SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JULY 3, 2014

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Acosta, DeGrasse, Freedman, Richter, JJ.

12942 Michelle DeJesus, Index 300714/11
Plaintiff-Respondent,

-against-

The Parkchester South Condominium Inc.,
Defendant-Appellant.

_____

McGaw, Alventosa & Zajac, Jericho (Andrew Zajac of counsel), for appellant.

Law Office of John C. Dearie, New York (Casey Fundaro of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered December 17, 2013, which denied defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendant dismissing the complaint.

Defendant established its entitlement to judgment as a matter of law in this action where plaintiff was injured when a child, riding a bicycle, struck her from behind as she walked on an interior walkway of defendant's complex. Defendant submitted the testimony of a member of its private security force, who

stated that defendant employed five to seven security guards during normal business hours. He asserted that people traversed the property, and some "occasionally" rode bicycles, but this happened "rarely." Nevertheless, defendant had a rule against riding bicycles in this area, and there were a number of signs posting this rule. Defendant also had surveillance cameras on the interior and exterior of the property, and the security officer further stated that when someone was found riding a bicycle, he or she would either be given a summons, the bicycle would be confiscated, or a warning would be issued.

Under the circumstances presented, defendant demonstrated that it provided the requisite "minimal precautions" to protect people from the foreseeable harm of bicycle riders (*Banner v New York City Hous. Auth.*, 94 AD3d 666, 667 [1st Dept 2012] [internal quotation marks omitted]). Indeed, "[i]t is difficult to understand what [further] measures could have been undertaken to prevent plaintiff's injury except presumably to have had a security officer posted at the precise location where the incident took place. . ., surely an unreasonable burden" (*Florman v City of New York*, 293 AD2d 120, 127 [1st Dept 2002]).

Plaintiff failed to submit opposition to the motion, and the arguments she has set forth in her appellate brief are

unpreserved. In any event, the arguments raised by plaintiff do not present triable issues of fact that would warrant the denial of the subject motion.

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

ENTERED: JULY 3, 2014

DEPUTY CLERK

Gonzalez, P.J., Acosta, DeGrasse, Freedman, JJ.

12944 Siu Nam Wong Pun, Index 305736/07
Plaintiff-Respondent,

-against-

Che-Kwok Pun,
Defendant-Appellant.

_____

Kevin Kerveng Tung, P.C., Flushing (Kenji Fukuda of counsel), for appellant.

Che-Kwok Pun, appellant pro se.

_____

Order, Supreme Court, New York County (Ellen Gesmer, J.), entered on or about June 28, 2013, which denied defendant's motion to dismiss the complaint for lack of personal jurisdiction, unanimously affirmed, without costs.

In this action for divorce, defendant husband waived the defense of lack of personal jurisdiction by failing to move to dismiss the complaint on that ground within 60 days after serving his answer (see CPLR 3211[a][8], [e]; *Wiebusch v Bethany Mem. Reform Church*, 9 AD3d 315 [1st Dept 2004]).

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

ENTERED: JULY 3, 2014

Margaret Saval
DEPUTY CLERK

Gonzalez, P.J., Acosta, DeGrasse, Freedman, Richter, JJ.

12946 Aurateq Systems International, Inc., Index 105453/10
Plaintiff-Appellant,

-against-

David Marvisi, etc.,
Defendant-Respondent.

_____

Altman & Company P.C., New York (Steven Altman of counsel), for appellant.

Cox Padmore Skolnik & Shakarchy LLP, New York (Sanford Hausler of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered May 8, 2013, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

In January 2006, the parties entered into a stipulation in connection with an action for breach of contract pursuant to which plaintiff released defendant from "any claim" it has or "may have" against him. The stipulation bars the instant action alleging fraud and seeking to "set aside and recover fraudulent conveyances" (*see Centro Empresarial Cempresa S.A. v América Móvil, S.A.B. de C.V.*, 76 AD3d 310 [1st Dept 2010], *affd* 17 NY3d 269 [2011]). We note that the alleged fraudulent conveyances were made well in advance of the execution of the release, and

that there is no "objective evidence" that the parties intended the release to be of limited scope (*see Johnson v Lebanese Am. Univ.*, 84 AD3d 427, 432 [1st Dept 2011]).

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

ENTERED: JULY 3, 2014

DEPUTY CLERK

Gonzalez, P.J., Acosta, DeGrasse, Freedman, Richter, JJ.

12947 Alberto Galue, Index 303246/11
Plaintiff-Respondent-Appellant,

-against-

Independence 270 Madison LLC, et al.,
Defendants-Respondents,

J. Spaccarelli Construction Co. Inc.,
Defendant-Appellant-Respondent.

_____

Gannon Rosenfarb Balletti & Drossman, New York (Peter J. Gannon of counsel), for appellant-respondent.

Sidney M. Segall, Port Washington, for respondent-appellant.

Martin Clearwater & Bell LLP, New York (Arjay G. Yao, John L.A. Lyddane and Steven A. Lavietes of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered August 21, 2013, which denied plaintiff's motion for partial summary judgment on liability and denied the motion for summary judgment made by defendant J. Spaccarelli Construction Co. Inc. (Spaccarelli), seeking dismissal of plaintiff's complaint and the cross claims of defendants Independence 270 Madison LLC, 270 Madison Avenue Associates LLC and ABS Partners Real Estate LLC (Madison), unanimously modified, on the law, to dismiss Madison's cross-claims against Spaccarelli for contractual indemnification and damages for breach of contract, and otherwise affirmed, without costs.

