

concerning the ladder, which, according to the store manager, had rubber feet on it (see *Davila v City of New York*, 95 AD3d 560 [1st Dept 2012]).

Plaintiff failed to raise a triable issue of fact. Plaintiff testified that he inspected the ladder on the date of his accident, determined that it looked safe, and could not recall whether the ladder was missing its rubber feet. The affidavit of his supervisor was speculative concerning a ladder the supervisor allegedly complained about in the past (see *Flynn v 835 6th Ave. Master L.P.*, 107 AD3d 614 [1st Dept 2013]). Moreover, the report of plaintiff's expert fails to raise a triable issue of fact. The report is unsworn and the expert's findings were based upon photographs taken some time after the accident (see *Gilson v Metropolitan Opera*, 15 AD3d 55, 59 [1st Dept 2005], *affd* 5 NY3d 574 [2005]). Since there was no evidence adduced that the ladder was in the same condition as it was on

the date of the accident, the expert's findings were conclusory (see *Matter of Aetna Cas. & Sur. Co. v Barile*, 86 AD2d 362, 364 [1st Dept 1982]).

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

ENTERED: DECEMBER 19, 2013


CLERK

arbitration award was properly vacated except to the extent it imposed sanctions against petitioner's counsel.

However, the court offered no valid justification for its decision to remand the matter for consideration by a new arbitrator. There was no evidence of bias, fraud or corruption by the arbitrator and thus the matter should be remanded to the same arbitrator (*see Sawtelle v Waddell & Reed*, 304 AD2d 103, 117 [1st Dept 2003] ["In view of the twin goals of arbitration, namely settling disputes efficiently and avoiding long and expensive litigation, absent a showing that the original panel is incapable of carrying out its duties impartially, courts will generally remand the matter to the original panel"] [internal quotation marks omitted]).

There was no basis for vacating the sanction against petitioner's counsel for violating the confidentiality order.

The Decision and Order of this Court entered herein on September 10, 2013 is hereby recalled and vacated (*see* M-5200 decided simultaneously herewith).

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

ENTERED: DECEMBER 19, 2013


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after the crime occurred, that defendant was the only person in the area, and that defendant matched the victim's description of the perpetrator, the evidence showed that the victim followed defendant and had him under observation for the entire period between the crime and the arrest, except for very brief intervals. Given the circumstances under which defendant was observed and apprehended, expert testimony on identification would have been of little or no value to the jury (see *People v Zohri*, 82 AD3d 493 [1st Dept 2011], *lv denied* 16 NY3d 901 [2011]). These circumstances were independent of the victim's identification itself, and they constituted "significant corroborating evidence" (*id.* at 494). The victim had ample opportunity to observe defendant, and his accurate description of defendant's unusual hairstyle far outweighed any alleged deficiencies in the description.

Defendant did not preserve his particular challenges to the procedures by which the court disposed of the reverse *Batson* application (see *People v Richardson*, 100 NY2d 847, 853 [2003]; *People v Smocum*, 99 NY2d 418, 423-424 [2003]), and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits (see *People v Payne*, 88 NY2d 172, 184 [1996]). The record supports the court's express and implied findings (see *Payne*, 88 NY2d at 185) that the

race-neutral reasons provided by defense counsel for the peremptory challenge at issue were pretextual. The court's reasoning is supported by the record, which shows that other people who were victims of violent crime were seated and selected as alternates. These findings, based primarily on the court's assessment of counsel's credibility, are entitled to great deference (see *Snyder v Louisiana*, 552 US 472, 477 [2008]; *People v Hernandez*, 75 NY2d 350, 256 [1990], *affd* 500 US 352 [1991]; *People v Chicco*, 19 AD3d 199, 199 [1st Dept 2005]).

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The court properly instructed the jury that the knowledge element would be satisfied by proof establishing defendant's knowledge that he possessed a knife in general, and did not require proof of defendant's knowledge that the knife met the statutory definition of a gravity knife (see *Neal*, 79 AD3d at 524; *People v Berrier*, 223 AD2d 456 [1st Dept 1996], *lv denied* 88 NY2d 876 [1996]).

After sufficient inquiry, the court properly determined that a deliberating juror was not "grossly unqualified" (CPL 270.35[1]), and it properly exercised its discretion in declining to discharge the juror, a remedy that would have necessitated a mistrial under the circumstances. The juror expressed a concern about the fact that she lived in the same area where, according to defendant's testimony, his former girlfriend resided. However, upon further questioning, the juror unequivocally confirmed that she would follow the court's instructions, and that her proximity to defendant's ex-girlfriend's residence would not affect the juror's evaluation of the evidence. Thus, the record supports the conclusion that there was no basis to disqualify the juror (see *People v Mejias*, 21 NY3d 73, 79 [2013]; *People v Buford*, 69 NY2d 290, 298-299 [1987]). Defendant did not preserve his challenges to the manner or sufficiency of the

court's inquiry of the juror (*see People v Ocasio*, 258 AD2d 303 [1st Dept 1999], *lv denied* 93 NY2d 975 [1999]), and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits. The record does not support defendant's assertions that the court's manner of questioning was coercive, or that the juror displayed fear and anxiety that required further inquiry.

We perceive no basis for reducing the sentence.

