SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 24, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Andrias, J.P., Gesmer, Kern, Singh, Moulton, JJ.

5839 Vista Engineering Corporation, Index 302991/15
Plaintiff-Appellant,

-against-

Everest Indemnity Insurance Company,
Defendant-Respondent,

East Coast Painting & Maintenance,
et al.,
Defendants.

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Baxter Smith & Shapiro, P.C., White Plains (Sim R. Shapiro of counsel), for appellant.

Kennedys CMK LLP, New York (Ann M. Odelson of counsel), for respondent.

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Order, Supreme Court, Bronx County (Kenneth L. Thompson, J.), entered on or about January 4, 2016, which denied plaintiff's motion for summary judgment declaring that defendant insurer was obligated to defend and indemnify it in an underlying personal injury action, and granted defendant's cross motion for summary judgment declaring that it has no duty to defend or indemnify plaintiff in that action, modified on the law, to deny

defendant's motion, and remand the matter for further proceedings, and otherwise affirmed, without costs.

This appeal concerns an insurance coverage dispute. Because its resolution involves the application of *Carlson v American Intl. Group, Inc.* (30 NY3d 288 [2017]), which was handed down by the Court of Appeals when this appeal was pending and all the briefing complete, we remand to the motion court for further fact-finding.

In September 2010, defendant East Coast Painting (East Coast) entered into a subcontract with plaintiff general contractor Vista Engineering Corporation (Vista) to perform work at the Queensboro Plaza subway station. The subcontract required East Coast to purchase insurance naming Vista and the New York City Transit Authority (TA) as additional insureds. East Coast obtained an insurance policy from defendant Everest Indemnity Insurance Company (Everest).

East Coast employee Louis Soto allegedly sustained injuries while working on the Queensboro Plaza project on June 3, 2011. Soto brought a personal injury action in the Bronx soon thereafter. By correspondence to East Coast's broker dated August 15, 2011, Vista's insurer, through its claims administrator, sought a defense and indemnification from East

Coast on behalf of Vista. This tender was forwarded to Everest's claim administrator, which, in correspondence dated September 20, 2011, acknowledged receipt of the tender.

By correspondence dated November 17, 2011, Everest's claims administrator disclaimed coverage, invoking the insurance contract's "Third Party Action Over" exclusion, which barred claims arising from injuries to East Coast's employees. The parties do not dispute that the policy excludes coverage for employees of East Coast.

Vista commenced the instant action seeking a declaration that Everest has a duty to defend and indemnify it in the underlying action. Vista moved for summary judgment, arguing that Everest had failed to disclaim within a reasonable time, as required by Insurance Law § 3420(d)(2), which states:

> "If under a liability policy issued or delivered in this state, an insurer shall disclaim liability or deny coverage for death or bodily injury arising out of a[n]... accident occurring within this state, it shall give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant."

Everest cross-moved for summary judgment declaring that it had no duty to defend or indemnify because section 3240(d)(2) applies only to insurance policies "issued or delivered" in New

York. Everest argued that it is a New Jersey insurer and that it issued the policy to East Coast, a New Jersey company, and that therefore the policy was not "issued or delivered" in New York.

Supreme Court, relying upon *Carlson v American Intl. Group., Inc.*, (130 AD3d 1477 [4th Dept 2015]), denied Vista's motion and granted Everest's cross motion, holding that because the policy was issued and delivered outside of New York State, the timeliness requirements of § 3240(d)(2) did not apply.

Vista appealed. The parties completed their briefing in early November 2017. On November 20, 2017, the Court of Appeals issued its decision in *Carlson v American Int'l Group, Inc.* (30 NY3d 288 [2017]), modifying the Fourth Department.

The Court of Appeals held that the applicability of Insurance Law § 3420(d)(2) depends on (1) a policy covering risks located in New York, and (2) the insured being located in New York. The *Carlson* Court, for the first time, determined that a company was "located in" New York if it had a "substantial business presence" there (30 NY3d at 306). The Court found that under that test the insured in *Carlson*, DHL, was located in New York. In dicta, the Court reasoned that the legislature did not intend that a company "doing business in New York and purporting to cover risks in New York" be able to evade the Insurance Law

(*id.* at 309).

We agree with the dissent that the first prong of *Carlson* was satisfied in this case. The risks covered under the Everest policy include the Queensboro Plaza project, which is located in New York State. However, we find that the record is not sufficiently developed for us to decide whether East Coast had a substantial business presence in New York under the Court of Appeals' decision in *Carlson*.[1]

It is well settled that a party may not argue on appeal a theory never presented to the court of original jurisdiction (see *Tortorello v Carlin*, 260 AD2d 201, 205 [1st Dept 1999]; *Sean M. v City of New York*, 20 AD3d 146, 149-150 [1st Dept 2005] [same]; *Admiral Ins. Co. v Marriott Intl., Inc.*, 79 AD3d 572 [1st Dept 2010], *lv denied* 17 NY3d 708 [2017] [same]; *Elter v New York City Hous. Auth.*, 260 AD2d 232 [1st Dept 1999] [same]; *Botfeld v Wong*, 104 AD3d 433, 434 [1st Dept 2013] [argument improperly raised for the first time on appeal since the issue was not a purely legal issue apparent on the face of the record but required for resolution facts not brought to the opposing party's attention on

[1]The fact that Vista asked this Court to take judicial notice of *Carlson* and that it was addressed extensively at oral argument has no bearing on whether the record is sufficiently developed to permit a determination.

the motion]). In *Preserver Ins. Co. v Ryba* (10 NY3d 635 [2008]), the Court of Appeals held that although the policy at issue covered risks in New York, the insured was a New Jersey company, with its only offices located in New Jersey, and, hence, the insured was not located in New York. Nor was the policy "issued for delivery" in New York (*id. at 642*). While the Court of Appeals in *Carlson* held that the "meaning of 'issued or delivered' is informed by our decision in" *Preserver* (*Carlson*, 10 NY3d at 296), the Court expanded on the definition of "located in" by adding a substantial business presence element. The dissent discounts the fact that this element was not briefed before the motion court, or before us. We decline to grant Vista summary judgment on an incomplete record and on a theory that was not raised below.

As the dissent notes, the current record does contain some indicia that East Coast had a substantial business presence in New York. The payment under the subcontract was for $982,500, and there is email correspondence that the Queensboro Plaza project was East Coast's "main job." However, that email demonstrates why the record must be further developed before a decision can be made on summary judgment. The email was forwarded by Jennifer Connell-Weibelt, an insurance

representative for nonparty Environmental Underwriting Solutions (EUS), who avers in her affidavit that "EUS was neither an employee nor an agent of Everest, nor did EUS have binding authority from Everest." The email was written by a George Zerlanko to a Beth Linton; we do not have affidavits by either of them as to their roles in the process. Nor is the June 22, 2010 email referencing East Coast's "main job" authenticated as a business record. Thus, we do not know how much credence to give the "main job" comment.

Because the *Carlson* Court did not set forth a specific definition of substantial business presence, and because the record is insufficiently developed concerning East Coast's business presence in New York, we remand to allow the parties to develop the record and give Supreme Court an opportunity to meaningfully review the case in light of *Carlson*.

All concur except Andrias, J.P. and Gesmer, J. who dissent in a memorandum by Andrias, J.P. as follows:

ANDRIAS J.P. (dissenting)

The outcome of this action turns on whether or not the timeliness requirements of Insurance Law § 3420(d) apply to the commercial liability policy issued by defendant Everest Indemnity Insurance Company to defendant East Coast Painting & Maintenance.

In *Carlson v American Intl Group, Inc.* (30 NY3d 288 [2017]), decided after the order on appeal was entered, the Court of Appeals, applying the "*Preserver* [*Preserver Ins. Co. v Ryba,* 10 NY3d 635 (2008)] standard," held that Insurance Law § 3420, as amended in 2008 (L 2008, ch 388), applies "whenever a policy covers insureds and risks located in this state" (*id.* at 306 [internal quotation marks omitted]). The Court then determined that the insured, DHL Worldwide Express, Inc., was located in New York "because it has a substantial business presence and creates risks in New York" (*id.*).

We all agree that the Everest policy at issue expressly covers risks created by East Coast in New York. However, stating that the *Carlson* Court determined for the first time that a "substantial business presence" in the state could satisfy the "located in" New York requirement, the majority remands to Supreme Court for further proceedings "[b]ecause the *Carlson* Court did not set forth a specific definition of substantial

business presence, and because the record is insufficiently developed concerning East Coast's business presence in New York." I disagree.

As the majority states, in *Carlson*, the Court of Appeals observed that the legislature did not intend that a company "doing business in New York and purporting to cover risks in New York" be able to evade the Insurance Law (30 NY3d at 309). Guided by this intention and giving the term "substantial" its plain and ordinary meaning, I find that the record establishes that East Coast and plaintiff, Vista Engineering Corporation, an additional insured under the policy, availed themselves of the benefits and protections of the laws of New York, generated considerable income in the state, and had a substantial business presence here during the Everest policy's original and renewal terms. Furthermore, endorsements were added to the policy for the express purpose of covering risks created by the work East Coast performed on a New York City Transit Authority (NYCTA) project in New York. Accordingly, I dissent and would find that the timeliness requirements of Insurance Law § 3420(d) apply.

In July 2010, the Metropolitan Transit Authority notified Vista that it had been awarded "Contract C-34903, Overcoat Painting of Elevated Structure 27th Street-41 Avenue, Astoria &

Flushing Lines in the Borough of Queens" for the lump sum price of $7,191,000. In September 2010, Vista, pursuant to a written subcontract, hired East Coast to perform certain overcoat painting work on the project for the lump sum price of $982,500.

The Vista/East Coast subcontract identified the project owner as "The Metropolitan Transportation Authority Acting by [NYCTA]" and the Architect/Engineer as NYCTA. The subcontract contained indemnity, hold harmless and procurement of insurance clauses which provided:

> "18. To the fullest extent permitted by law, Subcontractor [East Coast] shall indemnify and hold Vista, General Contractor, the owner, and architect (excluding Professional liability) harmless from claims, damages, losses and expenses, including attorney fees and disbursements, arising out [sic] or relating to the performance of this Subcontractor, provided the same is caused in whole or part by Subcontractor, its Subcontractor, supplier, agent, employee, or someone for whose acts or omissions any of them might be liable.
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> "19. In addition to workmen's compensation coverage, Subcontractor shall maintain liability insurance coverage for bodily injury and property damage in such forms and in such amounts as required by the prime contract. All insurance policies shall name Owner [NYCTA] and Vista as additional insured. Certificates of Insurance shall name Owner and Vista as additional insured. Certificates of Insurance shall be submitted to Vista prior to commencing performance and shall contain a provision that such policies will not be canceled until at least 30 days written notice has been given to Vista."

To demonstrate its compliance with these contractual obligations, East Coast, through its broker Global Indemnity Insurance Agency (Global), procured two certificates of insurance that showed that it had purchased a commercial general liability policy from Everest, a New Jersey insurance company. The first, issued to Vista, stated that it was "issued as a matter of information only." The second, issued to NYCTA/MTA at its Manhattan business address, stated that it covered that entity "and its subsidiaries and affiliates, and the City of New York (as owner)." That certificate of insurance also stated:

> "The subscribing insurance company(s), authorized to do business in the State of New York, certifies that insurance of this kind and type and for limits of liability herein stated, covering the Agreement/Contract herein designated, has been procured by and furnished on behalf of the insured and is in full force and effect for the period stated on the front of the Certificate of Insurance."

The policy's "Additional Insured - Owners, Lessees or Contractors - Scheduled Person or Organization" endorsement identified the name of additional insureds as "Blanket where required by written contract." The "Schedule of Additional Insureds-Owners, Lessees or Contractors-Completed Operations," "Contractual Liability - Railroads" and "Amendment of Limits of Insurance" all named NYCTA. The policy also contained a "Primary

and Noncontributory Provision - Your Operations for Named Person" endorsement, which specifically applied to "New York Transit/MTA, 2 Broadway 21st Floor, New York, NY 10004."

In June 2011, East Coast employee Louis Soto was injured when he fell from a ladder while performing work at the Queensboro Plaza subway station and commenced a Labor Law action in New York against Vista. On August 15, 2011, Vista's insurer, Argonaut Insurance Company, through its claims administrator, Colony Specialty, sought a defense and indemnification from East Coast on behalf of Vista and NYCTA, predicated on the indemnification and hold harmless and insurance procurement provisions contained in the Vista/East Coast subcontract. On August 22, 2011, Global forwarded a copy of Colony's tender letter to Everest's wholesale broker, Insurance Office of America, Inc. d/b/a Environmental Underwriting Solutions (EUS), which forwarded it to FARA Insurance Services (FARA), a third-party claims administrator for Everest.

On or about August 28, 2012, Vista filed a third-party summons and complaint in the underlying action asserting causes of action against East Coast sounding in contractual indemnification and contribution, common-law indemnification and contribution, and breach of contract to procure insurance. On

September 20, 2011, FARA, on Everest's behalf, stated that Everest was reserving all rights while it investigated the claim, and requested that Colony send it a copy of Vista's contract with NYCTA and the "full complaint" it had referenced in its tender letter.

On September 21, 2011, Colony emailed FARA a copy of the summons and complaint in the underlying action and the NYCTA/Vista contract. On November 17, 2011, FARA disclaimed coverage to Vista and NYCTA on Everest's behalf based upon a "Third Party Action Over Exclusion Endorsement" in the policy, which excluded coverage for bodily injury to employees of East Coast. Consequently, Vista commenced this action seeking a declaration that Everest has a duty to defend and indemnify it in the underlying action because Everest's disclaimer, made just under three months after the coverage tender was made, was untimely under Insurance Law § 3420(d)(2), which provides:

> "If under a liability policy issued or delivered in this state, an insurer shall disclaim liability or deny coverage for death or bodily injury arising out of a motor vehicle accident or any other type of accident occurring within this state, it shall give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant."

The motion court declared that Everest has no duty to defend

or indemnify Vista, on the ground that Section 3420(d)(2) does not apply because "[a]ll of the evidence indicates that the pertinent policy and endorsements were issued and delivered outside the state of New York." Based on the Court of Appeals subsequent decision in *Carlson* (30 NY3d 288 [2017], *supra*), this was error.

In *Carlson,* the plaintiff's decedent was killed when a truck painted with DHL Express's logo and owned by MVP Delivery and Logistics, struck his car. After obtaining a judgment against MVP, the plaintiff commenced an action pursuant to Insurance Law Section 3420(a)(2) seeking, among other things, to collect on a policy issued by American Alternative Insurance Co. (AAIC) to DHL, which had a cartage agreement with MVP. AAIC contended that it was not subject to suit under section 3420 because DHL's policy was not issued from an AAIC office located in New York, and because New York was not DHL's principal place of business.

