SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 19, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Friedman, J.P., Richter, Gesmer, Kern, Moulton, JJ.

7996 Evelyn Laniox, Index 306867/11
Plaintiff-Respondent,

-against-

The City of New York,
Defendant,

The New York City Housing Authority,
Defendant-Appellant.

_____

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

Popkin & Popkin, LLP, New York (Eric F. Popkin of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about September 22, 2017, which denied the motion of defendant New York City Housing Authority (NYCHA) for summary judgment dismissing the complaint, reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

NYCHA met its prima facie burden by demonstrating that plaintiff failed to raise an issue of fact as to whether the assailant was an intruder, as opposed to a tenant or invitee

lawfully on the premises (*see Burgos v Aqueduct Realty Corp.*, 92 NY2d 544 [1998]; *Smith v New York City Hous. Auth.*, 130 AD3d 427 [1st Dept 2015]). In support of its motion, NYCHA submitted plaintiff's deposition testimony that she was not a resident and did not know any other tenants in the building aside from her two patients. Plaintiff also testified that she did not see her assailant's face because he kept his face covered with the hood of his sweatshirt and that she did not know if her assailant was a tenant or guest.

Despite plaintiff's deposition testimony, she subsequently submitted an affidavit in opposition to the motion for summary judgment stating that the assailant did not conceal his face while in the building. This portion of the affidavit directly contradicts her prior testimony and creates a feigned issue of fact insufficient to defeat a properly supported motion for summary judgment (*Vila v Foxglove Taxi Corp.*, 159 AD3d 431, 431 [1st Dept 2018]; *see Vilomar v 490 E. 181 St. Hous. Dev. Fund Corp Corp.*, 50 AD3d 469 [1st Dept 2008]).

We previously have held that the victim's familiarity with building residents, a history of ongoing criminal activity, and the assailant's failure to conceal his or her identity tend to demonstrate that the assailant was more likely than not an intruder (*see Chunn v New York City Hous. Auth.*, 83 AD3d 416 [1st

Dept 2011]; *De Luna-Cole v Fink*, 45 AD3d 440 [1st Dept 2007]; *Patel v 25 Gunhill Assoc.*, 277 AD2d 84 [1st Dept 2000]; *Reynolds v New York City Hous. Auth.*, 271 AD2d 280 [1st Dept 2000]; *Foreman v B & L Props. Co.*, 261 AD2d 301 [1st Dept 1999]). Here, plaintiff's testimony demonstrates that these important factors were not present. Thus, plaintiff "provided no evidence from which a jury could conclude, without pure speculation, that it was more likely than not that the assailant was an intruder" (*Hierro v New York City Hous. Auth.*, 123 AD3d 508, 508-509 [1st Dept 2014]).

Contrary to the dissent's position, NYCHA does not concede that it was aware of ongoing criminal activity in the building. In fact, it denies this in its answer. In its reply brief on appeal, NYCHA explicitly states that it is not conceding that it was aware of any ongoing criminal activity. Rather, it focuses on the argument that there is no proximate cause because it is just as likely the assailant was a tenant or invitee. Also, plaintiff did not produce any evidence, such as police reports, during discovery or any time thereafter, to show the extent of any such alleged prior criminal activity. The only evidence plaintiff points to is the deposition testimony of the building's caretaker stating that she was unaware of any criminal acts in the building, except that she learned about a shooting at a

deposition in another case. However, she provided no details about that single incident, including whether the shooter was a tenant or intruder, and there is no other evidence about it in the record.

Nor is the fact that NYCHA was aware of a broken building entry door sufficient, by itself, to establish liability on its part. Although we do not condone NYCHA's alleged failure to adequately repair the door lock, if the identity of the assailant remains unknown, plaintiff must provide sufficient evidence to establish that the assailant was more likely than not an intruder (*Burgos*, 92 NY2d at 551). Plaintiff testified that she did not recognize and could not identify the assailant, nor did she know whether he was a tenant, invitee or intruder.

During plaintiff's deposition, she testified that the assailant's hood was up, that she was unable to describe his facial features, and that she never got a good look at his face. At the 50-H hearing, plaintiff testified that during the struggle, she was unable to see the assailant's face because "he kept his face covered with his hood." Despite the dissent's efforts to attribute the assailant's actions to the weather, the fact that the assailant kept his face covered with the hood of his sweatshirt and that plaintiff was unable to see his face because of his hood is sufficient circumstantial evidence to

support the inference that the assailant was attempting to conceal his identity. Plaintiff's testimony, which is mentioned by the dissent, that the assailant said something to another person while in the elevator, does not establish the identity of the assailant because we do not know who he was speaking to, or any details of the exchange.

Finally, although there is not a single factor test to determine whether it is more likely than not that the assailant was an intruder, the cases cited by the dissent (*Patel v 25 Gunhill Assoc.*, 277 AD2d 84 [1st Dept 2000]; *Carmen P. v PS&S Realty Corp.*, 259 AD2d 386 [1999]) are factually distinguishable because in those cases, the plaintiffs were building residents and each adduced sufficient evidence to establish a pattern of ongoing criminal activity on the premises. There would be no reason in these cases to discuss whether the assailant hid his identity because the injured parties were tenants who could recognize people in the building. Here, by contrast, plaintiff was not a building resident, and there is no evidence in the record of significant ongoing criminal activity in the building, or its surrounding areas.

Accordingly, NYCHA's motion should have been granted.

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

GESMER, J. (dissenting)

The only issue before us on this appeal is whether plaintiff has raised triable issues of fact from which the factfinder could reasonably infer that her assailant was an intruder (*Burgos v Aqueduct Realty Corp.*, 92 NY2d 544, 551 [1998]; *Chunn v New York City Hous. Auth.*, 83 AD3d 416, 417 [1st Dept 2011]). In my view, she has done so. Accordingly, I respectfully dissent.

When a landlord breaches its duty to take minimal precautions against foreseeable criminal activity, a tenant or invitee who is assaulted on the property may recover damages from the landlord if the failure to provide adequate security was a proximate cause of the assault (*Burgos*, 92 NY2d 544, 548). If the identity of the assailant is unknown, the plaintiff must show that it is more likely than not that the assailant was an intruder, rather than a tenant or other person lawfully on the premises, "[s]ince even a fully secured entrance would not keep out another tenant, or someone allowed into the building by another tenant" (*id.* at 550-551). On a defendant's motion for summary judgment in such a case, the court must view the facts before it in the light most favorable to the plaintiff to determine whether she has presented any facts "from which intruder status may reasonably be inferred" (*id.* at 551). "To defeat a motion for summary judgment, a plaintiff need not

conclusively establish that the assailants were intruders" (*Chunn v New York City Hous. Auth.*, 83 AD3d 416, 417).

Plaintiff, a nurse, was on her way to visiting her patient who lived in a building owned and maintained by defendants when she was assaulted from behind by an unidentified attacker. She commenced this action in which she alleges, inter alia, that defendants' negligence in maintaining adequate security was a proximate cause of her injuries.

Defendant New York City Housing Authority (defendant) does not dispute that its employees were aware on the day plaintiff was assaulted that the lock on the front door of the building had been broken for approximately three months.[1] Defendant also did not dispute before the motion court plaintiff's claim that her assault was reasonably foreseeable because defendant was aware of

[1]Defendant's employee testified that her duties included completing the building's daily caretaker logs, on which she was required to indicate the condition of the front door, that she listed the door lock as being broken on the logs between September 1 and November 22, 2010, that she advised her supervisor each time she observed that a lock was broken, that the records did not indicate that the lock had been repaired, and she did not remember anyone having attempted to repair the lock during that time. Plaintiff, who had been to the building on many prior occasions, testified that, on each occasion, the doors to the building were wide open and she was able to walk into the building without being buzzed in.

criminal activity on the premises prior to her assault.[2]

Defendant sought summary judgment, arguing only that plaintiff could not establish that its negligence in securing the building was a proximate cause of her injuries because there was no evidence from which the factfinder could reasonably infer that her assailant was an intruder.

In my view, the motion court correctly denied defendant's motion. In *Burgos*, the Court of Appeals reversed two decisions from this court, and expressly rejected a requirement in cases like this one that a plaintiff definitively rule out the possibility that the assailant was a tenant or invitee, finding that this was an "impossible burden" (*Burgos*, 92 NY2d at 551; *see also Carmen P. v PS&S Realty Corp.*, 259 AD2d 386, 388 [1st Dept 1999]). Rather, Judge Kaye wrote that "a plaintiff who sues a

---

[2]Before the motion court, defendant argued only that plaintiff's inability to identify her assailant and her not having testified at her hearing pursuant to General Municipal Law § 50-h that he had entered through a door with a broken lock were insufficient, as a matter of law, for a trier of fact to determine that he was an intruder who gained entry to the building due to defendant's negligence in maintaining security. For the reasons discussed below, I disagree. Defendant argues for the first time in its reply brief on this appeal that it disputes that it had notice of prior criminal activity in the area. However, defendant failed to argue this on its motion for summary judgment. Indeed, even after plaintiff's attorney argued in opposition to defendant's motion that defendant had not challenged plaintiff's claim that defendant was aware of ongoing criminal activity, defendant did not dispute or otherwise address this claim in its reply papers before the motion court.

landlord for negligent failure to take minimal precautions to protect tenants from harm can satisfy the proximate cause burden at trial even where the assailant remains unidentified, if the evidence renders it more likely or more reasonable than not that the assailant was an intruder who gained access to the premises through a negligently maintained entrance" (92 NY2d at 551).