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Plaintiffs' opposition failed to raise a triable issue of fact. Plaintiffs submitted the transcript of the injured plaintiff's General Municipal Law § 50-h hearing testimony in which he testified that the subject saw had a bottom guard which covered the saw blade when it was "closed." He further stated that the plywood he was cutting broke, pushing his left hand into the saw's blade. Such evidence is insufficient to raise an issue of fact as to whether the saw had a defective or inadequate "movable self-adjusting guard below the base plate," which failed to "completely cover the saw blade to the depth of the teeth when such saw blade [was] removed from the cut" (12 NYCRR 23-1.12[c][1]; *cf. Keneally v 400 Fifth Realty LLC*, 110 AD3d 624 [1st Dept 2013]).

Plaintiffs' theory that the accident was caused by defendant's failure to provide the injured plaintiff with a saw table does not support his claim under Labor Law § 241(6) because 12 NYCRR 23-1.12(c)(1) does not require that a saw table be provided to workers using a "power-driven saw." Plaintiffs' challenge to the probative value of defendant's expert's affidavit is improperly raised for the first time on appeal (see *e.g. Gramercy Co. v Benenson*, 223 AD2d 497, 498 [1st Dept 1996]). In any event, the challenge is without support, as there is no evidence suggesting that the subject saw was altered or modified

during the 16 months between plaintiff's accident and the time of the examination of the saw by the expert. Moreover, the expert's opinion was based, in part, on his review of certain photographs taken of the saw, which plaintiff testified were accurate depictions of the saw's condition at the time of the accident.

We have considered plaintiffs' remaining contentions and find them unavailing.

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

ENTERED: DECEMBER 19, 2013



CLERK

Tom, J.P., Andrias, Saxe, DeGrasse, Richter, JJ.

11376 In re Christopher B., Jr., etc.,

A Dependent Child Under the
Age of Eighteen Years,

Melvin B.,
Respondent-Appellant,

Saint Dominic's Home,
Petitioner-Respondent.

Geoffrey P. Berman, Larchmont, for appellant.

Warren & Warren, P.C., Brooklyn (Ira L. Eras of counsel), for
respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Judith
Waksberg of counsel), and Proskauer Rose LLP, New York (Susan D.
Friedfel of counsel), attorneys for the child.

Order, Family Court, Bronx County, (Kelly O'Neill Levy, J.),
entered on or about January 28, 2013, which, to the extent
appealed from as limited by the briefs, upon a fact-finding
determination that appellant-father is presently and for the
foreseeable future unable by reason of mental illness to provide
proper and adequate care for his child, terminated his parental
rights, and transferred custody and guardianship of the child to
the Commissioner of Social Services and petitioner Saint
Dominic's Home, unanimously affirmed, without costs.

Clear and convincing evidence, including expert testimony
from a court-appointed psychologist, who examined the father on

two occasions and reviewed all of his available medical records, supported the determination that he is presently and for the foreseeable future unable, by reason of mental illness, to provide proper and adequate care for his child (see Social Services Law 384-b[6][a]). The father had periods of noncompliance with his medications and exhibited symptoms regularly, whether or not he was compliant with treatment (see *Matter of Justin Javonte R. [Leticia W.]*, 103 AD3d 524 [1st Dept 2013]).

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provided circumstantial evidence from which the jury could reasonably infer that a claimed sticky soda spill on defendant's internal stairs had existed for a sufficient length of time to allow defendant's on-site cleaning workers to have discovered the hazardous substance and to have remedied the condition prior to plaintiff's accident (see *Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]).

Defendant failed to preserve its argument on appeal that the verdict was irreconcilably inconsistent because plaintiff was found to be comparatively negligent, but that such negligence was not a substantial cause of her accident (see e.g. *Askin v City of New York*, 56 AD3d 394, 396 [1st Dept 2008], *lv dismissed* 12 NY3d 769 [2009]). Were we to reach the issue, we would find that there is a reasonable view of the evidence that, inter alia, plaintiff could be found to be negligent for observing the condition of the allegedly sticky step as she stepped down onto

it, but that such negligence was not so inextricably interwoven with the proximate cause of her fall as would warrant a retrial on the issue of plaintiff's comparative negligence (see *id.* at 396; *cf. Fisk v City of New York*, 74 AD3d 658 [1st Dept 2010]).

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A handwritten signature in black ink, appearing to read "Susan R. [unclear]", written over a horizontal line.

CLERK

Tom, J.P., Andrias, Saxe, DeGrasse, Richter, JJ.

11380 In re Marlon C.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.

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Presentment Agency

Andrew J. Baer, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Hanh H. Le of
counsel), for presentment agency.

Order of disposition, Family Court, New York County (Clark
V. Richardson, J.), entered on or about April 3, 2013, which
adjudicated appellant a juvenile delinquent upon his admission
that he committed an act that, if committed by an adult, would
constitute the crime of menacing in the second degree, and placed
him with the Office of Children and Family Services for a period
of 12 months, unanimously affirmed, without costs.

The placement was a proper exercise of the court's
discretion, and it constituted the least restrictive alternative
consistent with appellant's needs and best interests, and the
community's need for protection (*see Matter of Katherine W.*, 62
NY2d 947 [1984]). The underlying offense was a serious, violent
attack involving a weapon. Furthermore, appellant displayed a
pattern of aggressive behavior, and the court had ample

information indicating that appellant was not a suitable candidate for a community-based program.

We have considered and rejected appellant's remaining claims.

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vehicle until after the collision. Thus, defendants' purported nonnegligent explanation for the collision was speculative (see *Rodriguez v Chapman-Perry*, 82 AD3d 638 [1st Dept 2011]; *Davis v Quinones*, 295 AD2d 394 [2d Dept 2002]).