In this action for personal injuries allegedly sustained by plaintiff when he was hit in the head by a metal paper towel dispenser/receptacle unit that fell out of the wall at a building owned by Madison and operated by ABS, plaintiff's motion seeking partial summary judgment on liability was properly denied. Summary judgment pursuant to res ipsa loquitur is appropriate in only "exceptional cases" and not where, as here, there are issues of fact with respect to the exclusivity of control over the instrumentality that allegedly caused the injury (*Morejon v Rais Const. Co.*, 7 NY3d 203, 210-212 [2006]).

The motion court erred, however, in failing to dismiss Madison's claims against Spaccarelli seeking contractual indemnity and breach of an insurance procurement agreement since Spaccarelli's work at the premises was performed under an accepted proposal containing no such provisions.

Under the circumstances, we decline to search the record to award Madison summary judgment.

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

ENTERED: JULY 3, 2014

Margaret Saval
DEPUTY CLERK

Gonzalez, P.J., Acosta, DeGrasse, Freedman, Richter, JJ.

12948-	The People of the State of New York,	Ind. 5460/09
12948A-	Respondent,	2596/10
12948B		4871/11

-against-

James V. Moore,
Defendant-Appellant.

_____

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

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

_____

Judgments, Supreme Court, New York County (Charles H. Solomon, J.), rendered November 7 and December 20, 2011, convicting defendant, upon his pleas of guilty, of identity theft in the first degree (two counts), identity theft in the second degree, and grand larceny in the fourth degree (two counts), and sentencing him to an aggregate term of 7 to 14 years, unanimously modified, as a matter of discretion in the interest of justice,

to the extent of reducing the sentences for the first-degree identity theft convictions to terms of 2 to 4 years, resulting in a new aggregate term of 4 to 8 years, and otherwise affirmed.

We find the sentence excessive to the extent indicated.

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

ENTERED: JULY 3, 2014

DEPUTY CLERK

Gonzalez, P.J., Acosta, DeGrasse, Freedman, Richter, JJ.

12949 The People of the State of New York, Respondent, Ind. 287/10

-against-

Dexter Dorner, Defendant-Appellant.

_____

Leonard J. Levenson, New York, for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Natalia B. Bedoya of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Herbert J. Adlerberg, J.H.O. at suppression hearing; Lewis Bart Stone, J. at suppression decision; Edward J. McLaughlin, J. at jury trial and sentencing), rendered February 1, 2011, convicting defendant of criminal sale of a controlled substance in or near school grounds and criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to concurrent terms of nine years, unanimously affirmed.

The verdict was based on legally sufficient evidence. In this observation sale case, the evidence warranted the conclusion that the drugs recovered from the buyer were the same objects that defendant had given to the buyer in return for money, only moments before (*see e.g. People v Bolden*, 6 AD3d 315 [2004], *lv denied* 3 NY3d 637 [2004]).

The court properly denied defendant's suppression motion. An officer saw a pattern of suspicious conduct that led him to a reasonable conclusion, based on his experience and training, that defendant and another man had just engaged in a drug transaction. This provided probable cause to arrest defendant (*see People v Jones*, 90 NY2d 835 [1997]; *People v Schlaich*, 218 AD2d 398 [1996], *lv denied* 88 NY2d 994 [1996]). Moreover, before arresting defendant, the police arrested the other man and found drugs in his possession.

Defendant's procedural challenge to his second felony drug offender adjudication requires preservation (*see People v Samms*, 95 NY2d 52, 57 [2000]), and we decline to review this unpreserved claim in the interest of justice.

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

ENTERED: JULY 3, 2014

DEPUTY CLERK

Gonzalez, P.J., Acosta, DeGrasse, Freedman, Richter, JJ.

12950 Niles H. Lauersen, Index 103195/09
Plaintiff-Respondent,

-against-

John ("Yanni") Antonopolous,
Defendant-Appellant,

750 Park Avenue Apartments Corp.,
Defendant.

_____

Peter M. Levine, New York, for appellant.

Bailey & Sherman, P.C., Douglaston (Anthony V. Gentile of counsel), for respondent.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered April 5, 2013, which denied defendant Antonopolous's motion for summary judgment dismissing the complaint as against him, unanimously affirmed, without costs.

Plaintiff contends that in 1990 he and defendant orally agreed that defendant would reside in a cooperative apartment owned by plaintiff, that he would not pay rent but would be responsible for the maintenance, assessments, and other charges related to the unit, and that he would vacate the premises when so requested by plaintiff, who would remain "the true, legal and equitable owner of the Apartment." Plaintiff contends that he allowed defendant to become a joint tenant and coop shareholder for the price of $1, and had defendant so listed on the share

certificate and proprietary lease, solely as an accommodation to him, since the coop board objected to open-ended occupancy by a non-owner. Defendant, who has lived in the apartment continuously since February 27, 1990, and has paid all the maintenance and assessments in that time, denies that there was any such agreement between himself and plaintiff, and contends that he received an interest in the apartment in consideration for the services he performed for plaintiff in the latter's medical practice. Defendant moved for summary judgment dismissing the complaint on statutes of frauds and limitations grounds.

