SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 17, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Friedman, J.P., Richter, Kapnick, Webber, JJ.

6316 In re Justine Luongo, Index 160232/16
Petitioner-Appellant,

-against-

Records Access Appeals Officer, etc.,
Respondent-Respondent.

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The Legal Aid Society, New York (Cynthia H. Conti-Cook of counsel), and Cleary Gottlieb Steen & Hamilton LLP, New York (Katherine R. Lynch of counsel), for appellant.

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

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Judgment (denominated a decision and order), Supreme Court, New York County (Joan B. Lobis, J.), entered June 1, 2017, denying the petition to compel respondent to disclose documents requested pursuant to the Freedom of Information Law (FOIL) and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The New York City Police Department personnel orders at issue contain information used to evaluate officers' performance, such as the dispositions of disciplinary charges brought against

them. Moreover, these records, which contain factual details regarding misconduct allegations and punishments imposed on officers, are "material ripe for degrading, embarrassing, harassing or impeaching the integrity of [the] officer[s]" (*Matter of New York Civ. Liberties Union v New York City Police Dept.*, __NY3d__ 2018 NY Slip Op 08423, *9 [2018] [internal quotation marks and alterations omitted]). Accordingly, the court properly found that the records sought were exempt from disclosure under Civil Rights Law § 50-a (*id.*, 2018 NY Slip Op 08423 [2018]).

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

ENTERED: JANUARY 17, 2019

CLERK

Sweeny, J.P., Gische, Tom, Mazzarelli, Kern, JJ.

7444 Christopher Brown, Index 163017/15
Plaintiff-Respondent,

-against-

ESRT Empire State Building,
L.L.C., et al.,
Defendants- Appellants.

- - - - -

ESRT Empire State Building, L.L.C., et al.,
Third-Party Plaintiffs-Appellants,

-against-

First Quality Maintenance II, LLC, doing
business as First Quality Maintenance,
Third-Party Defendant-Respondent.

_____

An appeal having been taken to this Court by the above-named appellants from an order of the Supreme Court, New York County (Lynn R. Kotler, J.), entered on or about September 7, 2017,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated December 28, 2018,

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

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

ENTERED: JANUARY 17, 2019

CLERK

Sweeny, J.P., Gische, Kahn, Singh, JJ.

8010 Liberty Mutual Underwriters, Inc., Index 150787/14
Plaintiff-Respondent,

-against-

112 Central Park South, LLC,
Defendant-Appellant,

Travelers Property Casualty Company of America,
Defendant-Respondent.

_____

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Barbara Jaffe, J.), entered on or about March 22, 2017,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated December 28, 2018,

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

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

ENTERED: JANUARY 17, 2019

CLERK

Sweeny, J.P., Gische, Kahn, Oing, Singh, JJ.

8018 D.K. Property, Inc., Index 650733/17
Plaintiff-Appellant,

-against-

National Union Fire Insurance
Company of Pittsburgh, Pa.,
Defendant-Respondent.

_____

Hoguet Newman Regal & Kenney, LLP, New York (Andrew N. Bourne of counsel), for appellant.

Mound Cotton Wollan & Greengrass LLP, New York (Costantino P. Suriano of counsel), for respondent.

_____

Order, Supreme Court, New York County (Robert R. Reed, J.), entered March 3, 2018, which, to the extent appealed from, granted defendant's motion pursuant to CPLR 3211 to dismiss the demand for consequential damages (other than attorneys' fees), unanimously reversed, on the law, with costs, the motion denied, and the claims reinstated.

This action involves an insurance coverage dispute under a commercial insurance policy issued by defendant to plaintiff. Supreme Court dismissed the claims for consequential damages, but otherwise allowed the general breach of contract claim (1st cause of action) and the collateral contract claim for breach of the implied covenant of good faith and fair dealing (second cause of

action) to proceed. At issue is whether, at the pleading stage, a claim for consequential damages arising from defendant's processing of plaintiff's insurance claim requires a detailed, factual description or explanation for why such damages, which do not directly flow from the breach, are also recoverable. We find that the motion court erred in dismissing the consequential damages claim, because plaintiff fulfilled its pleading requirement by specifying the types of consequential damages claimed and alleging that such damages were reasonably contemplated by the parties prior to contracting.

The policy that plaintiff purchased from defendant covers "direct physical loss or damage to" plaintiff's building, located at 40 Prince Street in Manhattan. After certain construction work began in an adjoining building, plaintiff's building began to shift and exhibit structural damage, including cracks. In October 2014, plaintiff filed a timely insurance claim with defendant. Defendant, however, did not pay the claim, nor did it disclaim coverage.

Two causes of action are asserted in the amended complaint; the first cause of action is for breach of contract for failure to pay covered losses under the policy; the second cause of action is for breach of the implied covenant of good faith and

fair dealing. Plaintiff seeks consequential damages in connection with each cause of action and legal fees solely in connection with its second (bad faith) cause of action. Supreme Court granted defendant's pre-answer motion to dismiss the amended complaint only to the extent of dismissing the claims for consequential damages, excepting the demand for legal fees.

It is well settled law that on a motion to dismiss pursuant to CPLR 3211(a)(7), the pleading is afforded a liberal construction, facts as alleged in the complaint are accepted as true, plaintiffs are afforded the benefit of every possible favorable inference, and the motion court must only determine whether the facts as alleged fit within any cognizable legal theory (*see e.g. Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

The complaint alleges that rather than pay the claim, defendant has made unreasonable and increasingly burdensome information demands throughout the three year period since the property damage occurred. Plaintiff contends that this was a tactic by defendant to make the claim so expensive to pursue that plaintiff would abandon it altogether. Plaintiff contends defendant's investigatory process has taken so long and become so attenuated that the structural damage to the building has worsened. Among the consequential damages alleged are

engineering costs, painting, repairs, monitoring equipment, and moisture abatement to address water intrusion, loss of rents, and other expenses attributable to mitigating further damage to the property. Despite substantial documentation of the cause and extent of the damage to plaintiff's building, not only by plaintiff's engineer, but also an engineer that defendant hired, who inspected the building several times, defendant has persisted in demanding further, unnecessary monitoring, data collection, inspections, and reinspections. Although it has yet to pay the loss or deny the claim, defendant nonetheless sought to intervene as plaintiff's subrogor under the policy when plaintiff sued the owner of the adjoining property. By doing so, defendant forced plaintiff to incur significant, unnecessary legal fees.

A plaintiff may sue for consequential damages resulting from an insurer's failure to provide coverage if such damages ("risks") were foreseen or should have been foreseen when the contract was made (*Bi-Economy Mkt, Inc. v Harleysville Ins. Co. of N.Y.*, 10 NY3d 187, 192 [2008]). Although proof of such consequential damages will ultimately rest on what liability the insurer is found to have "assumed consciously," or from the plaintiff's point of view, have warranted the plaintiff to reasonably suppose the insurer assumed when the insurance

contract was made, a determination of whether such damages were, in fact, forseeable should not be decided on a motion to dismiss and must await a fully developed record (*see Panasia Estates, Inc. v Hudson Ins. Co.*, 10 NY3d 200, 203 [2008]; *see also Bi-Economy* at 192). In other words, the inquiry is not whether plaintiff will be able to establish its claim, but whether plaintiff has stated a claim.

Here, plaintiff's allegations meet the pleading requirements of the CPLR with respect to consequential damages, whether in connection with the first cause of action or the second cause of action for breach of the covenant of good faith and fair dealing in the context of an insurance contract (*id.*). Contrary to defendant's claim, there is no heightened pleading standard requiring plaintiff to explain or describe how and why the "specific" categories of consequential damages alleged were reasonable and forseeable at the time of contract. There is no heightened pleading requirement for consequential damages (*Panasia Estates Inc. v Hudson Ins. Co.*, 68 AD3d 530, 530 [1st Dept 2009], *affd* 10 NY3d 200 [2008], *citing* Bi-Economy 10 NY3d at 192). Furthermore, an insured's obligation to "take all reasonable steps to protect the covered property from further damage by a covered cause of loss" supports plaintiff's

allegation that some or all the alleged damages were forseeable (*Benjamin Shapiro Realty Co. v Agricultural Ins. Co.*, 287 AD2d 389, 389-390 [1st Dept 2001]).

As noted by the Court of Appeals in *Bi-Economy*, a claim for breach of contract and one for bad faith handling of an insurance claim are not necessarily duplicative (*id.* at 191). The first and second causes of action plead different conduct by defendant and, in any event, defendant did not cross-appeal with respect to Supreme Court's denial of its motion to dismiss the bad faith claim on the basis of duplication.

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

ENTERED: JANUARY 17, 2019

CLERK

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

8118 The People of the State of New York, Ind. 2731/15
Respondent,

-against-

Oscar Jiggetts,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered July 29, 2016, convicting defendant, after a jury trial, of robbery in the second degree, grand larceny in the fourth degree (two counts) and criminal possession of stolen property in the fifth degree, and sentencing him, as a persistent violent felony offender, to an aggregate term of 17 years to life, unanimously affirmed.

The court erred in denying defendant's request for a charge on cross-racial identifications. "When identification is an issue in a criminal case and the identifying witness and defendant appear to be of different races, upon request, a party is entitled to a charge on cross-racial identification" and the trial court must give the charge if a party requests it (*People v*

Boone, 30 NY3d 521, 526, 535 [2017]). "It is the fact of a cross-racial identification that should be the basis of the court's charge, not the nature of the questions asked on the examination" (*id.* at 532), and "expert testimony is not necessary to establish the right to the charge" (*id.* at 530). *Boone* "should be applied retroactively to cases pending on direct appeal" (*People v Crovador*, 165 AD3d 610, 610 [1st Dept 2018]). It is clear based on *Boone* that the court should have granted defense's counsel request for the charge on cross-racial identifications.