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ENTERED: DECEMBER 19, 2013

A handwritten signature in black ink, appearing to read "Susan R.", written over a horizontal line.

CLERK

Tom, J.P., Andrias, DeGrasse, Richter, JJ.

11384 &
M-5893
M-6111
M-6133

Index 650980/12

ACE Securities Corp., etc.,
Plaintiff-Respondent,

-against-

DB Structured Products, Inc.,
Defendant-Appellant.

- - - - -

The Securities Industry and
Financial Markets Association,
The Association of Mortgage
Investors, Professor Robert
T. Miller and Mortgage Bankers
Association,
Amici Curiae.

Simpson Thacher & Bartlett LLP, New York (David J. Woll of
counsel), for appellant.

Kasowitz, Benson, Torres & Friedman LLP, New York (Marc E.
Kasowitz of counsel), for respondent.

Wachtell, Lipton, Rosen & Katz, New York (George T. Conway III of
counsel), for The Securities Industry and Financial Markets
Association, amicus curiae.

McKool Smith, P.C., New York (Robert W. Scheef of counsel), for
The Association of Mortgage Investors, amicus curiae.

Robert T. Miller, amicus curiae pro se.

Jenner & Block LLP, New York (Paul M. Smith of counsel), for
Mortgage Bankers Association, amicus curiae.

Order, Supreme Court, New York County (Shirley Werner
Kornreich, J.), entered May 14, 2013, which denied defendant's

motion to dismiss the complaint, unanimously reversed, on the law, with costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

This action is barred by the six-year statute of limitations on contract causes of action (CPLR 213[2]).

Plaintiff alleges that defendant breached representations and warranties in connection with the securitization of a pool of mortgage loans governed by a Mortgage Loan Purchase Agreement (MLPA) and a Pooling and Servicing Agreement (PSA). The MLPA and PSA provided that the trustee was not entitled to sue or to demand that defendant repurchase defective mortgage loans until it discovered or received notice of a breach *and* the cure period lapsed. The motion court erred in finding that plaintiff's claims did not accrue until defendant either failed to timely cure or repurchase a defective mortgage loan (*see Structured Mtge. Trust 1997-2 v Daiwa Fin. Corp.*, 2003 WL 548868, 2003 US Dist LEXIS 2677 [SD NY 2003]). To the contrary, the claims accrued on the closing date of the MLPA, March 28, 2006, when any breach of the representations and warranties contained therein occurred (*see Ely-Cruikshank Co. v Bank of Montreal*, 81 NY2d 399, 402 [1993]; *Varo, Inc. v Alvis PLC*, 261 AD2d 262, 267-268 [1st Dept 1999], *lv denied* 95 NY2d 767 [2000]).

The certificate holders commenced an action on behalf of the

trust, after plaintiff refused to do so, on March 28, 2012, the last day of the limitations period. However, defendant had not received notice of the alleged breach until February 8, 2012. Thus, the 60- and 90-day periods for cure and repurchase had not yet elapsed. The certificate holders' failure to comply with a condition precedent to commencing suit rendered their summons with notice a nullity (see *Southern Wine & Spirits of Am., Inc. v Impact Env'tl. Eng'g, PLLC*, 80 AD3d 505 [1st Dept 2011]).

In any event, the certificate holders lacked standing to commence the action on behalf of the trust. The "no-action" clause in § 12.03 of the PSA sets forth as a condition precedent to such an action that the certificate holders provide the trustee with "a written notice of default and of the continuance thereof." However, the "defaults" enumerated in the PSA concern failures of performance by the servicer or master servicer only. Thus, the PSA does not authorize certificate holders to provide notices of "default" in connection with the sponsor's breaches of the representations (see *Walnut Place LLC v Countrywide Home Loans, Inc.*, 96 AD3d 684 [1st Dept 2012]).

Nor does the substitution of the trustee as plaintiff permit us to deem timely filed the trustee's complaint, which was filed September 13, 2012 (compare e.g. *HSBC Guyerzeller Bank AG v Chascona N.V.*, 42 AD3d 381, 382 [1st Dept 2007] [original and

substituted plaintiffs were "affiliates in the HSBC family"; *American Home Assur. Co. v Scanlon*, 164 AD2d 751, 752 [1st Dept 1990] [original and substituted plaintiffs were "both part of the American International Group of insurance companies"]; *Frankart Furniture Staten Is. v Forest Mall Assoc.*, 159 AD2d 322 [1st Dept 1990] [original and substituted plaintiffs were a retail furniture business and the actual owner of the furniture]).

In light of the foregoing, we need not reach defendant's alternative basis for dismissal.

M-5893

M-6111

M-6133 - *ACE Securities Corp., etc. v DB Structured Products, Inc.*

Motion and cross motions for leave to file amicus curiae brief granted.

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

ENTERED: DECEMBER 19, 2013


CLERK

Tom, J.P., Andrias, Saxe, DeGrasse, Richter, JJ.

11386 Michael N. Victor, Jr., etc., Index 102749/09
Plaintiff-Respondent,

-against-

New York City Transit Authority,
Defendant-Appellant.

Wallace D. Gossett, Brooklyn (Lawrence Heisler of counsel), for
appellant.

Robert Stein, New York, for respondent.

Judgment, Supreme Court, New York County (Martin Shulman,
J.), entered April 5, 2012, awarding plaintiff, after a jury
verdict, the principal amounts of \$400,000 for past pain and
suffering and \$450,000 for future pain and suffering over 6
years, unanimously affirmed, without costs.

