted the balance of such monies to his personal use. These allegations sufficiently state a cause of action for conversion (*see Lemle v Lemle*, 92 AD3d 494, 497 [1st Dept 2012]; *Passaic Falls Throwing Co. v Villaneuve-Pohl Corp.*, 169 AD 727 [1st Dept 1915]).

Plaintiffs' cause of action alleging fraud in the inducement was properly dismissed, as it is founded upon non-actionable promises of future conduct or events, rather than present fact (*see Archstone Dev LLC v Renval Constr. LLC*, 156 AD3d 432 [1st Dept 2017]; *Ullman v Hillyer*, 106 AD3d 579 [1st Dept 2013], *lv denied* 22 NY3d 860 [2014]) and non-actionable opinion of defendant as to his entity's resources and capability of

undertaking the luxury renovation work sought by plaintiffs (*see Jacobs v Lewis*, 261 AD2d 127 [1st Dept 1999]; *Ullman*, 106 AD3d 579).

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

ENTERED: MAY 22, 2018

CLERK

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

6639N & M-2126 Jericho Group, Ltd., Plaintiff-Respondent, Index 113274/04

-against-

Midtown Development, L.P., Defendant-Appellant.

_____

Phillips Nizer LLP, New York (Mark M. Elliott of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered December 8, 2017, which granted plaintiff's application for leave to file a motion to vacate the action, unanimously reversed, on the law and the facts, with costs, and the application denied.

This action, which began as a dispute over a real estate transaction over 15 years ago, has proceeded through Supreme Court, this Court, and others, spanned six lawsuits and five appeals, and resulted in state and federal orders precluding plaintiff, Jericho Group, Ltd., from commencing further proceedings against defendant, Midtown Development, L.P., without leave of court. The instant appeal concerns Supreme Court's most recent order, which granted plaintiff leave to move to vacate this action, the initial 2004 action, on the ground that new

evidence, namely proof that its prior attorney had sabotaged the lawsuit, rendered that action a nullity.

Plaintiff's application should have been denied since the issues raised and claims made by plaintiff in support of vacatur are barred by the doctrines of res judicata and collateral estoppel (*see generally Matter of Reilly v Reid*, 45 NY2d 24 [1978]).

M-2126 - *Jericho Group, Ltd. v Midtown Development, L.P.*

Motion to amend brief denied.

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

ENTERED: MAY 22, 2018

CLERK

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

6640N Kathleen Hutton, Index 800030/11
Plaintiff-Appellant,

-against-

Aesthetic Surgery, P.C., et al.,
Defendants,

Alex M. Greenberg, D.D.S., P.C., et al.,
Defendants-Respondents.

_____

Lutfy & Santora, Staten Island (James L. Lutfy of counsel), for appellant.

Rawle & Henderson, LLP, New York (Sylvia E. Lee of counsel), for respondents.

_____

Order, Supreme Court, New York County (Alice Schlesinger, entered September 16, 2017, which, in this action for dental and plastic surgical malpractice, granted the motion of defendants Alex M. Greenberg, D.D.S., P.C. and Alex M. Greenberg, D.D.S. (Dr. Greenberg) for a protective order to the extent of placing certain limits on Dr. Greenberg's deposition, unanimously affirmed, without costs.

The motion court did not improvidently exercise its discretion in limiting further deposition of Dr. Greenberg to one day, which was in addition to the two previous days he had been deposed, and in limiting the scope of inquiry as concerned a surgical procedure performed by codefendant Elliot Rose. The

procedure performed by Rose was one that Dr. Greenberg was not trained in and did not perform in his practice, and did he not assist on the date in question (*see e.g. McKay v Khabele*, 46 AD3d 258 [1st Dept 2007]). Plaintiff failed to show that the limitations deprived them of "deposition testimony relevant and necessary for preparation for trial" (*Smukler v 12 Lofts Realty, Inc.*, 178 AD2d 125, 126 [1st Dept 1991].