Consistent with *Burgos*, we have since held that, where a plaintiff cannot identify her assailant as an intruder, a showing that the landlord was aware of a broken building entry door lock and of prior criminal acts in the vicinity "raise[s] an issue of fact as to the intruder status of the assailant" sufficient to defeat a summary judgment motion (*Patel v 25 Gunhill Assoc.*, 277 AD2d 84 [1st Dept 2000]; *see also Carmen P.*, 259 AD2d 386]). Here, plaintiff testified that she witnessed her assailant enter the building through the door on which the lock had been broken for several months. My colleagues note that the record before us contains little detail about prior crimes in the vicinity. However, the building caretaker testified that she was aware of a shooting in the building. Morever, in its summary judgment motion, defendant did not dispute plaintiff's claim that it was aware of ongoing criminal activity. The proponent of a summary judgment motion has the burden to demonstrate that there are no issues of fact in dispute requiring a trial, and failure to meet

this burden requires denial of the motion, regardless of the sufficiency of the opponent's response (*Pullman v Silverman*, 28 NY3d 1060, 1062 [2016]). Defendant cannot meet its burden by failing to address at all plaintiff's allegation that it had notice of prior criminal activity. Accordingly, the sufficiency of plaintiff's proof of prior criminal activity is not at issue on this appeal.

As my colleagues note, we have held that evidence that an assailant did not attempt to conceal his identity can be sufficient to raise a question of fact as to whether he was an intruder. However, this showing is not required where, as here, plaintiff has presented other facts from which the factfinder could reasonably infer that her assailant was an intruder (*see Patel*, 277 AD2d 84; *Carmen P.*, 259 AD2d 386). In any event, for the reasons discussed below, I respectfully disagree with my colleagues' characterization of plaintiff's testimony about her assailant. As a result, I find that her testimony was entirely consistent with her statement in her affidavit that he did not attempt to conceal his identity.

Plaintiff, who is 5' 6" tall, testified that, as she approached the building, she observed a thin young man, a few inches taller than she, and a young woman enter the building before her through the unlocked door. When plaintiff then

entered the building, she observed the young man sitting on the steps to the left of the elevator. Plaintiff further testified as follows:

> Q: Okay. And could you describe that young man?
>
> A: All I saw was he was - - his head was down. He was on the phone. He had the gray and the black hoodie and a pair of jeans. And he was on his phone. He had a backpack on. And he had brown skin.
>
> . . .
>
> Q: Now, you say that the man had a black hoodie on?
>
> A: Black and gray.
>
> Q: Was the hood up?
>
> A: Yes.
>
> Q: And his head was down, so other than seeing that his skin was brown, can you describe his features in any other way?
>
> A: No.
>
> Q: Do you know whether he had any facial hair?
>
> A: I don't know.
>
> Q: Throughout - - from now until this incident occurred, did you ever get a look at his face?
>
> A: Not that I recall.

Plaintiff testified that, when the elevator came, she and

the two young people and an elderly man in a wheelchair got on. After they got on the elevator, the young man and the young woman began speaking to each other. They spoke loudly enough for her to hear, but she did not recall what they said because she was "looking at my things, what I was going to do with my patient, so I was not paying any mind to them."

Plaintiff testified that, when she got off the elevator, she was attacked from behind. She recognized the sleeve of the young man's sweater because he had wrapped his left arm around her neck and was choking her while holding his right hand over her mouth. She passed out, and came to with the young man still behind her trying to grab a chain she was wearing around her neck. She managed to break free and run down the hall about ten feet away from him and about two feet away from her patient's door, when she turned and saw him start to come toward her. She began screaming and banging on her patient's door, at which point the young man screamed at her to "shut up," and then turned and ran into a nearby stairwell. She testified that the time from when she regained consciousness to when she began screaming and banging on her patient's door is "a block of time I just don't remember." She was "so shaken up" from the assault that she had difficulty remembering what happened even after reaching the relative safety of her patient's apartment, when she was "still

hyperventilating. I couldn't think. I was still wrapping my mind around the fact that somebody tried to kill me." She could not recall being struck by her assailant, but when she saw herself in a mirror in her patient's apartment, she noticed that her face was bruised and scratched, and that there was blood on the front left side of her neck.

Although plaintiff testified that she did not recall ever getting a look at the young man's face, and that he had his hood up at all times when she was able to see him, including during the assault, she did not testify that he was trying to hide his face, nor was she asked whether she observed him trying to do so, either at her 50-h hearing or at her deposition. Moreover, her observation that he wore his hood up on a "cool" day in November is not sufficient on this summary judgment motion to prove that he intended, by wearing his hood, to prevent anyone from identifying him. In addition, her undisputed testimony that he engaged in an audible conversation on the elevator, in front of several people, raises a further question of fact as to whether he was trying to conceal his identity.

The majority mischaracterizes plaintiff's testimony as being that her assailant deliberately prevented her from seeing his face by keeping his hood up, arguing that this is inconsistent with her statements in her affidavit that he had not tried to

conceal his identity. However, that was not her testimony. As discussed above, plaintiff did not testify or imply that her assailant tried to conceal his identity. Rather, she testified that, on the "cool" day in November when she was assaulted, the young man was wearing a hoodie with the hood up, and was looking down at his phone when she entered the building. On the elevator, she testified, she was absorbed in her work and not paying attention to the young man, who spoke loudly enough for her to hear what he was saying. Her memory of the assault contained gaps because she was extremely shaken by it, and she did not recall ever getting a look at his face. This testimony is entirely consistent with her statements in her affidavit that his wearing his hood up on what she had testified was a "cool" day in November was not remarkable, and that she did not observe him doing anything she perceived as being designed to "conceal his identity."[3]

---

[3]The only witness whose testimony provides what the majority refers to as "sufficient circumstantial evidence to support the inference that the assailant was attempting to conceal his identity" is plaintiff, and she unequivocally stated in her affidavit in opposition that "he took no steps to hide his identity." I take issue with the majority's suggestion that I am speculating about the reason the assailant kept his hood up. That finding is based on the record, specifically, on plaintiff's affidavit in opposition, in which she attributed to the cool weather the fact that her assailant had his hood up at all times, and noted that the hoodie, even when up, did not conceal his face in any event.

The majority cites to *Villa v Foxglove Taxi Corp.*, where we held that a "party's affidavit that contradicts his prior sworn testimony creates only a feigned issue of fact, and is insufficient to defeat a properly supported motion for summary judgment" (159 AD3d 431 at 431 [2018]). In that case, when the plaintiff was asked at his deposition why he had stopped receiving medical treatment for his alleged injuries for four years, he testified that, although he had insurance, he did not like doctors. In his later affidavit in opposition to a summary judgment motion, he made the completely contradictory statements that he had stopped receiving treatment because he did not have insurance, and because a doctor had told him further treatment would not be effective. Similarly, in *Vilomar v 490 181st Street Housing Development Fund Corp Corporation* (50 AD3d 469 [1st Dept 2008]), also cited by the majority, the plaintiff testified that he had not seen anything on the stairs prior to slipping and falling on them, and the defendant's employee testified that he cleaned the stairs twice a day and had not seen anything on the stairs the evening before the plaintiff's fall. In opposition to the defendant's summary judgment motion, the plaintiff submitted the affidavit of his girlfriend, who claimed to have seen a banana peel on the stairs two days before the plaintiff's fall, and that the stairs had not been cleaned for four days before.

In both cases, we found that the affidavits directly contradicted earlier testimony and created feigned issues of fact insufficient to defeat a summary judgment motion.

In contrast, here, when defendant's attorney questioned plaintiff at the 50-h hearing and at her deposition, counsel did not ask her whether her assailant was trying to hide his identity. Apparently, defendant first raised that issue in its summary judgment motion. Accordingly, plaintiff's affidavit in opposition was her first opportunity to address it. Although her statement that she did not observe that her assailant was trying to conceal his identity was information that was neither sought nor obtained at her 50-h hearing or her deposition, it is entirely consistent with her earlier testimony. Moreover, to the extent that there is any inconsistency between her deposition testimony that he had his hood up and her statement in her affidavit that he was not trying to conceal his identity, it "may be weighed by the trier of fact, but [does] not support judgment as a matter of law" (*Granados v New York City Hous. Auth.*, 255 AD2d 249, 250 [1st Dept 1998]).

For all of these reasons, I would vote to affirm the motion court's denial of defendant's summary judgment motion.