We find the error harmless given the specific facts of this case where the key identifying feature was a red cloth that the victim stated the robber had been holding. Defendant appeared on a videotape holding such a cloth, as he tried to use the victim's credit card shortly after the robbery, and defendant admitted he regularly carried such a cloth (*see People v Bradley*, 160 AD3d 760, 762 [2d Dept], *lv denied* 31 NY3d 1115 [2018]). Furthermore, the evidence, which included the recovery of the victim's Social Security card from defendant's apartment, was overwhelming, and defendant provided an implausible explanation for his recent, exclusive possession of the fruits of the crime (*see People v Galbo*, 218 NY 283, 290 [1916]).

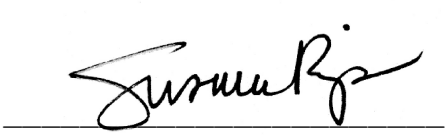
Defendant's ineffective assistance of counsel claims are

generally unreviewable on direct appeal because they involve matters not reflected in, or fully explained by, the record, concerning the manner in which counsel litigated a motion to suppress the victim's lineup identification of defendant (*see People v Rivera*, 71 NY2d 705, 709 [1988]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). The record does not support defendant's contention that the victim should have been called at the suppression hearing. Defendant has not established that the victim's testimony was relevant to whether the lineup was unduly suggestive (*see People v Chipp,* 75 NY2d 327, 335 [1990], *cert denied* 498 US 833 [1990]), or that the allegedly suggestive circumstances that defendant faults counsel for failing to explore further involved a police-arranged

confrontation (*see Perry v New Hampshire*, 565 US 228 [2012]; *People v Marte*, 12 NY3d 583, 587 [2009], *cert denied* 559 US 941 [2010]).

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

ENTERED: JANUARY 17, 2019



CLERK

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

8119 & M-5412 New York Helicopter Charter, Inc., Plaintiff-Respondent, Index 152189/14

-against-

Peter Borneman doing business as Aircraft Maintenance Specialists, et al., Defendants,

Keystone Turbine Services, LLC, Defendant-Appellant.

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Gordon Rees Scully Mansukhani, LLP, Harrison (Gregory Picciano and James E. Robinson of the bar of the State of New Jersey and the Commonwealth of Pennsylvania, admitted pro hac vice, of counsel), for appellant.

Andrew D. Greene, P.C., Lake Success (Andrew D. Greene of counsel), for respondent.

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Order, Supreme Court, New York County (Melissa A. Crane, J.), entered January 18, 2018, which denied the motion of defendant Keystone Turbine Services, LLC (Keystone) to dismiss the complaint as against it, unanimously modified, on the law, to the extent of dismissing the cause of action alleging breach of warranty, and otherwise affirmed, without costs.

Plaintiff made a sufficient showing under CPLR 302(a)(1) to establish that New York courts have jurisdiction over Keystone (*see Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 [1988]; *Robins v Procure Treatment Ctrs., Inc.*, 157 AD3d 606, 607 [1st

Dept 2018]). The evidence reflects that the claim of negligence in Keystone's maintenance, installation, and turbine repair arises out of Keystone's contacts with New York (*see Helicopteros Nacionales de Colombia, S.A. v Hall*, 466 US 408, 414 [1984]). Keystone chose to do business with a New York resident when it was hired to continuously repair the turbine at issue, and made visits to New York to observe the effect of the engine's failure and inspect the engine (*see D&R Global Selections, S.L. v Bodega Olegario Falcon Pineiro*, 29 NY3d 292, 298-299 [2017]; *Scheuer v Schwartz*, 42 AD3d 314, 316 [1st Dept 2007]).

We modify to dismiss the breach of warranty claim because the repairs Keystone made on the subject turbine were services and not a sale of a refurbished turbine (*see Gutarts v Fox*, 104 AD3d 457, 459 [1st Dept 2013]; *Aegis Prods. v Arriflex Corp. of Am.*, 25 AD2d 639 [1st Dept 1966]). Although Keystone's invoices state "sold to," the invoices clearly outlined that the bill was for the services Keystone conducted to repair the turbine.

We have considered the remaining arguments and find them unavailing.

M-5412 - *New York Helicopter Charter, Inc. v Peter Borneman*

Motion to enlarge the record granted.

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

ENTERED: JANUARY 17, 2019

CLERK

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

8120-
8120A In re Damani Cory B., and Another,

Dependent Children Under Eighteen
Years of Age, etc.,

Kevin Cory B.,
Respondent-Appellant,

Catholic Guardian Services,
Petitioner-Respondent,

Tina Erykah J.,
Respondent.

_____

Law Office of Thomas R. Villecco, P.C., Jericho (Thomas R. Villecco of counsel), for appellant.

Magovern & Sclafani, Mineola (Joanna M. Roberson of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Riti P. Singh of counsel), attorney for the children.

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Orders, Family Court, New York County (Karen I. Lupuloff, J.), entered on or about June 8, 2017, which, inter alia, determined that respondent father's consent for the adoption of the subject children was not required, terminated his parental rights, and transferred custody and guardianship of the children to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The court properly concluded that the father was a notice

father only because he failed to show that he provided the children with consistent financial support according to his means (*see Matter of Sjuqwan Anthony Zion Perry M. [Charnise Antonia M.]*, 111 AD3d 473 [1st Dept 2013], *lv denied* 22 NY3d 864 [2014]). He provided no support for one child and only provided support for the other child during the first six months after the child was born, which is inadequate to satisfy the statutory support requirements (*see Matter of Latricia M.*, 56 AD3d 275 [1st Dept 2008], *lv denied* 12 NY3d 705 [2009]; Domestic Relations Law § 111[d]). The father stated that he was on public assistance and provided the children with food and toys at visits, while agreeing that consistent financial support should take priority over occasional gifts and snacks (*see e.g. Matter of Clarence Davion M. [Clarence M.]*, 124 AD3d 469 [1st Dept 2015]). He also did not provide an adequate explanation as to why he was unable to obtain employment over the two-year time period at issue. Furthermore, the father acknowledged that he failed to visit for several months after a trial discharge was aborted due to his inconsistent visitation (*see Matter of Maxamillian*, 6 AD3d 349, 351 [1st Dept 2004]).

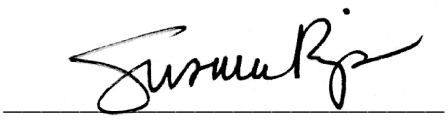
The court properly concluded that it was in the best interests of the children to free them for adoption by the foster

family, who provided them with a stable and loving home (*see e.g. Matter of Chandel B.*, 58 AD3d 547 [1st Dept 2009]). The father's testimony indicated that he did not have a realistic plan for the children's future, and the foster mother's alleged intent to move the children to Pennsylvania does not warrant a different determination (*id.* at 548).

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

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

ENTERED: JANUARY 17, 2019



CLERK

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

8121 Yu Yan Zheng, Index 152370/15
Plaintiff,

-against-

Fu Jian Hong Guan American
Unity Association, Inc.,
Defendant-Respondent,

Diane Chong,
Defendant-Appellant.

_____

Gannon, Rosenfarb & Drossman, New York (Lisa L. Gokhulsingh of counsel), for appellant.

Litchfield Cavo LLP, New York (Lyndsey C. Bechtel of counsel), for respondent.

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Order, Supreme Court, New York County (James E. d'Auguste, J.), entered November 22, 2017, which, in a personal injury action, granted landlord-defendant Diane Chong's motion, pursuant to CPLR 2221(a), for modification of an order, same court and Justice, entered September 15, 2017, inter alia, granting her summary judgment dismissing the complaint, by adding provisions addressing additional relief sought on summary judgment, and upon such consideration, denied summary judgment on her cross claims for defense, indemnification and past and future legal costs, fees, expenses and disbursements as against co-defendant Fu Jian Hong Guan American Unity Association, Inc. (the Association),

unanimously reversed, on the law, without costs, and summary judgment granted to movant on such cross claims.

On February 9, 2015, plaintiff Yu Yan Zheng was descending an exterior stairway, which provides access to the basement of commercial premises at 17 Monroe Street in Manhattan, when she allegedly slipped and fell on a snowy or icy condition, fracturing her left ankle. It was snowing at the time of the accident. Defendant Diane Chong co-owns the building with her husband, nonparty Louis Chong, and, at the time of the accident, was leasing the basement to the Association.

By answer dated April 29, 2015, Chong asserted cross claims against the Association seeking indemnity and/or contribution in the event of any recovery by plaintiff, urging that the Association as tenant was responsible for maintaining the stairway. Chong also alleged that the Association breached its lease by failing to procure general liability insurance on her behalf. The Association opposed by moving to dismiss Chong's cross claims against it, claiming it had no duty to remedy the alleged condition, because there was a storm in progress when the accident happened.

The parties agree that the controversy is controlled by a lease agreement entered into by Louis Chong and the Association

and a rider, which were apparently executed December 12, 2008.[1] The lease agreement provided that the lease would be in effect from January 1, 2009 to December 31, 2013. Although the accident occurred in February 2015, the uncontroverted evidence supports the parties' position that the lease continued to govern their relationship at the time of the accident.

Paragraph 2 of the lease provides that the Association

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[1] The date appearing in the introduction of the standard form lease agreement is December 11, 2009. That document lacks any date accompanying the signatures of the parties to it, however. The lease agreement is apparently one part of a package consisting of the lease agreement itself; a rider to the lease agreement, a schedule of monthly rental payments from January 1, 2009 to December 31, 2013 and an allonge to the tenant basement lease. Each of the pages of these documents is signed or initialed by the same three parties. The package also includes the signed personal guaranty of Yee Fu Chan, the signed personal guaranty of Jun Di Chan, and a document, primarily in Chinese, on which the name of the Association and the names Yee Fu Chan and Louis Chong appear, as well as the address of the subject premises. With the exception of the lease agreement and schedule (which is undated), all of the documents in the package are dated December 12, 2008. As all of the documents in the package (referenced together by the parties as the "lease"), when read together, relate to a rental term beginning January 1, 2009 and terminating December 31, 2013, it appears that the correct date of the lease agreement in December 11, 2008, and the lone 2009 date in the introductory language of the lease agreement is a typographical error. The notion that the lease agreement was signed in December 2009, one year after the rider and the other documents in the package were signed, makes no sense. Nor is it likely that the parties would enter into a lease agreement in December 2009 for a lease term that began in January 2009, nearly a year earlier.

agreed to "forever indemnify and save" Chong harmless "against any and all liability, penalties, damages, expenses and judgments arising from injury during" the lease term, for any act or omission of the Association and its employees, guests, and agents, "and also for any matter or thing growing out of [its] occupation of the demised premises or the streets, sidewalk or vaults adjacent thereto."