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 22, 2018

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Dianne T. Renwick, J.P.
Rosalyn H. Richter
Sallie Manzanet-Daniels
Marcy L. Kahn
Cynthia S. Kern, JJ.

5441
Index 100999/14

_____x

In re Stahl York Avenue Co., LLC,
Plaintiff/Petitioner-Appellant,

-against-

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

- - - - -

Friends of the Upper East Side
Historic Districts, et al.,
Amici Curiae.

_____x

Plaintiff/petitioner appeals from the order and judgment (one paper), of the Supreme Court, New York County (Michael D. Stallman, J.), entered January 28, 2016, granting defendants/respondents' cross motion to deny the petition complaint, and dismissing the proceeding/action.

Shapiro Arato LLP, New York (Alexandra A.E. Shapiro, Eric S. Olney and Chetan A. Patil of counsel), and Kramer Levin Naftalis & Frankel LLP, New York (Paul D. Selver of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Aaron M. Bloom and Claude S. Platton of counsel), for respondents.

Michael S. Gruen, New York, for amici curiae.

KAHN, J.

On this appeal in this hybrid article 78/plenary action, we are asked to determine whether the denial by respondent New York City Landmarks Preservation Commission (LPC) of the hardship application of petitioner, Stahl York Avenue Co., LLC (Stahl), to demolish two buildings included within a designated landmark was without rational basis and whether Stahl is entitled to money damages on the ground that the inclusion of the two buildings within that designated landmark constitutes an unconstitutional taking (*see* US Const Amends V, XIV; NY Const, art I, § 7).

I. *Statement of Facts and Procedural Background*

In a prior appeal, this Court affirmed the dismissal of an action brought by Stahl to annul the LPC's determination, as approved by the New York City Council, to expand a previously designated landmark to include the two buildings in question (*see Matter of Stahl York Ave. Co. LLC v City of New York*, 76 AD3d 290 [1st Dept 2010], *lv denied* 15 NY3d 714 [2010] [*Stahl I*]).

A. Landmark Designation Approval

In 1990, the LPC designated an entire block of tenement buildings known as the First Avenue Estate (FAE) as an historic landmark. The block in question includes 15 six-story buildings that were built in the early 1900s as "light-court model tenements" - one of only two existing full-block light-court

tenement developments in the United States.[1]

On August 21, 1990, the New York City Board of Estimate voted six to five to approve the LPC's designation of most of the FAE as a landmark, excluding the two buildings at issue here.

In September 2004, Community Board No. 8 adopted a resolution in favor of amending the FAE landmark designation to include the two buildings in question.

In 2006, the LPC voted in favor of including the two buildings in the FAE landmark designation.

On February 1, 2007, the New York City Council unanimously approved the LPC's decision to include the two buildings in the FAE landmark designation.

On September 22, 2014, Stahl commenced *Stahl I*, an article 78 proceeding challenging the LPC's determination and the City Council's approval of that determination as arbitrary and capricious, in light of the 1990 determination to exclude the two buildings from the FAE landmark designation. This Court held that the LPC and the City Council could revisit the earlier determination and that the exclusion of the two buildings from that designation was the result of a politically motivated "bad

[1] The other such tenement development, located on East 78th Street, is known as the "York Avenue Estate." It received landmark designation in 1990.

backroom deal" made under intense pressure from a major developer (*Stahl I*, 76 AD3d at 296 [internal quotation marks omitted]). As we noted in *Stahl I*, in introducing the amendment to the designation to the full City Council the Speaker of the City Council made an observation to the effect that the earlier determination to exclude the buildings from the designation was "a bad decision based upon improper considerations which had nothing to do with the buildings' historical or cultural significance" (*id.*).