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

ENTERED: MARCH 19, 2019

CLERK

Sweeny, J.P., Renwick, Gische, Kahn, Kern, JJ.

8602- SCI 4261/15
8603 The People of the State of New York,
Respondent,

-against-

Mitchel Golden,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered January 25, 2016, as amended May 24, 2016, convicting defendant, upon his plea of guilty, of attempted assault in the second degree (two counts), and sentencing him to concurrent terms of one to three years, unanimously reversed, on the law, the plea vacated, the superior court information dismissed, the indictment reinstated, and the matter remanded for further proceedings. Appeal from order, same court (Robert M. Stolz, J.), entered on or about September 15, 2017, which denied defendant's CPL 440.10 and 440.20 motions to vacate the judgment and set aside the sentence, unanimously dismissed, as academic.

As the People concede, defendant is entitled to vacatur of the plea because his negotiated plea included a promise of shock

incarceration, and that promise cannot be honored because shock incarceration is only available for persons convicted of controlled substance or marijuana offenses (*see* Penal Law 60.04[7]). Since the guilty plea was induced by an unfulfilled promise, we vacate the plea in its entirety. The SCI was part and parcel of the negotiated plea. Therefore, we restore defendant to his preplea status and reinstate the indictment (*see People v. Devalle*, 94 NY2d 870, 872 [2000], *People v Selikoff*, 35 NY2d 227 [1974]).

This disposition renders defendant's remaining claims academic.

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

ENTERED: MARCH 19, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Tom, Kahn, Gesmer, JJ.

8611 In re Matthew Boder, Index 101985/16
Petitioner-Appellant,

-against-

James P. O'Neill, etc., et al.,
Respondents-Respondents.

_____

Chet Lukaszewski, P.C., Garden City (Chester Lukaszewski of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Jeremy W. Shweder of counsel), for respondents.

_____

Order and judgment (one paper), Supreme Court, New York County (Arlene P. Bluth, J.), entered November 30, 2017, which denied the petition brought pursuant to CPLR article 78 to annul respondents' determination, dated August 10, 2016, denying petitioner's application for accident disability retirement (ADR) benefits, unanimously reversed, on the law, without costs, the petition granted, the determination annulled, and the matter remanded for further proceedings in accordance herewith.

Petitioner met his burden in establishing that he was entitled to ADR benefits by presenting the reports of his treating physicians, including the surgeon who performed his spinal surgery, the line-of-duty (LOD) accident reports indicating neck and back injuries, the contemporaneous emergency room reports also documenting neck and back pain, and MRIs from

2010 and 2011 revealing disc herniation, disc degeneration, and stenosis. Such medical evidence showed that petitioner suffered from chronic back pain as a result of LOD injuries, in particular those sustained during a LOD accident that occurred in 2008.

The Board of Trustees' determination that petitioner's 2008 accident was not causally related to his disability based on a two-year gap in treatment, during which time he returned to full duty, was conclusory in light of the foregoing medical evidence (*see Matter of Salvia v Bratton*, 159 AD3d 583 [1st Dept 2018], *lv denied* 31 NY3d 913 [2018]). "While the Medical Board was free to come to any conclusion supported by medical evidence before it, the board could not disregard the only competent evidence on the issue before it" (*id.* at 584 [internal quotation marks omitted]). Both the Medical Board and the Board of Trustees failed to refute the opinion of petitioner's surgeon that petitioner's condition, which necessitated surgical intervention, was the result of his LOD injuries.

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

ENTERED: MARCH 19, 2019

CLERK

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

8730 The People of the State of New York, Ind. 4449/15
Respondent,

-against-

Dwight Nichols,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Sabrina Margret Bierer of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Michael Obus, J.), rendered April 6, 2017,

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: MARCH 19, 2019

CLERK

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

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

8731 Peter Alphas, et al., Index 155790/15
Plaintiffs-Appellants,

-against-

Scott Smith, et al.,
Defendants-Respondents.

_____

Spinak Law Office, White Plains (Robert Spinak of counsel), for appellants.

Lewis Brisbois Bisgaard & Smith, LLP, New York (Philip Furia of counsel), for respondents.

_____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered January 10, 2018, which, to the extent appealed from, granted defendants' motion for discovery sanctions to the extent of ordering that at trial an adverse inference charge shall be given against plaintiffs relating to the documents plaintiffs claim were lost or destroyed, unanimously affirmed, without costs.

Plaintiffs do not dispute that they had a duty to preserve relevant documents and that the documents they claim were lost or destroyed were relevant (*see Zubulake v UBS Warburg LLC*, 220 FRD 212, 218 [SD NY 2003]; *Voom HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 AD3d 33, 36 [1st Dept 2012]). They argue only that defendants failed to show that they acted negligently (*see Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543,

547-548 [2015]).

We find that the motion court found that plaintiffs acted negligently. Plaintiffs argue that, despite a court order of protection, plaintiff Peter Alphas's landlord illegally evicted him and destroyed his records. However, even if there was a court order of protection, plaintiff's decision to store his only copy of these records in a location that was the subject of an eviction proceeding, while he was under an obligation to safeguard the documents, demonstrates negligence.

As noted by the court, spoliation sanctions "are not limited to cases where the evidence was destroyed willfully or in bad faith, since a party's negligent loss of evidence can be just as fatal to the other party's ability to present a defense" (*Strong v City of New York* (112 AD3d 15, 21 [1st Dept 2013]). While the record did not demonstrate that plaintiff destroyed the documents willfully or in bad faith, so as to warrant striking the pleading, "a less severe sanction would be appropriate."

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

ENTERED: MARCH 19, 2019

CLERK

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

8732-
8732A In re Juliya V.,
Petitioner-Appellant,

-against-

Aleksandr V.,
Respondent-Respondent.

_____

Law Office of Cabelly & Calderon, Jamaica (Lewis S. Calderon of counsel), for appellant.

_____

Order, Family Court, New York County (Emily M. Olshansky, J.), entered on or about February 7, 2017, which denied petitioner's objection to the November 2, 2016 order of the Support Magistrate on the ground that it had not been served on respondent's assigned counsel, unanimously reversed, on the law and the facts, without costs, and the matter remanded for a determination on the merits of petitioner's objection. Order, same court and Judge, entered on or about August 1, 2017, which denied petitioner's objection to the May 19, 2017 order of the Support Magistrate, as untimely, unanimously reversed, on the law and the facts, without costs, and the matter remanded to Family Court for a determination of the objection on the merits.

Pursuant to Family Court Act 439(e), petitioner was required to serve her objections to the May 19, 2017, order within 35 days of its mailing. Despite the Family Court's assertion that the

order was mailed on May 25, 2017, there is no evidence in the record to support this. Petitioner submitted a copy of an envelope stamped "May 31, 2017," in which she asserts the order was mailed, making petitioner's objections, filed July 3, 2017, timely as a matter of law (*see e.g. Matter of Commissioner of Soc. Servs. v Dietrich*, 208 AD2d 474 [1st Dept 1994]; *Matter of Kao v Kao*, 165 AD3d 944 [2d Dept 2018]). Given the absence of any other evidence in the record, and of opposition to this appeal, the envelope is accepted as unrebutted.

With regard to the issue of petitioner's service of her objections to the November 2, 2016 order of the Support Magistrate, respondent was assigned counsel purely for the violation petition and not for the support petition, as there is no right to assigned counsel for support matters (*Matter of Charity Akosua A. v Nana A.*, 132 AD3d 462, 463 [1st Dept 2015], *lv denied* 26 NY3d 1072 [2015]). As such, respondent was pro se on the issue of support, and petitioner's service on him was appropriate (CPLR 2103 [c]).

We have considered petitioner's remaining arguments and find them to be beyond the scope of the appeal.

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

ENTERED: MARCH 19, 2019

CLERK

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

8733 SFR Holdings Ltd., et al., Index 652367/12
Plaintiffs-Respondents,

-against-

John Rice, et al.,
Defendants-Appellants.

_____

Brody, O'Connor & O'Connor, New York (Scott A. Brody of counsel), for appellants.

Stevens & Lee, P.C., New York (Constantine D. Pourakis of counsel), for respondents.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered September 20, 2017, which, insofar as appealed from, denied defendants John Rice, Joseph Ingrassia, Capstone Cayman Special Purpose Fund LP, Capstone Special Purpose Fund LP, Capstone Capital Management, Inc., Capstone Capital Group I, LLC, Capstone Trade Partners, Ltd., Capstone Business Credit, LLC, Amincor Other Assets Inc., and Amincor, Inc.'s motion for summary judgment dismissing the fraud cause of action,[1] unanimously modified, on the law, to grant the motion as to the claim

[1] On a prior appeal, this Court modified so much of an order as granted defendants' motion to dismiss the fraud claim to deny the motion as to defendants Rice, Ingrassia, Capstone Capital Management Inc., Capstone Cayman Special Purpose Fund LP, and Capstone Special Purpose Fund LP (132 AD3d 424 [1st Dept 2015]), *lv dismissed in part, denied in part* 27 NY3d 977 [2016]).

asserted by plaintiff Cannonball Stability Fund LP, and otherwise affirmed, without costs.