In opposition, plaintiff argues that he has partly performed the oral agreement and that, if the agreement is not enforced, injustice will result, i.e., defendant's receipt of a half interest in this valuable Park Avenue apartment in exchange for grossly insufficient consideration ($1) (*see* General Obligations Law § 5-703[4]; *Club Chain of Manhattan v Christopher & Seventh Gourmet*, 74 AD2d 277, 281-82 [1st Dept 1980], *appeal dismissed* 53 NY2d 703 [1981]). The record presents issues of fact whether plaintiff's performance of the alleged agreement is unequivocally referable to the agreement, including whether plaintiff gave defendant an interest in the apartment in consideration for services that defendant performed for him, and whether the

written assignment of the lease was legitimate.

With respect to the statute of limitations, issues of fact exist whether defendant's possession of the apartment was adverse (*see* CPLR 212[a]; RPAPL 311; *see also Nazarian v Pascale*, 225 AD2d 381, 383 [1st Dept 1996]). As to the trespass cause of action, the applicable statute of limitations does not commence while the trespass is continuous and ongoing (*see Bloomingdales, Inc. v New York City Tr. Auth.*, 52 AD3d 120 [1st Dept 2008], *affd* 13 NY3d 61 [2009]; CPLR 214[4]).

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

ENTERED: JULY 3, 2014

Margaret Soval
DEPUTY CLERK

Gonzalez, P.J., Acosta, DeGrasse, Freedman, Richter, JJ.

12952 The People of the State of New York, Respondent, Ind. 4477/09

-against-

Otis Young, Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (William B. Carney of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Lewis Bart Stone, J. at suppression hearing; Analisa Torres, J. at jury trial and sentencing), rendered June 3, 2010, convicting defendant of robbery in the first degree (two counts), robbery in the second degree (two counts) and criminal possession of stolen property in the fifth degree, and sentencing him, as a persistent violent felony offender, to an aggregate term of 25 years to life, unanimously modified, on the law, to the extent of vacating the conviction of robbery in the second degree pursuant to Penal Law § 160.10(2)(b) under the fourth count of the indictment and dismissing that count, and otherwise affirmed.

The court properly denied defendant's suppression motion. The officers' initial detention of defendant on a subway platform was supported by, at least, reasonable suspicion. The

plainclothes officers identified themselves as police and then briefly restrained defendant after they saw him struggling with a woman over a purse as the woman yelled, "Let go of my bag." As officers detained defendant, the woman took her bag back and returned to a subway car. When one of the officers approached her on the subway train, she appeared extremely nervous and afraid, and was unwilling to leave the train as long as defendant was on the platform. When the woman took her identification out of a wallet in that bag to show the officer, this, along with the officer's earlier observations, including the woman having yelled, "Let go of my bag," provided probable cause to arrest defendant. Defendant's alternative explanations for these events are far-fetched, and the police were not required to rule out all hypotheses of innocence (*see e.g. People v Lewis*, 50 AD3d 595 [2008], *lv denied* 11 NY3d 790 [2008]). There is no merit to defendant's suggestion that the woman's behavior was indicative of criminal behavior on her own part.

The court properly declined to charge third-degree robbery as a lesser included offense of first-degree robbery, as there was no reasonable view of the evidence "that defendant used any type of force other than the display of what appeared to be a firearm" (*People v Santiago*, 303 AD2d 321 [1st Dept 2003], *lv denied* 100 NY2d 598 [2003]). However, as the People concede,

defendant was entitled to submission of third-degree robbery under the count charging second-degree robbery pursuant to Penal Law § 160.10(2)(b). While this error would normally require a new trial on the count at issue, we accept the People's recommendation that this count be dismissed in the interest of judicial economy.

Defendant's challenge to the sufficiency of the evidence supporting the element of physical injury regarding the remaining second-degree robbery conviction (*see* Penal Law § 160.10[2][a]) is without merit. There is no basis for disturbing the jury's credibility determinations concerning the victim's description of her level of pain (*see People v Guidice*, 83 NY2d 630, 636 [1994]). The evidence supports the inference that her injuries caused "more than slight or trivial pain" (*People v Chiddick*, 8 NY3d 445, 447 [2007]).

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

ENTERED: JULY 3, 2014

Margaret Sawal
DEPUTY CLERK

Gonzalez, P.J., Acosta, DeGrasse, Freedman, Richter, JJ.

12953 The City of New York, Index 450214/12
Plaintiff-Appellant,

-against-

American Safety Casualty Insurance Company,
Defendant-Respondent.

[And A Third-Party Action]

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Zachary W. Carter, Corporation Counsel, New York (Janet L. Zaleon of counsel), for appellant.

Westermann Sheehy Keenan Samaan & Aydelott, LLP, Uniondale (Avninder S. Aujla of counsel), for respondent.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered March 11, 2013, which, to the extent appealed from as limited by the briefs, denied so much of plaintiff's motion for summary judgment as sought payment of fines and fees incurred by third-party defendant Pullini Subsurface Contractors, Inc., and granted defendant's cross motion for partial summary judgment dismissing plaintiff's claim for such fines and fees, unanimously affirmed, without costs.

Supreme Court correctly held that the bond agreements for two permit bonds issued by defendant, as surety, in favor of third-party defendant Pullini, as principal, do not require defendant to pay for fines and fees issued by agents of the City in connection with permitted work performed by Pullini. Indeed,

the language used in the bonds does not expressly or impliedly state that defendant is liable for any fines or fees incurred by Pullini. Rather, the language unambiguously provides that defendant shall "either pay to complete the work and/or obligations, including repair and maintenance thereof (the "Permitted Work"), or to fully complete the Permitted Work . . . to be performed under [Pullini's] permits . . . if [Pullini] . . . has failed or neglected to fully perform and complete such Permitted Work." Supreme Court correctly found that the word "obligations" does not encompass the payment of fines or fees, but rather is limited to the enumerated "repair and maintenance" work and things of a similar nature (*see Popkin v Security Mut. Ins. Co. of N.Y.*, 48 AD2d 46, 48 [1st Dept 1975]).