B. Stahl's Hardship Application

Stahl then sought from the LPC a certificate of appropriateness approving the demolition of the two buildings on the ground of insufficient return, in accordance with Title 25 of the Administrative Code of the City of New York (§ 25-301 *et seq.*) (Landmarks Law). Stahl represented that it was entitled to a certificate of appropriateness pursuant to section 25-309 of the Landmarks Law because the expenses incurred in operating the two buildings in question, both before and after the payment of real estate taxes, significantly exceeded the income that they generated, and that therefore it would be appropriate to demolish the buildings, build mixed-income condominium towers in their place, and use the proceeds from that redevelopment to perform renovations at the other buildings in the FAE.

In support of its hardship application, Stahl submitted two economic feasibility studies prepared by Cushman & Wakefield supporting its claim that there was no feasible scenario under which the buildings were capable of earning a "reasonable return" within the meaning of the Landmarks Law (Administrative Code § 25-309[a][1][a]). One of those two studies, issued in 2010, stated that the two buildings' units, 190 in total, each had small rooms, including bathrooms that required undersized tubs and toilets, tiny closets, and electrical systems that did not support modern usage, and that the buildings lacked sprinklers and other modern safety and security systems. According to that study, half of the 190 units were occupied and subject to rent stabilization or rent control, and the remaining units were vacant and could be leased at market rent. The study posited that if the necessary repairs and improvements were performed and the apartments within the two buildings, including the half subject to rent stabilization or rent control, were leased, their annual net return would be negative 2.87%, which would not meet the 6% minimum standard for "reasonable return" set by the LPC. According to the other study, issued in 2009, the vacant units in the two buildings, if improved, renovated and rerented, would yield an annual return of 1.19%. That study also concluded that without the improvements, the annual return yielded by the vacant

units would be .614%. Both studies analyzed the projected return from the combined two buildings separately from the other properties within the FAE.

On May 20, 2014, the LPC denied Stahl's hardship application. The LPC commissioners reasoned that the proper scope for reasonable return analysis was the FAE property as a whole. The LPC further opined that in computing depreciation allowance, Stahl mistakenly considered projected renovation costs not only for the 53 apartments that were vacant at the time that the LPC voted to confer landmark status upon the two buildings in 2006, but also for 44 additional apartments that became vacant after the inclusion of the two buildings in the landmark designation. The LPC observed that Stahl's anticipated renovation costs for apartments that Stahl had warehoused subsequently to the landmark redesignation was a self-imposed hardship. The LPC also rejected Stahl's "cost approach" accounting methodology for projecting postrenovation assessed value, finding that an "income approach" was more appropriate for rental property. The LPC performed an alternative reasonable return calculation using Stahl's assumptions and methods, which calculation showed that the two buildings were capable of earning a reasonable return.

C. The Instant Case

On September 22, 2014, Stahl commenced this hybrid article 78/plenary action against respondents City of New York and the LPC and its chairwoman, challenging the denial of its hardship application and seeking money damages.[2] Stahl maintained that the inclusion of the two buildings in question within the FAE landmark designation amounted to a taking in violation of the federal and state constitutions (*see* US Const Amends V, XIV; NY Const, art I, § 7). Stahl argued that the LPC reached the false and unreasonable conclusion that Stahl could earn more than a 6% return from the two buildings by misapplying its own standards and by refusing to consider the full costs that Stahl would incur to renovate the buildings. Stahl also argued that the entire FAE should not have been considered and that the LPC erred in using the income approach in its calculations rather than using the cost approach, as it had done in granting the hardship

[2] On the same day, Stahl commenced an action against the City of New York and the LPC in the United States District Court for the Southern District of New York seeking an order annulling and setting aside the 2006 landmark redesignation and the denial of its hardship application, awarding compensatory damages, and awarding attorneys' fees and costs. That action was dismissed in a written opinion and order (*Stahl York Ave. Co., LLC v City of New York, et al.*, 2015 WL 2445071, 2015 US Dist Lexis 66660 [SD NY, No. 14 Civ. 7665 (ER), May 21, 2015]), which was affirmed by the United States Court of Appeals for the Second Circuit (641 Fed Appx 68 [2d Cir 2016]). On October 31, 2016, the United States Supreme Court denied Stahl's petition for a writ of certiorari (-- US --, 137 S Ct 372 [2016]).

application of another developer in 1988.