Paragraph 1 of the rider requires the Association to maintain liability insurance naming Chong as an additional insured, providing coverage of $1,000,000.00 for bodily injury, and $100,000.00 for property damage. Paragraph 7 of the rider obligates the Association to "keep the sidewalk and basement stairs in front of the demised premises free of snow and ice and free of debris."

By order entered September 15, 2017, the court granted Chong's and the Association's respective motions for summary judgment and dismissed the complaint, finding that plaintiff had testified that it was snowing at the time of the accident, and thus there was a storm in progress.[2] The court did not address

[2] By order entered October 11, 2018 this Court unanimously affirmed the September 15, 2017 order on the grounds that it was undisputed that defendants' obligation to keep the stairs free of snow and ice was suspended by the storm in progress doctrine and

Chong's motion for summary judgment on her cross claims against the Association, however.

Chong then sought "reconsideration and modification" of the September 15, 2017 order to grant her motion for summary judgment as to her cross claims against the Association for indemnification, contribution and costs. On November 22, 2017, the court granted Chong's motion for reconsideration, but denied her request for summary judgment on her cross claims for indemnification, contribution and costs. Chong now appeals from that determination.

At the outset, it is evident that all documents in the lease package were executed together, on or about December 12, 2008, and that the intent of the parties was that the lease agreement be construed together with the accompanying rider and the other documents as being the terms of their lease transaction.[3]

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that the Association demonstrated that it reasonably maintained the premises by placing non-skid strips on the stairs. (*see Zheng v Fu Jian Hong Guan Am. Unity Assn., Inc.*, 165 AD3d 486 [1st Dept 2018]). It is Supreme Court's subsequent order, entered November 22, 2017, that is being challenged on this appeal, however.

[3] As this Court has recently stated, "we must examine the parties' obligations and intentions as manifested in the entire agreement and seek to afford the language an interpretation that is sensible, practical, fair, and reasonable" (*MPEG LA, LLC v Samsung Electronics Co., Ltd.*, 166 AD3d 13 [1st Dept 2018] [citing *Riverside S. Planning Corp. v CRP/Extell Riverside, L.P.*,

There is no issue of fact as to whether the terms of the 2008 lease remain binding on the parties. Both parties are in agreement that the terms of the lease, including both the lease agreement and rider, remained binding on them as of the date of the accident, notwithstanding the fact that the accident occurred subsequently to the December 31, 2013 expiration date stated in the lease. Where, as here, "a tenant . . . remains in possession on the expiration of a [lease] granting exclusive possession, it is a holdover and, pursuant to common law, there is implied a continuance of the tenancy on the same terms and subject to the same covenants as those contained in the original instrument" (*City of NY v Pennsylvania R. Co.*, 37 NY2d 298, 300).

Here, paragraph 7 of the rider to the subject lease unambiguously provides that the Association "shall keep the sidewalk and basement stairs in front of the demised premises free of snow and ice." The factual record reveals that there is only one exterior stairway on the premises, which is the stairway upon which the accident allegedly occurred. Further, the record

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13 NY3d 398, 404 (2009)]; *see* 11 Richard A. Lord, Williston on Contracts § 32:11 at 765 [4th ed 2012] ["A contract must be construed as a whole and the intention of the parties collected from the entire instrument and not from detached portions. . . . The words of a contract should be given a reasonable meaning rather than an unreasonable one"]).

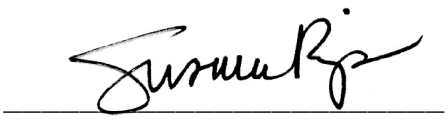
reveals that Rui Hua Bian, the Association's janitor, testified that she recalled cleaning snow off the stairs at 11:00 a.m. on the day of the alleged accident. This testimony is consistent with Louis Chong's testimony that the Association and he, as landlord, had an agreement that the tenant Association would be responsible for removing snow and ice from the stairs leading to their space.

Moreover, under paragraph 2 of the subject lease, the Association agreed to "forever indemnify and save" Chong harmless "against any and all liability, penalties, damages, expenses and judgments arising from injury . . . occasioned in whole or in part by any act or acts, omission or omissions of the [Association]." Further, paragraph 1 of the rider requires the Association to maintain liability insurance naming Chong as an additional insured, providing coverage of $1,000,000 for bodily injury. Thus, read together, the provisions of the subject lease agreement and rider, and hence, the lease itself, unambiguously require the Association to keep the exterior stairway free of snow and ice and to indemnify defendant landlord Chong for any liability arising from bodily injury occasioned by the Association's failure to keep the exterior stairway free of snow and ice.

Supreme Court's reliance on paragraph 22 of the lease in reaching a different conclusion was in error, as that provision of the lease pertains to the "sidewalk and curb in front" of the premises, and not the basement stairs, which are specifically addressed in paragraph 7 of the rider.

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

ENTERED: JANUARY 17, 2019



CLERK

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

8122 AmBase Corporation, et al., Index 655031/17
Plaintiffs-Appellants,

-against-

Spruce Capital Partners LLC, et al.,
Defendants-Respondents,

111 West 57th Sponsor LLC, et al.,
Nominal Defendants.

_____

Meister Seelig & Fein LLP, New York (Stephen B. Meister of counsel), for appellants.

Reed Smith LLP, New York (Louis M. Solomon of counsel), for respondents.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered August 29, 2017, to the extent it granted defendants Spruce Capital Partners LLC and 111 W57 Mezz Investor LLC's (the Spruce defendants) motion to dismiss the second cause of action (for a declaratory judgment) pursuant to CPLR 3211(a)(7), unanimously affirmed, without costs, and the appeal therefrom otherwise dismissed, without costs, as moot.

Insofar as plaintiffs seek a preliminary injunction, that remedy is "a legal impossibility," and the appeal is moot (*Divito v Farrell*, 50 AD3d 405, 406 [1st Dept 2008]; *see Currier v First Transcapital Corp.*, 190 AD2d 507, 508 [1st Dept 1993] ["an

injunction may not issue to prohibit a *fait accompli*"]). The strict foreclosure that plaintiffs sought to enjoin occurred more than a year ago, in late August or early September 2017, and we denied plaintiffs' motion for a stay, pending this appeal, of so much of the order as dissolved the TRO that had been granted (*see* 2018 NY Slip Op 61540[U] [Jan. 18, 2018]).

Plaintiffs' request for a declaratory judgment is not moot, because plaintiff 111 West 57th Investment LLC (Investment) might be entitled to damages from defendant 111 W57 Mezz Investor LLC (Junior Mezz Lender) if it is judicially determined that Investment had the right to object to the strict foreclosure pursuant to Uniform Commercial Code (UCC) § 9-620(a)(2)(B) (*see Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 812 [2003], *cert denied* 540 US 1017 [2003]).[1] However, the complaint, as currently pleaded, mentions neither damages nor a constructive trust. Similarly, the complaint does not allege

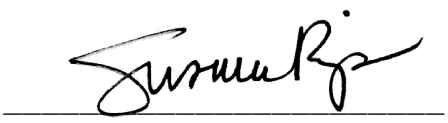
[1] Plaintiff AmBase Corporation – Investment's parent – does not explain why it (as opposed to Investment) has standing. For example, it does not contend that Investment's corporate veil should be reverse-pierced to benefit it (AmBase). Therefore, at a minimum, the motion court correctly dismissed AmBase's claims.

Plaintiffs do not contend that the motion court erred in dismissing their claims against Spruce Capital because they failed to show why Junior Mezz Lender's corporate veil should be pierced.

that the Spruce defendants acted in bad faith because they colluded with other defendants who are not party to this appeal or that Investment was entitled to object to the strict foreclosure under UCC 9-621(a)(1). As plaintiffs recognize, they need to replead or amend. As the order appealed from does not show that the dismissal was with prejudice, in and of itself, it does not prevent plaintiffs from moving for leave to amend or supplement the complaint.

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

ENTERED: JANUARY 17, 2019



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

8123 Artcorp. Inc., Index 653878/13
Plaintiff-Appellant,

-against-

Citirich Realty Corp.,
Defendant-Respondent.

_____

Moulinos & Associates LLC, New York (Daniel Moulinos of counsel), for appellant.

Todd Rothenberg, New Rochelle, for respondent.

_____

Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered February 20, 2018, which denied plaintiff's motion for partial summary judgment declaring that plaintiff was not in breach of its lease agreement with defendant and that the notice to cure served upon it was defective, affirmed, without costs.

Contrary to plaintiff's contention, the issue of whether plaintiff's assignment of its ownership interests in the subject lease was never decided on the prior appeal (124 AD3d 545, 546 [1st Dept 2015]). In that case, which reversed the motion court's denial of *Yellowstone* relief to plaintiff, this Court explicitly stated that "[t]o obtain *Yellowstone* relief a tenant need not show a likelihood of success on the merits."

Even if plaintiff defaulted on the lease, "it is not

necessary, in order to cure, that a tenant show that it is able to erase the past, as long as it can show that it is able to bring itself into compliance with the lease without vacating the premises" (*Empire State Bldg. Assoc. v Trump Empire State Partners*, 245 AD2d 225, 229 [1st Dept 1997]). As found in *Artcorp Inc.*, plaintiff "asserted its willingness to cure the allegedly improper assignment of its shares, and had the ability to do so either by transferring its shares back to the deceased owner's estate. . .or by seeking consent from the landlord" (124 AD3d at 546), which could be obtained post-assignment. In view of plaintiff's willingness to cure the allegedly improper assignment of its shares, the remaining issue is whether plaintiff defaulted on the lease.