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

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

ENTERED: JULY 3, 2014

Margaret Sowal
DEPUTY CLERK

Gonzalez, P.J., Acosta, DeGrasse, Freedman, Richter, JJ.

12956 Oneysie Acosta, Index 301721/09
Plaintiff-Appellant,

-against-

Juan Carlos Vidal, et al.,
Defendants-Respondents.

_____

Law Offices of Larry Hallock, PC, Maspeth (Mary J. Joseph of counsel), for appellant.

Richard T. Lau & Associates, Jericho (Marcella Gerbasi Crewe of counsel), for Juan Carlos Vidal, respondent.

Law Offices of Karen L. Lawrence, Tarrytown (David Holmes of counsel), for Kilopatie Dwhaj, respondent.

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Judgment, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered December 18, 2012, dismissing the complaint, and bringing up for review an order, same court and Justice, entered November 9, 2012, which granted defendants' motions for summary judgment dismissing the complaint alleging serious injuries under Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendants met their initial burden of establishing that plaintiff did not sustain serious injuries to her left shoulder, neck and back as a result of the accident by submitting the affirmed report of an orthopedic surgeon who opined that her injuries had been resolved through treatment, and found that she

had normal range of motion in all parts. Defendants also submitted the postoperative report of plaintiff's treating orthopedic surgeon, which reported that plaintiff did not have a labroid tear in the shoulder, but had impingement, and that subacromial decompression had been performed.

In opposition, plaintiff failed to raise an issue of material fact. Although her orthopedic surgeon averred that plaintiff had quantified limitations in range of motion of the spine and left shoulder shortly after the accident and upon recent examination, he failed to address the conflicting findings made by plaintiff's physical therapist of normal range of motion in all parts one week after the accident (*see Thomas v City of New York*, 99 AD3d 580 [1st Dept 2012], *lv denied* 22 NY3d 857 [2013]; *Jno-Baptiste v Buckley*, 82 AD3d 578 [1st Dept 2011]). The physical therapy records showed that plaintiff's neck and back continued to have full range of motion at two subsequent appointments, while the left shoulder had limitations attributable to the surgical procedure, which improved within a month. Minor limitations are insufficient to support a serious injury claim (*see Rickert v Diaz*, 112 AD3d 451 [1st Dept 2013]).

In addition, the surgeon's report of a post-surgical examination found that plaintiff had a negative impingement sign, indicating the condition had been repaired.

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

ENTERED: JULY 3, 2014

DEPUTY CLERK

Gonzalez, P.J., Acosta, DeGrasse, Freedman, Richter, JJ.

12957 Delores Covington, Index 17576/05
Plaintiff-Appellant,

-against-

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

_____

Raymond Schwartzberg & Associates, PLLC, New York (Raymond B. Schwartzberg of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Randy E. Kleinman of counsel), for municipal respondent.

Carroll McNulty & Kull LLC, New York (Frank J. Wenick of counsel), for Bronx Lebanon Hospital Center, respondent.

_____

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered November 13, 2012, which granted defendants' motions for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants each demonstrated entitlement to judgment as a matter of law in this action where plaintiff allegedly tripped and fell on a sidewalk defect. Defendant City submitted evidence showing that it had no written notice of the alleged defect (*see* Administrative Code of City of NY § 7-201[c]; *Castro v City of New York*, 101 AD3d 573 [1st Dept 2012]), and defendant hospital demonstrated that it was a lessee, and not the owner of the premises in front of which plaintiff allegedly fell (*see*

Tucciarone v Windsor Owners Corp., 306 AD2d 162, 163 [1st Dept 2003]).

In opposition, plaintiff failed to raise a triable issue of fact. To the extent that her affidavit contradicted her prior testimony as to the defect, it was clearly tailored to avoid the consequences of her earlier testimony and was properly disregarded by the motion court (*see e.g. Sutin v Manhattan & Bronx Surface Tr. Operating Auth.*, 54 AD3d 616 [1st Dept 2008]; *see also Addo v Melnick*, 61 AD3d 453 [1st Dept 2009]).

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

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

ENTERED: JULY 3, 2014

DEPUTY CLERK

Gonzalez, P.J., Acosta, DeGrasse, Freedman, Richter, JJ.

12958 In re Isis U., etc., and Others,

Children Under Eighteen
Years of Age, etc.,

Administration for Children's Services,
Petitioner-Appellant,

Ayesha A., et al.,
Respondents-Respondents.

_____

Zachary W. Carter, Corporation Counsel, New York (Drake A. Colley of counsel), for appellant.

Susan Jacobs, Center for Family Representation, Inc., New York (Emily S. Wall of counsel), for Ayesha A., respondent.

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), for Reggie U., respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Judith Waksberg of counsel), attorney for the children Isis U., Asiarah U., Ariayah U. and Ahriel U.

Steven Feinman, White Plains, attorney for the children Angelicah U. and Ahzahriah U.

_____

Order, Family Court, New York County (Stewart H. Weinstein, J.), entered on or about April 7, 2014, which, following a hearing pursuant to Family Court Act § 1028, inter alia, directed that the subject children be released to the custody of respondent mother Ayesha A. and respondent father Reggie U., upon respondents' demonstration of compliance with certain conditions, and that they have unsupervised visitation with the children in

the interim, unanimously affirmed, without costs.