With regard to the taking issue, Stahl argued that before 2006, the two properties in question could have been sold for more than $100 million - - and twice that much had they been redeveloped. Stahl maintained that the 2006 public hearing held by LPC prior to amending the FAE landmark designation improperly focused on concerns of politically influential local residents who sought to block any development in order to protect their own special interests and that LPC commissioners repeatedly made comments that prejudiced its application. Stahl also asserted that the LPC's 2006 determination to include the buildings within the landmark designation had had a severe economic impact on the value of the buildings, preventing it from earning a reasonable rate of return, and had interfered with its investment-backed expectations.

Respondents answered and cross-moved to dismiss the petition and complaint, arguing that the LPC had properly denied Stahl's hardship application. They contended that the relevant improvement parcel for purposes of determining the hardship application embraced the whole FAE, that the LPC's use of the income approach was proper, and that there was no unconstitutional taking because Stahl could continue to operate the buildings with low-scale rental units.

As indicated, Supreme Court dismissed the petition and granted respondents' cross motion to dismiss the taking claim. The court found that the relevant property for both the hardship and taking analyses was the FAE as a whole, that the income approach was not improper, and that the LPC had rationally concluded that Stahl failed to demonstrate a hardship.

II. *Discussion*

A. Petitioner's Claim that Hardship Application Denial Was Irrational

1. Petitioner's contentions

On this appeal, Stahl contends that the LPC reached a false and unreasonable conclusion in determining that Stahl could earn more than a 6% return from the two buildings in question. Further, Stahl argues, the LPC erred in finding that the relevant improvement parcel was the entire FAE rather than the two buildings in question and in using the income approach rather than the cost approach.

2. Legal Standards

In reviewing an administrative agency determination, courts must ascertain whether there is a rational basis for the action in question or whether it is arbitrary and capricious, i.e., taken without sound basis in reason or regard to the facts (*see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1*

of Towns of Scarsdale & Mamaroneck, Westchester County, 34 NY2d 222, 231 [1974]).

Section 25-309(a) of the Landmarks Law provides in relevant part that the LPC "shall" make a preliminary determination of insufficient return when an applicant for a permit "to demolish any improvement located on a landmark site" is filed "and the applicant establishes to the satisfaction of the commission that . . . the improvement parcel (or parcels) which includes such improvement, as existing at the time of the filing of such request, is not capable of earning a reasonable return."

The "Definitions" section of the Landmarks Law (§ 25-302) contains the following relevant definitions:

"Landmark" is defined as any landmarked "improvement" (§ 25-302[n]);

"Improvement" is defined as "[a]ny building, structure, place, work of art or other object constituting a physical betterment of real property, or any part of such betterment" (§ 25-302[i]);

"Landmark Site" is defined as "[a]n improvement parcel or part thereof on which is situated a landmark and any abutting improvement parcel or part thereof used as and constituting part of the premises on which the landmark is situated, and which has been designated as a landmark site . . . " (§ 25-302[o]); and

"Improvement parcel" is defined as "[t]he unit of real property which (1) includes a physical betterment constituting an improvement and the land embracing the site thereof, and (2) is treated as a single entity for the purpose of levying real estate taxes" (§ 25-302[j]).

3. Discussion

The LPC was entitled to require Stahl to establish that it could not earn a reasonable return on the entire landmark that it sought to alter, not the individual buildings in question. Although the Landmarks Law definitions, read together, appear ambiguous as to how to define a relevant "improvement parcel" for purposes of the instant hardship application, the LPC's interpretation was rational.