We have considered the remaining contentions and find them unavailing.

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

GISCHE, J. (concurring)

I write separately because although I agree with my colleagues that the underlying order should be affirmed, I do so based upon a different analysis of the issues presented. I agree that this court's prior granting of a *Yellowstone* injunction did not resolve the merits of the parties' underlying dispute about whether the tenant was in default of the underlying lease. I disagree with the majority to the extent they do not discuss the central issue on this appeal, which is whether this court should determine, as a matter of law, that a default did not occur, but instead focus on whether plaintiff has an ability to cure any default.

Yellowstone injunctions grant a toll of the cure period to the tenant so that the parties may litigate the issue of whether a tenant is actually in default, without the tenant forfeiting a valuable underlying leasehold. If the tenant is successful in proving that it is not in default, then there is no need for any cure and the tenant remains in possession. If the tenant does not succeed, and it is determined to be in default, then the tenant still has the right to effect a cure to retain the leasehold (*Graubard, Mollen, v 600 Third Avenue Assocs.*, 93 NY2d 508 [1999] ["A *Yellowstone* injunction maintains the status quo so

that a commercial tenant, when confronted by a threat of termination of its lease, may protect its investment in the leasehold by obtaining a stay tolling the cure period so that upon an adverse determination on the merits, the tenant may cure the default and avoid a forfeiture."]; *First National Stores, Inc. v Yellowstone Shopping Center, Inc.*, 21 NY2d 630 [1968]). Here, the tenant claims that it is entitled to summary judgment declaring that it was not in default of the lease. The issue of the cure was not before the court. The tenant, however, failed to make a prima facie case that it was not in default.

The Notice of Default claims that the tenant had made an assignment without the consent of the landlord. Paragraph 51(i) of the lease provides as follows:

> "Any transfer, in one or aggregate transactions, of a majority of the issued and outstanding capital stock of a corporate tenant or a change in the composition of a tenant which is a partnership or a limited liability company shall be deemed an assignment of this Lease for which the Landlord's consent and strict compliance with this Article are required."

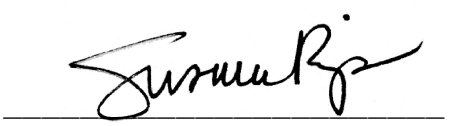
Tenant acknowledges that Artcorp is the corporate tenant. At the time of the signing of the lease, Artcorp stock was owned 100% by Brandon Stewart, who personally guaranteed the lease. Shortly before his death, Stewart transferred his hundred percent

interest in Artcorp to Serge Gregorian. Gregorian claims that this transfer did not change corporate control under paragraph 51(i) of the lease because he already was the beneficial owner of 50% of Artcorp before the transfer. No documentation of this claim is provided. On its face, this does not prove that the transfer was not an assignment prohibited under the lease because the landlord's prior consent was not obtained. The fact that we stated in the prior appeal that a "cure" could be effected by obtaining consent after the fact, does not negate the existence of a default in the first place. Any issues of cure are premature unless and until a breach is determinated to have occurred. In that event, the tenant can attempt to cure. Additionally, even if the tenant can cure in this case by seeking late landlord consent, the landlord still has the right to reasonably withhold its consent. These are issues that should not be reached on this appeal, which concerns only whether a default has occurred.

Accordingly, I agree with my colleagues that the motion court should be affirmed.

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

ENTERED: JANUARY 17, 2019



CLERK

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

8124- Index 110302/08
8125 Tomoko Watabe, et al.,
Plaintiffs-Respondents,

-against-

Ci:Labo USA, Inc.,
Defendant-Appellant,

Yoshinori Shirono, et al.,
Defendants.

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Ronald G. Schneider, New York, for appellant.

Michael G. O'Neill, New York, for respondents.

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Order, Supreme Court, New York County (Richard F. Braun, J.), entered August 16, 2016, which, insofar as appealed from, denied defendant Ci:Labo USA, Inc.'s motion for summary judgment dismissing plaintiffs Watabe's and Saito's claims for overtime pay, and order, same court (Anthony Cannataro, J.), entered February 8, 2018, which, upon renewal, denied defendant's motion for summary judgment dismissing plaintiffs Otani's and Sugioka's claims for overtime pay, unanimously affirmed, with costs.

The court correctly found, upon renewal, that plaintiffs Sugioka's and Otani's affidavits in opposition to defendant's motion were admissible. The fact that Sugioka and Otani, as well the other plaintiffs, testified at a deposition with the

assistance of a Japanese translator does not preclude them from drafting their affidavits in English, and, accordingly, their affidavits did not need to be accompanied by an affidavit by a Japanese translator. Otani's affidavit that was personally served on defendant was not otherwise inadmissible on the ground that it contained an electronic signature (State Technology Law § 304[2]).

The record does not demonstrate as a matter of law that any of the plaintiffs fall within an exemption from overtime pay regulations (*see* Labor Law § 650 *et seq.*; 12 NYCRR 142-2.1, 142-2.4, 142-2.6; *see also* 29 USC § 201 *et seq.*). There is no conclusive documentary evidence establishing that an exemption applies, and there are conflicts between plaintiffs' descriptions of their work and defendant's general managers' descriptions of plaintiffs' work (*see Reiseck v Universal Communications of*

Miami, Inc., 591 F3d 101, 104 [2d Cir 2010]; *Thomas v Meyers Assoc., L.P.*, 39 Misc 3d 1217[A], 2013 NY Slip Op 50650[U] [Sup Ct, NY County 2013]).

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

ENTERED: JANUARY 17, 2019

CLERK

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

8126-
8127 Index 154743/14

Debra Hauerstock, etc., et al.,
Plaintiffs-Appellants-Respondents,

-against-

Barclay Street Realty LLC, et al.,
Defendants-Respondents-Appellants,

Saladino Furniture Inc., et al.,
Defendants-Respondents.

_____

Stadtmauer & Associates, New York (Marc A. Stadtmauer of counsel), for appellants-respondents.

Landman Corsi Ballaine & Ford P.C., New York (Joshua Deal of counsel), for respondents-appellants.

McGivney Kluger & Cook, P.C., New York (Anthony Nwaneri of counsel), for Saladino Furniture Inc., respondent.

Koster, Brady & Nagler, New York (Marc R. Wilner of counsel), for Saladino Group, Inc. and John Saladino, respondents.

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Order, Supreme Court, New York County (Robert D. Kalish, J.), entered on or about August 10, 2017, which, to the extent appealed from as limited by the briefs, granted defendants Barclay Street Realty LLC (Barclay) and Glenwood Management Corp. (Glenwood)'s motion for summary judgment dismissing the complaint as against them and all cross claims asserted against them, except as to plaintiffs' causes of action for common-law negligence and for negligence based upon Multiple Dwelling Law §

78, and granted defendants Saladino Furniture Inc. (SFI), Saladino Group Inc. (SGI), and John Saladino (Saladino)'s separate motions for summary judgment dismissing the complaint as against them and all cross claims asserted against them, unanimously affirmed, without costs.

We agree with Supreme Court that Local Law No. 1 (2004) of City of New York (codified at Administrative Code of City of New York §§ 27-2056.1 - 27-2056.18) applies to elements, fixtures, and improvements of a multiple dwelling, and not to movable or removable decorative furnishings. Under this interpretation, we further agree that Local Law No. 1 does not impose on Barclay and Glenwood, which owned and managed the subject building, respectively, a duty to remediate the lead-based paint hazard posed by the decorative columns in the building's lobby - which were both movable and removable - prior to being notified by the Health Department that the columns, in fact, contained lead-based paint.

Supreme Court did, however, err in interpreting the scope of a property owner's duty under Multiple Dwelling Law § 78. "At common law[,] landlords had no duty to maintain leased premises, other than common areas, in good repair" (*Juarez v Wavecrest Mgt. Team*, 88 NY2d 628, 643 [1996] [citation omitted]). Multiple

Dwelling Law § 78 expanded this duty to include not only common areas of dwellings, but the *entire* dwelling, as well as the land upon which it is situated. It did not, however, impose liability upon a property owner for a dangerous or defective condition of which it had no actual or constructive notice.

Nevertheless, Supreme Court correctly declined to dismiss plaintiffs' claims for common-law negligence and pursuant to Multiple Dwelling Law § 78 as against Barclay and Glenwood, since Barclay and Glenwood failed to establish prima facie that the antique columns which they purchased and placed in the building's lobby were in reasonably safe condition, and that they lacked actual and constructive notice that the columns contained lead-based paint (*see generally Chapman v Silber*, 97 NY2d 9 [2001]).

The court properly dismissed the action as against SFI, since the only evidence suggesting its involvement in the procurement of the subject columns was inadmissible hearsay, and as against Saladino, since there was no basis for imposing liability against him in his individual capacity (*see Peguero v 601 Realty Corp.*, 58 AD3d 556, 559 [1st Dept 2009]; *Espinosa v Rand*, 24 AD3d 102, 102 [1st Dept 2005]).

We also agree with Supreme Court that SGI was a casual seller of the subject columns, and therefore not subject to

strict products liability (*see Stiles v Batavia Atomic Horseshoes*, 81 NY2d 950 [1993]; *Sukljian v Ross & Son Co.*, 69 NY2d 89 [1986]). The record demonstrates that its sale of the subject columns to Barclay and Glenwood was an incidental part of its interior design services, and that SGI was not regularly engaged in the procurement or sale of such artifacts or antiques.

Since the record demonstrates that SGI did not know that the subject column contained lead-based paint at the time that it procured it for Barclay and Glenwood, SGI did not breach its duty, as a casual seller, to warn Barclay and Glenwood "of known defects that are not obvious or readily discernible" (*Sukljian*, 69 NY2d at 97). In any event, the column's age and the fact that its paint was chipped and peeling were obvious.