The Appellate Division, Fourth Department dismissed the cause of action against AAIC on the ground that the policy, which was issued in New Jersey and delivered in Washington and then in Florida, was not "issued or delivered in this state," as required by Insurance Law § 3420(a)(2) (130 AD3d 1477 [4th Dept 2015]). The Court of Appeals, guided by its decision in *Preserver Ins.*

Co. v Ryba (10 NY3d 635 [2008], *supra*), modified the Fourth Department's Order to deny AAIC's motion to dismiss, stating:

> "Insurance Law § 3420 does not define the term 'issued or delivered in this state,' but other provisions of the Insurance Law are instructive: '[T]he proper interpretation of the term "issued or delivered in this state" refers both to a policy issued for delivery in New York, and a policy issued for delivery outside of New York' (Ops Gen Counsel NY Ins Dept No. 09-06-08). In *Preserver*, we interpreted section 3420(d), which then required insurers to provide written notice when disclaiming coverage under policies 'issued for delivery' in New York. We held that '[a] policy is "issued for delivery" in New York if it covers both insureds and risks located in this state' (10 NY3d at 642). Thus, under *Preserver*, 'issued for delivery' was interpreted to mean where the risk to be insured was located—not where the policy document itself was actually handed over or mailed to the insured. We interpreted section 3420 to provide a benefit—deliberately in derogation of the common law—to New Yorkers whenever a policy covers 'insureds and risks located in this state' (*id.*). Applying the *Preserver* standard to the facts of this case, it is clear that DHL is 'located in' New York because it has a substantial business presence and creates risks in New York. It is even clearer that DHL purchased liability insurance covering vehicle-related risks arising from vehicles delivering its packages in New York, because its insurance agreements say so.
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> "Interpreting 'issued or delivered in this state' to apply exclusively to policies issued by an insurer located in New York or by an out-of-state insurer who mails a policy to a New York address would undermine the legislative intent of Insurance Law § 3420. It would require an assumption that the legislature intended to remove coverage benefitting injured New York residents if the policy was mailed from another

> state, but to increase coverage for foreign victims injured elsewhere so long as the policy was mailed to New York or underwritten by a New York-based insurer—hardly plausible in light of the express purposes of section 3420 and the 2008 amendments" (30 NY3d at 305-306, 307 [internal quotation marks, brackets and footnotes omitted]).

Thus, under *Carlson*, if an out-of-state insurer issues a policy covering risks located in New York to a company that has a substantial business presence in New York, the disclaimer requirements of Insurance Law § 3420(d) will apply, even though the policy is issued and delivered outside the state (*see also Columbia Cas. Co. v National Emergency Servs.*, 282 AD2d 346, 347 [1st Dept 2001] ["We reject plaintiff's claim that the timely disclaimer provision is inapplicable in this case merely because the policy in question was issued out of State and listed the address of the insured's corporate headquarters out of State. The policy expressly covers insureds and risks located in New York and must therefore be deemed issued for delivery in New York"]).

Here, as to the first prong of the *Carlson* analysis, Everest issued the policy knowing that it was providing coverage for a construction project that was located in New York and that the activities of East Coast and Vista would create risks in the

state.[1] The record demonstrates that Everest first issued policy number EF4ML01588-091 for the policy period July 6, 2009 to July 6, 2010 to East Coast. Several months after the policy was issued, East Coast's broker, Global, contacted EUS and requested that endorsements be added in connection with a NYCTA project in New York, and the endorsements were added, effective December 8, 2009.

In June 2010, EUS received a renewal application from Global. EUS was advised by Global that the renewal policy would have to include the endorsements arising out of the NYCTA project that had been added to the 2009 policy. By email dated June 22, 2010, EUS forwarded the renewal information to Emanouil Ivanaov of Everest. Everest then issued the renewal policy with the endorsements requested by Global, fully aware that it was insuring risks located in New York. Indeed, the policy provided named additional insured coverage to a New York entity, listing

[1]Vista demonstrated that it was properly an additional insured under the policy based on its written agreement with East Coast and the additional insured by written contract endorsement in the policy (*see* 77 *Water St., Inc. v JTC Painting & Decorating Corp.*, 148 AD3d 1092, 1096 [2d Dept 2017]). Indeed, in its disclaimer, Everest did not dispute that Vista is properly an additional insured under the policy, and relied solely on the "Third-Party Action Over" exclusion.

NYCTA's New York address in multiple endorsements.[2]

As to the second prong of the *Carlson* analysis, the definition of "substantial" in Black's Law Dictionary (10th ed 2014) includes "having actual, not fictitious, existence," "[i]mportant, essential, and material; of real worth and importance," and "[c]onsiderable in amount or value; large in volume or number." Employing these commonly understood meanings of the word, the record conclusively establishes that East Coast and Vista had a "substantial" business presence in New York.

While Vista is a New Jersey corporation and East Coast is a New Jersey limited liability company, both are registered with the New York Department of State as foreign entities authorized

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[2]While Everest states that the endorsements are not relevant because they reference a different contract number (C-34795) than the subject contract (C-34903) between Vista and East Coast, the "Contractual Liability - Railroads" endorsement references "NY City Transit/MTA" and Job Site "Contract #C34903." The "Primary and Noncontributory Provision - Your Operations for Named Person" endorsement identifies "New York Transit/MTA, 2 Broadway 2nd Floor, New York, NY 10004." Further, affidavits by Jennifer Connell-Wiebelt of EUS and Tom Barrett, Director of Environmental Underwriting for Everest, submitted on the motion, state that "[w]ith respect to Contract C-34903, the 2010 Everest Policy has a $1 million per occurrence ($2 million general aggregate)." Further, in the disclaimer letter dated November 17, 2011, FARA stated that "[w]e reviewed the above-captioned [underlying *Soto*] Complaint in conjunction with the contracts provided between Vista ... and [East Coast] . . . under job #34904, and the insurance policy EF4ML01588-101, issued by [Everest] to [East Coast]."

to do business in New York pursuant to either Business Corporation Law § 1304(a)(5) or Limited Liability Company Law § 802(a)(3). In its answer in the underlying action, Vista admitted that it (i) was and still is a foreign business corporation duly authorized to do business in the State of New York; (ii) performed certain work at the subject location in Queens; (iii) was retained by the Metropolitan Transportation Authority and/or NYCTA to perform work, labor and services at the aforesaid premises; and (iv) retained East Coast for specified work on the project in accordance with a written subcontract agreement.

The record further establishes that both Vista and East Coast garnered considerable income in the state. The price for the work under the Vista/NYCTA contract was $7,791,000. The price for the work under the Vista/East Coast subcontract was $982,500. Indeed, an email from East Coast's broker, Global, to EUS, a copy of which was forwarded to Everest with the renewal application in 2010, states that the "main job that [East Coast] is still performing is for the MTA in New York City." While the majority questions the probative value of the this email, it was authored by East Coast's broker, Global, for the express purpose of having the endorsements covering the NYCTA project in the

original policy included in the renewal policy. While the majority states that the email was not authenticated as a business record, it was produced by Everest in its submissions to the motion court. Moreover, the record establishes that the endorsements requested by Global were included in the policy renewal to cover the risks associated with the NYCTA project. In this regard, the fact that the Everest policy had to be renewed for a second year with the requested endorsements demonstrates that the coverage was for an ongoing project in New York, rather than a brief interlude in the state. Lastly, affidavits in the record state that there are three personal injury cases arising from East Coast's work in New York and that the plaintiffs underwent medical treatment in New York and collected New York State workers' compensation benefits.

The majority states that we may not consider whether East Coast has a substantial presence in New York because *Carlson* was decided after the order on appeal was issued and was not addressed by the parties in their briefs. However, both the Court of Appeals decision in *Preserver* and the Fourth Department's decision in *Carlson* were raised before the motion court with respect to the question of whether the Everest Policy was "issued or delivered" in New York. Further, by letter dated

November 29, 2017, the attorney for plaintiff requested that we take judicial notice of the Court of Appeals decision in *Carlson*, which was addressed extensively at oral argument in this Court. Accordingly, we may apply the *Preserver* standard, as clarified in *Carlson*, to the established facts in the record to determine whether East Coast and/or Vista, an additional insured, were located in New York when the policy was issued and renewed.

There is simply no support for Everest's argument that, under *Preserver*, the insured must maintain an office in New York for it be deemed to have a substantial presence in the state. In *Preserver*, Ryba, an employee of the insured, a New Jersey company that did not maintain an office in New York, was injured while working at a construction site in New York. Ryba sued the owner/general contractor, which in turn commenced a third-party action against the insured asserting causes of action for common-law indemnification, contribution, contractual indemnification, and breach of contract.

The insured had been issued a workers' compensation and employers' liability policy by Preserver, a New Jersey company, underwritten and delivered in New Jersey. "Part Three-Other States Insurance," stated that:

"[i]f you begin work in any one of those states [shown

> in Item 3.C. of the Information Page] after the effective date of this policy and are not insured or are not self-insured for such work, all provisions of the policy will apply as though that state were listed in Item 3.A. of the Information Page" (*Preserver*, 10 NY3d at 641 [internal quotation marks omitted]).

Part Three also required that the insured "[t]ell us at once if you begin work in any state listed in Item 3.C. of the Information Page" (*id.* [internal quotation marks omitted]).

While the liability policy generally covered risks in New York as an Item 3.C. state, the Court of Appeals found that it could not be said that the insured was located in New York where its only offices were located out of state. Thus, the Court held that the policy was not "issued for delivery" in New York within the meaning of Insurance Law § 3420(d), which requires that both the risk and the insured be located in New York.

However, while the insured allegedly agreed to list the owner/general contractor as an additional insured in the policy, it failed to do so. Moreover, while New York was covered generally as an Item 3.C. state, no specific New York location or project was listed in the policy, and there was no evidence that the insured informed Preserver that it had commenced operations on the owner/general contractor's New York property. In contrast, here, Everest was aware that East Coast was involved in

a NYCTA project in Queens and that Vista and NYCTA were additional insureds. While Vista and East Coast were New Jersey businesses, both were authorized to do business in New York and garnered substantial income from the NYCTA project in the state.

Moreover, Everest's argument that *Carlson* must be read narrowly in light of *Preserver* to require a New York office in order to find a substantial business presence in New York is too narrow in light of the policy considerations set forth in *Carlson*. As the Court of Appeals stated in *Carlson*,

> "Generally, statutes designed to promote the public good will receive a liberal construction and be expounded in such a manner that they may, as far as possible, attain the end in view" (McKinney's Cons Laws of NY, Book 1, Statutes § 341, Comment). The overall legislative intent of Insurance Law § 3420 is to protect the tort victims of New York State, and the subsequent amendments to section 3420 were designed to expand the remedy, not to contract it" (30 NY3d at 306-307).

Thus, as a claim for common-law indemnification arising directly from an underlying bodily injury claim falls within the notice provisions of Insurance Law § 3420(d)(2) (*see Sierra v 4401 Sunset Park, LLC*, 101 AD3d 983, 985 [2d Dept 2012], *affd* 24 NY3d 514 [2014]; *Admiral Ins. Co. v State Farm Fire & Cas. Co.*, 86 AD3d 486, 488-90 [1st Dept 2011]; *Old Republic Ins. Co. v United Natl. Ins. Co.*, 2017 NY Slip Op 30789[U], *6 [Sup Ct, NY

County 2017]), I would remand the matter to the motion court to determine whether Everest's disclaimer was untimely under Insurance Law § 3420(d) (*see Stachowski v United Frontier Mut. Ins. Co.*, 148 AD3d 1716, 1717-1718 [4th Dept 2017]).

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

ENTERED: MAY 24, 2018

CLERK

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

6352 The People of the State of New York, Ind. 4695/09
Respondent,

-against-

Davawn Robinson,
Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (Mitchell J. Briskey of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered August 15, 2012, convicting defendant, after a jury trial, of manslaughter in the second degree, and sentencing him to a term of 4 to 15 years, unanimously reversed, on the law, and the matter remanded for a new trial.

During jury selection, after the parties had questioned a round of prospective jurors, the court asked for challenges to the first 12 jurors seated in the jury box. The People challenged Ms. C. for cause, and the court denied the challenge; defense counsel made several cause challenges which the court also denied. The People then made a number of peremptory strikes, but did not challenge Ms. C. The court asked if the remaining jurors, among which was Ms. C., were acceptable, and

the People answered, "Yes."

Defense counsel then began to exercise her peremptory challenges, striking several prospective jurors, who were seated both before and after Ms. C.'s position, but did not make a challenge to Ms. C. During that process, the People interrupted and stated that they had made a mistake, and sought to belatedly make a peremptory challenge to Ms. C. Defense counsel objected, and the court directed her to continue her challenges. After further jury selection and a lunch recess, the court permitted the People to belatedly exercise a peremptory challenge to Ms. C., and offered defense counsel the opportunity to "go through the whole list [of prospective jurors] starting from the beginning" and "change any" of their prior peremptory challenges. Counsel declined the court's proposed remedy, arguing that other than seating Ms. C. on the jury, the only appropriate remedy was a mistrial. The court denied that application.

On appeal, defendant argues that the court improperly permitted the People to exercise their belated peremptory challenge. At the outset, we reject the People's argument that defendant's current claim is unpreserved and waived. Defense counsel made a timely and specific objection when the People attempted to challenge Ms. C. Moreover, when the court decided

to seat the juror, counsel promptly moved for a mistrial. Thus, the issue is fully preserved and properly before us.

On the merits, we believe that a reversal is warranted. The rules for selecting a jury are set forth in the Criminal Procedure Law. After questioning of the jurors is complete, each party, starting with the People, may challenge the jurors for cause (CPL 270.15[2]). After both parties have been given the opportunity to make cause challenges, the court must allow them to peremptorily challenge any remaining prospective juror (*id.*). "The [P]eople *must* exercise their peremptory challenges first and *may not*, after the defendant has exercised his peremptory challenges, make such a challenge to any remaining prospective juror who is then in the jury box" (*id.* [emphasis added]). Thus, "[i]n no event may the People exercise a peremptory challenge after the defendant has exercised his or her peremptory challenges" (*People v Powell*, 13 AD3d 975, 977 [3d Dept 2004], *lv denied* 4 NY3d 889 [2005]).

"The right of peremptory challenge given to an accused person is a substantial right," and the order in which peremptory challenges are made "is matter of substance" "intended for the benefit of the defendant" (*People v McQuade*, 110 NY 284, 292-294 [1888] [addressing similar predecessor statute]). The statute

governing the order for peremptory challenges is not a "mere rule of procedure," but is "a right secured to the defendant" (*id.* at 295). The requirement that the People make peremptory challenges first "is imperative," and violation of that rule is "a substantial, and not a mere technical error" (*id.* at 292, 295; *see People v Luciano*, 10 NY3d 499, 504 [2008] [noting that the Court of Appeals has "strictly constru(ed)" the statutory language governing the order of peremptory challenges "without exception"]; *People v Alston*, 88 NY2d 519, 529 [1996] ["the one persistently protected and enunciated rule of jury selection (is) that the People make peremptory challenges first, and that they never be permitted to go back and challenge a juror accepted by the defense"]).