Plaintiffs claim that defendants concealed their investments in real estate from them, made false statements, issued false and misleading reports about the investments, and misrepresented the magnitude of the investments to induce them to refrain from redeeming their interests (*see Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). The claim is supported by monthly progress reports that failed to reveal the nature and extent of the real estate investments, and testimony and sworn statements about a meeting at which defendants significantly understated the amount of money used to fund real estate deals and about defendants' assurances that 90% of the improper investments would be transferred to another fund.

Defendants argue, citing *HSH Nordbank AG v UBS AG* (95 AD3d 185 [1st 2012]), that plaintiffs are sophisticated investors who knew or should have known of the real estate holdings by August 2007. However, only post-investment fraud is at issue here (except as to Cannonball Stability Fund LP, discussed below), and defendants failed to establish that plaintiffs had a means of ascertaining the breadth of the fraud.

Defendants failed to establish the absence of any causally related damages (*see generally Laub v Faessel*, 297 AD2d 28, 31

[1st Dept 2002]). They maintain that, even if plaintiffs had redeemed their full investments by November 30, 2007, they would not been repaid, because the Capstone Partnerships lacked the liquidity to cash out the redemption requests. However, their proof was inadequate; they relied on a chart purporting to list the names of investors who had outstanding redemption requests, made as early as October 1, 2007, and defendant Ingrassia's affidavit saying that "[n]one of the investors [listed] received all of their money back." Defendants did not address the preceding period at all, despite the fact that the fraud allegations pre-date October 1, 2007.

Plaintiff Cannonball Stability Fund LP accepted a position in the Capstone Partnerships on January 1, 2008, after it had been disclosed that defendants were investing heavily in real estate deals. Thus, its fraud claim should be dismissed.

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: MARCH 19, 2019

CLERK

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

8734 The People of the State of New York, Respondent, Ind. 5650/10

-against-

Stanley Holmes, Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Sheila O'Shea of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Renee A. White, J. at suppression hearing; Michael R. Sonberg, J. at jury trial and sentencing), rendered June 30, 2016, convicting defendant of criminal possession of a weapon in the second degree, and sentencing him, as a persistent violent felony offender, to a term of 16 years to life, unanimously reversed, on the law, and the matter remanded to Supreme Court for a determination, based upon the evidence presented at the suppression hearing, of the issues raised at the hearing but not decided by the court, and for a new trial.

The parties correctly agree that the hearing court erred when it denied defendant's motion to suppress a pistol based solely on the court's finding that defendant lacked standing because the pistol was recovered from the ground. Two officers

testified at the hearing to the effect that the pistol was recovered immediately after it fell from defendant's person. Since this Court lacks jurisdiction to affirm the denial of defendant's motion to suppress the pistol on the alternative ground that the police had reasonable suspicion to stop and frisk him, a ground upon which the hearing court did not rule, we "reverse the denial of suppression and remit the case to Supreme Court for further proceedings" (*People v LaFontaine*, 92 NY2d 470, 474 [1998]; *see also People v Simmons*, 151 AD3d 628, 629 [1st Dept 2017]) [determination of unresolved suppression issues following remand is to be based upon the hearing minutes]).

Defendant is also entitled to a new trial, because the trial court improperly precluded his counsel from cross-examining the only police officer who allegedly saw the pistol falling from his person about allegations raised in a federal civil action against the officer, which had settled. Counsel had a good faith basis for seeking to impeach the officer's credibility by asking him about allegations that he and other officers approached and assaulted the plaintiff in that case without any basis for suspecting him of posing a danger and filed baseless criminal charges against him (*see People v Smith*, 27 NY3d 652, 666-67 [2016]). Although trial courts "retain broad discretion" over the admission of prior bad acts allegedly committed by a police

witness or other witness (*id.* at 660), the court improvidently exercised its discretion by entirely precluding any cross-examination about the allegations at issue here without any valid justification, such as a potential to confuse the jury (*see id.* at 668).

We find that this error was not harmless (*see People v Crimmins*, 36 NY2d 230, 242 [1975]). This case hinged on the testimony of the two police officers present at the time the pistol was retrieved from the ground, and the court's ruling pertained to the only officer who allegedly saw the pistol falling from defendant's person. Since the evidence of guilt was not overwhelming and defendant "was not permitted to cross-examine [the] witness[] regarding the acts underlying the federal lawsuit, which would have been relevant to [his] credibility," there was a "significant probability that the jury would have acquitted if defendant had been permitted to impeach" the officer (*Smith*, 27 NY3d at 668). We note that the jury returned its verdict in this simple weapon possession case after deliberating for three days and receiving two *Allen* charges (*see Allen v United States*, 164 US 492 [1896]), and two prior juries failed to reach a unanimous verdict on the sole count in this case.

Since we are ordering a new trial, we find it unnecessary to

reach defendant's remaining arguments, except that we find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]).

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

ENTERED: MARCH 19, 2019

CLERK

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

8735 OHM NYC LLC, Index 151536/18
Plaintiff-Appellant,

-against-

Times Square Associates LLC, et al.,
Defendants-Respondents.

_____

Phillips Nizer LLP, New York (Richard P. Kaye of counsel), for appellant.

Rosenberg & Estis, P.C., New York (Jeffrey Turkel of counsel), for respondents.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered August 27, 2018, which granted the part of defendants' motion pursuant to CPLR 3211 seeking to dismiss the causes of action for fraudulent inducement and rescission, unanimously reversed, on the law, with costs, and the motion denied.

The complaint alleges multiple instances of defendants misrepresenting to plaintiff that the Bridge, a portion of the ground floor of a building, would be included in the leased premises. These misrepresentations, which the complaint alleges were made to induce plaintiff into entering into the lease, were not promises of future performance, but misrepresentations of a then present fact. Thus, the complaint states a cause of action

for fraudulent inducement that is not duplicative of the breach of contract claim (*see Deerfield Communications Corp. v Chesebrough-Ponds, Inc.*, 68 NY2d 954 [1986]; *MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 87 AD3d 287, 294 [1st Dept 2011]; *GoSmile, Inc. v Levine*, 81 AD3d 77, 81 [1st Dept 2010], *lv dismissed* 17 NY3d 782 [2011]).

Contrary to defendants' contention, the disclaimer and merger provision of the subject lease does not provide a ground for dismissing the fraudulent inducement claim. There is nothing in the record to suggest that plaintiff knew or should have known that the Bridge would not be included in the leased premises, as was originally represented. Moreover, there is nothing in the record to suggest that plaintiff could have discovered the terms of the lease of the adjacent premises or any promises about the Bridge that defendants may have made to the tenants of the adjacent premises, which would be facts peculiarly within defendants' knowledge (*see Basis Yield Alpha Fund [Master] v Goldman Sachs Group, Inc.*, 115 AD3d 128, 137-140 [1st Dept 2014]).

In view of the reinstatement of the fraud claim, the rescission claim should also be reinstated (*see Callanan v Keeseville, Ausable Chasm & Lake Champlain R.R. Co.*, 199 NY 268, 284 [1910]; *Babylon Assoc. v County of Suffolk*, 101 AD2d 207, 215

[2d Dept 1984]).

At oral argument before the motion court, defendants abandoned the part of their motion seeking to dismiss the remaining causes of action (*see Elliott Intl. L.P. v Vitro, S.A.B. de C.V.*, 95 AD3d 565 [1st Dept 2012]; *Williamson v Hodson*, 147 AD3d 1488, 1489 [4th Dept 2017], *lv denied* 29 NY3d 913 [2017]).

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

ENTERED: MARCH 19, 2019

CLERK

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

8736 22 Gramercy Park, LLC, et al., Index 151756/17
Plaintiffs-Appellants,

-against-

Michael Haverland Architect, P.C.,
Defendant-Respondent,

Lehr Associates Consulting Engineers LLP,
Defendant.

_____

Katsky Korins LLP, New York (Steven B. Feigenbaum of counsel), for appellants.

Trachtenberg Rodes & Friedberg LLP, New York (Barry J. Friedberg of counsel), and Byrne & O'Neill, LLP, New York (Kevin O'Neill of counsel), for respondent.

_____

Order, Supreme Court, New York County (Robert R. Reed, J.), entered September 6, 2018, which, to the extent appealed from, upon granting plaintiffs' motion to discontinue the complaint without prejudice, denied plaintiffs' motion to dismiss defendant Michael Haverland Architect, P.C.'s (Architect) counterclaims pursuant to CPLR 3211(a)(1) and (7), unanimously modified, on the law, to grant plaintiffs' motion to dismiss the unjust enrichment counterclaim, and otherwise affirmed, without costs.