The jury's determination finding defendant liable and
plaintiff's decedent free from culpable conduct was neither
legally insufficient (*see Szczerbiak v Pilat*, 90 NY2d 553 [1997])
nor against the weight of evidence (*Cerasuoli v Brevetti*, 166
AD2d 403, 404 [2nd Dept 1990]). Decedent's testimony that the
doors suddenly closed on her while the train conductor was making
announcements concerning whether the train would be proceeding
local or express was unrebutted. Defendant's conductor, who did
not testify at trial, testified at her deposition that such an

action would be improper, and that a conductor should finish such an announcement, closing the door a safe time thereafter.

Decedent suffered a fractured hip requiring surgery, and she testified that it changed her lifestyle, as she was no longer able to regularly travel into Manhattan to visit museums and attend cultural events and lectures. Thus, the jury's award for future pain and suffering was not excessive. Furthermore, the jury's award for past pain and suffering does not deviate materially from what would constitute reasonable compensation under the circumstances (*see e.g. Luna v New York City Tr. Auth.*, __ AD3d __, 2013 NY Slip Op 07819).

THIS CONSTITUTES THE DECISION AND ORDER
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ENTERED: DECEMBER 19, 2013


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prosecutor and defense counsel, it is clear that the court determined that defendant's very extensive criminal record, including numerous felony convictions, made him an unsuitable candidate for a judicial diversion program, regardless of what an evaluation might reveal. There is no basis for disturbing that determination.

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

ENTERED: DECEMBER 19, 2013



CLERK

Tom, J.P., Andrias, Saxe, DeGrasse, Richter, JJ.

11389-

11390 In re Orlando R.,

A Child Under the Age
of Eighteen Years, etc.,

Orlando R.,
Respondent-Appellant,

Nancy E.,
Respondent,

Administration for Children's
Services,
Petitioner-Respondent.

Steven N. Feinman, White Plains, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Mordecai
Newman of counsel), for respondent.

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

Order of disposition, Family Court, New York County (Clark
V. Richardson, J.), entered on or about January 2, 2013, which,
upon a fact-finding determination of neglect, placed the subject
child in the custody of the Commissioner of Social Services until
completion of the next permanency hearing (June 14, 2013),
unanimously affirmed, without costs, as to the fact-finding
determination, and the appeal therefrom otherwise dismissed as
moot. Order of fact-finding, same court and Judge, entered on or
about November 27, 2012, unanimously affirmed, without costs.

The Family Court properly held that petitioner, the Administration for Children's Services, satisfied its burden of proving, by a preponderance of the evidence, that the father neglected the child, in that he "knew or should have known of the mother's drug use and failed to exercise the minimum degree of care to ensure that the mother did not abuse drugs during her pregnancy" (*Matter of Kierra C. [Kevin C.]*, 101 AD3d 993, 993 [2d Dept 2012]; see Family Court Act §§ 1012[f][i][B], 1046[b][I]; *Nicholson v Scopetta*, 3 NY3d 357, 368 [2004]).

The evidence established that the father did not use drugs but was aware of the mother's history of drug use. Notwithstanding his efforts to address her drug problem, shortly before she gave birth, he placed her in the home of a friend who he knew was a drug user and who was visited by others who used alcohol and drugs. While this residence was a last resort, as the couple had been homeless and unemployed, the environment apparently contributed to her relapse during her pregnancy.

The Family Court correctly reasoned that the father's intermittent incarceration and resulting separation from the mother contributed to his failure, or inability, to exercise the minimum degree of care necessary to ensure that the mother did not abuse drugs during her pregnancy. Moreover, as the father admitted to incurring convictions for at least three theft

related offenses, the Family Court did not violate the presumption of innocence in referring to such crimes (see e.g. US Const 5th, 6th and 14th Amends; NY Const art I, § 6). In any case, the Family Court ultimately reasoned that the resulting incarceration, rather than the crimes themselves, contributed to the neglect of the child.

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

ENTERED: DECEMBER 19, 2013



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Tom, J.P., Andrias, Saxe, DeGrasse, Richter, JJ.

11391N In re 155 West 21st Street, LLC, Index 109627/06
 Petitioner-Appellant,

 HRH Construction LLC,
 Petitioner,

 -against-

 Alistair McMullan,
 Respondent-Respondent,

 Extell 21st Street LLC,
 Respondent.

Ledy-Gurren Bass & Siff LLP, New York (Nancy Ledy-Gurren of counsel), for appellant.

Sheindlin & Sullivan, LLP, New York (Gregory Sheindlin of counsel), for respondent.

Order, Supreme Court, New York County (Steven E. Liebman, Special Referee), entered September 6, 2012, which awarded certain attorney's fees against petitioner 155 West 21st Street, LLC, unanimously affirmed, with costs.

Contrary to petitioner's assertion, respondent Alistair McMullan could recover fees awarded under 22 NYCRR 130-1.1, even if counsel was representing him pro bono (see *Senfeld v I.S.T.A. Holding Co.*, 235 AD2d 345 [1st Dept 1997], *lv dismissed* 91 NY2d 956 [1998], *lv denied* 92 NY2d 818 [1998]). Moreover, while the fact that respondent had vacated the premises at issue rendered the underlying proceeding moot, it did not deprive this Court of

the power to award a sanction against petitioner in the proceeding. Nor was there a bar to respondent being awarded fees for the extensive effort of obtaining and defending the sanctions award (see *Posner v S. Paul Posner 1976 Irrevocable Family Trust*, 12 AD3d 177, 179 [1st Dept 2004]).