In *People v Williams* (26 NY2d 62 [1970]), after both parties had exercised peremptory challenges, the court allowed the People to make a peremptory challenge to a previously unchallenged juror. The Court of Appeals reversed the judgment of conviction and ordered a new trial, observing that the requirement that the People exercise peremptory challenges first has been construed "very strictly," and "has been consistently . . . followed" and "firmly reiterated" (*id.* at 63, 64-65). Similarly, the Court of Appeals affirmed a Second Department decision, for the reasons

stated therein, that found reversible error where the trial court permitted the People to exercise a peremptory challenge after they had already completed their peremptory challenges, and while defendant was in the process of exercising his peremptory challenges (*People v De Conto*, 80 NY2d 943 [1992], *affg* 172 AD2d 684 [2d Dept 1991]).

The facts of this case are identical to those in *De Conto*. The People here had completed their peremptory challenges for the round, and expressly told the court that the remaining prospective jurors, including Ms. C., were acceptable. It was only while defense counsel was making her peremptory challenges that the People sought to belatedly challenge Ms. C. Under these circumstances, the court's decision to allow the challenge and excuse the juror constitutes reversible error (*see De Conto,* 80 NY2d at 943). Although the People contend that there was no bad faith in their belated request to exercise the peremptory challenge, CPL 270.15(2) does not contain an exception for good faith. Nor has the Court of Appeals recognized a good faith exception in its decisions strictly construing the statute.

We decline to follow *People v Levy* (194 AD2d 319 [1st Dept 1993], *lv dismissed* 82 NY3d 890 [1993]) and its progeny. Those

decisions cannot be reconciled with the Court of Appeals' affirmance in *De Conto* and the principles consistently enunciated by settled Court of Appeals jurisprudence (*see Luciano*, *Alston*, *Williams*, *McQuade*).

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

ENTERED: MAY 24, 2018

CLERK

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

6416 Alex Shanklin, et al., Index 653702/13
Plaintiffs-Appellants-Respondents,

-against-

Wilhelmina Models, Inc., et al.,
Defendants-Respondents-Appellants,

MC2 Model and Talent Miami LLC, et al.,
Defendants.

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Quinn Emanuel Urquhart & Sullivan, LLP, New York (William B. Adams of counsel), for appellants-respondents.

Otterbourg P.C., New York (Richard G. Haddad of counsel), for Wilhelmina Models, Inc and Wilhelmina International Ltd., respondents-appellants.

M W Moody LLC, New York (Mark W. Moody of counsel), for Click Model Management, Inc., respondent-appellant.

Kaufman Borgeest & Ryan LLP, New York (Cara A. O'Sullivan of counsel), for Next Management, LLC, respondent-appellant.

Ledy-Gurren , Bass, D'Avanzo & Siff LLP, New York (Joseph A. D'Avanzo of counsel), for Major Model Management Inc., respondent-appellant.

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Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered on or about May 26, 2017, which, to the extent appealed from as limited by the briefs, granted defendant model management agencies' CPLR 3211 motions to dismiss to the extent of limiting plaintiff fashion models' claims to those accruing on or after October 24, 2007 and dismissing plaintiffs' causes of

action pursuant to Labor Law § 191 without prejudice, unanimously modified, on the law, to dismiss the breach of contract claim of Vanessa Perron as against defendant Next Management, LLC (Next), and reinstate the Labor Law § 191 claim of Melissa Baker as against defendant Click Model Management, Inc. (Click), and otherwise affirmed, without costs.

The motion court correctly ruled that "usage payments," payments models receive in the event third parties use images taken at photo shoots, are not wages, as defined by article 6 of the Labor Law (Labor Law § 190[1]; *see also Truelove v Northeast Capital & Advisory*, 95 NY2d 220 [2000]; *Beach v Touradji Capital Mgmt., LP*, 128 AD3d 501 [1st Dept 2015]). The motion court also correctly ruled that plaintiffs stated a cause of action that they were employees, notwithstanding the agreements between the parties stating that they were independent contractors (*see Bynog v Cipriani Group*, 1 NY3d 193, 198 [2003]; *see also Bizjak v Gramercy Capital Corp.*, 95 AD3d 469 [1st Dept 2012]). It cannot be said at this stage that plaintiffs' tax status is dispositive on their Labor Law status (*see Matter of Campbell*, 143 AD3d 1026 [3d Dept 2016], *lv dismissed* __ NY3d __, 2018 NY Slip Op 67825 [2018]). Plaintiffs' Labor Law claims pursuant to §§ 193 and 195(3) stated a cause of action, while their claims pursuant to

Labor Law § 191, with the exception of the claim of Melissa Baker, were insufficiently pled. Baker timely alleges that Click failed to pay her for a Sports' Illustrated shoot.

Click's argument that the claims of breach of contract of Michelle Griffin-Trotter were insufficiently pled is unpersuasive, as she pled performance in appearing at photo shoots, and breach and damages, in that Click claimed improper expenses against her earnings, reducing the fee paid to her. Whether she was fully paid cannot be determined on this motion on the pleadings. Next, however, is correct in arguing that Perron's claim for breach of contract is untimely, as her contract terminated in 2006, and she makes no allegations that she earned, but was not paid, any usages on or after October 24, 2007.

We have considered the parties' remaining contentions and find them unavailing.

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

ENTERED: MAY 24, 2018

CLERK

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

6570 In re Ann C. McCormack, by her Special Guardian and Attorney-in-Fact Carol Bamonte, concerning the Estate of Kathleen Durst, Absentee and Alleged Deceased. File 5053/82D

- - - - -

Carol M. Bamonte, etc.,
Petitioner-Appellant,

-against-

Robert Durst,
Nonparty Respondent.

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Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara Wolf & Carone, LLP, New York (Robert Abrams of counsel), for appellant.

Kasowitz Benson Torres LLP, New York (Joshua A. Seigel of counsel), for respondent.

Davidoff Hutcher & Citron LLP, New York (Charles Capetanakis of counsel), for Charles Capetanakis, guardian ad litem for Kathleen Durst.

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Order, Surrogate's Court, New York County (Nora S. Anderson, J.), entered on or about March 24, 2017, which, inter alia, denied petitioner's order to show cause seeking removal of the guardian ad litem, striking his report and staying the proceeding pending such determination, and determined the absentee's date of death to be January 31, 1987, unanimously modified, on the law, to determine absentee's date of death to be January 31, 1982 and, as so modified, affirmed, without costs.

This petition was brought by the estate of the mother of the absentee, Kathleen Durst (Kathleen), to declare her dead and determine her date of death.

The Surrogate's Court erred in finding that Kathleen died on January 31, 1987, the statutory default date under the applicable version of EPTL 2-1.7. Clear and convincing evidence established that the date of Kathleen's disappearance was the most probable date of death under EPTL 2-1.7(a).

Petitioner submitted evidence that Kathleen disappeared without explanation, and without her car and personal effects, on January 31, 1982. Kathleen has not been seen or heard from since that date. Kathleen's sisters submit affidavits in which they recite that they were close with her, and communicated with her several times a month, prior to her disappearance. They state that it is inconceivable that Kathleen would abruptly cease all communication with family and friends. Kathleen was also a medical student at Mt. Sinai Medical School at the time of her disappearance. She was two months away from graduation. According to her family it was Kathleen's dream to become a doctor and it would be incomprehensible that she would walk away from her studies when she was so close to her goal. Respondent Robert Durst has not submitted an affidavit refuting or

explaining this evidence.

We find that this evidence is sufficient to establish a "high[] probab[ility]" that Kathleen died on the date of her disappearance (*Matter of Philip*, 50 AD3d 81, 83 [1st Dept 2008]).

The guardian ad litem's report (GAL), which is cited by Surrogate's Court in its decision, determined that lower court precedent was persuasive in finding that the statutory default period for determining death after disappearance under EPTL 2-1.7 should apply to this case. This lower court precedent is not on point, at least insofar as it concerns setting an earlier date of death pursuant to EPTL 2-1.7(a). In three cases cited by the GAL the petitioners sought the statutory default date of death, and not any earlier date (*e.g. Matter of Ferguson,* 2014 NYLJ LEXIS 3908 [Sur Ct, Bronx County 2014]; *Matter of Putterman*, 38 Misc 3d 1219[A], 2013 NY Slip Op 50157[U] [Sur Ct, Nassau County 2013]; *Matter of Emile*, 2010 WL 5553306, 2010 NY Misc LEXIS 6449 [Sur Ct, Nassau County 2010]). *Matter of Diaz* (4 Misc 3d 1027[A], 2004 NY Slip Op 51083[U] [Sur Ct, Nassau County 2004]), incorrectly cited by the GAL as *Matter of Gartner*, is decided

under EPTL 2-1.7(b), a section we need not consider here given our holding under EPTL 2-1.7(a).[1]

In light of the above conclusions we need not reach the other issues on appeal.

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

ENTERED: MAY 24, 2018

CLERK

[1]The GAL distinguished *Matter of Cosentino* (177 Misc 2d 629 [Sur Ct, Bronx County 1998]), which set a date of death earlier than the default date, as animated by equitable principles. In *Cosentino*, the court determined an earlier date of death where there was evidence that decedent's family would otherwise not qualify for certain benefits. The GAL also cited *Matter of Klein* (2015 NYLJ Lexis 5843 [Sur Ct, Suffolk County 2015]) without distinguishing that case.

Friedman, J.P., Gische, Andrias, Kern, Oing, JJ.

6641 The People of the State of New York, Ind. 51/08
Respondent,

-against-

Camor Harding,
Defendant-Appellant.

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Christina A. Swarns, Office of the Appellate Defender, New York (Eunice C. Lee of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Ryan P. Mansell of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (George Villegas, J.), rendered May 19, 2014, convicting defendant, after a nonjury trial, of murder in the second degree (two counts) and criminal possession of a weapon in the fourth degree, and sentencing him to an aggregate term of 50 years to life, unanimously affirmed.

Defense counsel did not render ineffective assistance when he declined to assert the affirmative defense of mental disease or defect in the face of defendant's opposition to presenting that defense, and the court correctly agreed that this decision was for defendant, not counsel, to make. A defendant retains ultimate authority to decide whether to assert an insanity defense, like the closely related defense of extreme emotional disturbance (*see People v Petrovich*, 87 NY2d 961 [1996]; *People v*

Thomas, 247 AD2d 284 [1st Dept 1998], *lv denied* 92 NY2d 906 [1998].

The court properly denied defendant's suppression motion. The record supports the court's finding that defendant was not in custody when he made statements to the police (*see People v Yukl*, 25 NY2d 585 [1969], *cert denied* 400 US 851 [1970]; *People v Dillhunt*, 41 AD3d 216 [1st Dept 2007], *lv denied* 10 NY3d 764 [2008]). In any event, defendant's waiver of his *Miranda* rights was knowing, intelligent and voluntary, despite his mental infirmities (*see People v Williams*, 62 NY2d 285, 288-289 [1984]).

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

ENTERED: MAY 24, 2018

CLERK

Friedman, J.P., Gische, Andrias, Kern, Oing, JJ.

6642 Jose Daniel Nunez-Ariza, Index 21891/14E
Plaintiff-Respondent,

-against-

Brian J. Nell,
Defendant-Appellant,

Marie Peterson, et al.,
Defendants.

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Morris Duffy Alonso & Faley, New York (Iryna S. Krauchanka of counsel), for appellant.

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

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Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered on or about April 24, 2017, which granted plaintiff's cross motion pursuant to CPLR 306-b to extend the time to serve defendant Brian J. Nell (defendant), and granted defendant's motion to dismiss the complaint unless plaintiff property serves him within 60 days, unanimously affirmed, without costs.

Where plaintiff attempted to serve defendant pursuant to Vehicle and Traffic Law § 253, but the notice of service upon the Secretary of State along with a copy of the summons and complaint that he mailed to defendant's out-of-state address was returned as undeliverable, service was never effectuated (Vehicle and

Traffic Law § 253; *Mez v Proud Tr., Inc.*, 55 AD3d 332 [1st Dept 2008]). However, where, as here, service is not timely made, the court may, within its discretion, extend the time for service upon either good cause or in the interest of justice (CPLR 306-b; *Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 101 [2001]). In applying the interest of justice standard, "the court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, including expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to defendant" (*Leader*, 97 NY2d at 105-106). "No one factor is determinative" (*id.* at 106).

Here, defendant's insurer was on notice of the claim within months of the happening of the accident and plaintiff demonstrated a potentially meritorious action. "Because some factors weigh in favor of granting an interest of justice extension and some do not, we should not disturb Supreme Court's discretion-laden determination" (*Sutter v Reyes*, 60 AD3d 448, 449

[1st Dept 2009]; *see Nicodene v Byblos Rest., Inc.*, 98 AD3d 445 [1st Dept 2012]; *Woods v M.B.D. Community Hous. Corp.*, 90 AD3d 430 [1st Dept 2011]).

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

ENTERED: MAY 24, 2018

CLERK

Friedman, J.P., Gische, Andrias, Kern, Oing, JJ.

6643 Yanil Javier, Index 154636/13
Plaintiff-Respondent,

-against-

New York City Housing Authority,
Defendant-Appellant.

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Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Patrick J. Lawless of counsel), for appellant.

Law Office of Ephrem J. Wertenteil, New York (Ephrem J. Wertenteil of counsel), for respondent.

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Order, Supreme Court, New York County (Arthur F. Engoron, J.), entered April 21, 2017, which, to the extent appealed from as limited by the briefs, denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant failed to establish its entitlement to judgment as a matter of law in this action where plaintiff was injured when, while descending an exterior stairway of a premises owned and operated by defendant, she tripped and fell on a crack that was allegedly present in the stairway. The record shows that defendant failed to demonstrate that it lacked actual notice of the stairway defect, since an April 2012 building inspection report states that the property's ramps, steps and railing

required repair. Defendant also failed to demonstrate that it did not have constructive notice of the alleged defect, because it submitted evidence only as to the building's general cleaning routine, and failed to show when the stairway had last been inspected prior to the accident (*see Rodriguez v Board of Educ. of the City of N.Y.*, 107 AD3d 651, 652 [1st Dept 2013]).

In light of defendant's failure to meet its initial burden to establish that it lacked actual or constructive notice of the defective condition of the stairway, the burden never shifted to plaintiff to establish how long the condition was in existence (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

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

ENTERED: MAY 24, 2018

CLERK

Friedman, J.P., Gische, Andrias, Kern, Oing, JJ.

6644- Ind. 2262/11
6645 The People of the State of New York,
Respondent,

-against-

Darrin Nemelc,
Defendant-Appellant.

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Christina A. Swarns, Office of the Appellate Defender, New York (Anastasia Heeger of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered March 22, 2013, convicting defendant, after a jury trial, of rape in the second degree, criminal sexual act in the second degree (four counts) and sexual abuse in the third degree (two counts), and sentencing him to an aggregate term of seven years, and order, same court and Justice, entered on or about February 14, 2017, which denied defendant's CPL 440.10 motion to vacate the judgment, unanimously affirmed.