Plaintiff Ellenbogen, the sole member of plaintiff 22 Gramercy Park, LLC (22 Gramercy), engaged Architect in connection with the renovation of a condominium building in 2002, and the project continued through 2012. During that time, Ellenbogen or

22 Gramercy, as "Owner," entered into a letter agreement with Architect dated March 30, 2002, which was amended by letter dated February 11, 2003 and, subsequently, by amendment dated March 12, 2008 due to the increased scope of the project. Under the 2008 amendment, Architect conditionally released plaintiffs from any and all claims for fees, costs and expenses arising under the 2003 amendment, except that, "in the event Owner commences a claim against Architect, Architect may assert, and recover as the evidence supports, by way of counterclaim . . . the amount of fees that otherwise would be due Architect . . ."

In 2017, plaintiffs commenced this action against Architect seeking to be indemnified for amounts they paid to settle claims brought by third parties. Architect then asserted counterclaims against plaintiffs seeking to recover fees owed to it under the 2003 amendment.

Plaintiffs then decided that the litigation was not cost-effective, and moved for leave to discontinue their indemnification claim without prejudice (CPLR 3217[b]) and to dismiss the counterclaims based on the terms of the parties' agreements.

Contrary to plaintiffs' contention, Supreme Court providently exercised its discretion in granting their request for a discontinuance "without prejudice," regardless of the

continuation of the counterclaims, as requested in their notice of motion and at oral argument (*see Tucker v Tucker*, 55 NY2d 378, 383 [1982]).

The court also properly determined that the terms of the 2008 amendment did not compel dismissal of the breach of contract counterclaim seeking to recover fees that would have been due under the 2003 amendment, but for the conditional release. Under the 2008 amendment, once plaintiffs commenced an action, Architect could pursue "by way of counterclaim . . . the amount of fees that otherwise would be due Architect, . . . but for" its having released plaintiffs from such claim. The contract does not state that Architect's pursuit of its counterclaims is conditioned on plaintiffs' continuation of their action. The court did not "interpret an agreement as impliedly stating something which the parties have neglected to specifically include" (*see Ashwood Capital, Inc. v OTG Mgt., Inc.*, 99 AD3d 1, 7 [1st Dept 2012]; *150 Broadway N.Y. Assoc., L.P. v Bodner*, 14 AD3d 1, 6 [1st Dept 2004]). Supreme Court providently exercised its discretion in severing the counterclaims upon granting discontinuance of plaintiffs' claim (*see* CPLR 603; *see 172 Van Duzer Realty Corp. v 878 Educ., LLC*, 164 AD3d 1171, 1171 [1st Dept 2018]).

However, plaintiffs' motion to dismiss the unjust enrichment

counterclaim should have been granted because it arises out of "subject matter covered by express contracts and the validity of the contracts are not in dispute" (*Dabrowski v ABAX Inc.*, 64 AD3d 426, 427 [1st Dept 2009]). Although the parties dispute which of the plaintiffs is a party to the contract, the existence of an express contract governing the subject matter of Haverland's counterclaim to recover fees "also bars any quasi-contractual claims against . . . a third-party nonsignatory to the valid and enforceable contract" (*Bellino Schwartz Padob Adv. v Solaris Mktg. Group*, 222 AD2d 313, 313 [1st Dept 1995]).

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

ENTERED: MARCH 19, 2019

CLERK

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

8737 Dervanna H. A. Troy-McKoy, Index 652456/16
Plaintiff-Appellant,

-against-

City of New York Parks and
Recreation Department,
Defendant-Respondent.

_____

Dervanna H. A. Troy-McKoy, appellant pro se.

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

_____

Order, Supreme Court, New York County (Alexander M. Tisch, J.), entered June 6, 2018, which granted defendant's motion to dismiss the amended complaint, unanimously affirmed, without costs.

Plaintiff's defamation claims were barred because he did not timely file a notice of claim within 90 days of the July 8, 2011 notice from nonparty Department of Labor denying his application for unemployment benefits based upon the allegedly defamatory information provided by respondent (*see* General Municipal Law (GML) § 50-e[1][a]). Plaintiff did not seek leave to file a late notice of claim within one-year and 90 days from the date his claims accrued (*see Pierson v City of New York*, 56 NY2d 950, 954-955 [1982]; *Turner v City of New York*, 94 AD3d 635 [1st Dept 2012]). That plaintiff ultimately served a notice of claim upon

defendant in September 2013 is of no moment, because it was served well after the statute of limitations had expired (*see* GML 50-e[1], [5]; GML 50-I; *Matter of Pipitone v City of New York*, 38 AD3d 557 [2d Dept 2007], *lv denied* 9 NY3d 810 [2007]).

We have considered plaintiff's remaining contentions, including that defendant interfered with his ability to timely file a notice of claim or seek leave to file a late notice within the applicable statute of limitations, and find them unavailing.

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

ENTERED: MARCH 19, 2019

CLERK

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

Ind. 205/15
8738- 4420/15
8739 The People of the State of New York,
Respondent,

-against-

Randy Jasquez,
Defendant-Appellant.

_____

Christina A. Swarns, Office of The Appellate Defender, New York (David Billingsley of counsel), for appellant.

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

_____

An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Michael Sonberg, J.), rendered March 25, 2016,

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

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

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

ENTERED: MARCH 19, 2019

CLERK

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

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

8740-
8741-
8742 In re Baby Boy W., also known as Muhamed Umar W.,

A Child Under Eighteen Years of Age, etc.,

Jessica W.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Tennille M. Tatum-Evans, New York, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Jessica Miller of counsel), for respondent.

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

_____

Appeal from order of disposition, Family Court, New York County (Susan K. Knipps, J.), entered on or about September 10, 2015, which, based upon a fact-finding determination that respondent mother neglected the subject child and placed the child with the Commissioner of the Administration for Children's Services until the next permanency hearing and directed the mother to engage in services, unanimously dismissed, without costs, as moot. Order of fact-finding, same court and Judge, entered on or about January 29, 2015, unanimously affirmed, without costs.

The finding of neglect is supported by a preponderance of the evidence (*see* Family Ct Act §§ 1012[f][i][B]; 1046[b][i]). At the time ACS brought the petition, the child was an infant. Hospital records show that the mother was diagnosed with anxiety, schizophrenia, bipolar disorder, and personality disorder. The record demonstrates that the mother's untreated mental illness, aggressive behavior, depression, poor impulse control, and repeated psychiatric hospitalizations for suicidal ideation placed the child at imminent risk of impairment (*see Matter of Tyzavier M.[Shanice M.]*, 155 AD3d 578 [1st Dept 2017]; *Matter of Cerenithy Ecksthine B. [Christian B.]*, 92 AD3d 417, 417-418 [1st Dept 2012]; *Matter of Madeline R.*, 214 AD2d 445 [1st Dept 1995]).

The mother's appeal from the order of disposition is moot, since the dispositional order has expired by its own terms and was superseded by two subsequent permanency orders (*see Matter of Fawaz A. [Franklyn B.C.]*, 112 AD3d 550, 551 [1st Dept 2013]).

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

ENTERED: MARCH 19, 2019

CLERK

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

8743 Li Xian, et al., Index 304347/09
Plaintiffs-Respondents,

-against-

Tat Lee Supplies Co., Inc.,
Defendant-Appellant,

Lorimer Development, LLC, et al.,
Defendants.

_____

Morton S. Minsley, New York, for appellant.

Law Office of James Trainor, P.C., New York (James Trainor of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered on or about June 28, 2018, which denied defendant Tat Lee Supplies Co., Inc.'s motion for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Defendant failed to establish prima facie that it is not responsible for the injuries sustained by plaintiffs as a result of a third-party assault in the vicinity of its building, since much of the evidence it submitted on the issue of proximate cause is inadmissible and may not be considered (*see Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 81-82 [1st Dept 2013], citing *GTF Mktg. v Colonial Aluminum Sales*, 66 NY2d 965, 967 [1985]). The nonparty witnesses' deposition transcripts are unsigned by the witnesses, and there is no notice to the witnesses requesting

that they review and sign the transcripts (*see* CPLR 3116[a]; *Ramirez v Willow Ridge Country Club, Inc.*, 84 AD3d 452, 453 [1st Dept 2011], *lv denied* 18 NY3d 805 [2012]). Plaintiffs' criminal trial testimony transcripts are unauthenticated (*see* CPLR 4540[a]; *Hofstetter v Goldenberg*, 132 Misc 772 [App Term, 1st Dept 1982]). The documents purportedly produced by the Kings County District Attorney's Office are also unauthenticated (*see* CPLR 4518[a]).

Moreover, defendant failed to submit evidence as to the foreseeability of a third-party assault in the vicinity of its building, whether its failure to properly maintain its doors and door frames was a proximate cause of the assault, or whether it had actual or constructive notice of the alleged defect; it relied instead on gaps in plaintiff's evidence, which was insufficient to satisfy its burden as movant (*see Hairston v Liberty Behavioral Mgt. Corp.*, 157 AD3d 404, 405 [1st Dept 2018], *lv dismissed* 31 NY3d 1036 [2018]; *see also Brown v Smith*, 85 AD3d 1648, 1649 [4th Dept 2011] [movant cannot satisfy its initial burden of proof by relying on evidence submitted in opposition to motion]).