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

ENTERED: DECEMBER 19, 2013


CLERK

Friedman, J.P., Moskowitz, Richter, Manzanet-Daniels, Gische, JJ.

10615 Estelle A. Carr, etc., Index 117185/97
Plaintiff-Appellant-Respondent,

Dennis Beaver, as Executor of the
Estate of Royce K. Hoffman,
Plaintiff-Respondent-Appellant,

-against-

Rose A. Caputo, etc.,
Defendant,

Henry Alpizar, etc.,
Defendant-Respondent,

Philip Mangerino, etc.,
Defendant-Respondent-Appellant.

Pollack Pollack Isaac & Di Cicco, New York (Michael H. Zhu of
counsel), for appellant-respondent.

Herbert Adler, White Plains, for respondents-appellants.

Schwaber & Kafer, P.C., New York (Susan M. Kafer of counsel), for
respondent.

Order, Supreme Court, New York County (Donna M. Mills, J.),
entered November 17, 2010, modified, on the law, to the extent of
declaring that the Estate of John Gene Mangerino has an undivided
1/6 ownership interest in the building as a partner and tenant in
common, and remanding to the motion court for a reallocation of
shares consistent herewith, and otherwise affirmed, with costs.

Opinion by Gische, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
Karla Moskowitz
Rosalyn H. Richter
Sallie Manzanet-Daniels
Judith J. Gische, JJ.

10615
Index 117185/97

x

Estelle A. Carr, etc.,
Plaintiff-Appellant-Respondent,

Dennis Beaver, as Executor of the
Estate of Royce K. Hoffman,
Plaintiff-Respondent-Appellant,

-against-

Rose A. Caputo, etc.,
Defendant,

Henry Alpizar, etc.,
Defendant-Respondent,

Philip Mangerino, etc.,
Defendant-Respondent-Appellant.

x

Cross appeals from an order of the Supreme Court,
New York County (Donna M. Mills, J.), entered
November 17, 2010, which, to the extent
appealed from as limited by the briefs,
denied plaintiff Estelle A. Carr's motion for
summary judgment, granted defendant Henry
Alpizar's motion for summary judgment, and
granted the motion for summary judgment of
plaintiff Estate of Royce K. Hoffman and
defendant Estate of John Gene Mangerino to
the extent of declaring that Alpizar has an

undivided 1/6 ownership interest in the subject building as a partner and tenant in common, and defendant Estate of Mangerino has only an undivided 1/12 ownership interest in the building as a partner and tenant in common.

Pollack Pollack Isaac & Di Cicco, New York (Michael H. Zhu and Brian J. Isaac of counsel), for appellant-respondent.

Herbert Adler, White Plains, for respondents-appellants.

Schwaber & Kafer, P.C., New York (Susan M. Kafer of counsel), for respondent.

GISCHE, J.

These appeals involve years of disputes and litigation over ownership interests in a building located at 45-47 Second Avenue in Manhattan (the Building), and interests in a partnership formed by the original owners of the Building, after the Building was purchased. Although a number of deeds have been recorded over the years purporting to convey interests in the Building, and the partners who died bequeathed their interests to heirs, plaintiff Estelle A. Carr, and others at various times, have claimed that such conveyances and bequests were in violation of the partnership agreement the original owners executed in connection with a venture known as 45-47 Enterprises (1969 Agreement). There were prior motions for summary judgment in 2001 before a different justice (Sheila Abdus-Salaam, J.), then presiding over this matter, which resulted in an order dated January 10, 2002 granting partial summary judgment (2002 Order). No allocation of interests was ordered at that time because the court found certain factual disputes needed to be resolved. Nonetheless, eight years later and following further discovery, the motion court has, in the order presently being appealed, allocated all of the undivided shares in the Building to the parties in various fractional shares "as partners and as tenants in common."

Only Carr, Philip Mangerino, as executor of the Estate of J.G. Mangerino and as Administrator of Frank Bradley's Estate (collectively, Mangerino, sometimes Mangerino's estate) have appealed from that order. Henry Alpizar, individually and as executor of the Estate of Dan Kampel (collectively, Alpizar) has filed responsive briefs. Rose A. Caputo, who is sued individually and in her capacity as the legal representative for interests previously held by Lil E. Dominguez and Joseph Sample, has not submitted any opposition to the appeal or cross appeal.

The issues presented by this limited appeal are whether, as argued by Carr, the 1969 Agreement governs the disposition of the ownership interests in the Building, as well as partnership interests or, as argued by Mangerino and Alpizar, ownership should be determined by the deeds and testamentary dispositions. Mangerino and Alpizar also argue that lack of standing, untimeliness and laches bar Carr's claims. In his cross appeal, Mangerino affirmatively claims that the Estate of Mangerino has a 1/6, not 1/12, ownership in the Building, based upon adverse possession. Carr argues that under the 1969 Agreement, Alpizar and Mangerino's interests are limited to book value, while Alpizar and Mangerino claim they have a direct interest in the Building itself and consequently, share in its market value. The market value of the Building exceeds book value by millions of

dollars.

The undisputed facts establish that Carr along with six other individuals, including Kampel, Dominguez, Caputo, Bradley, Sample, and Hoffman, purchased the Building as tenants in common, pursuant to a deed dated June 25, 1968 that was recorded. The Building was comprised of six residential apartments and commercial space that was leased to various businesses. The 1968 deed provided for the following undivided interests: Carr, 1/6; Kampel, 2/6; Caputo and Dominguez, 1/6 as joint tenants; Bradley and Sample, 1/6 as joint tenants; and Hoffman, 1/6. On June 26, 1968, Kampel conveyed one-half of his interest, i.e., 1/6, to Charles Caspar and Keith Whitten, as joint tenants. That deed was recorded as well.