The court providently exercised its discretion in denying defendant's CPL 440.10 motion (*see People v Samandarov*, 13 NY3d 433, 439-440 [2009]). Based on the submissions on the motion, as well as the trial record, we conclude that defendant received

effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). We also find no need for a remand for an evidentiary hearing.

Defendant's team of attorneys presented a coherent defense, developing the theory that after the 14-year-old victim ran away from home, defendant found her in the street and brought her back to his apartment, where they had an innocent encounter, and that the victim either lied about sexual activity or suffered a delusion that it had occurred, based on her psychiatric history and troubled past. The defense also sought to establish that the DNA evidence in the case could be explained by the phenomenon of "DNA transfer," by which a person's DNA could end up on another person by innocuous contact. The attorneys developed this defense primarily through cross-examination of the People's witnesses and by presenting psychiatric testimony bearing on the victim's credibility.

Viewed in light of this strategy, we conclude that the challenged conduct of the attorneys generally met an objective standard of reasonableness. In any event, defendant has not demonstrated that, viewed individually or collectively, the alleged errors deprived him of a fair trial or had a reasonable

probability of affecting the outcome of the case.

Defendant asserts that his attorneys were ineffective for requesting an alibi charge and presenting the testimony of two alibi witnesses, because they could not account for the time that the victim alleged that she was in defendant's apartment. However, as trial counsel explained in an affidavit submitted by the People in opposition to defendant's 440.10 motion, the purpose of the alibi was to undermine the People's timeline of the events, not to show that the victim was never with defendant. Thus, regardless of whether "alibi" nomenclature accurately characterizes this particular type of defense, it was reasonably consistent with counsel's strategy of admitting that a nonsexual encounter occurred, and of impeaching the victim's credibility in general to support the theory that she invented the sex acts. Defendant's assertion that the alibi testimony affirmatively damaged his case is without merit, because there is no reasonable possibility that the jury could have viewed the testimony at issue as a "false" alibi.

Defendant next claims his attorneys were ineffective because they sought to admit his statement to a detective based on a misunderstanding of hearsay law. The attorneys reasonably expected the People to introduce defendant's statement on their

direct case. Accordingly, it was reasonable for the defense opening statement to reveal that the jury would hear defendant's "side of the story." When the People did not introduce the statement, the attorneys attempted unsuccessfully to persuade the court that the statement was admissible nevertheless. Although their theory of admissibility was erroneous, defendant was not prejudiced. Regardless of whether they planned their strategy on the incorrect assumption that defendant's statement would be heard by the jury, the attorneys ultimately presented defendant's side of the story through cross-examination of the People's witnesses and in summation.

The attorneys' handling of DNA issues was not ineffective. While the defense did not seek to challenge the admissibility of low copy number DNA evidence, such a challenge would have been futile (*see People v Gonzalez*, 155 AD3d 507 [1st Dept 2017], *lv denied* 30 NY3d 1115 [2018]). The attorneys' decision not to present their own DNA expert was neither unreasonable nor prejudicial. The defense made a valid strategic choice to present the theory that defendant and the victim had met but that their encounter was not sexual, and to argue that defendant's DNA could have been deposited on the victim by way of transfer. Consistent with that strategy, the attorneys engaged in extensive

cross-examination of the People's DNA expert concerning the possibility of DNA transfer.

Defendant also argues that attorneys were ineffective for failing to provide the defense psychiatric expert with the victim's account of the incident. Defendant has not shown that this omission was objectively unreasonable or prejudicial (*see People v Henderson*, 27 NY3d 509, 514 [2016]; *People v Pavone*, 26 NY3d 629, 636, 647 [2015]).

Lastly, defendant contends that his attorneys were ineffective for failing to object to various items of testimony and portions of the prosecutor's summation. We find that, regardless of whether these objections should have been made, there is no showing that the absence of these objections had any reasonable probability of affecting the outcome or fairness of the trial.

We have considered and rejected the claims of trial error

raised on the direct appeal. The evidentiary rulings at issue were provident exercises of discretion that do not warrant reversal.

We perceive no basis for reducing the sentence.

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

ENTERED: MAY 24, 2018

CLERK

Friedman, J.P., Gische, Andrias, Kern, Oing, JJ.

6646 HSBC Bank USA, National Association, etc., Plaintiff-Respondent, Index 35004/13E

-against-

David Gifford, Defendant-Appellant,

Mortgage Electronic Registration Systems, Inc., etc., et al., Defendants.

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Michael Kennedy Karlson, New York, for appellant.

Sanselands Eyet, LLP, New York (Lauren P. Chirch of counsel), for respondent.

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Judgment of foreclosure and sale, Supreme Court, Bronx County (Ben R. Barbato, J.), entered on or about March 22, 2017, and bringing up for review an order, same court (Lizbeth Gonzalez, J.), entered on or about June 6, 2016, which granted plaintiff's motion for summary judgment, unanimously reversed, on the law, without costs, the judgment vacated and, upon a search of the record, summary judgment dismissing the complaint as against defendant Gifford granted without prejudice. The Clerk is directed to enter judgment accordingly.

We reject defendant's contentions that plaintiff's proof of standing was insufficient and that the contents of its notice of

default and 90-day notice pursuant to Real Property Actions and Proceedings Law § 1304 failed to comply with the mortgage and the statute. However, we find that plaintiff failed to carry its burden of proving proper service of the notice of default, which is a condition precedent to the commencement of a foreclosure action (RPAPL 1304[3]). The affidavit of mailing, by a person who did not personally do the mailing but relied on his knowledge of his employer's office practices, does not demonstrate the affiant's familiarity with his employer's mailing practices and procedures with respect to notices of default (*see Nationstar Mtge., LLC v Cogen*, ___ AD3d ___, 2018 Slip Op 01413 [1st Dept 2018]; *U.S. Bank N.A. v Brjimohan*, 153 AD3d 1164 [1st Dept 2017]).

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

ENTERED: MAY 24, 2018

CLERK

Friedman, J.P., Gische, Andrias, Kern, Oing, JJ.

6647 Modern Art Services, LLC, Index 651115/16
Plaintiff-Appellant,

-against-

Financial Guaranty Insurance Company,
Defendant-Respondent.

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The Majorie Firm, Ltd., New York (Francis B. Majorie of counsel), for appellant.

Weil, Gotshal & Manges LLP, New York (Edward Soto of counsel), for respondent.

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Order, Supreme Court, New York County (Anil C. Singh, J.), entered on or about October 13, 2016, which, insofar as appealed from, granted defendant's motion to dismiss the claims for breach of contract, breach of warranty, and unjust enrichment pursuant to CPLR 3211(a)(7), unanimously affirmed, without costs.

During the City of Detroit's bankruptcy proceedings, defendant, one of the City's largest unsecured creditors, engaged plaintiff to assemble a financing proposal and obtain commitments from lenders to loan the City billions of dollars, secured by the City's museum's art collection. The parties' contract provided that plaintiff would be paid an "Additional Fee" if certain conditions were satisfied. The parties dispute whether plaintiff is entitled to the Additional Fee.

Paragraph 3(b)(x) sets forth the condition that "the receipt of the Art Proceeds [be] effected through one or more provisions of [Detroit's Bankruptcy] Plan relating to use of the DIA [Detroit Institute of Arts] Collection or any portion thereof in a manner different than that contemplated in the Fourth Amended Plan." Plaintiff contends that this condition was satisfied because the Fourth Amended Plan was a "cram-down" plan, whereas the Eighth Amended Plan (the Plan ultimately confirmed) was consensual, the State of Michigan extended the deadline for approval of the plan containing the "Grand Bargain" (an agreement to sell or transfer the DIA collection to a charitable trust for a sum to be paid over 20 years by DIA donors, foundations and the State of Michigan, the proceeds to be used to be to fund a portion of the pension claims owed by the City), and the State added conditions for funding relating to its portion of the Grand Bargain. However, none of these differences between the Fourth Amended Plan and the Eighth Amended Plan "relat[es] to use of the DIA Collection or any portion thereof," as required under paragraph 3(b)(x); plaintiff may not read that phrase out of the paragraph (*see e.g. NML Capital v Republic of Argentina*, 17 NY3d 250, 259-260 [2011]; *Schiavone Constr. Co., Inc. v City of New York*, 106 AD3d 427 [1st Dept 2013]).

Plaintiff argues that the contract must be interpreted with "regard to the surrounding circumstances" (*Matter of Stravinsky*, 4 AD3d 75, 81 [1st Dept 2003] [internal quotation marks omitted]), and that, when the parties entered into their contract, they knew it was unlikely that the Bankruptcy Court would change the Grand Bargain, i.e., would allow the City to sell the DIA Collection or use it as collateral for a loan. However, it is fundamental that a contract is construed in accord with the parties' intent, and, as plaintiff itself admits, the best evidence of the parties' intent is "what they say in their writing" (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002] [internal quotation marks omitted]; *see also Ashwood Capital, Inc. v OTG Mgt., Inc.*, 99 AD3d 1, 7 [1st Dept 2012]). Plaintiff also suggests that it is unfair for it not to be compensated when defendant vastly improved its situation between the Fourth and Eighth Amended Plans. However, "the possibility of unfairness to plaintiff [does not] warrant an interpretation of paragraph [3(b)(x)] that is not in accordance with its unambiguous language" (*RM 14 FK Corp. v Bank One Trust Co., N.A.*, 37 AD3d 272, 274 [1st Dept 2007]).

Since the various conditions on which the Additional Fee depends are listed in the conjunctive in paragraph 3(b), having

determined that one (3[b][x]) was not met, we need not consider the remaining conditions.

The breach of warranty claim was correctly dismissed, because, by its terms, defendant's warranty applies only to "a modification of terms of the Fourth Amended Plan relating to a sale, disposition, transfer, financing or other utilization of the DIA Collection to generate proceeds to the City," which did not occur. Plaintiff relies on the alleged purpose of the warranty. However, the contract – particularly because it is a commercial contract negotiated at arm's length by sophisticated business people represented by counsel – should be enforced according to its terms (*Ashwood*, 99 AD3d at 7). Moreover, the parties' contract contains both a no-oral-modification clause and a broad merger clause, which as a matter of law precludes any claim based on an unexpressed alleged intent (*id.* at 9).

Plaintiff requests that the dismissal of its quantum meruit/unjust enrichment claim be without prejudice in the event subsequent proceedings in the case may make the claim viable. However, the claim would be made viable only if defendant withdrew its statement that the parties' contract can be enforced

(*see Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 572 [2005]), and defendant would not be permitted to withdraw the statement.

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

ENTERED: MAY 24, 2018

CLERK

Friedman, J.P., Gische, Andrias, Kern, Oing, JJ.

6648 In re John J. Cannavo, Index 159126/16
Petitioner-Appellant,

-against-

Shola Olatoye, etc., et al.,
Respondents-Respondents.

_____

Sullivan Papain Block McGrath & Cannavo P.C., New York (Vito A. Cannavo of counsel), for appellant.

Kelly D. MacNeal, New York (Nabiha Rahman of counsel), for respondents.

_____

Order and judgment (one paper), Supreme Court, New York County (Joan B. Lobis, J.), entered on or about May 22, 2017, denying the petition to annul respondents' determination, dated August 5, 2016, which denied petitioner's application for reinstatement to his former position with respondent New York City Housing Authority (NYCHA), and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The article 78 court correctly determined, upon consideration of all the facts, that respondents' denial of petitioner's application for reinstatement to his former position with NYCHA was not arbitrary and capricious or an abuse of discretion (*see Matter of Roberts v Gavin*, 96 AD3d 669, 671 [1st

Dept 2012]). Despite petitioner's previous position as a "civil service" employee with the New York City Department of Housing Preservation and Development (HPD), when he was hired by NYCHA in 1996, it was in a non-competitive position that was not eligible for civil service status, as NYCHA's records reflect. Upon a review of records kept by HPD, NYCHA, and the Department of Citywide Administrative Services, respondents determined that petitioner's civil service status had not been formally transferred from HPD to NYCHA, and, since only those who have civil service status are eligible for reinstatement following retirement, rationally concluded that petitioner was not eligible for reinstatement.

While petitioner claims that certain NYCHA documents – including a notification of appointment and performance reviews he received in 1996 – reflect that he maintained his competitive civil service status, the record shows that he subsequently had many conversations with Human Resources and took actions to obtain a formal transfer. Moreover, attached to the petition is a 1996 memo from Human Resources informing petitioner that he did not, in fact, possess this status. As the court found, this is not a rare or extraordinary case in which the doctrine of estoppel or laches should be applied against a government agency

(*see Matter of New York State Med. Transporters Assn. v Perales*, 77 NY2d 126, 130 [1990]).

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

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

ENTERED: MAY 24, 2018

CLERK

Friedman, J.P., Gische, Andrias, Kern, Oing, JJ.

6649 In re Ian C.,
Petitioner-Respondent,

-against-

Desery C.,
Respondent-Appellant.

_____

Leslie S. Lowenstein, Woodmere, for appellant.

Karen P. Simmons, The Children's Law Center, Brooklyn (Laura Solecki of counsel), attorney for the child.

_____

Order, Family Court, Bronx County (Rosanna Mazzotta, Referee), entered on or about October 7, 2016, which, to the extent appealed from as limited by the briefs, upon petitioner father's motion to modify a visitation order, granted petitioner father visitation on alternate weekends from Friday afternoons to Sunday mornings, unanimously affirmed, without costs.

The determination that awarding alternate weekend visitation to petitioner was in the child's best interest has a sound and substantial basis in the record (*see Matter of Frank M. v Donna W.*, 44 AD3d 495 [1st Dept 2007]; *see also Nimkoff v Nimkoff*, 18 AD3d 344, 347 [1st Dept 2005] [child's best interest "is normally best protected by allowing the development of the fullest possible healthy relationship with both parents"]). Contrary to

respondent's contention, the court weighed respondent's purported desire that the child attend church with her every Saturday against the value of maintaining meaningful and regular visitation with petitioner. The court considered, among other things, the father's work schedule, the geographic distance between the households and respondent's continued efforts to obstruct petitioner's relationship with the child for reasons unrelated to her stated religious concerns or for no reason at all (*see e.g. Matter of Larkin v White*, 79 AD3d 751 [2d Dept 2010]; *see also Szemansco v Szemansco*, 296 AD2d 686 [3d Dept 2002]).

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

ENTERED: MAY 24, 2018

CLERK

Friedman, J.P., Gische, Andrias, Kern, Oing, JJ.

6650 The People of the State of New York, SCID 30164/16
Respondent,

-against-

Jose Santa Cruz,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Kelly L. Smith of counsel), for respondent.

_____

Order, Supreme Court, New York County (Gilbert C. Hong, J.), entered on or about December 9, 2016, which adjudicated defendant a level two sexual offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Clear and convincing evidence supported the court's point assessments under the risk factors for sexual contact and continuing course of conduct. The court correctly relied on facts contained in a California probation report recounting the victim's allegations of sexual abuse (*see People v Mingo*, 12 NY3d 563, 573 [2009]). Although there was a difference between the conduct described in this report and the crime of which defendant was convicted after trial, we do not find that the discrepancy

undermines the validity of the point assessments at issue, especially given the different standards of proof in each proceeding.