The entire FAE constitutes one landmark and one landmark site. Thus, the entire FAE development contains one "improvement," which is defined as "a physical betterment of real property, or any part of such betterment" (§ 25-302[i]). Stated otherwise, the FAE constitutes one unit of real property that includes that physical betterment.

Furthermore, the LPC did not confer a landmark designation on the 2 buildings in question that is separate from the earlier designation of the other 13 buildings within the FAE. Rather, the LPC chose to protect the FAE in its entirety by conferring a

single landmark redesignation on the entire parcel.

Contrary to Stahl's argument, the entire landmark constitutes one improvement for hardship purposes, even though Stahl did not intend to demolish the entire landmark. The definition of "improvement" includes "any part of [the] betterment" of the real property in question (§ 25-302[i]). Thus, although the part of the improvement that Stahl sought to demolish was 2 of the 15 buildings within the FAE, Stahl was still required to prove that the entire "improvement parcel," which includes the improvement in question, was not capable of earning a reasonable return.

Furthermore, the record reflects that the entire FAE was one "unit of real property" treated as a single entity for purpose of levying real estate taxes, i.e., the "improvement parcel." The FAE consists of four tax lots, but all four are within the one tax block comprising the FAE landmark site. This is further demonstrated by the fact that from 2007 to 2012, with respect to the FAE, Stahl made a single tax filing applicable to the entire tax block.

Moreover, the LPC also analyzed the hardship application solely with respect to tax lot 22 (which contains only the two buildings in question) and rationally determined that no hardship was demonstrated under a separate analysis of that tax lot

because Stahl failed to demonstrate that those buildings, considered alone, were "not capable of earning a reasonable return" (Administrative Code § 25-309[a][1][a]).

Notwithstanding Stahl's argument to the contrary, it was not irrational for the LPC to exclude from its analysis the renovation costs for the 44 apartments within the two buildings that were kept vacant after the 2006 landmark designation. That argument, rejected by both the article 78 court and the federal courts (*see Stahl*, 2015 WL 2445071 at *16, 2015 US Dist LEXIS 66660 at *42-*46, 641 Fed Appx at 72), is unavailing. The LPC rationally chose values for the relevant variables, including rental rates, vacancy rates, collection loss, and operating expenses, to calculate whether the buildings were capable of earning a reasonable return. Moreover, the LPC's calculations reflected the rational rejection of Stahl's own assumed values. Because the Landmarks Law defines "capable of earning a reasonable rate of return" as "[h]aving the capacity, under reasonably efficient and prudent management, of earning a reasonable return" (Administrative Code § 25-302[c]), the LPC appropriately concluded that Stahl had demonstrated inefficient management, by, inter alia, its imprudent decision to warehouse 44 apartments at the landmarked buildings in the hope of demolition.

Furthermore, the LPC's use of the "income approach" rather than the "cost approach" in making its determination was rational. The LPC neither contradicted its own precedent nor acted arbitrarily and capriciously in concluding that the income approach was the more appropriate method to measure assessed value in Stahl's rental scenarios (*see Stahl*, 2015 WL 2445071 at *16, 2015 US Dist LEXIS at *42-*46, 641 Fed Appx 68 at 72). The LPC demonstrated that its use of the income approach comported with the valuation method used by taxing authorities, whereas the cost approach would generate a higher assessed value for the buildings, resulting in higher real estate taxes (which would be contrary to efficient and prudent management practices). Moreover, even though the LPC had, in a 1998 hardship decision, used the cost approach to measure assessed value, in that case the owner sought to recoup its renovation costs by selling, rather than by renting, as petitioner seeks to do (*see Stahl*, 641 Fed Appx at 72).

In any event, the record reveals that the LPC also performed more than 20 additional reasonable-return calculations using many of the assumptions that Stahl preferred, as well the "cost approach," all of which showed that the buildings were capable of earning a reasonable return. Thus, as the Second Circuit found, the errors Stahl points to do not materially affect the

property's projected profit margin, since, even using petitioner's values and proposed methodology, the property's rate of return would still be above the 6% threshold for hardship relief under all renovation scenarios (641 Fed Appx at 72).