The court providently exercised its discretion in determining that, provided respondents demonstrated compliance with conditions relating to the condition of the home and provision of appropriate education and medical care for the children, return of the children to their parents would not present an imminent threat to the children's life or health (Family Ct Act § 1028[a]; *see Nicholson v Scoppetta*, 3 NY3d 357 [2004]). Any imminent risk to the children was minimized by requiring respondents to first demonstrate compliance with those conditions, and by the other conditions of the order which, among other things, directed that the agency must be permitted to enter the home, that the children must continue to attend school or be home-schooled as approved by the Department of Education, and that the children must consistently be seen by an identified medical provider and their medical history documented (*see Matter of Aliyah B. [Denise J.]*, 87 AD3d 943 [1st Dept 2011]; *Matter of Natalie L. [Lisette A.]*, 79 AD3d 487 [1st Dept 2010]). Additionally, the court's decision was in the children's best interest, in light of the harm inflicted on the children from their continued removal (*id.* at 488). Finally, the court did not

abuse its discretion in directing unsupervised visitation in the interim, in that none of the problems posed by respondents would pose a risk to the children during an unsupervised visit.

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

ENTERED: JULY 3, 2014

DEPUTY CLERK

Gonzalez, P.J., Acosta, DeGrasse, Freedman, Richter, JJ.

12959 The People of the State of New York, Respondent, Ind. 2962/09

-against-

Anthony Patino, Defendant-Appellant.

_____

Richard M. Greenberg, Office of The Appellate Defender, New York (Sara Gurwitch of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Lewis Bart Stone, J.), rendered October 6, 2011, convicting defendant, upon his plea of guilty, of attempted robbery in the second degree, and sentencing him, as a second violent felony offender, to a term of six years, unanimously affirmed.

The court properly denied defendant's motion to withdraw his guilty plea. "When a defendant moves to withdraw a guilty plea, the nature and extent of the fact-finding inquiry rest[s] largely in the discretion of the Judge to whom the motion is made and a hearing will be granted only in rare instances" (*People v Brown*, 14 NY3d 113, 116 [2010] [internal quotation marks omitted]). Defendant, who was represented by new counsel at the plea withdrawal motion, received a full opportunity to present his arguments orally and in writing. Defendant's belated claims of

innocence and attorney coercion were unsupported, and were contradicted by the plea record (*see e.g. People v Chimilio*, 83 AD3d 537 [1st Dept 2011], *lv denied* 17 NY3d 814 [2011]).

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

ENTERED: JULY 3, 2014

Margaret Sowah
DEPUTY CLERK

Gonzalez, P.J., Acosta, DeGrasse, Freedman, Richter, JJ.

12960N Lingsworth Pendley, Index 100629/12
Plaintiff-Respondent,

-against-

The City of New York, et al.,
Defendants-Appellants.

_____

Barry, McTiernan & Moore, New York (Laurel A. Wedinger of counsel), for appellants.

Frekhtman & Associates, Brooklyn (Stephen J. Smith of counsel), for respondent.

_____

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered November 28, 2012, which granted plaintiff's motion to have his late notice of claim deemed timely served nunc pro tunc, unanimously affirmed, without costs.

The motion court did not improvidently exercise its discretion in granting plaintiff's motion, in this action where plaintiff alleges that he was injured when he tripped and fell on defendants' stairs. Although plaintiff did not provide a reasonable excuse for failing to timely serve the notice of claim, such failure, by itself, is not fatal to the motion (*see e.g. Weiss v City of New York*, 237 AD2d 212, 213 [1st Dept 1997]). Rather, the record demonstrates that there was a relatively short delay in the filing of the notice of claim, which provided actual notice of the accident within a reasonable

time after the 90-day period expired. Furthermore, defendants did not address plaintiff's showing that defendants would not be prejudiced because the condition of the steps had not changed since the accident (*see Matter of Mercado v City of New York*, 100 AD3d 445 [1st Dept 2012]; *Fredrickson v New York City Hous. Auth.*, 87 AD3d 425 [1st Dept 2011]).

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

ENTERED: JULY 3, 2014

DEPUTY CLERK

Gonzalez, P.J., Acosta, DeGrasse, Freedman, Richter, JJ.

12961N DTG Operations, Inc., doing business as Dollar Rent-A-Car, Plaintiff-Appellant, Index 110729/11

-against-

Excel Imaging, P.C., et al., Defendants,

Haar Orthopaedics and Sports Medicine, P.C., et al., Defendants-Respondents.

_____

Rubin, Fiorella & Friedman LLP, New York (Aaron F. Fishbein of counsel), for appellant.

Amos Weinberg, Great Neck, for respondents.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered May 22, 2013, which granted defendants-respondents' motion to vacate a default judgment against them, unanimously reversed, on the law, without costs, and the motion denied.

In this declaratory judgment action seeking a declaration that the medical provider defendants have no right to collect no-fault benefits for medical services allegedly provided to the claimant defendants, defendants-respondents failed to offer a reasonable excuse for their default and a meritorious defense (*see New Media Holding Co. LLC v Kagalovsky*, 97 AD3d 463, 465 [1st Dept 2012]). In support of their motion to vacate the default, defendants-respondents submitted, among other things,

the affidavit of their office and billing manager who stated that she "d[id] not recall" any court papers on this matter, but did not deny receiving any. She further stated that the office location had moved, but did not specify whether that move occurred before or after the date reflected in the affidavits of service. She further asserted that the "summons" did not provide any information from which to link this action to the claimant treated by defendants-respondents. However, the concise, 10-page complaint named defendants-respondents and claimants as defendants in the caption and plainly states that claimants sought medical treatment from defendants-respondents for which plaintiff sought a declaration that defendants-respondents were not entitled to reimbursement. Accordingly, defendants-respondents' excuses are unreasonable. Further, defendants-respondents' proffered defense, that the examinations under oath requested by plaintiff are improper, is contrary to law (*see* 11 NYCRR 65-1.1).