The court providently exercised its discretion in declining to grant a downward departure from defendant's presumptive risk level (*see People v Gillotti*, 23 NY3d 841, 861 [2014]). The mitigating factors cited by defendant were adequately taken into account by the risk assessment instrument, or were outweighed by the seriousness of the underlying offense and defendant's criminal history.

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

ENTERED: MAY 24, 2018

CLERK

Friedman, J.P., Gische, Andrias, Kern, Oing, JJ.

6651-
6652 Erjon Isufi, et al.,
Plaintiffs-Respondents,

-against-

Prometal Construction, Inc.,
Defendant-Appellant,

RLI Insurance Company,
Defendant.

Index 653265/12

_____

FordHarrison LLP, New York (Eric Su of counsel), for appellant.

Virginia & Ambinder, LLP, New York (Michele A. Moreno of counsel), for respondents.

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Orders, Supreme Court, New York County (Debra A. James, J.), entered April 5, 2017, which denied defendants' motion to dismiss the complaint, and granted plaintiffs' motion for class certification for employees of defendant Prometal Construction, Inc. who worked at the "Ingersoll Houses Project," unanimously affirmed, without costs.

This action to recover for underpayment of prevailing wages required by the Federal Housing Act for a public works contract is not barred by collateral estoppel based on a prior determination by NYCHA on this issue (*see Cox v NAP Constr. Co., Inc.*, 10 NY3d 592 [2008]).

Plaintiffs were not parties to the administrative proceeding before NYCHA, they did not have any right to participate in the proceeding before NYCHA and they were not in privity with an affected party (*see ABN AMRO Bank, N.V. v MBIA Inc.*, 17 NY3d 208, 227 [2011]; *Matter of Bleecker St. Inv., LLC v Zabari*, 148 AD3d 577 [1st Dept 2017]).

Prometal's argument that this action is barred because NYCHA has primary jurisdiction over all prevailing wage violation claims is also unavailing. Although plaintiffs triggered the administrative review process by filing their initial complaint with NYCHA, plaintiffs were not limited to commencing an Article 78 proceeding to challenge NYCHA's determination. Indeed, the Court of Appeals has held that a party need not exhaust administrative remedies prior to bringing a private state action alleging underpayment of prevailing wages (*see Cox, supra*).

Plaintiffs satisfied the conditions for class certification (*see Stecko v RLI Ins. Co.*, 121 AD3d 542 [1st Dept 2014]; *Dabrowski v Abax Inc.*, 84 AD3d 633 [1st Dept 2011]; *Nawrocki v Proto Constr. & Dev. Corp.*, 82 AD3d 534 [1st Dept 2011]; *Kudinov v Kel-Tech Constr. Inc.*, 65 AD3d 481 [1st Dept 2009]). Prometal argues that further discovery would enable it to show that the individuals that comprise the proposed class may not have been

employed by it. However, it failed to adduce evidence that any of these individuals was not employed by it. Prometal's contention that this Court should decide the class certification motion according to the rigorous standard of analysis used by the federal courts in addressing class certification is in error (*see Stecko*, 121 AD3d at 543-544). The threshold determination made in connection with class certification is not intended to be a substitute for summary judgment or trial *(see Kudinov*, 65 AD3d at 482).

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

ENTERED: MAY 24, 2018

CLERK

Friedman, J.P., Gische, Andrias, Kern, Oing, JJ.

6653 & M-1851

William Adagio, et al.,
Plaintiffs-Respondents,

-against-

New York State Urban Development Corporation, et al.,
Defendants-Respondents,

United States Roofing Corporation, et al.,
Defendants-Appellants,

Racanelli Construction Company, Inc., et al.,
Defendants,

- - - - -

United States Roofing Corporation,
Third-Party Plaintiff-Appellant,

-against-

Total Safety Consulting, LLC,
Third-Party Defendant.

- - - - -

William Adagio and Cathy Adagio,
Plaintiffs,

-against-

Total Safety Consulting, LLC,
Defendant.

Index 150273/13
595336/14
160646/14

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Lewis Brisbois Bisgaard & Smith, LLP, New York (Anthony S. McCaskey and Maria Drauakas of counsel), for appellants.

Dell & Dean, PLLC, Garden City (Michael D. Schultz of counsel), for William Adagio and Cathy Adagio, respondents.

McGaw, Alventosa & Zajac, Jericho (Ross P. Masler of counsel), for New York State Urban Development Corporation, Empire State Development Corporation, New York Convention Center Development Corporation, New York Convention Center Operating Corporation and Triborough Bridge and Tunnel Authority, respondents.

Order, Supreme Court, New York County (Jennifer G. Schecter, J.), entered on or about October 24, 2017, which, insofar as appealed from as limited by the briefs, denied defendants United States Roofing Corporation (USRC) and A-Deck, Inc.'s (A-Deck) motion for summary judgment dismissing the complaint and all cross claims against them, unanimously reversed, on the law, and the motion granted, without costs. The Clerk is directed to enter judgment dismissing the complaint and all cross claims against USRC and A-Deck.

The Labor Law § 240(1) claim should be dismissed, because the injured plaintiff's accident did not involve an elevation-related risk (*see Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]). Plaintiff tripped on a pile of sand on the ground, at the same level at which he was walking.

Further, the Labor Law § 241(6) claim should be dismissed because neither USRC nor A-Deck may be held liable under that statute. "Labor Law § 241(6) does not automatically apply to all subcontractors on a site or in the 'chain of command'" (*Vargas v*

Peter Scalamandre & Sons, Inc., 105 AD3d 454, 455 [1st Dept 2013], quoting *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317-318 [1981]). "Rather, for liability under the statute to attach to a defendant, a plaintiff must show that the defendant exercised control either over the plaintiff, the specific work area involved or the work that gave rise to the injury" (*Vargas,* 105 AD3d at 455). Here, there is no evidence that either USRC or A-Deck exercised any control over the plaintiff, the specific work area involved or the work that gave rise to plaintiff's injury.

The Labor Law § 200 claim should also be dismissed as neither USRC nor A-Deck may be held liable under that statute. "Section 200 of the Labor Law merely codified the common-law duty imposed upon an owner or general contractor to provide construction site workmen with a safe place to work" (*Russin*, 54 NY2d at 316-317). "An implicit precondition to this duty to provide a safe place to work is that the party charged with that responsibility have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" (*Id.* at 317). Here, there is no evidence that either USRC or A-Deck had the authority to control the activity that brought about plaintiff's injury.

USRC and A-Deck are also entitled to dismissal of the common-law negligence claim against them since there is no evidence that it is their sand that caused plaintiff's fall. It follows that USRC and A-Deck are entitled to summary judgment dismissing the cross claims against them for contractual indemnification, common-law indemnification and contribution.

M-1851 — *Adagio v New York State Urban Development Corp.*

Motion for stay denied.

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

ENTERED: MAY 24, 2018

CLERK

Friedman, J.P., Gische, Andrias, Kern, Oing, JJ.

6654 Lawrence Boliak, et al., Index 153941/16
Plaintiffs-Appellants,

-against-

Father Michael P. Reilly, et al.,
Defendants-Respondents.

- - - - -

National Employment Lawyers
Association of New York,
Amicus Curiae.

_____

Bergstein & Ullrich, LLP, New Paltz (Stephen Bergstein of counsel), for appellants.

Law Office of Mark E. Goidell, Garden City (Mark E. Goidell of counsel), for Father Michael P. Reilly, respondent.

Kelly Drye & Warren LLP, New York (David Zalman and John Callagy of counsel), for Robert Richard, Greg Manos, St. Joseph by the Sea High School, Cardinal Timothy Dolan and the Archdiocese of New York, respondents.

Harrison, Harrison & Assoc., Ltd., New York (Julie Salwen of counsel), for amicus curiae.

_____

Order, Supreme Court, New York County (Erika M. Edwards, J.), entered September 25, 2017, which, insofar as appealed from as limited by the briefs, denied plaintiffs' cross motion for leave to serve a second amended complaint, inter alia, adding Board of Trustees of defendant St. Joseph by the Sea High School and board chairman Dr. Theodore Strange as defendants, unanimously modified, on the law, to grant the motion except as

to adding Dr. Strange as a defendant, and otherwise affirmed, without costs.

Plaintiffs were not required to submit an affidavit of merit or make any other evidentiary showing in support of their motion (*see Berkeley Research Group, LLC v FTI Consulting, Inc.*, 157 AD3d 486, 490 [1st Dept 2018]; *Hickey v Steven E. Kaufman, P.C.*, 156 AD3d 436 [1st Dept 2017]).

The allegations that plaintiffs were subjected by defendant Father Reilly to a barrage of vulgar, misogynous and ageist remarks and epithets, which defendants Robert Richard and Greg Manos echoed, condoned, and amplified, state causes of action under the New York City Human Rights Law (Administrative Code of City of NY § 8-107) for gender and age discrimination through a hostile work environment (*see Hernandez v Kaisman*, 103 AD3d 106, 114-115 [1st Dept 2012], citing *Williams v New York City Hous. Auth.*, 61 AD3d 62, 80 [1st Dept 2009], *lv denied* 13 NY3d 702 [2009]). The allegations also state causes of action for retaliation (*see Fletcher v Dakota, Inc.*, 99 AD3d 43, 51-52 [1st Dept 2012]).

With the exception of Dr. Strange, the defendants named in the proposed complaint are subject to potential liability for Reilly's alleged discriminatory conduct either vicariously or as

aiders and abettors (*see* Administrative Code § 8-107[13][a]-[b]; *Priore v New York Yankees*, 307 AD2d 67, 74 [1st Dept 2003], *lv denied* 1 NY3d 504 [2003]; *see also Malena v Victoria's Secret Direct, LLC*, 886 F Supp 2d 349, 367 [SD NY 2012]). Dr. Strange is alleged to be the board's "current" chairman; since he is not alleged to have been a member of the board at any relevant time, the proposed complaint is palpably insufficient as to him.

The proposed complaint states a cause of action against Reilly and Manos for defamation of plaintiff Lawrence Boliak (*see Davis v Boeheim*, 24 NY3d 262, 272 [2014]; *O'Neill v New York Univ.*, 97 AD3d 199, 212 [1st Dept 2012]).

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

ENTERED: MAY 24, 2018

CLERK

Friedman, J.P., Gische, Andrias, Kern, Oing, JJ.

6655- Index 111250/11
6656-
6657-
6657A Daniel Jaquez, et al.,
Plaintiffs-Appellants-Respondents,

Jose Cruz Molina, et al.,
Plaintiffs,

-against-

Union Radio Dispatch, Inc.,
Defendant-Respondent-Appellant.

_____

Garvey Cushner & Associates PLLC, White Plains (Lawrence A. Garvey of counsel), for appellants-respondents.

Miguel A. Santiago, Bronx, for respondent-appellant.

_____

Judgment, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered March 2, 2017, restoring to all plaintiffs except Daniel Jaquez all right, title and interest to their shares as stockholders in defendant, and awarding them damages, unanimously affirmed, without costs. Appeals from order, same court and J.H.O., entered January 10, 2017, which determined, after a trial, that defendant terminated plaintiffs' shareholder rights and denied them dividends in violation of its bylaws; order, same court and J.H.O., entered December 30, 2016, which dismissed plaintiff Jaquez's claims as time-barred and determined

that plaintiffs Tatis, Ortiz and Santos were passive shareholders, and order, same court and J.H.O., entered January 10, 2017, which determined that plaintiffs Cruz Molina, Beras and Benitez were entitled to damages for weekly radio dispatch fees based on 48 weeks of work each year, unanimously dismissed, without costs, as subsumed in the appeals from the judgment.

Plaintiff Jaquez's claims, which are based on defendant's breach of its bylaws, were correctly dismissed as untimely under the six-year statute of limitations for contract actions (*see Pomerance v McGrath*, 124 AD3d 481 [1st Dept 2015], *lv dismissed* 25 NY3d 1038 [2015]; CPLR 213[2]). Jaquez was expelled from the corporation in May 2005. This action was commenced in or about October 2011, about five months after the statute of limitations had run.

The court correctly determined that plaintiffs Ortiz, Tatis and Santos are passive shareholders within the meaning of the corporate bylaws (*see Beardslee v Inflection Energy, LLC*, 25 NY3d 150, 157 [2015]). The bylaws unambiguously provide that a shareholder who has worked for the company for three years may stop working and maintain his or her shareholder rights, but that, after three years of inactivity, the shareholder will stop receiving dividends as an active shareholder. Ortiz, Tatis and

Santos presented no evidence that they remained active shareholders.

Defendant was not denied a fair trial as to liability. The court correctly ruled as a matter of law that, under the bylaws, plaintiffs' shareholder rights were improperly terminated, on the undisputed ground that plaintiffs did not receive a disciplinary hearing upon 72 hours' advance notice. The factual basis that defendant sought to establish at trial for ejecting plaintiffs from the corporation was legally insufficient to alter the court's conclusion. The court's determination that plaintiffs Cruz Molina, Beras and Benitez were entitled to damages based on a 48-week year is not against the weight of the evidence.

We have considered the parties' remaining arguments for affirmative relief and find them unavailing.

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

ENTERED: MAY 24, 2018

CLERK

Friedman, J.P., Gische, Andrias, Kern, Oing, JJ.

6658 The People of the State of New York, Ind. 682/11
Respondent,

-against-

Kevin Brathwaite,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Kyle R. Silverstein of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Patricia DiMango, J. at plea and sentence), rendered July 9, 2013, 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 24, 2018

CLERK

Friedman, J.P., Gische, Andrias, Kern, Oing, JJ.

6659- Index 300339/15
6659A Bright Stone Corp., et al.,
Plaintiffs-Respondents,

-against-

J&J Associates II, LLC, also known as J&J II Associates, LLC, et al.,
Defendants-Appellants.

_____

Reisman, Rubeo, McClure & Altman, LLP, Hawthorne (Mark I. Reisman of counsel), for appellants.

Ronald Paul Hart, P.C., New York (Ronald P. Hart of counsel), for respondents.

_____

Amended order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered May 18, 2017, which, to the extent appealed from as limited by the briefs, granted plaintiffs' motion for partial summary judgment on their claim for specific performance of a contract for the sale of commercial real property, and denied defendants' cross motion to dismiss all claims brought by plaintiff Zheng Kuan Gao and all claims against defendant Joann Montalbano, and to compel plaintiffs to comply with discovery, unanimously modified, on the law, to grant defendants' cross motion to the extent of dismissing the claims brought by plaintiff Gao and all claims as against Joann Montalbano, and otherwise affirmed, without costs. Appeal from the original

order, same court and Justice, entered March 13, 2017, granting the same relief, unanimously dismissed, without costs, as superseded by the appeal from the amended order.