Finally, plaintiffs' punitive damages claim was properly dismissed as against all defendants. The record contains no evidence that any of the defendants acted wilfully or maliciously - or, as plaintiffs suggest, recklessly - in placing the subject columns in the building's lobby. "This is not the 'singularly rare case' where the wrong complained of, having been actuated by an improper state of mind or malice, or having resulted in public harm, justifies an exemplary award" (*APW, Inc. v Marx Realty & Improvement Co.*, 291 AD2d 333, 334 [1st Dept 2002]).

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: JANUARY 17, 2019

CLERK

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

8128-
8129 The People of the State of New York,
Respondent,

-against-

Jose Rivera,
Defendant-Appellant.

Ind. 3527/15
2445/16

_____

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

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

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Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J. at suppression hearing; Arlene D. Goldberg, J. at jury trial and sentencing), rendered September 13, 2016, as amended September 22, 2016, convicting defendant of criminal possession of a controlled substance in the fourth and fifth degrees, and sentencing him to concurrent terms of one year, unanimously affirmed.

The court properly denied defendant's suppression motion. The hearing court saw and heard the witnesses, and there is no basis for disturbing its credibility determinations (*see People v Prochilo*, 41 NY2d 759, 761 [1977]), including those relating to police observations of a passenger in the car, rolling what

appeared to be a blunt cigarette, which provided the basis for stopping the car occupied by defendant.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The evidence supports a finding that defendant was a knowing possessor of the drugs found in the car, both under the automobile presumption (Penal Law § 220.25[1]) and the theory of constructive possession.

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

ENTERED: JANUARY 17, 2019

CLERK

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

8130 In re Margaret Michele W.S.,
Petitioner-Appellant,

-against-

Richard Allen M.,
Respondent-Respondent.

_____

Leslie S. Lowenstein, Woodmere, for appellant.

Law Offices of Randall S. Carmel, Jericho (Randall S. Carmel of counsel), for respondent.

Dawne A. Mitchell, The Legal Aid Society, New York (Marcia Egger of counsel), attorney for the child.

_____

Order, Family Court, New York County (Marva A. Burnett, Referee), entered on or about January 25, 2018, which denied the mother's petition to modify a custody order, unanimously affirmed, without costs.

The petition was properly denied because the mother failed to demonstrate a change in her circumstances warranting granting her supervised visitation with her daughter (*see* Family Court Act § 467[b][ii]; *Friederwitzer v Friederwitzer*, 55 NY2d 89, 95-96 [1982]).

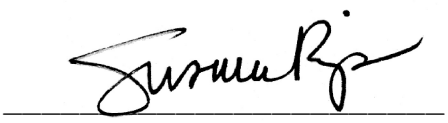
This Court previously affirmed a custody order granting the father full custody of the parties' daughter, citing the mother's history of psychiatric hospitalizations and her continued

irrational conduct which had placed the child in danger (*Matter of Devin M. [Margaret W.])*, 119 AD3d 435 [1st Dept 2014]). Although the mother testified that her mental condition has improved due to a change in her treatment regime, she provided no medical testimony or documentation to substantiate this assertion (*Mater of Savage v Morales*, 147 AD3d 861 [2d Dept 2017]).

We have considered the mother's additional arguments and find then unavailing.

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

ENTERED: JANUARY 17, 2019



CLERK

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

8131 The People of the State of New York, Ind. 3851/15
Respondent,

-against-

Marcus Perry,
Defendant-Appellant.

_____

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Laura Ward, J.), rendered August 16, 2016,

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

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

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

ENTERED: JANUARY 17, 2019

CLERK

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

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

8132 The People of the State of New York, Ind. 2909/16
Respondent,

-against-

Jonathan Espinal-Diaz,
Defendant-Appellant.

_____

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

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

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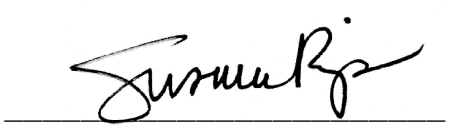
Order, Supreme Court, New York County (Ellen N. Biben, J.), entered on or about October 20, 2017, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court providently exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). The mitigating factors cited by defendant were

adequately taken into account and were outweighed by the seriousness of the underlying sex offenses against children aged 14 and 10.

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

ENTERED: JANUARY 17, 2019



CLERK

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

8133 Ecumenical Community Development Organization, Inc., Plaintiff-Respondent-Appellant, Index 156405/12

Ruth Walton, Intervenor Plaintiff-Respondent,

-against-

GVS Properties II, LLC, et al., Defendants-Appellants-Respondents,

BP11-3915 Broadway LLC, et al., Defendants.

_____

Golino Law Group, PLLC, New York (Santo Golino of counsel), for appellants-respondents.

Amsterdam & Lewinter, LLP, New York (Robert H. Gordon of counsel), for respondent-appellant.

Manhattan Legal Services, New York (Shantonu J. Basu of counsel), for respondent.

_____

Order, Supreme Court, New York County (Ellen M. Coin, J.), entered July 19, 2017, which granted defendants GVS Properties II, LLC and Alma Realty Corp.'s motion for summary judgment to the extent of dismissing the third cause of action as against them, and denied the motion as to the remaining causes of action, unanimously modified, on the law, to grant the motion as to the remaining causes of action, and otherwise affirmed, without costs. The Clerk is directed to enter judgment accordingly.

Defendants landlords demonstrated that the apartment leased by plaintiff Ecumenical Community Development Organization (ECDO) and occupied by intervenor plaintiff was not subject to rent regulation because the lawful monthly rent had increased to more than $2,000 (*see* Administrative Code of City of NY § 26-504.2). They established the base rent through the Division of Housing and Community Renewal's summary of the registered rents (*see Bradbury v 342 W. 30th St. Corp.*, 84 AD3d 681, 684 [1st Dept 2011]), and made a prima facie showing of the claimed improvements by submitting a detailed invoice from the contractor identifying the apartment and itemizing all work done (*see Lirakis v 180 Seventh Ave. Assoc., LLC*, 12 Misc 3d 1173[A], 2006 NY Slip Op 51211[U], *4-5 [Civ Ct, NY County 2006], *affd* 15 Misc 3d 128[A] [App Term, 1st Dept 2007]). Intervenor plaintiff's conclusory claim that the renovations were not made failed to raise an issue of fact (*see Taylor v 72A Realty Assoc., L.P.*, 151 AD3d 95, 103–104 [1st Dept 2017]). The fact that the invoice from the contractor and the check paid to it were business records of defendants' predecessor is no bar to the documents' admissibility (*see Bank of Am., N.A. v Brannon*, 156 AD3d 1, 8 [1st Dept 2017]).

While defendants knew of intervenor's occupancy, they never

affirmatively recognized her as a tenant (*see Johny v Tolbert*, 8 Misc 3d 130[A], 2005 NY Slip Op 51043[U] [App Term, 2d Dept 2005]; *see also Matter of Jo-Fra Props., Inc.*, 27 AD3d 298, 299 [1st Dept 2006] ["coverage under a rent regulatory scheme is governed by statute and may not be created or destroyed by laches, waiver and estoppel"], *lv denied* 8 NY3d 801 [2007]).

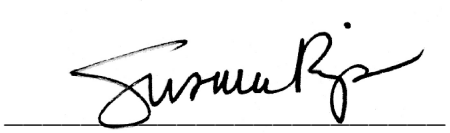
It is undisputed that ECDO, a nonprofit organization, leased the apartment from defendants' predecessor so that it could temporarily relocate intervenor plaintiff while it was renovating a separate residence for her. Intervenor plaintiff never paid rent directly to defendants or their predecessors and her occupancy was solely pursuant to a written temporary relocation agreement. Nor was this an illusory tenancy, because the prime tenant was not profiting from it, and there was no violation of the rent laws (*see Primrose Mgt. Co. v Donahoe*, 253 AD2d 404 [1st Dept 1998]).

Regardless of whether ECDO made a proper request for assignment of its one year temporary lease to the intervenor plaintiff, it was not unreasonable for defendants to withhold their consent in light of intervenor-plaintiff's inability to pay the rent.

In light of the foregoing, we need not reach plaintiff's remaining arguments.

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

ENTERED: JANUARY 17, 2019



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CORRECTED ORDER - FEBRUARY 1, 2019

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

8134 In re Diamond **Maldonado**, Index 250739/15
Petitioner-Appellant,

-against-

Crotona Place West Housing Development, et al.,
Respondents-Respondents.
- - - - -
Professor Paris R. Baldacci,
Amicus Curiae

_____

Marshall Green, The Legal Aid Society, Bronx (Matthew Tropp of counsel), and Paul, Weiss, Rifkind, Wharton & Garrison LLP, Washington, DC (Laurence Tai of the bar of the Commonwealth of Massachusetts and District of Columbia, admitted pro hac vice of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Lorenzo Di Silvio of counsel), for respondent.

Paris R. Baldacci, New York, amicus curiae pro se.

_____

Judgment, Supreme Court, Bronx County (Howard H. Sherman, J.), entered May 4, 2017, denying the petition to annul a determination of respondent Department of Housing Preservation and Development (HPD), dated January 6, 2015, which denied petitioner's request for reinstatement of Section 8 subsidy benefits and an informal hearing, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously reversed, on the law, without costs, the determination annulled, the Section 8 voucher reinstated retroactive to date of termination, and the matter remanded for an informal hearing.

The twenty-five-year-old petitioner grew up with her mother in a housing development located in the Bronx where the family received a rent subsidy under the Housing Choice Voucher program administered by respondent City of New York Department of Housing Preservation & Development (HPD). After her mother died in September 2014, HPD terminated the voucher on the ground that petitioner's mother was the sole household member and denied petitioner an informal hearing. Petitioner claims that she had lived continuously in the apartment her entire life and was unaware the mother made efforts to remove her from the household.