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

ENTERED: JULY 3, 2014

Margaret Sawal
DEPUTY CLERK

Mazzarelli, J.P., Acosta, Renwick, Freedman, Manzanet-Daniels, JJ.

11851 Selwyn N. Bartholomew, etc., Index 102272/10
Plaintiff-Respondent,

-against-

Ina Itzkovitz, M.D.,
Defendant-Appellant,

Manhattan's Physician Group, P.C.,
Defendant.

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Kaufman Borgeest & Ryan LLP, Valhalla (Jacqueline Mandell of counsel), for appellant.

Godosky & Gentile, P.C., New York (Robert Godosky of counsel), for respondent.

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Order, Supreme Court, New York County (Alice Schlesinger, J.), entered June 25, 2013, which denied the motion of defendant doctor for summary judgment dismissing the complaint as against her, affirmed, without costs.

In December 2008, the decedent was a 73-year-old man with a history significant for hypertension, hernia, hydrocele, arthritis and benign prostatic hyperplasia. He had undergone a transurethral resection of the prostate in 1998, and developed a deep vein thrombosis postsurgically, as a result of which a "bird's nest" filter was placed in the inferior vena cava (IVC) vein to prevent the formation of pulmonary emboli.

On September 22, 2008, the decedent presented to defendant

complaining of hematuria, or blood in the urine. Defendant formulated a differential diagnosis of infection, possible prostate malignancy, tumor, kidney stones or obstruction. She did not consider embolism or deep vein thrombosis as a diagnosis, nor did she consider the risk that the bird's nest filter had failed, although the risk of such failure, according to expert evidence, ran as high as 24%.

Defendant ordered tests, including a urinalysis, urine culture, urine cytology, complete blood count (CBC) and complete metabolic panel, a urology consult, and a sonogram of the kidney and bladder, which was scheduled for October 27, 2008. The urine culture was negative for the presence of bacteria; the urine cytology was negative for malignant cells, and the CBC was normal.

On October 11, 2008, the decedent returned to defendant, complaining of stiff legs, lower back pain, knee pain, and fatigue. He reported that the hematuria he had experienced on September 22 had cleared up within three days. Defendant found a small left hernia and "a very large, somewhat tense scrotal sac on the right." Once again, defendant attributed the decedent's complaints to prostate cancer without ruling out any other diagnoses, including life-threatening clots or the failure of the bird's nest filter.

Two days after the second visit, the decedent collapsed at home and could not be revived. The autopsy report determined that the cause of death was a retroperitoneal hemorrhage due to erosion through the inferior vena cava by a strut of the IVC filter.

Defendant doctor described the filter as "[a] device that would be placed in the inferior vena cava that would block any lower extremity clots from traveling to the lungs and causing a pulmonary embolism." She was aware that the filter had been placed in 1998, and that it was still in place when she was treating decedent in 2008. Defendant acknowledged that the decedent's medical history put him at increased risk of clots such as pulmonary emboli and deep vein thrombosis. She considered the history of pulmonary embolism significant enough to list it as a "chronic problem" in his medical chart, so "anyone who met him [would be aware of the] history of pulmonary embolism."

Defendant moved for summary judgment, asserting that her treatment of the decedent comported with good and accepted medical practice. She relied, inter alia, on the expert affirmations of Dr. Elias G. Sakalis, an internist, and Dr. Joshua L. Weintraub, a vascular radiologist. Dr. Sakalis opined that IVC filter erosion was an "exceedingly rare" complication,

occurring in 1-2% of cases, but offered no support for his statement. He opined that the decedent's normal hemoglobin and hematocrit on September 22nd "eliminat[ed] the possibility of anemia from internal bleeding," and that the decedent's prostate specific antigen (PSA) levels on that date were suggestive of metastatic prostate cancer, or at a minimum, prostatitis. Because filter erosion was "exceedingly rare," and the decedent's blood work normal, and because the decedent was not experiencing the primary symptoms of retroperitoneal bleeding, i.e., diffuse abdominal pain and distension, Dr. Sakalis opined that defendant had no reason to consider retroperitoneal bleeding from filter erosion as a possible diagnosis.

Dr. Sakalis similarly opined that none of the decedent's complaints, signs or symptoms on October 11, 2008 were indicative of internal bleeding, much less IVC filter erosion, noting that the decedent did not present with abdominal pain or distension, and that his vital signs were within normal limits. Dr. Sakalis opined that the decedent's complaints of back pain and stiff legs were unrelated to and not indicative of a problem with the IVC filter, noting that "[s]tiffness and back pain are among the most common complaints in the elderly population."

Dr. Weintraub opined that "filter penetration into adjacent structures occurs in less than 1% of patients." He acknowledged

that lower back pain and pain in the lower extremities "could be symptoms of a retroperitoneal bleed," yet maintained that the decedent did not present with any signs or symptoms that would have alerted defendant that "his bird's nest filter was migrating through his [i]nferior [v]ena [c]ava." Dr. Weintraub opined that the decedent's complaints were consistent with his known history of a hernia as well as the strong possibility that he was suffering from metastatic prostate cancer. Dr. Weintraub opined, in any event, that even if defendant had discerned that the filter had perforated the decedent's inferior vena cava, no treatment would have altered the patient's outcome since removal of the filter would have entailed an "enormous and extremely invasive surgical procedure that would have essentially required a re-routing of all of his major blood vessels."