In May 2014, plaintiff Bright Stone and defendant J&J entered into a contract pursuant to which J&J agreed to sell certain commercial real property to Bright Stone for $3.3 million at a closing to take place on October 31, 2014. However, after signing the contract, defendant J&J's principal, defendant Montalbano, sought to cancel the contract and delay the closing. After numerous "time is of the essence" closing dates set by plaintiffs passed, Bright Stone and its principal, plaintiff Gao, brought this action.

Contrary to defendants' assertions, the contract was a valid and enforceable agreement (*see Argent Acquisitions, LLC v First Church of Religious Science*, 118 AD3d 441, 444 [1st Dept 2014]; *Nesbitt v Penalver*, 40 AD3d 596, 598 [2d Dept 2007]). Defendants failed to raise an issue of fact concerning the sufficiency of Gao's signature on the contract (*see generally Simpson v Term Indus.*, 126 AD2d 484, 486 [1st Dept 1987]). Nor did defendants demonstrate that plaintiffs are not entitled to the equitable relief of specific performance based on the doctrine of unclean hands, since the alleged wrongdoing by plaintiffs did not

directly relate to the subject matter in litigation or injure defendants (*see Lucia v Goldman*, 145 AD3d 767, 769 [2d Dept 2016]). Further, the court correctly determined that plaintiffs made a sufficient showing that Bright Stone was ready, willing and able to fulfill its contractual obligations (*see ADC Orange, Inc. v Coyote Acres, Inc.*, 7 NY3d 484, 490 [2006]).

As for the cross motion, defendants demonstrated that no valid claim is stated against Joann Montalbano individually, as she was not a party to the contract, the contract was a valid and enforceable agreement, and there is no evidence to suggest that she lacked the authority to sell the property as a representative of J&J. Defendants also demonstrated, and plaintiffs do not dispute on appeal, that Zheng lacks the legal capacity to sue on the contract, since he is not a party to the contract or an intended third-party beneficiary (*see generally State of Cal.*

Pub. Employees' Retirement Sys. v Shearman & Sterling, 95 NY2d 427, 434-435 [2000]; *Edge Mgt. Consulting, Inc. v Blank*, 25 AD3d 364, 368 [1st Dept 2006], *appeal dismissed* 7 NY3d 864 [2006]).

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

ENTERED: MAY 24, 2018

CLERK

Friedman, J.P., Gische, Andrias, Kern, Oing, JJ.

6660 Shantel Capers, Index 301499/15
Plaintiff-Respondent,

-against-

New York City Housing Authority,
Defendant-Appellant.

_____

Herzfeld & Rubin, P.C., New York (Linda M. Brown of counsel), for appellant.

Ephrem J. Wertenteil, New York, for respondent.

_____

Order, Supreme Court, Bronx County (Llinet M. Rosado, J.), entered on or about September 11, 2017, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff testified that on the day of the accident (Thanksgiving) she took the stairs down from the third floor and they were dry. This was sometime between 11:30am and noon that day. When she returned some twenty minutes later, sometime between 11:50 a.m. and 12:20 p.m., plaintiff walked up the same flight of stairs. On her way up, she noticed there was some liquid or water on the steps and she sidestepped the puddle. Later that day, at 3 p.m., plaintiff took the same flight of stairs a third time, this time with her son. Plaintiff testified

that as she walked down the stairs at 3 p.m. she slipped and fell. Her testimony is that she slipped on water or some liquid substance that had no smell and that it was in the same location on the stairs where she had previously observed a puddle earlier that afternoon.

Defendant denies that it had actual notice of the condition alleged. Defendant's building caretaker testified that she inspected the staircase twice that day, following an established schedule. Her first inspection was at approximately 8:20 a.m. and her second inspection was at 12:30 p.m.. The caretaker denied having seen any liquid or water on the steps either time and defendant also contends no one made any complaints about a wet condition on the stairs that day.

Summary judgment was not appropriate, and the motion was correctly denied. Defendant failed to satisfy its prima facie burden of showing the absence of actual notice of a dangerous condition on the steps upon which plaintiff allegedly slipped and fell (*see generally Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). The conflicting testimony as to whether or not there was water on the steps at the time the caretaker's second inspection implicates issues of credibility. If, as plaintiff claims, there was water on the steps at or

shortly before 12:30 p.m., when the caretaker did her second inspection, then defendant knew, or in the exercise of reasonable care, should have known that a dangerous condition existed but, nevertheless, failed to remedy the situation (*see Mendoza v Fordham-Bedford Hous. Corp.*, 139 AD3d 578 [1st Dept 2016]). The evidence submitted by defendant was not sufficient to demonstrate, prima facie, that defendant did not have actual notice of the allegedly hazardous condition prior to plaintiff's fall (*see Gordon*, 67 NY2d at 837 [1986]).

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

ENTERED: MAY 24, 2018

CLERK

Friedman, J.P., Gische, Andrias, Kern, Oing, JJ.

6661 The People of the State of New York, Respondent, Ind. 1616N/13

-against-

Juan Ayarde, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Melissa C. Jackson, J. at speedy trial motion; A. Kirke Bartley, Jr., J. at suppression hearing, jury trial and sentencing), rendered October 21, 2014, convicting defendant of criminal sale of a controlled substance in the third degree, and sentencing him, as a second drug felony offender, to a term of three years, unanimously reversed, on the law, the suppression motion granted, and the matter remanded for a new trial.

The court should have granted defendant's motion to suppress physical evidence recovered from his person. The People's theory, which is reflected in the suppression court's findings, is that nontestifying officers lawfully detained defendant based on reasonable suspicion provided by a testifying detective's

radioed communication, that the testifying detective then acquired probable cause for an arrest, that he then identified defendant to the other officers, and that these officers then searched defendant incident to a lawful arrest. However, because of a lack of proof about the sequence of events, the record fails to support this theory.

Initially, we agree with the People that the police had reasonable suspicion to detain defendant based on the detective's report that he saw a possible drug transaction in which a Hispanic man later identified as defendant, who was wearing a black leather jacket, handed a bag containing two small white objects to another man before walking away, in close temporal and spatial proximity to defendant's apprehension (*see People v Wilson*, 104 AD3d 593 [1st Dept 2013], *lv denied* 21 NY3d 1011 [2013]). However, this information did not establish probable cause to arrest and search defendant. The detective did not testify that he observed anything that appeared to be money being exchanged or handled by either of the two men, that there was anything furtive about their behavior aside from the sheer brevity of their encounter, or that the area was particularly drug prone (*compare People v Jones*, 90 NY2d 835 [1997]; *People v McRay*, 51 NY2d 594 [1980]).

When the detective recovered a bag containing drugs after the apparent buyer discarded it, this clearly raised the level of suspicion to probable cause. However, the nontestifying officers had detained defendant based only on the information known at the time of the initial radioed report. The People's assertion that the search occurred after the testifying detective made a confirmatory identification of defendant is unsupported by the record. In fact, the detective could not specify when the search occurred, or when he learned about it, and the People did not call any witnesses to testify about the nature and timing of the search based on personal knowledge.

Accordingly, the physical evidence recovered from defendant should have been suppressed. We find that the denial of the suppression motion was not harmless beyond a reasonable doubt (*see People v Crimmins*, 36 NY2d 230, 237 [1975]), particularly in light of the prosecutor's repeated references to the recovered plastic bags in its summation.

The court properly denied defendant's speedy trial motion.

We find that all the periods disputed on appeal were excludable. Accordingly, defendant is not entitled to dismissal of the indictment. Since we are ordering a new trial, we find it unnecessary to reach defendant's remaining arguments.

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

ENTERED: MAY 24, 2018

CLERK

Friedman, J.P., Gische, Andrias, Kern, Oing, JJ.

6662N Robert Lee, Index 159405/14
Plaintiff-Respondent,

-against-

13th Street Entertainment LLC, et al.,
Defendants-Appellants,

All Season Protection of NY LLC, et al.,
Defendants.

_____

Faust, Goetz, Schenker & Blee LLP, New York (Lisa De Lindsay of counsel), for appellants.

Louis Grandelli, P.C., New York (Louis Grandelli of counsel), for respondent.

_____

Order, Supreme Court, New York County (Debra A. James, J.), entered April 12, 2017, which granted plaintiff's motion to strike the answer of defendants 13th Street Entertainment LLC and Tri Hospitality, Inc., reversed, on the law, the facts and in the exercise of discretion, without costs, and the motion denied.

A court may strike an answer only when the moving party establishes "a clear showing that the failure to comply is willful, contumacious or in bad faith" (*Palmenta v Columbia Univ.*, 266 AD2d 90, 91 [1st Dept 1999]). Here, it was improper for the motion court to strike defendants' answer because plaintiff failed to establish that defendants' conduct was

willful, contumacious or in bad faith. Although defendants failed to produce deposition witnesses in violation of two court orders, defendants' business was defunct and its former employees and officers were no longer within their control(*see Ewadi v City of New York*, 66 AD3d 583 [1st Dept 2009]; *Schneider v 17 Battery Place N. Assoc. II*, 289 AD2d 164, 165 [1st Dept 2001]).

Defendants provided plaintiff with contact information for their employees and plaintiff could have subpoenaed such employees as nonparty witnesses. Furthermore, defendants did not receive prior warning from the court that a failure to comply with the court orders would result in CPLR 3126 sanctions. Accordingly, in light of the strong preference to resolve actions on their merits, plaintiff's motion to strike should have been denied (*see e.g. Catarine v Beth Israel Med. Ctr.*, 290 AD2d 213, 215 [1st Dept 2002]).

All concur except Gische, J. who dissents in a memorandum as follows:

GISCHE, J. (dissenting)

I respectfully dissent. I would affirm the order striking defendants' answer.

Defendants failed to produce deposition witnesses in violation of two court orders. Defendants also failed to offer a reasonable excuse for their failure. The fact that the businesses are now defunct does not excuse defendants from producing officers or owners. Failure of an owner of a corporation to cooperate with its attorneys does not relieve a party of its obligation to appear for a deposition (*see Reidel v Ryder TRS, Inc.*, 13 AD3d 170 [1st Dept 2004]).

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

ENTERED: MAY 24, 2018

CLERK

Friedman, J.P., Gische, Andrias, Kern, Oing, JJ.

6663N Yolanda Vizcaino, Index 301814/12
Plaintiff-Appellant,

-against-

Western Beef, Inc., et al.,
Defendants-Respondents.

_____

Omrani & Taub, P.C., New York (James L. Forde of counsel), for appellant.

Albert W. Cornachio, P.C., Rye Brook (Christopher R. Block of counsel), for respondents.

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Order, Supreme Court, Bronx County (Laura G. Douglas, J.), entered on or about June 6, 2017, which denied plaintiff's motion to strike the answer and for other discovery sanctions, unanimously modified, on the facts, to grant the motion to the extent of ordering defendants to pay plaintiff's costs in connection with the instant motion and appeal, and otherwise affirmed, without costs.

We see no reason to disturb the motion court's exercise of discretion in declining to strike defendants' answer (*see* CPLR 3126[3]). Defendants ultimately provided current contact information for the cashier who assisted plaintiff after her accident at their store, and explained their delay in providing this information as the result of a series of purported good

faith mistakes. However, in view of the length of time it took and multiple discovery motions and court orders for defendants finally to provide complete and accurate information, we find that monetary sanctions are warranted. An award of the costs of this motion and appeal is appropriate to compensate plaintiff for the extraordinary time and effort necessitated by defendants' lack of diligence.

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

ENTERED: MAY 24, 2018

CLERK

Friedman, J.P., Gische, Andrias, Kern, Oing, JJ.

6664N Donald Alexandre, et al., Index 152301/16
Plaintiffs-Appellants,

-against-

Police Officer Eric C. Martinez,
et al.,
Defendants-Respondents.

_____

Hausman & Pendzick, Harrison (Alan R. Gray Jr. of counsel), for appellants.

_____

Order, Supreme Court, New York County (W. Franc Perry, J.), entered October 16, 2017, which, inter alia, denied plaintiffs' motion for a default judgment against defendant Police Officer Eric C. Martinez, and granted defendants The City of New York and New York Police Department's cross motion for a stay pending resolution of an Internal Affairs Bureau investigation into the underlying incident, unanimously modified, on the law, the facts and in the exercise of discretion, to grant plaintiffs' motion to the extent of providing them with the right to enter a default judgment against Officer Martinez unless he serves an answer or otherwise moves with respect to the complaint within 30 days after service of a copy of this order with notice of entry, and otherwise affirmed, without costs.

The City defendants' opposition papers set forth both a

reasonable excuse for delay in appearing on behalf of Officer Martinez, due to the existence of issues as to whether Corporation Counsel could represent him, and a meritorious defense, reflected in their timely answer that interposed affirmative defenses (*see Silverio v City of N.Y.*, 266 AD2d 129 [1st Dept 1999]; *Drawhorn v Iglesias*, 254 AD2d 97 [1st Dept 1998]). However, in light of the City defendants' withdrawal of their opposition and Officer Martinez's failure to oppose the motion, the motion should have been granted to the extent indicated above.

We need not reach the issue of the stay, which has since been lifted and rendered academic (*see Sedita v Board of Educ. of City of Buffalo*, 43 NY2d 827, 828 [1977]).

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

ENTERED: MAY 24, 2018

CLERK

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

6665 The People of the State of New York, Ind. 1212N/14
Respondent,

-against-

Shawn Campbell,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Michael R. Sonberg, J.) rendered March 22, 2016, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree, and sentencing him to a term of 90 days concurrent with 5 years' probation, unanimously affirmed.

The hearing court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations, which are supported by the record (*see People v Prochilo*, 41 NY2d 759, 761 [1977]). Evidence credited by the court established that the police recovered a quantity of cocaine by way of a lawful strip search (*see People v Hall*, 10 NY3d 303, 310-311 [2008]). Reasonable suspicion warranting a strip search resulted from, among other things, an officer's detection of a

hard object under defendant's pants in the area of his buttocks. Furthermore, the search was conducted in a reasonable manner. The court also correctly determined that the search did not rise to the level of intrusion of a visual body cavity search and that, in any event, a visual body cavity search would likewise have been permissible under the circumstances (*see id.*).

We perceive no basis for reducing the sentence.

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

ENTERED: MAY 24, 2018

CLERK

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

6666 In re Robert Brizel, Index 653163/16
Petitioner-Appellant,

-against-

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

_____

Glass Krakower LLP, New York (Bryan D. Glass of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Kwame N. Akosah of counsel), for respondents.

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Order, Supreme Court, New York County (James E. d'Auguste, J.), entered January 27, 2017, which denied the petition to vacate an arbitration award imposed pursuant to Education Law § 3020-a, finding petitioner guilty of misconduct and terminating his employment with respondent New York City Department of Education, and granted respondents' cross motion to dismiss the petition and confirm the award, unanimously affirmed, without costs.