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

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

ENTERED: MARCH 19, 2019

CLERK

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

8744 Getty Properties Corp., Index 151772/16
Plaintiff-Appellant-Respondent,

Power Test Realty Company Limited Partnership, et al.,
Plaintiffs,

-against-

Lukoil Americas Corporation, et al.,
Defendants-Respondents-Appellants.

_____

Johnson Gallagher LLC, New York (Steven Johnson of counsel), for appellant-respondent.

Akin Gump Strauss Hauer & Feld LLP, New York (Joseph L. Sorkin of counsel), for respondents-appellants.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered August 16, 2017, which, to the extent appealed from as limited by the briefs, granted defendants' motion to dismiss the breach of contract cause of action as against defendant Lukoil Americas Corporation and denied the motion as to the causes of action alleging violations of New York, New Jersey and Connecticut environmental laws, unanimously modified, on the law, to deny the motion as to the breach of contract cause of action as against Lukoil, and otherwise affirmed, without costs.

Plaintiff Getty Properties Corp. (plaintiff) seeks to recover damages from defendant Lukoil as an alter ego of its defunct subsidiary, nonparty Getty Petroleum Marketing, Inc.

(GPMI). Plaintiff alleges that GPMI breached its obligations under a master lease and violated state laws concerning environmental contamination and that, as a result, plaintiff incurred substantial expense to remediate environmental contamination on its properties.

Contrary to defendants' contention, plaintiff's settlement of its direct claims against GPMI in the context of the latter's bankruptcy does not require that its alter ego claims be dismissed. The settlement agreement expressly preserves plaintiff's ability to pursue claims against Lukoil as an "alter ego" of GPMI. Plaintiff had the right to name GPMI as a nominal party in any such suit, and agreed not to seek any further recovery from GPMI (*cf. Bailon v Guane Coach Corp.*, 78 AD3d 608 [1st Dept 2010]; *see also Morales v Solomon Mgt. Co., LLC*, 38 AD3d 381, 382 [1st Dept 2007] ["a release may not be read to cover matters which the parties did not desire or intend to dispose of"] [internal quotation marks omitted]). The parties did not fully release and extinguish the underlying claims but clearly expressed their intent that plaintiff could pursue additional recovery from GMPI's parent, Lukoil, on an alter ego theory (*see Plath v Justus*, 28 NY2d 16, 19 [1971]; *CDR Creances S.A.S. v Cohen*, 104 AD3d 17, 29 [1st Dept 2012], *mod on other grounds* 23 NY3d 307 [2014]; *cf. In re Tronox Inc. v Anadarko*

Petroleum Corp., 549 BR 21, 28-30 [SD NY 2016], *appeal dismissed* 855 F3d 84 [2d Cir 2017] [intent alone cannot revive claims released in settlement agreement with no carve-out]).

The motion court erred in dismissing the breach of contract cause of action against Lukoil on the ground that it was not a party to the lease and had not assumed GPMI's contractual obligations. Plaintiff did not proceed against Lukoil under those theories, but seeks to hold Lukoil liable for its subsidiary's contractual obligations under an alter ego or veil-piercing theory, which is a permissible theory even though Lukoil is not a party to the agreement (*see Baby Phat Holding Co., LLC v Kellwood Co.*, 123 AD3d 405 [1st Dept 2014]; *see also 2406-12 Amsterdam Assoc. LLC v Alianza LLC*, 136 AD3d 512 [1st Dept 2016]).

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

ENTERED: MARCH 19, 2019

CLERK

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

8745 Steve Dixon, Index 304457/14
Plaintiff-Appellant,

-against-

Sekou Kone, et al.,
Defendants-Respondents,

Ryan J. Brown, et al.,
Defendants.

_____

Law Offices of Michael A. Cervini, P.C., Elmhurst (Michael A. Cervini of counsel), for appellant.

Marjorie E. Bornes, Brooklyn, for respondents.

_____

Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered on or about April 9, 2018, which, inter alia, granted the motion of defendants Sekou Kone and Martinez G. Transportation Inc. for summary judgment dismissing the complaint as against them based on plaintiff's inability to meet the serious injury threshold of Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendants established their entitlement to judgment as a matter of law in this action where plaintiff alleges that he suffered an aggravation of preexisting conditions in his cervical and lumbar spine as the result of an accident that occurred while he was a passenger in defendants' taxi. Defendants submitted, among other things, plaintiff's deposition testimony,

acknowledging that he previously had fusion surgery in his cervical spine, and reports of their radiologist who, consistent with plaintiff's own radiologists, found that MRIs and CT scans performed approximately seven years before the accident showed significant degenerative disc disease in his cervical and lumbar spine *(see Rivera v Fernandez & Ulloa Auto Group*, 123 AD3d 509 [1st Dept 2014], *affd* 25 NY3d 1222 [2015]; *Alvarez v NYLL Mgt. Ltd.*, 120 AD3d 1043, 1044 [1st Dept 2014], *affd* 24 NY3d 1191 [2015]). Defendants' orthopedist and neurologist found no current symptoms related to the accident, but only symptoms related to the preexisting conditions, and their emergency medicine expert found no indication of traumatic injury in plaintiff's hospital records from the day of the accident (*see Moore-Brown v Sofi Hacking Corp.*, 151 AD3d 567 [1st Dept 2017]).

In opposition, plaintiff failed to raise a triable issue of fact. He submitted medical records, which also confirmed his preexisting conditions, and the report of a physician who examined him two years after the accident. Although the physician acknowledged plaintiff's prior surgery, preexisting degenerative conditions, and continuing pre-accident treatment, he failed to explain why plaintiff's alleged injuries were not caused by the preexisting conditions, or to provide any basis for

finding an aggravation of those injuries (*see Hessing v Carroll*, 161 AD3d 462, 463 [1st Dept 2018]; *Latus v Ishtarq*, 159 AD3d 433 [1st Dept 2018]).

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

ENTERED: MARCH 19, 2019

CLERK

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

8746 In re the Estate of Edulji Framroz Dinshaw, Deceased. SCI 1970/50A

- - - - -

Dr. Pankaj Phadnis, et al., Petitioners-Appellants,

-against-

Nuslin N. Wadia, Respondent-Respondent.

_____

Dealy, Silberstein & Braverman, LLP, New York (Laurence J. Lebowitz of counsel), for appellants.

Carter Ledyard & Milburn LLP, New York (Matthew D. Dunn of counsel), for respondent.

_____

Order, Surrogate's Court, New York County (Rita Mella, S.), entered on or about January 17, 2018, which granted respondent's motion to dismiss the petition, unanimously affirmed, without costs.

The Surrogate properly dismissed the petition on the ground of forum non conveniens (CPLR 327[a]; *see Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 478-479 [1984], *cert denied* 469 US 1108 [1985]). All the parties are residents of India, the contract was made in India, the real property is located in India, respondent was appointed to administer the trust by an Indian court, many witnesses are located in India, and Indian law may apply to the statute of limitations defense asserted by

respondent. Moreover, as the Indian court left open the possibility that a party with standing could bring a claim before it, there is an alternative forum in which petitioner can bring his claim. The only nexus between the controversy and the State of New York is that the decedent formerly resided here and his will was probated in this State. However, as the Surrogate observed, the estate in New York was fully administered decades ago, and the only remaining issues concern the Indian trust.

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

ENTERED: MARCH 19, 2019

CLERK

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

8747 The People of the State of New York, Respondent, Ind. 1175/17

-against-

Johnny Houston, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, Bronx County (George Villegas, J.), rendered November 8, 2017, unanimously affirmed.

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

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

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

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

ENTERED: MARCH 19, 2019

CLERK

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

8748 In re New York Foundation for Senior Citizens, etc., Petitioner-Respondent, Index 500017/17

-against-

William Hamilton, Respondent.

- - - - -

1983 Heights, LLC, Nonparty Appellant.

_____

Rose & Rose, New York (James E. Bayley and Eric Steiglitz of counsel), for appellant.

Morris K. Mitrani, P.C., New York (Morris K. Mitrani of counsel), for respondent.

_____

Order, Supreme Court, New York County (Shawn T. Kelly, J.), entered on or about February 27, 2018, which granted petitioner guardian's motion to vacate a stipulation of settlement, entered in Civil Court, New York County (Jack Stoller, J.), on or about June 7, 2016, in a holdover proceeding brought by nonparty appellant 1983 Heights, LLC (landlord), against William Hamilton (respondent), unanimously affirmed, on the law and the facts, without costs.