On May 1, 1969, all nine of the Building's owners entered into the 1969 Agreement for an unnamed partnership which later became known as 45-47 Enterprises. Although no certificate of partnership was filed, there were tax filings and other documents filed for the partnership over the years. The 1969 Agreement recites that the parties have purchased the Building for the sum of \$47,000 and contains a detailed breakdown of how the purchase was financed. The agreement states that "the primary and sole purpose" for the partners having purchased the Building was to make sure they each had a "permanent place of residence." The

1969 Agreement itemizes, floor by floor, the "party" occupying each apartment, that person's monetary contribution towards the purchase of the Building and classifies 60% of such contribution as a "capital contribution" whereas 40% is classified as a "loan."

According to the 1969 Agreement, the parties' respective "percentage of interest and apartments occupied by each" is as follows: Carr, 1/6; Bradley, 1/12; Sample, 1/12; Caspar, 1/12; Whitten, 1/12; Kampel, 1/6; Hoffman, 1/6; Caputo, 1/12; Dominguez, 1/12. Although the partners agreed that they would be responsible for maintaining the apartment they each occupy, the agreement provides that the partnership is responsible for maintaining, improving, and making repairs to the common areas of the building they share. Another provision in the agreement (Section 19) prohibits the subletting of any apartment without the prior written consent of all the remaining partners. The 1969 Agreement does not contain any provision regarding the partnership's dissolution nor does the Agreement have an end date, rendering this an at-will partnership, as previously determined in this case by the court in the 2002 Order. There are no provisions in the 1969 Agreement indicating that title to or beneficial interest in the Building would be transferred to the partnership at that or a later time. In fact, at no time

since the execution of 1969 Agreement has title to the Building, or any part thereof, been held by the partnership. Title ownership of the Building, as reflected in the recorded 1968 and 1969 deeds, remained unchanged when the 1969 Agreement was first made.

The 1969 Agreement contained limitations on how a partner's interest in the partnership could be sold or conveyed and also provided that a deceased partner's interest reverted to the partnership at death. Pursuant to Sections 10 and 11 of the 1969 Agreement, the partnership had a 30-day right of first refusal on any sale of a partner's interest and the partner wishing to sell was obligated to notify the partnership in writing of his or her desire to sell that interest. If the partnership declined to exercise its right, then the individual partners were given the opportunity to purchase the interest. The sale of an interest to the partnership or another partner was to be made at the "book value" of the interest at the time of the sale. Section 14 of the 1969 Agreement provides that upon the death, retirement or incapacity of any partner, that partner's interest reverted to the partnership and the value of such interest would, as with a sale, be determined by the book value of the interest when the deceased partner died. The legal representative of an estate was required to execute and deliver any documents necessary to

transfer the deceased partner's interest to the surviving partners only after receiving payment for the interest (Section 15, 1969 Agreement).

Dissension arose among the owners/partners about how to pay for the operating expenses of the Building and by 1975, the fault line grew, dividing Caputo and Dominguez from the seven other owners. On November 20, 1975, those same seven owners met and signed a "Resolution and Dissolution with Statement of Accounting" (Resolution), purporting to dissolve the partnership. That dissolution agreement was never signed by Caputo or Dominguez. Thereafter, those same seven owners took steps to convert the building to condominium ownership by, among other things, executing among themselves a series of deeds which they recorded. On November 5, 1976, those same seven partners executed a "Plan of Apartment Ownership-Master Deed" (Plan). Despite the Resolution, tax documents for the 45-47 Enterprises partnership continued to be filed for a number of years thereafter. The tax documents included K-1s showing rental income.

On January 20, 1979, Caspar and Whitten executed a deed assigning their interests in the Building to Carr for \$25,000. In 1978, Sample moved out of the apartment he had shared with Bradley, never returning to the Building. Sample and Bradley,

like the other five owners, had signed deeds in 1975 in connection with the Plan. When Sample moved out, J.G. Mangerino moved into the apartment and lived with Bradley until Bradley died in August 1980. When Bradley died, he left his entire estate to J.G. Mangerino. J.G. Mangerino remained in the apartment after Bradley died until his own death in October 1999, at which time his heirs assumed possession and control thereof. In 1991, Kampel died, leaving "all my shares in the partnership known as '4547 (sic) Enterprise Partnership' which partnership owns the apartment I live in located at 45 Second Avenue #3" to Alpizar. In May 2001, Hoffman died, leaving his 1/6 interest to Carr, who, by a deed dated November 2, 2006, assigned half of that interest (1/12) to Caputo and Dominguez. In February 2004, Sample (who is now deceased) sold his 1/12 interest to Caputo and Dominguez. Dominguez is now deceased as well, and the only remaining original partners are Carr and Caputo. Caputo is the executrix of the estate of Dominguez. Although some of these conveyances followed the formalities set forth in the 1969 Agreement, most of them did not and were accomplished simply by bequests or sales.