The guilty findings as to specifications one (a)-(c), two and three were in accord with due process, supported by adequate evidence, rational, and not arbitrary and capricious (*see Lackow v Department of Educ. [or "Board"] of City of N.Y.*, 51 AD3d 563, 567-568 [1st Dept 2008]), and petitioner has not met his burden

to show the invalidity of the Hearing Officer's determination (*see id.* at 568). The record shows that petitioner's misconduct, which included, inter alia, a classroom outburst where petitioner trapped a student in the corner of the classroom with a desk while verbally reprimanding him, was unacceptable behavior and endangered the welfare of his students, who were approximately 11 years of age. There exists no basis to disturb the Hearing Officer's credibility determinations (*see Matter of Brito v Walcott*, 115 AD3d 544, 545 [1st Dept 2014]; *Lackow* at 568).

Under the circumstances presented, the penalty of termination does not shock our sense of fairness (*see Matter of Bolt v New York City Dept. of Educ.*, 30 NY3d 1065, 1070-1071 [2018]). Although petitioner had a 27-year career with respondent Department of Education, that career was not without incident, as evidenced by his 2008 settlement of disciplinary charges, which the Hearing Officer properly considered. Furthermore, petitioner fails to acknowledge the gravity of his misconduct, continues to deny wrongdoing, and attempts to shift

blame to his students (*see Matter of Villada v City of New York*, 126 AD3d 598 [1st Dept 2015]).

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

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

ENTERED: MAY 24, 2018

CLERK

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

6668 Oliver Johnson, Index 301361/12
Plaintiff-Appellant,

-against-

675 Coster Street Housing
Development Fund, et al.,
Defendants-Respondents.

_____

Parker Waichman LLP, Port Washington (Jay L.T. Breakstone of counsel), for appellant.

Havkins Rosenfeld Ritzert & Varriale, LLP, White Plains (Jonathan W. Greisman of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered June 24, 2016, which granted defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff identified the cause of his fall on stairs in a building owned and managed by defendants sufficiently to withstand summary judgment. He was not required to identify at the time of the accident "exactly where [he] fell and the precise condition that caused [him] to fall" (*Tomaino v 209 E. 84th St. Corp.*, 72 AD3d 460, 461 [1st Dept 2010]). He identified the location of his fall at his deposition. Plaintiff also explained that it was the "concave" shape of the steps that caused him to

slip. This testimony was corroborated by plaintiff's expert, who opined that the stairs were dangerously slippery and were disproportionately worn in the middle, creating an unsafe "inward sloping condition" (*see Berr v Grant*, 149 AD3d 536, 537 [1st Dept 2017]). Plaintiff's expert's opinion was properly considered, although it was not timely disclosed, since there was no showing of prejudice to defendants (*see Yampolskiy v Baron*, 150 AD3d 795, 795-96 [2d Dept 2017]; *Ramsen A. v New York City Hous. Auth.*, 112 AD3d 439 [1st Dept 2013]).

Plaintiff's evidence of the cause of his fall is also sufficient to raise issues of fact as to the existence of a defective condition. While it is difficult to discern a concave or sloping condition in the photographs in the record, the photographs are not sufficiently clear to be conclusive.

The record also presents issues of fact as to defendants' notice of the alleged defects. Inconsistently worn and slippery steps are not latent defects and do not appear overnight. In addition, defendants submitted evidence showing that they had an opportunity to observe the defects. The building superintendent informally inspected the stairs at least three times a week

during cleaning. Thus, if the defects are found to exist, it will be reasonable to infer that defendants had constructive notice of them (*see Garcia v New York City Tr. Auth.*, 269 AD2d 142 [1st Dept 2000]).

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

ENTERED: MAY 24, 2018

CLERK

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

6673 John Cintron Jr., Index 20497/12E
Plaintiff-Respondent, 50000/15E
43100/15E

-against-

RC Dolner, LLC,
Defendant-Appellant,

H&H Woodworking, Inc., et al.,
Defendants-Respondents.

- - - - -

[And Third-Party Actions]

_____

Cartafalsa, Slattery, Turpin & Lenoff, New York (Michael J. Lenoff of counsel), for appellant.

The Law Offices of Anthony Iadevaia, New York (Susan Davis of counsel), for John Cintron Jr., respondent.

Law Office of Tobias & Kuhn, New York (Anthony Bianchi of counsel), for H&H Woodworking, Inc. and H&H Woodworking, LLC, respondents.

_____

Order, Supreme Court, Bronx County (Lizbeth Gonzalez, J.), entered May 15, 2017, which granted plaintiff's motion to renew, and, upon renewal, denied the motion of defendant RC Dolner, LLC (defendant)for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant's motion for summary judgment was properly denied in this action where plaintiff, a security guard at a building under construction, alleges that he was injured when he backed

into a wood plank protruding from a saw table that had been placed in a manner that created a dangerous condition. Defendant was the construction manager of the project.

The record presents triable issues of fact as to whether defendant had sufficient control of the work site and notice of the unsafe condition as to warrant liability (*see Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 556 [1st Dept 2009]). Defendant's project manager stated that, not only did defendant have general supervisory authority and the authority to stop any work perceived to be unsafe, but defendant would designate the areas where subcontractors would put away equipment and would tell workers where to move such equipment. Defendant also had rules regarding how the subcontractors were to put away equipment, held weekly safety meetings, and had exclusive oversight over the subcontractors. Defendant's project manager further testified that defendant's laborers would clean up the site after the subcontractors left, and while they were not authorized to move equipment, he did not know if defendant's laborers actually moved the subject saw table (*see Haseley v Abels*, 84 AD3d 480, 482 [1st Dept 2011]; *Bednarczyk v Vornado Realty Trust*, 63 AD3d 427, 428 [1st Dept 2009]).

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

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

ENTERED: MAY 24, 2018

CLERK

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

6674- Index 155985/14
6674A Board of Directors of Windsor Owners Corp.,
Plaintiff-Respondent,

-against-

Elaine Platt,
Defendant-Appellant.

_____

Elaine Platt, appellant pro se.

Gallett Dreyer & Berkey, LLP, New York (Morrell I. Berkowitz of counsel), for respondent.

_____

Order, Supreme Court, New York County (Jennifer G. Schecter, J.) entered January 7, 2016, which, to the extent appealed from as limited by the briefs, denied the motion of defendant, Elaine Platt, to add counterclaims for defamation; and order, same court and Justice, entered June 9, 2017, which, to the extent appealed from, dismissed defendant's counterclaims as academic, denied defendant's motion for summary judgment dismissing the claim by plaintiff, Board of Directors of Windsor Owners Corp. (the Board), for breach of fiduciary duty, and denied defendant's second motion to assert a counterclaim for defamation, unanimously affirmed, without costs.

Defendant failed to carry her burden on summary judgment of

showing that she is entitled to judgment as a matter of law on the Board's breach of fiduciary duty claim, and thus, her arguments to dismiss that claim because there was no harm to the Board must fail (*see William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]). An action against the Board by a third party is still pending, and the Board will likely incur damages not only in defending the action, but also in any potential award in the third party's favor.

As to the defamation claims, the statements of which Platt complains were either statements of fact or non-actionable statements of opinion, or both (*see e.g. Sandals Resorts Intl. Ltd. v Google, Inc.*, 86 AD3d 32, 43 [1st Dept 2011]). In addition, the statements were protected by the common interest privilege (*see Liberman v Gelstein*, 80 NY2d 429, 437 [1992]; *Ferguson v Sherman Sq. Realty Corp.*, 30 AD3d 288, 289 [1st Dept 2006]). As a result, the statements were not defamatory, and the motion court properly denied Platt's motion to amend her answer to assert counterclaims for defamation.

Finally, because the executive committee was disbanded, the first and second counterclaims do not present a justiciable controversy, nor are the counterclaims subject to an exception to

the mootness doctrine (*see Matter of Baines v Berlin*, 125 AD3d 439, 440 [1st Dept 2015]; *People ex rel. Lassiter v Schriro*, 114 AD3d 593, 594 [1st Dept 2014], *lv denied* 23 NY3d 906 [2014]). As a result, the motion court properly dismissed those counterclaims as moot (*see Baines*, 125 AD3d 440).

We have considered and rejected defendant's remaining arguments.

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

ENTERED: MAY 24, 2018

CLERK

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

6675 Daniel W. Dienst, et al., Index 651450/13
Plaintiffs-Appellants,

-against-

Paik Construction, Inc.,
Defendant-Respondent.
- - - - -
[And a Third-Party Action]

_____

Greenspoon Marder LLP, New York (Wendy Michael of counsel), for appellants.

The Marantz Law Firm, Rye (Neil G. Marantz of counsel), for respondent.

_____

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered May 16, 2017, which denied plaintiffs' motion pursuant to CPLR 3104(d) and Commercial Division Rule 11-a(b) to modify an order, same court (Ira Gammerman, J.H.O.), entered April 18, 2017, denying plaintiffs' application to compel defendant to disclose its full financial records related to the renovation project, unanimously affirmed, with costs.

Plaintiffs, the owners of a luxury duplex apartment under renovation, seek damages arising from, inter alia, defendant general contractor's alleged breach of its performance obligations under the parties' construction contract and an alleged exaggerated mechanic's lien filed by the defendant.

Plaintiffs' request for disclosure of all defendant's financial records related to their project was properly denied. Defendant agreed to perform the work specified in the contract for a fixed price, and the record strongly supports the conclusion that the contract was substantially performed. Whether defendant timely paid, underpaid or overpaid its subcontractors for the work specified in the contract is not relevant to whether it adequately performed the scope of the work.

While plaintiff would be entitled to seek disclosure pertaining to defendant's counterclaims for damages founded upon equitable theories of relief, i.e., quantum meruit and unjust enrichment, or on the basis of work allegedly performed outside of the contract requirements, as those claims have been withdrawn at oral argument, there remains no additional disclosure to which plaintiffs are entitled.

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

ENTERED: MAY 24, 2018

CLERK

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

6676 Kerron Jarrett, Index 22105/14E
Plaintiff-Respondent,

-against-

Carlo C. Claro,
Defendant-Appellant.

_____

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

German Rubenstein LLP, New York (Steven J. German of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Doris M. Gonzalez, J.), entered May 11, 2017, which, inter alia, denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Summary judgment was properly denied in this action for personal injuries sustained when plaintiff bicyclist was struck by a motor vehicle operated by defendant. The parties' conflicting versions as to how the accident occurred raise triable issues of fact (*see Huerta-Saucedo v City Bronx Leasing Inc.*, 147 AD3d 695 [1st Dept 2017]; *Beaubrun v Boltachev*, 111 AD3d 494 [1st Dept 2013]). The statement attributed to plaintiff in the police report should not serve as grounds to render his deposition testimony incredible as a matter of law (*see Ramos v*

Rojas, 37 AD3d 291, 292 [1st Dept 2007]).

We have considered the remaining arguments and find them unavailing.

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

ENTERED: MAY 24, 2018

CLERK

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

6677- Ind. 1536/15
6677A The People of the State of New York, 2160/15
Respondent,

-against-

Sherman Gibbs,
Defendant-Appellant.

_____

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

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

_____

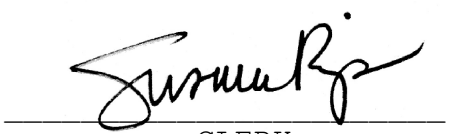
An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Michael Obus, J.), rendered March 15, 2016,

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

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

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

ENTERED: MAY 24, 2018



CLERK

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

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

6678 JG, et al., Index 151453/16
Plaintiffs-Appellants,

-against-

Myron Goldfinger, et al.,
Defendants-Respondents.

_____

R. Zachary Gelber Law PLLC, New York (R. Zachary Gelber of counsel), for appellants.

Michael Fuller Sirignano, Cross River, for Myron Goldfinger and June Goldfinger, respondents.

Jason M. Krellenstein, PLLC, Cross River (Jason M. Krellenstein of counsel), for Covecastles Development Corporation and Covecastles Limited, respondents.

_____

Order, Supreme Court, New York County (Kathryn E. Freed, J.), entered February 7, 2017, which, to the extent appealed from as limited by the briefs, granted defendants' motions to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7), unanimously modified, on the law, to deny the motion of defendants Covecastles Development Corporation and Covecastles Limited to dismiss the complaint as against them, and otherwise affirmed, without costs.

Plaintiffs allege that, while on vacation at a resort in Anguilla, a gardener employed by defendants' resort attacked the infant plaintiff, as she was on her way down to the beach.

Plaintiffs allege that defendants, the resort owner and manager, and two of its shareholders, negligently failed to provide appropriate security and negligently hired the gardener, who had a criminal history.

While an innkeeper is by no means an insurer of its guests' safety, it does, as a landowner, have a duty to guard against reasonably foreseeable criminal acts of third parties that threaten the property or well-being of its patrons (*see Penchas v Hilton Hotels Corp.*, 198 AD2d 10, 10-11 [1st Dept 1993]). We have applied this doctrine not only in cases where the assailant was a stranger to the defendant, but also, as in the case here, where the underlying act was committed by an employee of the establishment (*see Betancourt v 141 E. 57th St. Corp.*, 56 AD2d 823, 823-24 [1st Dept 1977]).

While the Covecastles defendants came forward with documentary evidence showing that they did not own the beach where the infant plaintiff was found, they failed to conclusively establish either that no part of the attack occurred on their property or that they had no responsibility for that area, which they touted as "our" beach. In addition, defendants failed to offer any evidentiary basis for the court to overlook the clear allegation in the complaint that the assailant had a criminal

history that made the attack foreseeable to defendants.

Similarly, when construing the complaint liberally, presuming its factual allegations to be true, and giving the allegations every favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), plaintiffs adequately state a claim for negligent hiring (*see Haddock v City of New York*, 140 AD2d 91, 94 [1st Dept 1988], *affd* 75 NY2d 478 [1990]). Although the complaint did not specifically plead that Covecastles knew of the employee's propensity to commit a sexual assault that would cause injury to the infant plaintiff, plaintiffs may later amplify these allegations in a bill of particulars (*see Jarvis v Nation of Islam*, 251 AD2d 116, 117 [1st Dept 1998]; *and see Pickering v State of New York*, 30 AD3d 393, 394 [2nd Dept 2006]).

However, the complaint failed to state a cause of action against defendants Myron Goldfinger and June Goldfinger, as the allegations regarding their involvement in the security and hiring at the resort are insufficient.

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

ENTERED: MAY 24, 2018

CLERK

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

6679 In re Lenox Hill Apartments Inc., Index 102049/16
Petitioner-Respondent,

-against-

New York State Division of Housing
and Community Renewal,
Respondent-Appellant.

_____

Mark F. Palomino, New York (Sandra A. Joseph of counsel), for appellant.

Borah, Goldstein, Altschuler, Nahins & Goidel, P.C., New York (Paul N. Gruber of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Arlene P. Bluth, J.), entered March 28, 2017, upon the petition brought pursuant to CPLR article 78, directing respondent (DHCR) to issue a final order of deregulation of an apartment, unanimously affirmed, without costs.