The record reveals that, in 2013, the mother submitted a request to remove petitioner from the household (RRHM), including a "self-certification" countersigned by a HPD staff member that the mother did not know petitioner's whereabouts and therefore could not provide a new address. HPD subsequently added petitioner back to the household after it was unable to verify that she had left the household. The mother then submitted a second RRHM, and when HPD rejected the request for lack of proof that petitioner was no longer a household member, the mother simply submitted the same self-certification that HPD had previously found insufficient. In February 2014, the mother submitted the annual recertification and omitted petitioner. Based on the mother's report, the landlord, Crotona Place West Housing Development (CPW), also submitted a form letter to HPD stating that the mother was the sole household member.

In the meantime, HPD continued to receive printouts from the Supplemental Nutrition Assistance Program (SNAP) during this period, which indicated that there was no change in family composition, other than the brother's removal from the household to foster care. Significantly, a printout dated May 27, 2014 - several months after the mother's submission of the annual recertification - indicated that petitioner remained an active member of the household and was receiving benefits.

Under these circumstances, we agree with petitioner that HPD's determination to terminate the voucher was arbitrary and capricious. It is undisputed that, but for the mother's unverified claim that petitioner was no longer a member of the household, petitioner would have succession rights to Section 8 benefits. HPD's argument that it properly removed petitioner from the household after the mother submitted the self-certification is flatly contradicted by the record, which shows that HPD found the mother's self-certification insufficient. As such, to the extent HPD's determination was predicated on the mother's self-certification it was irrational because the agency failed to explain why it "reach[ed] a different result on essentially the same facts" (*Matter of 20 Fifth Ave., LLC v New York State Div. of Hous. & Community Renewal*, 109 AD3d 159, 163 [1st Dept 2013] [internal quotation marks omitted]).

HPD also failed to adequately address why it disregarded the SNAP printouts reflecting that petitioner remained an active

household member as of May 2014, which, under the plain terms of its administrative plan, constituted a more reliable source of verification than the participant's claims (*see* NYC Dept of Housing Preservation and Development Housing Choice Voucher [Section 8] Administrative Plan, Section 6.1). Accordingly, we find HPD's determination to terminate the voucher arbitrary and capricious (*see generally Matter of Peckham v Calogero*, 12 NY3d 424, 431 [2009]).

That said, the mother's removal requests and 2014 annual recertification omitting petitioner created a presumption that petitioner moved out of the household (*see Matter of Manhattan Plaza Assoc., L.P. v Department of Hous. Preserv. & Dev. of City of N.Y.*, 8 AD3d 111, 112 [1st Dept 2004]). Petitioner was entitled to an informal hearing on the issue so that she could have an opportunity to rebut this presumption (*see id.*). Accordingly, we vacate HPD's determination, reinstate the voucher retroactive to the date of termination, and remand the matter for an informal hearing on the issue of whether petitioner has succession rights to the mother's Section 8 benefits.

We have considered the remaining arguments and find them either unavailing or academic in light of our determination.

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

ENTERED: JANUARY 17, 2019

CLERK

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

8135 The People of the State of New York, Ind. 2345/15
Respondent,

-against-

Eric Pek,
Defendant-Appellant.

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Justine M. Luongo, The Legal Aid Society, New York (Eve Kessler of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered April 20, 2016, convicting defendant, upon his plea of guilty, of rape in the first degree (two counts), burglary in the first degree, burglary in the second degree (two counts) and robbery in the second degree, and sentencing him to an aggregate term of 14 years, unanimously affirmed.

The court properly denied youthful offender treatment. Because defendant was convicted of rape in the first degree, youthful offender treatment would require a showing of mitigating circumstances (CPL 720.10[2][a][iii];[3]), and the record supports the court's finding that such circumstances did not exist in this case. Defendant's participation in this extremely

violent crime was very significant. In any event, regardless of eligibility, youthful offender treatment was not warranted.

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 17, 2019

CLERK

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

8136 The People of the State of New York, Ind. 5911/07
Respondent,

-against-

Mohamed Musaid,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Ellen Stanfield Friedman of counsel), for respondent.

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Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered April 12, 2016, convicting defendant, after a jury trial, of murder in the second degree and criminal possession of a weapon in the second degree, and sentencing him to consecutive terms of 25 years to life and 5 years, unanimously affirmed.

The court properly found defendant fit to proceed to trial following CPL article 730 examinations. The ultimate expert findings, and defendant's statements, showed that he "evinced an understanding of the purpose of a trial, the actors in a trial, their roles, the nature of the charges against him, and the severity of a potential conviction and sentence" (*People v Phillips*, 16 NY3d 510, 518 [2011]). Despite defendant's claims of innocence in the face of overwhelming evidence of his guilt,

the most recent set of expert reports provided "no indication that [he] was unable to understand the proceedings and assist in his defense" (*People v Snyder*, 29 AD3d 310, 310 [1st Dept 2006], *lv denied* 7 NY3d 818 [2006]). Although defendant engaged in some conspiratorial thinking, this did not render him unfit in light of his general understanding of the proceedings (*see e.g. People v Jackson*, 39 AD3d 394, 394 [1st Dept 2007], *lv denied* 9 NY3d 845 [2007], *cert denied* 553 US 1011 [2008]). "The court reasonably credited experts who found that defendant's psychiatric symptoms had been alleviated by compliance with his medication regimen, thus rendering his past history an unreliable indicator of his present competency" (*People v Breckenridge*, 162 AD3d 425, 426 [1st Dept 2018], *appeal dismissed* __ NY3d __, 2018 NY Slip Op 88505 [2018]). We also find that there was nothing in defendant's behavior during trial that obligated the court to order yet another examination, sua sponte.

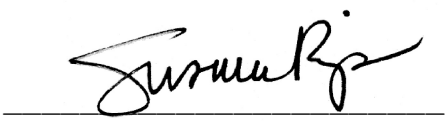
Having found defendant competent to stand trial, the court properly permitted him to decline to assert an insanity defense (*see People v Ciborowski*, 302 AD2d 620, 622 [3d Dept 2003], *lv denied* 100 NY2d 579 [2003]). The court was not required to conduct an inquiry analogous to the procedure for accepting a defendant's waiver of the right to counsel (*see People v*

Petrovich, 87 NY2d 961, 964 [1996]). In any event, "[t]he court fully informed defendant of his right to raise the affirmative defense of mental disease or defect and defendant knowingly chose not to assert such a defense" (*Ciborowski*, 302 AD2d at 622).

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 17, 2019



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

8137 & M-5914 — Lehman Brothers International (Europe)(in administration), Plaintiff-Respondent, -against- AG Financial Products, Inc., Defendant-Appellant. - - - - - Association of Financial Guaranty Insurers, Amicus Curiae — Index 653284/11

_____

Cleary Gottlieb Steen & Hamilton LLP, New York (Roger A. Cooper of counsel), for appellant.

Quinn Emanuel Urquhart & Sullivan LLP, New York (Andrew J. Rossman of counsel), for respondent.

Patterson Belknap Webb & Tyler LLP, New York (Erik Haas of counsel), for amicus curiae.

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Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered July 31, 2018, which, to the extent appealed from, denied defendant's motion for summary judgment dismissing the second cause of action in its entirety, unanimously affirmed, with costs.

Despite the discretion afforded to defendant under the parties' agreements to calculate its loss after the agreements had been terminated, plaintiff raised an issue of fact as to whether defendant's loss calculation was reasonable and in good

faith as required by the agreements. The court properly considered plaintiff's evidence, including expert reports, in support of its claim that defendant's calculations were not reasonable under the circumstances (*see Hoag v Chancellor, Inc.*, 246 AD2d 224, 230-231 [1st Dept 1998]).

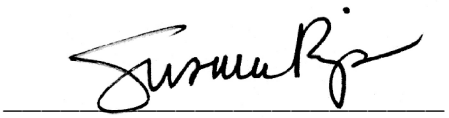
We have considered defendant's remaining arguments and find them unavailing.

M-5914 – *Lehman Brothers International (Europe) (in administration) v AG Financial Products, Inc.*

Motion for leave to file amicus curiae brief granted.

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

ENTERED: JANUARY 17, 2019



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

8138 The People of the State of New York, Ind. 5011/13
Respondent,

-against-

Luis Guzman,
Defendant-Appellant.

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Justine M. Luongo, The Legal Aid Society, New York (Heidi Bota of counsel), for appellant.

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

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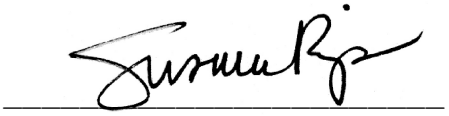
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Maxwell Wiley, J.), rendered December 7, 2016,

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

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

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

ENTERED: JANUARY 17, 2019



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

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

8139N Arisleyda Genao, Index 42063/16E
Plaintiff-Appellant,

-against-

Salcedo Maintenance Corp., et al.,
Defendants-Respondents.

_____

Andriene L. Holder, The Legal Aid Society, New York (Sumani V. Lanka of counsel), for appellant.

Mark H. Cohen & Associates P.C., Bronx (Paul J. Christ of counsel), for respondents.

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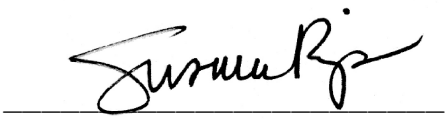
Order, Supreme Court, Bronx County (Mary Ann Brigantti, J.), entered on or about October 31, 2017, which granted defendants' cross motion to vacate the default judgment entered against Richard Liriano and Jacob Schwartz, compelled plaintiff to accept a late answer, and deemed the proposed verified answer to have been served on plaintiff, and denied as moot plaintiff's motion for partial reargument of her motion for a default judgment, unanimously affirmed, without costs, as to the cross motion, and the appeal otherwise dismissed, without costs, as taken from a nonappealable order.