Finally, to the extent that Stahl complains that the LPC evinced prejudice against it by way of its commissioners' comments at the 2006 public hearings reflecting concern for preserving the buildings, that complaint is unsupported by the hearing record, which does not reflect any prejudice against Stahl. Rather, the record suggests that the LPC's members were appropriately familiar with the subjects of their regulation, had advance knowledge of the facts and law surrounding the application, and were committed to the goal for which their agency was created, i.e., landmarks preservation (*see generally Matter of 1616 Second Ave. Rest. v New York State Liq. Auth.*, 75 NY2d 158, 162 [1990]).

B. Petitioner's Unconstitutional Taking Claim

Stahl's other principal argument is that the LPC's inclusion of the two buildings in the FAE landmark designation amounted to an unconstitutional taking.

1. Legal Standards

The takings clause of the federal constitution prohibits governmental taking of "private property . . . for public use,

without just compensation" (US Const Amend V).

A per se taking occurs if a regulation deprives the owner of all economically beneficial use of the property (*see Lucas v South Carolina Coastal Council*, 505 US 1003, 1019 [1992]), or a regulation may rise to the level of a taking under a multi-factor inquiry outlined in *Penn Cent. Transp. Co. v City of New York* (438 US 104 [1978]).

In *Penn Central*, the United States Supreme Court instructed that most regulatory takings cases should be considered on an ad hoc basis, with three primary factors to be weighed: the regulation's economic impact on the claimant, the regulation's interference with the claimant's reasonable investment-backed expectations, and the character of the government action (*id.* at 124).

The Penn Central multi-factor inquiry focuses on the magnitude of the economic impact of a regulatory action and the extent of that regulation's interference with property rights to determine if a regulatory action constitutes a taking (*see Lingle v Chevron U.S.A. Inc.*, 544 US 528, 540 [2005]). In *Penn Central*, the owner of Grand Central Terminal argued that a restriction on its ability to add an office building on top of the station amounted to a taking of its air rights, but the Supreme Court concluded that the correct unit of analysis was

the owner's "rights in the parcel as a whole" (*438* US at 130-131). The Court noted that claimants cannot establish a takings claim "simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development" (*id.* at 130).

In the recent case of *Murr v Wisconsin* (– US -, 137 S Ct 1933 [2017]), the owners of two adjacent lots (referred to by the Court as Lots E and F) located alongside a river wished to sell Lot E but could not sell it separately from Lot F due to state regulations that forbade the sale of a parcel with less than an acre of land suitable for development. Lot E, by itself, did not meet that requirement, although it did meet the requirement when combined with Lot F. The owners sued the state, claiming that the state's regulatory action amounted to an unconstitutional taking.

The *Murr* Court treated the two lots as a single parcel in concluding that regulations preventing the separate sale of the two adjacent lots did not amount to an uncompensated taking. The Court observed that the establishment of lot lines was not dispositive of whether parcels should be considered separately or as a whole in a takings analysis. The Court reasoned that lot lines are established with varying degrees of formality among the states, and are often subject to easy adjustment by landowners

with minimal governmental oversight, leading to the risk of gamesmanship by landowners (*Murr*, 137 S Ct at 1948).

Rather, the *Murr* Court opined that the proper test for determining whether parcels should be treated separately or as a whole for takings analysis purposes is objective in nature and should determine whether reasonable expectations about property ownership would lead a landowner to anticipate that its holdings would be treated as one parcel or as separate lots. The Court then set forth a three-factor test for this purpose. First, courts should give substantial weight to the property's treatment, and in particular how it is bounded or divided, under state and local law. Second, courts should look to the property's physical characteristics, including the physical relationship of any distinguishable tracts, the topography, and the surrounding human and ecological environment. Third, courts should assess the property's value under the challenged regulation, with special attention to the effect of burdened land on the value of other holdings (*Murr*, 137 S Ct at 1944–1947).