On May 15, 2015, petitioner filed a Petition by Owner for High Income Rent Deregulation (OPD) with DHCR. The OPD indicated that the legal rent for the apartment and the tenants' total annual income exceeded the deregulation threshold, as the tenants certified on an Income Certification Form (ICF) (*see* Administrative Code of City of NY §§ 26-504.3[a][2], [3]). By the mandatory and explicit language of Administrative Code § 26-

504.3(b), DHCR was required to issue an order of deregulation within 30 days after the filing of the OPD (*see Matter of Classic Realty LLC v New York State Div. of Hous. & Community Renewal*, 2 NY3d 142, 146 [2004]; *Pledge v New York State Div. of Hous. & Community Renewal*, 257 AD2d 391, 394 [1st Dept 1999], *affd* 94 NY2d 851 [1999]). It failed to do so, and, on December 20, 2016, more than a year and a half later, petitioner commenced this proceeding to compel DHCR to issue an order of deregulation.

DHCR's reliance on Administrative Code § 26-504.3(c) is misplaced, because the tenants timely certified their income and petitioner did not challenge the certification. DHCR's reliance on *Classic Residences v New York State Div. of Hous. & Community Renewal* (212 AD2d 418 [1st Dept 1995]) is misplaced, because it was DHCR's unexplained notice of confirmation that prompted the tenants to change their certified income, as reflected in an amended ICF filed May 26, 2016, more than a year after petitioner's filing of the OPD.

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

ENTERED: MAY 24, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Kapnick, JJ.

6680 The People of the State of New York, Ind. 551/03
Respondent,

-against-

Edwin Santiago,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (David Crow of counsel), and Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (Neil P. Kelly of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Marcy L. Kahn, J.), rendered June 8, 2012, convicting defendant, after a jury trial, of assault in the first degree, and sentencing him to a term of 21 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 determinations concerning credibility and identification, including its evaluation of the strengths and weaknesses of the testimony of three identifying witnesses.

The court providently exercised its discretion in ruling that if defendant introduced evidence of a current measurement of

his height, this would open the door to the People's introduction of a photograph of defendant indicating a different height. This ruling did not deprive defendant of a fair trial or impair his defense.

Defendant sought to establish that his height was actually five feet, six inches, which is several inches less than the witnesses' estimates of the assailant's height, as well as the estimate of defendant's height given by one of the officers who arrested him. The court ruled that if the defense introduced evidence of a contemporaneous height measurement of five feet, six inches, the People could introduce a redacted photo from the Department of Correction depicting defendant in front of a ruler that showed his height as five feet, eight inches.

The photo was admissible as a business record (*see* CPLR 4518[a]; *People v Cratsley*, 86 NY2d 81, 89-90 [1995]; *People v Nashal*, 130 AD3d 480 [1st Dept 2015], *lv denied* 26 NY3d 101 [2015]). Although the photo, the most recent of several which portrayed defendant in custody at varying heights, may not have accurately recorded defendant's height at five feet, eight inches, it was reliable to the extent that, if defendant introduced evidence that his height was five feet, six inches, the photo showed that he could have manipulated his apparent

height while being measured.

Furthermore, the photo was not unduly prejudicial. The court ordered various numerous redactions and precautions in the event the People introduced the photo, in order to avoid any suggestion that it was taken while defendant was in custody. Moreover, even if the jury might still have speculated that it was an arrest photo, it already knew that defendant had been arrested for the present crime and on another occasion relevant to the investigation, so any potential for prejudice was minimal. We find unpersuasive defendant's assertion that the photo nevertheless suggested additional, uncharged criminal activity.

In any event, although defendant ultimately opted not to introduce the evidence of his height, for fear of opening the door to admission of the photo, there was no impairment of his right to present a defense. The court's ruling did not preclude defendant from introducing evidence; instead, it merely gave the People an opportunity for rebuttal. Additionally, defendant still was able to elicit that, based on his own report of his

height, arrest paperwork stated his height as five feet, five inches, and he elicited inconsistencies in the prosecution witnesses' testimony regarding his height.

We perceive no basis for reducing the sentence.

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

ENTERED: MAY 24, 2018

CLERK

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

6681 In re Ellen Woolfolk, index 101107/16
Petitioner-Appellant,

-against-

New York City Board/Department
of Education, et al.,
Respondents-Respondents.

_____

Glass Krakower LLP, New York (Bryan D. Glass of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Megan E.K. Montcalm of counsel), for respondents.

_____

Order and judgment (one paper), Supreme Court, New York County (Manuel J. Mendez, J.), entered May 26, 2017, which denied the petition to set aside respondents' determination sustaining petitioner's ineffective annual performance rating for the 2013-2014 school year on the ground that she waived her right to initiate any legal or equitable claims in a Stipulation of Settlement, granted respondents' cross motion to dismiss the petition, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

In June 2015, following an ineffective year-end rating for the 2013-2014 school year, petitioner was served with formal misconduct charges pursuant to Education Law § 3020-a, which

related to the 2012-2013, 2013-2014, and 2014-2015 school years. On December 14, 2015, prior to the adjudication of those charges, petitioner entered into a Post-Charge Stipulation of Settlement to discontinue the action. Subsequently, petitioner administratively appealed her ineffective rating for the 2013-2014 school year, which was rejected, and then commenced this article 78 proceeding.

Supreme Court properly dismissed the petition. It is well settled that "when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms. Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing" (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). Here, pursuant to the clear and express terms of the stipulation of settlement, petitioner waived her right to file a claim in court relating to any matter arising from or relating to her employment prior to December 2015, including this challenge to the 2013-2014 year-end

ineffective rating.

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

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

ENTERED: MAY 24, 2018

CLERK

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

6682 The People of the State of New York, Ind. 5281/10
Respondent,

-against-

Mike Eldridge,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Katherine Kulkarni of counsel), respondent.

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Judgment, Supreme Court, New York County (Laura A. Ward, J. at suppression hearing; A. Kirke Bartley, Jr., J. at plea and sentencing), rendered January 26, 2012, as amended February 2, 2012, convicting defendant of attempted robbery in the second degree, and sentencing him, as a persistent violent felony offender, to a term of 14 years to life, 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 or exceeded the minimum standards for such a colloquy (*see People v Bryant*, 28 NY3d 1094 [2016]). Furthermore, the colloquy was supplemented by an appropriate written waiver.

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 24, 2018

CLERK

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

6683N Amir Korangy, Index 655211/16
Plaintiff-Appellant-Respondent,

-against-

Georgia Malone, et al.,
Defendants-Respondents-Appellants,

Daniel Shimko, et al.,
Defendants.

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The Stolper Group, LLP, New York (Michael Stolper of counsel), for appellant-respondent.

Law Office of D. Paul Martin PLLC, New York (D. Paul Martin of counsel), for respondents-appellants.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered June 6, 2017, which, to the extent appealed from, as limited by the briefs, granted, for reasons stated on the record on May 22, 2017, defendants' motion to dismiss plaintiff's first cause of action for breach of contract, third cause of action for breach of the covenant of good faith and fair dealing, and fourth cause of action for breach of fiduciary duty, and denied defendants' application for sanctions, unanimously affirmed, with costs.

The motion court correctly dismissed the breach of contract cause of action, as "[u]nder the plain language of the operating

agreement" (*Nader & Sons, LLC v Hazak Assoc. LLC*, 149 AD3d 503, 505 [1st Dept 2017]), namely, paragraph 3.3.3, when the members are deadlocked on an issue, they are to submit to mediation, and the "decision of the mediator shall be final and binding." Taking the allegations in the complaint as true, plaintiff admitted the parties were deadlocked and the dispute was submitted to mediation. The cause of action for breach of the covenant of good faith and fair dealing was also correctly dismissed, as the May 17, 2016 letter from defendants' attorney to the broker for plaintiff's prospective buyer did not violate the operating agreement, as it was entitled to withhold consent absent plaintiff's prior notification (*Phoenix Capital Invs. LLC v Ellington Mgt. Group, L.L.C.*, 51 AD3d 549, 550 [1st Dept 2008]). The cause of action for breach of fiduciary duty was foreclosed by the mediation that resolved this issue, and plaintiff was therefore estopped from rearguing this issue (*see Matter of Health Tea Corp. v New York City Loft Bd.*, 162 AD2d 152, 152 [1st Dept 1990]). That branch of the cause of action for breach of fiduciary duty based on defendant's purchase of a commercial building adjacent to the building at the core of this dispute, was correctly dismissed with leave to replead, as plaintiff has not sufficiently pled "'allegations from which

damages attributable to [defendants' conduct] might be reasonably inferred'" (*InKine Pharm. Co. v Coleman*, 305 AD2d 151, 152 [1st Dept 2003]).

"The court's denial of sanctions and its finding that neither plaintiff nor her lawyer had engaged in frivolous conduct constituted a proper exercise of discretion" (*Constantini v Constantini*, 44 AD3d 509, 509 [1st Dept 2007]; see 22 NYCRR 130-1.1[a],[c]).

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

ENTERED: MAY 24, 2018

CLERK

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

6684-
6685N Raul Marquez,
Plaintiff,

-against-

171 Tenants Corp.,
Defendant-Appellant,

David Kleinberg-Levin,
Defendant,

Kenneth Cook,
Defendant-Respondent.

- - - - -

[And a Second Third-Party Action]

- - - -

171 Tenants Corp.,
Third Third-Party Plaintiff-Appellant,

-against-

Cynthia Cook,
Third Third-Party Defendant-Respondent.

Index 106616/11
590264/14

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

Leahey & Johnson, P.C., New York (Peter J. Johnson, Jr. of counsel), for respondents.

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Order, Supreme Court, New York County (Lucy Billings, J.), entered July 8, 2015, which, inter alia, granted third third-party defendant Cynthia Cook's motion to compel discovery to the extent of directing defendant-third third-party plaintiff, 171

Tenants Corp. (171 Tenants) to provide certain documents and that its failure to do so precludes it from proving that it did not approve of or supervise the renovations performed on the 14th floor of the building where plaintiff was injured, unanimously modified, on the law, the preclusion order vacated, and otherwise affirmed, without costs. Order, same court and Justice, entered on or about September 11, 2017, which denied 171 Tenants' motion to vacate its default in opposing the motion of defendant/second third-party plaintiff Kenneth Cook for a default judgment as against second third-party defendants Philip J. Farley and Museum Quality Properties, LLC (MQ), and denied 171 Tenants' motion to renew with respect to the prior order imposing discovery sanctions on it, unanimously affirmed insofar as it denied the motion to vacate 171 Tenants' default, and the appeal therefrom unanimously dismissed, as academic, insofar as it denied renewal, all without costs.

A preclusion order requires a determination that the party engaged in willful, contumacious or bad faith conduct (*see National Cas. Co. v American Home Assur. Co.*, 102 AD3d 553, 553-554 [1st Dept 2013]; *Castor Petroleum, Ltd. v Petroterminal de Panama, S.A.*, 90 AD3d 424 [1st Dept 2011]). Here, the court's July 8, 2015 order properly directed 171 Tenants to fulfill its

discovery obligations concerning the written protocols and documents provided to second third-party defendants MQ and Farley via the testimony of its president or an affidavit detailing the search efforts for responsive documents. However, the court improvidently exercised its discretion when it resolved the issue of whether 171 Tenants approved and supervised the renovations as a sanction for the failure to produce those documents. The president of 171 Tenants testified to his search efforts, and there was no evidence that the search was deficient or that he refused to answer questions concerning the existence or location of responsive documents. There was also no evidence that 171 Tenants' failure to provide the requested documents was willful, contumacious, or in bad faith.

A party seeking to vacate a default must demonstrate both a reasonable excuse and a meritorious defense. A determination of the sufficiency of the proffered excuse and the statement of merits rests within the sound discretion of the court (*see Goldman v Cotter*, 10 AD3d 289, 291 [1st Dept 2004]). The court properly declined to vacate 171 Tenants' default in opposing Kenneth Cook's motion for a default judgment against MQ and Farley, which 171 Tenants improperly characterized as a motion to reargue. 171 Tenants did not provide a reasonable excuse for

failing to oppose Kenneth Cook's motion. It also failed to demonstrate a meritorious claim, in that it produced no evidence of negligence or other misconduct on the part of the movant seeking a default against plaintiff's employer.

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

ENTERED: MAY 24, 2018

CLERK

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

6686- Index 112337/07
6687-
6688N Vladimira Koch, etc.,
Plaintiff-Appellant,

Michael Koch, et al.,
Plaintiffs,

-against-

Sheresky, Aronson & Mayefsky LLP, et al.,
Defendants-Respondents.

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Andrew Lavoott Bluestone, New York, for appellant.

Traub Lieberman Strauss & Shrewsberry LLP, Hawthorne (Chelsea Four-Rosenbaum of counsel), for Sheresky, Aronson & Mayefsky LLP and David Aronson, respondents.

McManus Ateshoglou Adams Aiello & Apostolakos PLLC, New York (Christopher D. Skoczen of counsel), for Bragar, Wexler, Eagel & Morgenstern, P.C. and Raymond A. Bragar, respondents.

L'Abbate Balkan, Colavita & Contini, L.L.P., Garden City (Noah Nunberg of counsel), for Ragues & Min, Esqs. and Raymond Ragues, respondents.

Furman Kornfeld & Brennan LLP, New York (Rachel Aghassi of counsel), for D'Agostino & Salvi, LLP and Frank J. Salvi, respondents.

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Order, Supreme Court, New York County (Shlomo S. Hagler, J.), entered December 15, 2015, which, to the extent appealed from as limited by the briefs, granted defendants' motion to preclude plaintiff Vladimira Koch from testifying at trial, and

denied plaintiff's cross motion to supplement or amend the complaint and for an advisory jury pursuant to CPLR 4212, unanimously affirmed, without costs. Order, same court and Justice, entered October 14, 2015, which, to the extent appealed from as limited by the briefs, ordered plaintiff to appear for a deposition on a specified date or be precluded from testifying at trial, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered February 22, 2016, which denied plaintiff's motion to reargue, unanimously dismissed, without costs, as taken from a nonappealable order.

We reject plaintiff's argument that the December 2015 order contravenes an April 2013 stipulation between the parties. The order does not contradict the stipulation in any material way. Indeed, plaintiff relies on superficial variations between the order and the stipulation to justify her refusal to comply with the order. In the stipulation, plaintiff agreed to appear for the continuation of her deposition from day to day until its completion. It is uncontested that she did not do so.

The court properly denied plaintiff's cross motion to supplement or amend the complaint. The 22 proposed causes of action against plaintiff Vladimira Koch's former attorneys are palpably insufficient and clearly devoid of merit (*MBIA Ins.*

Corp. v Greystone & Co., Inc., 74 AD3d 499 500 [1st Dept 2010]; *see* CPLR 3025[b]).

The court also properly denied plaintiff's motion for a hearing before an advisory jury pursuant to CPLR 4212. Plaintiff failed to explain the necessity for such a hearing or to substantiate her claim of bias on the part of the special referee, who had denied her motion for a protective order and directed her to appear for a deposition. Plaintiff's motion for the appointment of an advisory jury after the special referee denied her motion for a protective order suggests a strategy to avoid the discovery orders entered against her as a result of her willful noncompliance.

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 24, 2018

CLERK