The motion court did not abuse its discretion, as defendants demonstrated both a reasonable excuse for their default (*see Oberon Sec. LLC v Parmar*, 135 AD3d 446 [1st Dept 2016]), and a

meritorious defense to plaintiff's claims (*see Mutual Marine Off., Inc. v Joy Constr. Corp.*, 39 AD3d 417, 419 [1st Dept 2007). Moreover, plaintiff cannot demonstrate prejudice (*see Silverio v City of New York*, 266 AD2d 129 [1st Dept 1999]), and public policy favors resolving cases on their merits (*see Yea Soon Chung v Mid Queens LP*, 139 AD3d 490 [1st Dept 2016]). The denial of reargument is not appealable (*Oyang v NYU Hosp Ctr*, 139 AD3d 531 [1st Dept 2016]).

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

ENTERED: JANUARY 17, 2019



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

8140N Wanda Banks-Dalrymple, Index 308657/11
Plaintiff-Respondent,

-against-

Judy Chang, D.D.S., et al.,
Defendants-Appellants.

_____

Mauro Lilling Naparty LLP, Woodbury (Katherine Herr Solomon of counsel), for appellants.

Burns & Harris, New York (Jason S. Steinberg of counsel), for respondent.

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Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered on or about February 28, 2018, which granted plaintiff's motion for sanctions, unanimously modified, on the law, to reduce the sanction award to an amount necessary to reimburse plaintiff's counsel its experts' fees, and otherwise affirmed, without costs.

Although the Court did not abuse its discretion in declaring a mistrial for defendant's counsel's violation of the court's in limine ruling, we find that a curative instruction, together with a striking of the impermissible parts of the record, would have sufficed. Accordingly, having declared the mistrial, it was a proper exercise of the court's discretion to sanction defendants' counsel, for its prejudicial questioning of plaintiff on a matter

ruled inadmissable (Rules of Chief Admin of Cts [22 NYCRR] § 130-1.1; *Pickens v Castro*, 55 AD3d 443, 444 [1st Dept 2008]). We, however, reduce the sanctions and direct that upon receipt of proof of payment to plaintiff's experts, defendant's counsel must reimburse plaintiff's counsel within 10 days.

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

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

ENTERED: JANUARY 17, 2019

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Judith J. Gische, J.P.
Angela M. Mazzarelli
Marcy L. Kahn
Ellen Gesmer, JJ.

2118
Index 652877/14

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In re Part 60 Put-Back Litigation

- - - - -

Deutsche Bank National Trust Company, etc.,
Plaintiff-Appellant,

-against

Morgan Stanley Mortgage Capital Holdings LLC, etc., et al.,
Defendants-Respondents.

_____x

Plaintiff appeals from the order of the Supreme Court, New York County (Marcy S. Friedman, J.), entered December 11, 2015, which, insofar as appealed from as limited by the briefs, granted defendants' motion to dismiss the cause of action for breach of representations and warranties to the extent it seeks compensatory damages inconsistent with the sole remedy clauses of the parties' agreements, punitive damages, and attorneys' fees.

MoloLamken LLP, New York (Robert K. Kry, Steven F. Molo and Lauren M. Weinstein of counsel), for appellant.

Davis Polk & Wardwell LLP, New York (Brian S. Weinstein, James P. Rouhandeh, Elisabeth Grippando, Alan J. Tabak and Matthew Cormack of counsel), for respondents.

KAHN, J.

On this appeal, which arises from the securitization and sale of residential mortgages, plaintiff, Deutsche Bank National Trust Company (Trustee), as trustee of the Morgan Stanley ABS Capital I Inc. Trust 2007-NC4 (Trust), challenges the motion court's pre-answer dismissal of the Trustee's cause of action for breach of contract to the extent that it included a demand for compensatory damages. The motion court dismissed the Trustee's compensatory damages demand on the ground that the "sole remedies" clauses in the underlying securitization agreements precluded the Trustee from seeking such relief. The Trustee maintains, however, that it sufficiently pleaded gross negligence on the part of defendants Morgan Stanley Mortgage Capital Holdings LLC (MSMCH) and Morgan Stanley ABS Capital I Inc. (MSAC) to render the "sole remedies" clauses unenforceable. On that issue, we hold, consistent with our decision in *Morgan Stanley Mortgage Mtge. Loan Trust 2006-13ARX v Morgan Stanley Mtge. Capital Holdings LLC* (143 AD3d 1 [1st Dept 2016]), that the complaint's allegations of gross negligence in this case are sufficient to render the "sole remedies" clauses unenforceable. We are also called upon to decide whether the motion court properly dismissed the Trustee's demands for punitive damages and attorneys' fees. As to those issues, for the reasons that follow, we hold that those demands should not have been

dismissed.

Specifically, this action arises from the securitization of subprime mortgages by Morgan Stanley & Co., Inc. in 2007, shortly before the housing market collapsed. The Trustee, as trustee of the Trust, seeks damages for the numerous loan defaults that occurred, rendering the residential mortgage backed securities (RMBS) it sold to outside investors virtually worthless.

In April 2007, defendant MSMCH acquired 5,337 mortgage loans with an aggregate principal of over $1.05 billion at a bankruptcy auction. MSMCH, as the sponsor of the securitization, conveyed the loans to defendant MSAC. MSAC then entered into a pooling and servicing agreement (PSA) to create the Trust and to convey the loans to the Trust. The Trust then issued certificates representing a security interest in the loans. Nonparty Morgan Stanley & Co., Inc., the underwriter, purchased the certificates and sold them to the investing public in exchange for substantial fees. The certificateholders were then entitled to the cash flow from the principal and interest payments on the mortgage loans.

In connection with MSMCH's conveyance of the loans to MSAC, those parties entered into a representations and warranties agreement (RWA), under which MSMCH made representations about the quality of the mortgage loans. MSMCH represented that neither it nor, to its knowledge, any party involved in the origination of the loans had committed any "fraud, error,

omission, misrepresentation, negligence or similar occurrence" with respect to the loans. MSMCH further represented that no mortgage loan payments had been more than 30 days delinquent since the origination of the loans, and made representations as to the borrowers' ability to repay and the value of the mortgaged properties.

Section 4(a) of the RWA provides, in pertinent part, that in the event that

> "a breach . . . involv[ing] any representation or warranty . . . cannot be cured within sixty (60) days of the earlier of either discovery by or notice to the Sponsor [MSMCH] of such breach, all of the Mortgage Loans materially and adversely affected thereby shall, at [the Depositor MSAC's] option, be repurchased by the [MSMCH] at the Repurchase Price."

The RWA also contains a "sole remedy" clause, which provides, in pertinent part:

> "It is understood and agreed that the obligation of [MSMCH] set forth in Section 4(a) to repurchase for a Mortgage Loan in breach of a representation or warranty . . . constitutes the sole remedy of the Depositor [MSAC] and any other person or entity with respect to such breach (RWA § 4[c])."

Pursuant to the PSA, MSAC assigned to the Trustee its right to enforce the representations and warranties made by MSMCH under the RWA. The PSA also included MSAC's representations to the Trustee that immediately before the transfer of the loans to the Trust, MSAC had "good title to . . . [the] Mortgage Loan[s], free of any interest of any other Person" (PSA § 2.06[h]). The PSA

further provided that if any party discovered a material breach of a representation or warranty made by MSMCH or MSAC, such party "shall give prompt written notice thereof" to the other parties and to MSMCH (PSA § 2.07).

The PSA further provides, in pertinent part:

> "Within 60 days of the earlier of either discovery by or notice to [MSAC] of any breach of a representation or warranty . . . that materially and adversely affects the value of any Mortgage Loan or the interest of the Trustee, the Certificate Insurer or the Certificateholders therein, [MSAC] shall use its best efforts to promptly cure such breach in all material respects and, if such defect or breach cannot be remedied, [MSAC] shall purchase such Mortgage Loan at the Repurchase Price or, if permitted hereunder, substitute a Substitute Mortgage Loan for such Mortgage Loan" (PSA) § 2.03[g]).

Additionally, the PSA contains a "sole remedies" clause, which provides:

> "It is understood and agreed by the parties hereto that the obligation of [MSAC] under this Agreement or of the Sponsor [MSMCH] under the Representations and Warranties Agreement to cure, repurchase or substitute any Mortgage Loan as to which a breach of a representation and warranty has occurred and is continuing, shall constitute the sole remedies against such Persons respecting such breach available to Certificateholders, [MSAC] (if applicable), or the Securities Administrator, Certificate Insurer or the Trustee on their behalf" (PSA) § 2.03[q]).

The complaint alleges that the Trust has suffered damages exceeding $495 million as the result of pervasive and widespread breaches of representations and warranties made by MSMCH in the RWA as to the quality of the loans made in the offering documents filed with the United States Securities and Exchange Commission

(SEC) and by MSAC in the PSA to provide good title, free of defects, to the mortgage loans. According to the complaint, these "assurances were especially important" to the securitization because the originator of the loans "was bankrupt and could not guarantee the Loans." The complaint further alleges that an independent analysis conducted by third-party consultants retained by the Federal Guaranty Insurance Company (FGIC), the certificate insurer, revealed breaches of representations and warranties in 100% of a sampling of 800 of the mortgage loans in question. According to the complaint, defendants were later provided with notice "that defective loans permeated the Trust - specifically, that no less than 1000 Mortgage Loans are in breach of MSMCH's representations and warranties." The Trustee claims that, notwithstanding having received such notice, MSMCH and MSAC failed substantially in their obligation to repurchase the loans within 60 days of discovery or notice to MSAC of any breach.

The complaint further alleges that on July 24, 2014, the SEC issued a cease and desist order against MSMCH, MSAC, and Morgan Stanley & Co. LLC (collectively, Morgan Stanley) based on findings that Morgan Stanley had made "misleading public disclosures regarding the number of delinquent loans" in the subject Trust and another similar trust created by Morgan Stanley. According to the Trustee, the SEC order stated that by

filing offering documents that materially understated current delinquencies, Morgan Stanley committed "fraud or deceit upon a purchaser of securities," in violation of Section 17(a)(3) of the Securities Act of 1933.