Applying that three-factor test, the *Murr* Court first found that state and local regulations had effectively merged the two lots into one parcel. Second, the Court found that the two lots were contiguous and that their narrow shape made it reasonable to

expect that their potential uses would be limited. The Court explained that because the lots were located along a river, the owners could reasonably anticipate that the lots would be subject to federal, state and local regulations that would affect their enjoyment of the property. Third, the Court determined that the prospective value that Lot E brought to Lot F supported considering them as one parcel (*id.* at 1948-1949).

Having concluded that the property in question should be considered as a whole, the *Murr* Court found that there had been no taking, as the regulations in question did not result in depriving the owners of all economically beneficial use of their property. The Court arrived at this conclusion by applying the "more general test of *Penn Central*," which it found did not support the conclusion that the landowners had suffered a taking (*id.* at 1949). Specifically, the Court first found that an expert appraisal relied upon by the state courts refuted any claim that the economic impact of the regulation was severe. Second, the Court reasoned that the owners could not have claimed that they reasonably expected to sell or develop their lots separately, given that the lots were subject to regulations forbidding such separate sale and development, which regulations predated the owners' acquisition of both lots. Third, the Court found that the governmental action in question was a reasonable

land-use regulation, enacted as part of a coordinated federal, state and local effort to preserve the river and surrounding land (*id.*).

In this case, application of the *Murr* analysis leads to the conclusion that all of the lots within the FAE, including the two buildings at issue, should be treated as one parcel for taking analysis purposes. First, although the FAE is divided by lot lines (which, according to *Murr*, is not a proper basis for determining whether the land in question should be treated as one unified parcel), the City has placed all of those lots within one tax block and has designated it as one unified landmark. Second, the lots are contiguous and contained within one city block, and all of the buildings within the FAE share a common historical and architectural significance when treated as a unified parcel, i.e., the distinction of being one of the only two existing light-court model tenements in this country. Third, the only discernable adverse effect of including the two buildings in question within the designated landmark on the value of the property as a whole is one manufactured by the owner itself in warehousing the 44 apartments within those two buildings.

Considering the FAE property as a whole, here, as in *Murr*, the regulatory action at issue, which, in this case, is the LPC's

amendment of the landmark designation to include the two buildings in question, did not result in complete deprivation of the owner's economically beneficial use of its property. The owner is still free to rent units within all of the buildings in the FAE, including the two buildings in question.

Application of the "more general" *Penn Central* test also supports the conclusion that petitioner has not suffered a taking. First, the extension of the FAE landmark designation to include the two buildings in question did not result in any further economic impact on Stahl beyond that resulting from preexisting legal restrictions limiting Stahl's use of the property even absent landmark status, such as rent control and rent stabilization. Second, Stahl's reasonable investment-backed expectations were not destroyed by the inclusion of the two buildings within the FAE landmark designation. As the LPC determined, the buildings in question are capable of earning a reasonable return, limiting the designation's economic impact on petitioner. Third, the character of the government action in question favors the LPC, since, as the Court in *Penn Central* found, the "preservation of landmarks benefits all New York citizens and all structures" and "improv[es] the quality of life in the city as a whole" (*id.* at 134).

Accordingly, the order and judgment (one paper), of the

Supreme Court, New York County (Michael D. Stallman, J.), entered January 28, 2016, granting defendants/respondents' cross motion to deny the petition-complaint, and dismissing the proceeding-action, should be affirmed, without costs.

All concur.

Order and judgment (one paper), Supreme Court, New York County (Michael D. Stallman, J.), entered January 28, 2016, affirmed, without costs.

Opinion by Kahn, J. All concur.

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

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

ENTERED: MAY 22, 2018

CLERK