Plaintiff opposed the motion, relying, inter alia, on the expert affirmations of a board certified surgeon and a physician board certified in internal medicine and geriatrics. Plaintiff's surgeon opined that defendant departed from good and accepted medical practice by failing to properly consider the decedent's prior medical and surgical history and failing to do a complete workup. He opined that "[s]pecifically, she did not consider the 1998 placement of an IVC filter in formulating an assessment or plan, and failed to consider it in her diagnosis." Plaintiff's

surgeon opined that the likelihood of a perforation of the inferior vena cava by filter struts was between 9 and 24%, not 1-2% as defendant's expert had stated, citing to an article in the Annals of Vascular Surgery. Plaintiff's surgeon opined that the decedent's complaints and medical history should have led defendant to include both a pulmonary embolism and a perforation of the vena cava by the filter in her differential diagnosis.

Plaintiff's surgeon explained that the decedent's symptoms of stiff legs and lower back pain were "classic signs and symptoms of occult retroperitoneal bleeding such as might be encountered with late filter strut perforation of the inferior vena cava and resultant slow leaking of blood into the retroperitoneal space located in the most posterior portion of the abdomen." He opined, citing to the medical literature, that the decedent's leg symptoms were "consistent with femoral neuropathy from pressure exerted by collecting blood on the femoral nerves."

Plaintiff's surgeon opined that the standard of care on September 22 and October 11, 2008 required defendant to order a STAT CT scan, which, he opined, to a reasonable degree of medical certainty, would have identified the problem and allowed for the decedent to undergo life-saving surgery. He disagreed with Dr. Weintraub regarding the feasibility of corrective surgery,

opining that prompt placement of a second filter, higher up, together with removal of the perforated filter and repair of the inferior vena cava, was not a prohibitively morbid procedure; and also noted that nonsurgical alternatives were available, including endovascular procedures.

He disagreed with Dr. Sakilis's statement that a patient with retroperitoneal bleeding would present with diffuse abdominal pain and distension, explaining that because such a bleed is contained in the limited space behind the abdominal peritoneal sac containing the solid organs and the GI tract, the rate of blood flow from the perforation would necessarily have been limited. Plaintiff's surgeon opined that the decedent's perforation was a gradual one which worsened over time, consistent with the decedent's normal hemoglobin and hematocrit levels at the September 22, 2008 visit. By the October 11 visit, the decedent had the classic presentation and findings of occult retroperitoneal bleed, i.e., lower back pain from pressure on his retroperitoneal nerves and stiff legs from femoral compressive neuropathy.

Plaintiff's surgeon explained that in patients on beta blockers, like the decedent, "a subtle decrease in systolic blood pressure may be all that is seen on vital signs as the blockers do not allow the normal physiologic response of tachycardia

(rapid heart rate) to bleeding and hypovolemia." He opined that the decedent's low systolic blood pressure, with normal pulse, was consistent with a bleeding patient on beta blockers.

Plaintiff's expert internist similarly opined that defendant's failure to consider other diagnoses and her failure to consider signs and symptoms necessitating further medical workup constituted departures from good and accepted medical practice.

The motion court denied defendant's motion for summary judgment dismissing the complaint, reasoning, inter alia, that defendant never considered the decedent's history, including insertion of the filter and the possibility that the filter might have failed or perforated a vessel, and that her focus on the decedent's prostate gland as the most likely culprit led her to fail to consider other possible diagnoses.

We agree, and now affirm. Assuming defendant's submissions make a prima facie case, plaintiff's opposition papers raise triable issues of fact concerning defendant's departures from good and accepted medical practice (*see Scalisi v Oberlander*, 96 AD3d 106 [1st Dept 2012]; *Costa v Columbia Presbyt. Med. Ctr.*, 105 AD3d 525 [1st Dept 2013]). Plaintiff's expert surgeon opined that defendant's failure to consider the risk of filter failure or the possibility of a clot in her differential diagnosis, in

light of the decedent's history and presentation, constituted a serious departure from good and accepted medical practice, and was a substantial factor in causing the ultimate demise of the decedent.

There is, on this record, a sharp dispute as to the likelihood of filter failure. Defendants' experts quantify the risk of such failure as 1%. Plaintiff's expert surgeon, citing the medical literature, opined that the rate of IVC filter erosion is between 9% and 24%. The conflicting expert reports raise a triable question of fact for the jury.

Plaintiff's and defendant's experts also disagree sharply on the treatment available to the decedent had the internal bleeding been detected earlier. While defendant's expert opined that treatment would have consisted of "watchful waiting," plaintiff's surgeon opines that timely surgery to stop the bleeding could have been accomplished with "minimum morbidity and mortality," and furthermore, that nonsurgical, endovascular options were available.

The concurrence dismisses plaintiff's experts' conclusions as "somewhat conclusory," yet engages in speculation itself by questioning whether the decedent, whom it characterizes as not a "totally compliant patient," would have declined to undergo surgery to correct his urgent internal bleeding.

Given the sharp factual disputes on the record, defendant's motion for summary judgment dismissing the complaint was correctly denied.