The court properly exercised its discretion to vacate the stipulation, which was so-ordered by the Housing Court without allocuting respondent. Although stipulations of settlement are generally favored and will not lightly be set aside, a court may

exercise its discretion to do so where there is a showing of "fraud, collusion, mistake, accident, or some other ground of the same nature," including a showing that a party

> "has inadvertently, unadvisably or improvidently entered into an agreement which will take the case out of the due and ordinary course of proceeding in the action, and in so doing may work to his prejudice . . . Where both parties can be restored to substantially their former position the court, as a general rule, exercises such power if it appears that the stipulation was entered into inadvisedly or that it would be inequitable to hold the parties to it" (*In re Frutiger's Estate*, 29 NY2d 143, 149-150 [internal citations omitted] [1971]).

Here, Supreme Court correctly found that respondent lacked capacity to enter into the stipulation. Appellant nonparty landlord argues that the Housing Court had already recognized respondent's inability to adequately defend his rights by appointing a GAL pursuant to Article 12 of the CPLR (*see* CPLR 1201, 1202). However, after she was appointed, the GAL implicitly recognized that respondent needed much greater assistance, because she referred respondent to Adult Protective Services. The GAL did not have the benefit of the more detailed evidence which petitioner presented in this Article 81 proceeding that led to the appointment of a guardian of his personal needs and property. Moreover, as we held in *Prospect Union Assoc. v*

DeJesus, "A GAL 'is not a decision-making position; it is an appointment of assistance" (167 AD3d 540, 542 [1st Dept 2018] [internal citations and quotation marks omitted]). Therefore, we reject the landlord's argument that it was entitled to rely on the GAL's acquiescence to the Stipulation.

The evidence presented set forth respondent's longstanding medical history documenting his significant intellectual development disabilities since childhood, and his more recent diagnosis of autism spectrum disorder. The Article 81 Court Evaluator pointed out that, while respondent may "initially appear[] to be highly functioning," he is, because of his disability, confused by simple tasks and "unable to retain information for any period of time or to adequately process it to prevent harm to himself or his interests, despite the information's recent discussions." Under these circumstances, the Supreme Court properly determined that respondent lacked capacity to enter into the stipulation (*see Matter of Embassy House Eat LLC v Dyan P*, 151 AD3d 483 [1st Dept 2017]).

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

ENTERED: MARCH 19, 2019

CLERK

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

8749 In re New York Public Library, et al., Petitioners-Respondents, Index 157703/17

-against-

Condominium Board of the Fifth Avenue Tower, Respondent-Appellant.

Boyd Richards Parker & Colonnelli, New York (Gary Ehrlich of counsel), for appellant.

Tannenbaum Helpern Syracuse & Hirschtritt LLP, New York (Maryann C. Stallone and Amanda M. Leone of counsel), for respondents.

Order and judgment (one paper), Supreme Court, New York County (Arlene P. Bluth, J.), entered December 14, 2017, in this proceeding pursuant to RPAPL 881, granting petitioners New York Public Library, Astor Lenox and Tilden Foundations (collectively, NYPL) a license to access and/or enter the premises of respondent Condominium Board of the Fifth Avenue Tower (the Condo) for purposes of erecting certain protective work in the Condo's plaza from the date of judgment through December 31, 2019, and denying the Condo's request for license fees, unanimously modified, on the facts and in the exercise of discretion, to the extent of granting the Condo's request for a license fee and remanding for a hearing to determine a reasonable license fee, and otherwise affirmed, without costs.

The court providently exercised its discretion in granting NYPL a license pursuant to RPAPL 881, because the inconvenience to the Condo is relatively slight compared to the hardship to NYPL if the license were not granted, and NYPL showed that it was prepared to do all that was feasible to avoid injuries resulting from its entry to the Condo (*see Matter of Board of Mgrs. of Artisan Lofts Condominium v Moskowitz*, 114 AD3d 491, 492 [1st Dept 2014]; *Mindel v Phoenix Owners Corp.*, 210 AD2d 167, 167 [1st Dept 1994], *lv denied* 85 NY2d 811 [1995]).

Although the determination of whether to award a license fee is discretionary, the grant of a license pursuant to RPAPL 881 often warrants the award of contemporaneous license fees, because an "owner compelled to grant access should not have to bear any costs resulting from the access" (*Matter of Van Dorn Holdings, LLC v 152 W. 58th Owners Corp.*, 149 AD3d 518, 519 [1st Dept 2017]). Here, the Condo showed that it had previously been inconvenienced for over six years by NYPL's use of the Plaza pursuant to a license, and that the grant of a license would entail interference with the residents' use and enjoyment of the Condo, as well as a reduction in the resale and rental value of the Condo's units. In light of this showing, it was an

improvident exercise of discretion to deny a license fee (*see id.*; *DDG Warren LLC v Assouline Ritz 1, LLC*, 138 AD3d 539, 539-540 [1st Dept 2016]).

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

ENTERED: MARCH 19, 2019

CLERK

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

8750 The People of the State of New York, Ind. 2946/16
Respondent,

-against-

Terrence Thompson,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Harold V. Ferguson, Jr. of counsel), for appellant.

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Larry Stephen, J.), rendered July 22, 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: MARCH 19, 2019

CLERK

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

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

8751N East Fordham DE LLC, Index 260551/14
Plaintiff-Respondent,

-against-

U.S. Bank National Association, et al.,
Defendants-Appellants.

_____

Allegaert Berger & Vogel LLP, New York (Partha P. Chattoraj of counsel), and Greenberg Traurig, LLP, New York (Carmen Beauchamp Ciparick of counsel), for U.S. Bank National Association, Commercial Mortgage Pass-Through Certificates, Series 2007-C2 and Torchlight Loan Services, LLC, appellants.

Zeichner Ellman & Krause LLP, New York (Jantra Van Roy of counsel), for Berkadia Commercial Mortgage LLC, appellant.

Polsinelli, PC, New York (Jason A. Nagi of counsel), for Keybank National Association, appellant.

Morrison Cohen LLP, New York (Brett Dockwell of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered on or about March 30, 2017, which granted plaintiff's motion for a preliminary injunction to the extent of enjoining defendants from seeking to enforce the applicability of any terms of the loan modification agreement, including the right to foreclose on the loan, and from seeking to exercise their rights with respect to "a certain Deed-in-Lieu of Foreclosure, a certain Foreclosure Affidavit, and a certain Receivership Affidavit and the Pledged Membership Interest placed in escrow pursuant to the

Loan Modification Agreement" (the "self-help" documents), unanimously modified, on the law and the facts, to enjoin defendants only from seeking to exercise their rights with respect to the aforesaid deed in lieu of foreclosure, foreclosure affidavit, and receivership affidavit and pledged membership interest, and to remand for a determination of an appropriate undertaking, and otherwise affirmed, without costs.

The court was not precluded from granting the preliminary injunction by this Court's prior order reversing the grant of a permanent injunction (*see East Fordham DE LLC v U.S. Bank N.A.*, 146 AD3d 610 [1st Dept 2017]). Nor did it improperly issue the injunction in disregard of its own order three days earlier denying plaintiff's contempt motion, which involved a request for different relief.

Under the circumstances, we reject defendants' argument that the injunction was issued in violation of CPLR 6312(c) because there was no hearing and appropriate determination. The court correctly found that plaintiff met its burden of showing a likelihood of success on the merits, imminent irreparable harm, and a balance of the equities in its favor to the extent it sought to enjoin defendants from executing the "self-help" documents that would allow a non-judicial foreclosure of its property (*see e.g. Concourse Rehabilitation & Nursing Ctr., Inc.*

v Gracon Assoc., 64 AD3d 405 [1st Dept 2009]). However, plaintiff did not make a showing adequate to warrant restraining defendants from seeking to enforce the various terms and conditions of the loan modification agreement.

The court should have ordered plaintiff to post an undertaking (CPLR 6312[b]; *Scotto v Mei*, 219 AD2d 181, 185 [1st Dept 1996]).

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

ENTERED: MARCH 19, 2019

CLERK

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

8752 In re David Segal, OPI 171/19
[M-419] Petitioner,

-against-

Sherrill Spatz, etc., et al.,
Respondents.

_____

David Segal, petitioner pro se.

John W. McConnell, New York State Office of Court Administration, New York (Lee Alan Adlerstein of counsel), for respondents.

_____

The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

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

ENTERED: MARCH 19, 2019

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

John W. Sweeny, Jr., J.P.
Dianne T. Renwick
Judith J. Gische
Marcy L. Kahn
Cynthia S. Kern, JJ.

8607N
Index 156671/15

_____x

Stephanie Markel,
Plaintiff-Appellant,

-against-

Pure Power Boot Camp, Inc., et al.,
Defendants-Respondents.
_____x

Plaintiff appeals from the order of the Supreme Court, New York County (Robert Reed, J.), entered on or about November 27, 2017, which, to the extent appealed from, denied plaintiff's motion for a protective order and to quash a subpoena duces tecum served on the individual who accompanied plaintiff to her medical examination by defendants' orthopedist.

Buzin Law, P.C., New York (Brian J. Isaac and Joshua Brian Irwin of counsel), for appellant.