Carr, Hoffman and Mangerino moved for summary judgment in 2001 seeking a declaration that no partnership had ever been formed despite the 1969 Agreement, but if it had been formed, the

partners dissolved it when they signed the Resolution and later took steps to convert the Building into a condominium. Caputo and Dominguez, who had not signed that Resolution or any deeds conveying interests to any other partner, opposed the motion, as did Sample. Caputo, Dominguez and Sample also cross-moved for a declaration that the various transactions that had occurred over preceding years, purporting to transfer title, were null and void because they had been made in violation of the 1969 Agreement. Caputo and Dominguez challenged, in particular, Carr's 1979 purchase of Caspar and Whitten's interests in the Building for \$25,000, although Caspar and Whitten had offered their interest to the partners and none of them had expressed an interest in the offer at that time. Alpizar also moved for summary judgment at that time, seeking a declaration that there had never been a partnership, but even if there had been, the agreement had been repudiated and the claims of Caputo/Dominguez/Sample were barred by the doctrine of laches. Alpizar sought a declaration that he held a 1/6 share which he had acquired by devise under Kampel's will.

In its 2002 Order,¹ the court decided that the nine original owners had, in fact, formed a partnership which some of them

¹Though notices of appeal was filed from the 2002 Order, the appeals were never perfected and were later dismissed.

tried to dissolve in 1975. However, since there had been no winding up of the partnership's affairs, as required under Partnership Law § 62, the partnership had continued to exist. The court found that the Plan to convert the Building into a condominium was ineffective and declared that the Building had not been converted to condominium status in 1976. Although the 2002 Order declared that the parties had formed a partnership in 1969, and the court noted that some of the formalities in the 1969 Agreement had been observed when Carr purchased Caspar and Whitten's interest in 1979, the court found no evidence that all the partners had been notified of the impending sale. Applying the doctrine of laches, however, the court found that the defendants challenging that sale had significantly delayed in asserting their claims. Alpizar's motion for summary judgment was also granted in part and the court declared that Kampel's bequest to Alpizar was valid to the extent that Alpizar had succeeded to Kampel's rights under the 1969 Agreement and under the 1968 deed because, as with the Caspar/Whitten sale, defendants had failed to timely object or take action on this issue until so many years later. Mangerino's motion for summary judgment which was then, as now, largely based upon claims of adverse possession, was denied in the 2002 Order because the court found there were unresolved issues of fact, including

whether Sample had abandoned the premises in 1978.

In 2010 Carr moved again for summary judgment,² as did defendants Caputo/Dominguez, Alpizar and Hoffman/Mangerino, resulting in the order that is the subject of this appeal and cross appeal. The motion court declared that the parties' undivided ownership rights in the Building as partners and tenants in common are as follows: Carr, 5/12; Caputo, 2/12; Dominguez, 2/12; Alpizar 2/12; and Mangerino, 1/12. As with the court in 2002, Justice Mills found that the doctrine of laches applied, even if the claims were not technically time-barred. The court also found that Alpizar's interest had already been decided in the 2002 Order, leaving only the issue of quantifying what that share was.

Carr argues on appeal that the motion court erred in holding that Alpizar has a 1/6 interest in both the Building and the partnership because, when Kampel died, his share reverted to the partnership, notwithstanding that Alpizar had never executed the documents necessary to convey that interest to the partnership. Carr argues that even if Alpizar has an ownership interest in the Building and partnership, his interest is only worth the book

²The issue of serial summary judgment motions was not raised below by any of the parties or on this appeal, except in the context of judicial estoppel, discussed infra.

value of Kampel's 1/6 interest at the time of his death. Carr presents similar arguments with respect to the interest Mangerino's estate claims to have. She maintains that Bradley never owned more than a 1/12 interest in the Building because Sample kept his own 1/12 interest when he moved out and later sold it. Although Carr acknowledges that there is no deed to the Building in the name of the partnership, she argues that the Building should be considered property of the partnership, not the individual partners or their heirs.

On the cross appeal, Mangerino argues that the court erred in finding that Mangerino's estate only has a 1/12 interest in the partnership and Building when it actually has a 1/6 interest in the Building and partnership. Mangerino contends that the Mangerino estate acquired the entire Bradley/Sample 1/6 interest when Bradley died because Sample abandoned the premises in 1978, never to return, and for more than 20 years, first Bradley, then his heirs, have exclusively controlled and occupied the apartment. Although Alpizar and Mangerino oppose Carr's appeal, no direct opposition has been interposed to Mangerino's cross appeal on the issue of adverse possession. Carr's only argument is that Mangerino's claim is, at most, only worth the book value when Bradley died in 1984. Caputo and Mangerino, who have the greatest legal interest in opposing Mangerino's claim of adverse

possession, have not appeared on this appeal at all. Their opposition before the motion court was that Mangerino has no claim to Bradley's interest at all, but if Mangerino's estate does, such interest is, at best, a 1/12th interest at book value.

We reject defendants' argument that Carr's appeal is barred by her lack of standing. By denying Carr's summary judgment motion for a declaration that Alpizar and Mangerino, as heirs of two of the original partners in the building, are entitled to only the book value of the deceased partners' interest at the time of their death, Carr obtained an order that adversely affected her interests making her an aggrieved party with the right to appeal from that order (CPLR 5511; *Mixon v TBV, Inc.*, 76 AD3d 144, 156-157 [2d Dept 2010]).

Also rejected are arguments that Carr is judicially estopped from asserting legal arguments in connection with the second motion for summary judgment (and on appeal) that are at odds with those she advanced in connection with the first motion for summary judgment. The doctrine of judicial estoppel "'precludes a party who assumed a certain position in a prior legal proceeding and who secured a judgment in his or her favor from assuming a contrary position in another action simply because his or her interests have changed'" (*Gale P. Elston P.C. v Dubois*, 18 AD3d 301, 303 [1st Dept 2005], quoting *Ford Motor Credit Co. v*

Colonial Funding Corp., 215 AD2d 435, 436 [2d Dept 1995]).