Based on the foregoing facts and allegations, the Trustee asserted in its complaint, insofar as is pertinent to this appeal, a cause of action against Morgan Stanley for breach of the representations and warranties concerning the quality of the loans in the RWA and conveyance of good title in the PSA and sought compensatory damages, punitive damages, and attorneys' fees and costs. As grounds for overcoming the sole remedy clauses, the complaint alleged that Morgan Stanley acted with "gross negligence" when it committed "widespread" breaches of the representations and warranties, and ignored its duties to notify and repurchase, despite discovering the breaches. As grounds for punitive damages, the complaint relied on the SEC order alleging that Morgan Stanley defrauded the public by misrepresenting delinquency rates in the offering documents.

Morgan Stanley moved to dismiss the claim of breach of representations and warranties as to the quality of the loans to the extent it seeks compensatory damages inconsistent with the sole remedy clauses, punitive damages and attorneys' fees.

Supreme Court dismissed the demands for compensatory damages, punitive damages, and attorneys' fees. As to the demand

for compensatory damages, it concluded that the sole remedy clauses were enforceable. In dismissing the demand for punitive damages, the court concluded that "an independent claim of fraud [was] not pleaded; nor [did] the complaint plead a wrong aimed at the public, generally." The court also dismissed the demand for attorneys' fees, citing a prior decision in which it dismissed an attorneys' fee claim that was based on substantially similar contract language as that here authorizing the trustee's recovery of expenses for enforcement of remedies, but noted that this Court had not addressed the issue on appeal *(see Nomura Home Equity Loan, Inc., Series 2006-FM2 v Nomura Credit & Capital, Inc.* (2014 NY Slip Op 32604[U] [Sup Ct NY County, July 18, 2014], *mod* 133 AD3d 96 [1st Dept 2015], *affd as mod* 30 NY3d 572 [2017]).

Our analysis begins with the recognition that "when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms" (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). In accordance with this general principle, contractual provisions that limit or negate the liability of a party to a contract are enforceable because they represent the parties' agreement to limit damages and thereby keep a party's commercial services affordable (*see Sommer v Federal Signal Corp.*, 79 NY2d 540, 554 [1992]).

This general principle of enforceability of contractual

provisions limiting liability is, nonetheless, inapplicable if there exists a statute or public policy to the contrary" (*Sommer*, 79 NY2d at 553). "It is the public policy of this State . . . that a party may not insulate itself from damages caused by grossly negligent conduct" (*id.* at 554, citing, inter alia, *Kalisch-Jarcho, Inc. v City of New York*, 58 NY2d 377, 384-385 [1983]. Such conduct, which must "smack[ ] of intentional wrongdoing" and/or evince "a reckless indifference to the rights of others," cannot be contractually immunized from liability as a matter of public policy (*Abacus Fed. Sav. Bank v ADT Sec. Servs., Inc.*, 18 NY3d 675, 683 [2012], quoting *Kalisch-Jarcho*, 58 NY2d at 385). "This applies equally to contract clauses purporting to exonerate a party from liability and clauses limiting damages to a nominal sum" (*Sommer*, 79 NY2d at 554).

In the past several years, the appellate courts of this state have considered the issue of enforceability of contractual liability limitation provisions in the form of "sole remedy" clauses in RMBS agreements, both under circumstances where the complaint sets forth no allegation of gross negligence and under circumstances where such an allegation is made. *Nomura Home Equity Loan, Inc.* (30 NY3d 572 [2017], *supra*) is an example of the former. In *Nomura*, decided after Supreme Court's decision here, the Court of Appeals held that the claims for general contract damages based upon allegations of "widespread, pervasive

and material misrepresentations and omissions" with respect to the residential mortgage loan transactions in question in that case could not survive a motion to dismiss (*id.* at 580). The mortgage loan purchase agreements entered into by the parties in *Nomura* provided that "to cure or repurchase a defective Mortgage Loan . . . constitute the sole remedies of the Purchaser against [defendant] respecting . . . a breach of the representations and warranties contained in" the agreements (*id.* at 579-580 [emphasis removed]). The Court of Appeals in *Nomura* concluded that these sole remedies clauses were "sufficiently clear to establish that no other remedy was contemplated" (*id.* at 582, citing *J. D'Addario & Co., Inc. v Embassy Indus., Inc.*, 20 NY3d 113, 118 [2012]), especially given the sophistication level of the contracting parties (*id.*, quoting *Kalisch-Jarcho*, 58 NY2d at 384). Thus, *Nomura* and its progeny apply the general rule that a sole remedy provision cannot be "nullif[ied by allegations of] multiple, systemic breaches" (*Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 31 NY3d 569, 582 [2018], quoting *Nomura*, 30 NY3d at 585-586).

By contrast, in *Morgan Stanley Mtge. Loan Trust 2006-13ARX* (143 AD3d 1 [1st Dept 2016], *supra*) (*ARX*), the plaintiff trustee claimed that the issuer of the securities had engaged in gross negligence, where hundreds of the 1,873 residential mortgage loans in the trust later went into default (*id.* at 4), and the

defendant knew at the time of sale that the borrowers had provided inaccurate income and other critical information on their loan applications (*id.* at 6). The mortgage loan purchase agreement contained a sole remedy clause substantially similar to that in the PSA in this case.[1] This Court held that the particular facts alleged in the complaint were "sufficient to support [a] claim of gross negligence" (*id.* at 4).

Here, the Trustee alleges that the FGIC sampling of 800 of the mortgage loans in question manifested breaches of representations and warranties in 100% of those loans, revealing breaches that were more pervasive and egregious than those alleged in either *ARX* or *Nomura*. Moreover, the complaint alleges violations on various grounds, including departures from defendants' own underwriting guidelines as to disclosure of the borrowers' income, debt obligations, employment status, use and occupancy of the property securing their loans, and appraisal value of the property, which were either known or should have been known to defendants by the time the securitization deal closed. Under the standard applicable on a pre-answer motion to

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[1] The language in *ARX* provided that "cure, repurchase or substitut[ion] for a defective Mortgage Loan *constitutes the sole remedy of the Purchaser* respecting . . . a breach of the representations or warranties" (*ARX*, 143 AD3d at 6 [internal quotation marks omitted]). Similarly, the language in the PSA in this case provided that "cure, repurchase or substitut[ion of] any Mortgage Loan as to which a breach of a representation and warranty has occurred and is continuing, shall constitute the sole remedies" (PSA § 2.03(q)]).

dismiss, the allegations of the pleading are presumed true and are entitled to all favorable inferences that may be drawn from them (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). Accordingly, the complaint's allegations of pervasive, knowing breaches of the representations and warranties on multiple grounds as to the quality of loans throughout the pool sufficiently plead gross negligence to render the sole remedy clause of the parties' agreements unenforceable (*ARX*, 143 AD3d at 9).

Furthermore, at this stage of the case, the actual effect of the sole remedy clause in making the investors whole cannot be ascertained. The fact that monetary damages may be required in lieu of specific performance is further reason to permit the allegations of gross negligence to remain (*id.*).

With respect to plaintiff's demand for punitive damages, such a demand is properly made in a breach of contract action if all of the following elements are sufficiently pleaded: "(1) defendant's conduct must be actionable as an independent tort; (2) the tortious conduct must be of [an] egregious nature . . .; (3) the egregious conduct [was] directed to plaintiff; and (4) it must be part of a pleaded pattern directed at the public generally" (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 316 [1995]).

Here, the complaint reflects findings of the SEC sufficient to allege a fraud claim against defendants: that defendants

committed "fraud and deceit" on the certificateholders, as the facts support a rational inference that defendants knowingly misrepresented in the offering documents the delinquency rates of the loans held in the Trust; that they did so in order to induce the investing public, and did induce the certificateholders, to buy the certificates that defendants knew did not meet their representations of quality and were therefore likely to cause significant losses to investors; and that the certificateholders purchased the securities in justifiable reliance on the misrepresentations, causing the Trust, and consequently the certificateholders, to suffer $495 million in losses (*see IKB Intl. S.A. v Morgan Stanley*, 142 AD3d 447 [1st Dept 2016] [holding that purchasers of 25 mortgage backed securities in 18 similar mortgage securitizations sufficiently stated a fraud claim based on allegations of misrepresentations in the offering documents that the loans were of good quality]). The complaint thus sufficiently alleges that defendants' conduct was "egregious" and "part of a pattern directed at the public generally" to satisfy the first, second and fourth elements of a demand for punitive damages, respectively.

With respect to the third element, namely, that the egregious conduct was directed to the plaintiff, the complaint alleges that defendants' misrepresentations of borrower income, debt obligations and appraisal value, as well as their failure to

convey good title, all materially and adversely affected the Trustee's, as well as the certificateholders', interests in the mortgage loans in question. Thus, plaintiff has sufficiently alleged, as is also required, that defendants' egregious conduct was "directed to" it, or that it was aggrieved by the conduct (*see New York Univ. v Continental Ins. Co.*, 87 NY2d at 316; *Rocanova v Equitable Life Assur. Socy. of U.S.*, 83 NY2d 603, 613-614 [1994]). Therefore, plaintiff's allegations of wrongdoing committed against it are sufficient to support a demand for punitive damages at this pleading stage.

Defendants concede that plaintiff is entitled to attorneys' fees under *U.S. Bank N.A. v DLJ Mtge. Capital, Inc.* (140 AD3d 518 [1st Dept 2016]).

Accordingly, the order of the Supreme Court, New York County (Marcy S. Friedman, J.), entered December 11, 2015, which, insofar as appealed from as limited by the briefs, granted defendants' motion to dismiss the cause of action for breach of representations and warranties to the extent it seeks compensatory damages inconsistent with the sole remedy clauses of the parties' agreements, punitive damages, and attorneys' fees, should be reversed, on the law, without costs, and the motion denied.

All concur.

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered December 11, 2015, reversed, on the law, without

costs, and the motion denied.

Opinion by Kahn, J. All concur.

Gische, J.P., Mazzarelli, Kahn, Gesmer, JJ.

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

ENTERED: JANUARY 17, 2019

CLERK