Havkins Rosenfeld Ritzert & Varriale, LLP, Mineola (Gail Ritzert of counsel), for respondents.

GISCHE J.

Plaintiff seeks damages for knee injuries that she alleges were sustained while participating in an exercise drill at defendants' boot camp style gym. During discovery, plaintiff appeared for a physical examination by an orthopedist designated by defendants (IME). Plaintiff's attorney hired a individual from IME Watchdog (IME observer) to be present with plaintiff while she was examined. Six months later, defendants served a subpoena deuces tecum on the IME observer for the production of her notes, reports, memoranda, photographs, and "any other relevant material" in her possession. Because these materials are protected by the qualified privilege applicable to materials prepared for litigation, the subpoena duces tecum should have been quashed and the protective order granted.

Where a plaintiff puts her physical condition at issue, the defendants may require that she submit to an IME by a physician retained by defendant for that purpose (CPLR 3121[a]; *Chaudhary v Gold*, 83 AD3d 477, 478 [1st Dept 2011]). It is well established that a plaintiff is entitled to have a representative of her choice present during the IME, provided the individual does not interfere with the IME or prevent the defendant's doctor from conducting "a meaningful examination" (*Santana v Johnson*, 154

AD3d 452, 452 [1st Dept 2017], *citing Guerra v McBean*, 127 AD3d 462 [1st Dept 2015]; *Henderson v Ross*, 147 AD3d 915 [2d Dept 2017]; *Marriott v Cappello*, 151 AD3d 1580 [4th Dept 2017]; *see also Ramsey v New York Univ. Hosp. Ctr.*, 14 AD3d 349 [1st Dept 2005]; *Jakubowski v Lengen*, 86 AD2d 398, 400-401 [4th Dept 1982]).

The categories of representatives that a plaintiff is entitled to have present during the IME are broad. They include the plaintiff's attorney or law clerks from plaintiff's attorney's office (*Jakubowski, supra*), paralegals (*Bermejo v New York City Health & Hosps. Corp.,* 135 AD3d 116 [2d Dept 2015]), interpreters (*Henderson, supra*), and in at least one case, a nurse (*Marriott* at 1583] [defendant's doctor improperly excluded a nurse hired to observe plaintiff's IME]). More recently, this Court clarified that a plaintiff can have an observer or "watchdog" present during the IME (*Martinez v Pinard*, 160 AD3d 440, 440 [1st Dept 2018]; *Santana v Johnson*, *supra*; *Guerra v McBean*, *supra*). No special or unusual circumstances need be shown in order for the IME observer to be present during the examination (*Santana* at 452). IME observers or "watchdogs" are typically hired by plaintiff's lawyers to assist their clients in filling out forms at the examining doctor's office. More importantly, according to plaintiff, the presence of an IME

observer deters examining doctors hired by defendants from inquiring about matters beyond the scope of the particular action and keeps the IME process honest.

The specific question of whether an IME observer's notes etc., are discoverable, given CPLR 3101(a)'s broad umbrella of full disclosure, presents an issue of first impression for this Court. The issue has been addressed by the trial courts with varying results[1], requiring us to now clarify whether, and under what circumstances, such materials are protected from disclosure.

The IME observer retained by plaintiff's attorney in this

---

[1]*See e.g. Sheehan v 30 Park Place Residential LLC*, 2019 NY Slip Op 30026[U], 1, 2019 WL 120596 [Sup Ct, NY County 2019] [plaintiff's motion to quash subpoena duces tecum served on IME Watchdog Advocate denied because advocate was expected to testify at trial, presumably to rebut any inaccurate testimony from defendants' examining physicians]; *Marks v 79th St. Tenants Corp.*, 2018 NY Slip Op 31431[U], 4, 2018 WL 3241902 [Sup Ct, NY County2018] [materials not attorney work product CPLR 3101[c] nor did they qualify for immunity under CPLR 3102[d][2]]; *Gelvez v Tower 111, LLC*, 2017 NY Slip Op 30071[U] [Sup Ct, NY County 2017], *affd* 166 AD3d 547 [1st Dept 2018] [watchdog's materials not attorney work product nor eligible for qualified privilege; however, defendants' motion to preclude the watchdog from testifying at trial denied and defendants allowed to depose the observer; our affirmance was solely on issues raised on appeal which did not concern the motion court's ruling that the materials did not qualify as privileged]; *Barahona v Continental Hosts, Ltd.*, 59 Misc 3d 1001 [Sup Ct, NY County 2018] [IME observer's notes protected from discovery as attorney work product and because they were prepared in anticipation of litigation]; *Katz v 260 Park Ave. S. Condominium Assoc.*, 2016 NY Slip Op 32821(U), 2016 WL 1597770 [Sup Ct, NY County 2016] [IME observer's materials held protected by the attorney work product doctrine]).

case is a college graduate. She has no formal training in any medical discipline, including orthopedics. No claim is made that she qualifies as an expert. Nor do defendants make any claim that the IME observer's presence either interfered with or impeded the defendants' doctor's examination of plaintiff or that the plaintiff's examination was in any way curtailed due to the IME observer's presence (*see e.g. Santana, supra*). Defendants do not identify in this record any information related to the plaintiff's IME that they cannot obtain from their own examining doctor.

The information contained in the IME observer's notes would generally be considered material and necessary for the prosecution or defense of the underlying action (CPLR 3101[a]). The dispute regarding whether the material is discoverable turns on whether it is otherwise protected by any privilege. Plaintiff, as the party resisting disclosure, has the burden of establishing that the material is covered by a protection (*Forman v Henkin*, 30 NY3d 656, 661-662 [2018]).

The information contained in the IME observer's notes and other materials are not protected by either the attorney-client or work product privileges (CPLR 3101[a][4]). The materials were not generated by plaintiff's attorney, nor were they used to communicate with the client or convey legal advice to her *(see*

Ambac Assur. Corp. v Countrywide Home Loans, Inc., 27 NY3d 616, 624 [2016]).

The IME observer, however, is an agent of the plaintiff's attorney. Consequently, the requested notes and materials constitute materials prepared for trial, bringing them within the conditional or qualified privilege protections of CPLR 3101(d)(2). Materials prepared in anticipation of litigation and preparation for trial may be obtained only upon a showing that the requesting party has a "substantial need" for them in the preparation of the case and that without "undue hardship" the requesting party is unable to obtain the substantial equivalent by other means (CPLR 3101[d][2]; *see also Forman* at 661-662).

The IME observer was hired to assist plaintiff's attorney in advancing the litigation and preparing for trial (*Hudson Ins. Co. v Oppenheim*, 72 AD3d 489 [1st Dept 2010]). Although present, she was not involved in the doctor's examination of the plaintiff. Her function was to serve as the attorney's "eyes and ears," observing what occurred during the IME, and then reporting that information back to plaintiff's attorney.

Defendants have not shown, in response, any "substantial need" for the IME observer's notes, etc., or why they are unable, without undue hardship, to obtain the "substantial equivalent" of the materials by other means (*id.*; *Forman* at 661-662). Key to

this analysis is that the defendants' doctor conducted plaintiff's examination and can provide defendants with any information concerning what generally occurred and what he did at the IME. In this case, the preliminary conference order required that defendants provide plaintiff with a copy of their doctor's IME report within 45 days of the examination. Defendants have not produced that report. There is no claim by defendants that they are unable to communicate with their own doctor about what transpired at the IME. In general, under these circumstances, defendants' access to their own doctor will seriously undermine any argument that there is a substantial need for the IME observer's materials because the information contained therein is not otherwise available without undue hardship *(see Cornex, Inc. v Carisbrook Indus.*, 161 AD2d 376, 377 [1st Dept 1990]).

An important consideration in the Court's analysis is plaintiff's representation that the IME observer will not be testifying at trial on plaintiff's affirmative case. We are not deciding whether a different result would obtain were the IME observer expected to be, or actually is, called as a witness at any time during the case (*Santana* at 452). Moreover, contrary to defendants' argument, *Santana* does not stand for the blanket legal proposition that an IME observer is subject to discovery in all circumstances. In order to obtain discovery where an IME

observer is not expected to testify at trial, there must be a showing that the substantial equivalent of the information is not otherwise available without undue hardship.

Accordingly, the order of the Supreme Court, New York County (Robert Reed, J.), entered on or about November 27, 2017, which, to the extent appealed from, denied plaintiff's motion for a protective order and to quash a subpoena duces tecum served on the individual who accompanied plaintiff to her medical examination by defendants' orthopedist should be reversed, on the law and the facts, without costs, the protective order granted, and the subpoena quashed.

All concur.

Order, Supreme Court, New York County (Robert Reed, J.), entered on or about November 27, 2017, reversed, on the law and the facts, without costs, the protective order granted, and the subpoena quashed.

Opinion by Gische, J. All concur.

Sweeny, J.P., Renwick, Gische, Kahn, Kern, JJ.

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

ENTERED: MARCH 19, 2019

CLERK