Although Carr has been selective in seeking to enforce the 1969 Agreement's terms when beneficial to her but rejecting provisions and transactions that are of no benefit to her, or reduce the value of her own interests, Carr did not "secure" a judgment in her favor on the earlier motion, rendering the doctrine inapplicable to the situation presented (see *Baje Realty Corp. v Cutler*, 32 AD3d 307, 310 [1st Dept 2006]).

It was already decided in 2002 that Kampel's bequest to Alpizar was valid and Alpizar had succeeded to Kampel's rights under the 1969 Agreement and under the 1968 deed. The 2002 Order was never challenged. Carr is not challenging the motion court's decision that Alpizar's interest is 1/6. Carr argues, however, that Alpizar's interest should be restricted to the book value of the partnership at the time of Kampel's death. That argument, however, is little more than a subset of the overarching argument that the formalities in the 1969 Agreement dictate Alpizar's rights and interests in the Building and the partnership. As with the broader issue of ownership, the doctrine of laches bars this claim, which limits the value of Alpizar's interest, because Carr significantly delayed in asserting it in a timely manner (*Matter of Schulz v State of New York*, 81 NY2d 336 [1993]). Despite the limitations in the 1969 Agreement pertaining to

sales, transfers, conveyances, etc., of any partner's interest either during his or her lifetime or at death, the partners openly sold their interests without tendering an offer to the partnership or other partners, as required in Section 14 of the 1969 Agreement, and as the partners died off, they disposed of their interests through bequests in their wills. Carr did not object to how Kampel's interest was handled by Alpizar when he died and she did not demand compliance with the 1969 Agreement. Neither Carr nor the partnership made any tender of payment to Kampel's estate, notwithstanding the requirement in the 1969 Agreement that when a partner dies, the liquidated amount of his or her interest "shall be paid" to the legal representative who is only then obligated to deliver the instruments necessary to effectuate the transfer of that deceased partners' interest. The prejudice to Alpizar is obvious because for the years following Kampel's death, Alpizar conducted himself as an owner-occupant of the apartment.

Mangerino's cross appeal presents some similar issues. It is unrefuted that whatever interest J.G. Mangerino had when he died was passed on to his estate, no tender was made by the partnership or any individual partner to purchase Mangerino's interest, and no documents transferring those interests back to the partnership were ever signed by the estate representative.

Carr's contention, that Mangerino estate has no interest, but if any, such interest is only worth book value, is barred by the doctrine of laches for the same reasons barring Carr's arguments as they relate to the value of Alpizar's interests.

We also reject Carr's argument that the partnership is the beneficial owner of the building, notwithstanding how title to the Building was recorded over the years and the bequests made by the decedents, who were partners. Although a partner can prove through circumstantial evidence that property actually belongs to the partnership, although held in the name of individual partners, there is no documentation or other evidence indicating that the partners intended, or the partnership was formed, to actually hold title to the Building (*compare Vick v Albert*, 17 AD3d 255 [1st Dept 2005]). The 1969 Agreement describes how the partners could dispose of their interests, sets forth rules for governing themselves, and even provides for how the Building would be operated, but nothing in the agreement expressly provides that the partnership itself would hold the deed.

Mangerino's claim on the cross appeal that the Mangerino estate holds a 1/6, not 1/12, interest rests on issues of adverse possession. This claim affects the "sale" by Sample of his purported 1/12 interest in the Building and partnership to Caputo and Dominguez in 2004. That sale was made after the first motion

for summary judgment was decided and Sample has since died. Mangerino established before the court below that Sample left and never returned, leaving Bradley, and his heirs (including JG Mangerino) in exclusive, hostile, possession of the apartment for the prescriptive period (see *Myers v Bartholomew*, 91 NY2d 630 [1998]). Although this means Sample's "sale" to Caputo and Dominguez is invalid, Caputo has not responded to that claim. In the absence of opposition, we hold that the Mangerino estate has a 1/6, not 1/12, undivided ownership interest in the Building as a partner and tenant in common. Unresolved issues remain, however, about the reallocation and recovery of this 1/12 interest from Caputo and/or Dominguez. We, therefore, remand to the trial court the issue of whether that 1/12 interest that the Mangerino estate is entitled to should come from Caputo, individually, Dominguez, individually, or both of them.

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

Accordingly, the order of the Supreme Court, New York County (Donna M. Mills, J.), entered November 17, 2010, which, to the extent appealed from as limited by the briefs, denied plaintiff Estelle A. Carr's motion for summary judgment, granted defendant Henry Alpizar's motion for summary judgment, and granted the motion for summary judgment of plaintiff Estate of Royce K.

Hoffman and defendant Estate of John Gene Mangerino to the extent of declaring that Alpizar has an undivided 1/6 ownership interest in the subject building as a partner and tenant in common, and defendant Estate of Mangerino has only an undivided 1/12 ownership interest in the building as a partner and tenant in common, should be modified, on the law, to the extent of declaring that the Estate of John Gene Mangerino has an undivided 1/6 ownership interest in the building as a partner and tenant in common, and remanding to the motion court for a reallocation of shares consistent herewith, and otherwise affirmed, with costs.

All concur.

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

ENTERED: DECEMBER 19, 2013


CLERK