All concur except Freedman, J. who concurs in a separate memorandum as follows:

FREEDMAN, J. (concurring)

Although I agree with the IAS court that plaintiff's experts' opinions are "somewhat conclusory," I concur with the majority that the experts have raised a sufficient question of fact as to whether it was a departure not to consider filter failure or a clot as a diagnosis and to order an immediate investigation of decedent's complaints on October 11, 2008. I do note, however, that defendant doctor did schedule a sonogram on that date, albeit one to take place two weeks later. I also note that decedent arrived at defendant's office unaccompanied and in no apparent severe distress. His complaints of stiffness and knee pain, while as it turned out were indicative of IVC filter failure and bleeding, were also general and could have been attributed to a myriad of causes.

I further note that decedent had not been a totally compliant patient, having refused a prostate biopsy despite PSA levels that were indicative of prostate cancer and having refused surgical repair of a hydrocele and hernia. Thus, I question the likelihood that he would have undergone major surgery in a short time.

In short, defendant appears to have been a caring and thorough physician, who missed a diagnosis. Whether that is sufficient to constitute a departure from good and accepted medical practice is a question for the trier of fact.

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

ENTERED: JULY 3, 2014

DEPUTY CLERK

Tom, J.P., Friedman, Sweeny, Saxe, Freedman, JJ.

12032 In re Anthony J. Russo, Index 103000/12
Petitioner-Appellant,

-against-

New York City Department of Education,
Respondent-Respondent.

_____

Anthony J. Russo, appellant pro se.

Jeffrey D. Frriedlander, Acting Corporation Counsel, New York (Christina Chung of counsel), for respondent.

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Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered January 14, 2013, which, in this proceeding pursuant to Education Law § 3020-a(5) and CPLR 7511, to vacate an arbitration award finding petitioner guilty of incompetence and imposing a penalty of termination, denied the petition and granted respondent's cross motion to dismiss the petition, modified, on the law, to deny the cross motion, and to grant the petition to the extent of remanding the matter to respondent, New York City Department of Education (DOE), for imposition of a lesser penalty, and otherwise affirmed, without costs.

Petitioner was a licensed common branches and special education teacher and had been employed as such by respondent for more than 21 years when he was terminated in 2011. In 2005, he was assigned to PS/IS 377 in Brooklyn. He received satisfactory

ratings at that school for three years, as he had in his previous years as a teacher. In 2008-2009, petitioner was assigned to a self-contained special education class comprised of 12 students who were chronologically fourth, fifth, sixth, graders, but who were functioning at two and three years below grade level.

After 18 years of satisfactory ratings, in 2009, the principal of the school rated petitioner unsatisfactory. Petitioner asked to either be assigned to another class or be assigned an aide or assistant, as was the usual practice for classes of special education students, but neither request was granted. Petitioner was assigned the same class with the same group of students for three consecutive years, until the older students completed the eighth grade. Petitioner was rated as unsatisfactory all three years he taught this class based in part on his inability to control the classroom and his inability to plan and effectively execute certain lessons. While petitioner's requests to be assigned to a different class were repeatedly denied, various teachers and administrators purported to advise him as to how to improve his performance.

At the disciplinary hearing, petitioner's principal and several other witnesses testified as to petitioner's deficiencies in preparing his classroom, planning and implementing the curriculum, and managing the unruly students. Included among the

specified charges were allowing students to eat in the classroom, not adequately controlling disruptive behavior, and not engaging all of the students in the prescribed curriculum. Petitioner was criticized for failing to follow the Teacher's College Workshop Model lessons, even though the Workshop Model made no provisions for students with learning disabilities.

The Hearing Officer determined that petitioner was guilty of seven out of nine of the specified charges spanning a three-year period. While the Hearing Officer acknowledged that petitioner had attempted to improve his performance by working with a mentor and participating in the Peer Intervention Plus Program (PIP Plus), which involved the assignment of an impartial teacher to assist petitioner, the Hearing Officer deemed petitioner's performance to be unsatisfactory.

Petitioner avers that the remediation efforts were inadequate in that he never received organized or consistent lessons from his peers and that they usually consisted of rushed, disorganized, and informal hallway meetings. Petitioner also contends that the assistance he received from the assistant principals was uncoordinated and often contradictory. In one instance petitioner sought help designing a lesson from one assistant principal but when a different assistant principal observed the lesson that the first assistant principal had

prepared with petitioner, the second one rated it as unsatisfactory because the lesson failed to follow a specific structure established by written guidelines.

Petitioner also contends that the PIP Plus program was conducted in a haphazard and undirected manner, giving him little opportunity to improve his performance. Although the PIP Plus professional concluded that petitioner's performance was unsatisfactory in the core instructional responsibilities, the professional acknowledged that it was his first assignment as a PIP Plus consultant. It was also his first time testifying. According to petitioner, the consultant also testified that he had never held any supervisory position, failed to follow PIP Plus protocols, and failed to inquire as to what resources were available at the school to help petitioner. Despite the limited guidance that petitioner received through the program, the consultant testified and the Hearing Officer found that petitioner made progress in several areas, including reducing behavioral problems in the classroom.

Petitioner further argues that his unblemished 18 years as a teacher prior to the assignment at issue should have been considered. Petitioner points out that he did not begin receiving unsatisfactory evaluations until he was assigned the same special needs class starting in 2008 for three consecutive

years.

While we do not dispute the specific findings of the Hearing Officer concerning petitioner's deficiencies in the management of this one special education class, we find that under the circumstances presented here the penalty of termination shocks our sense of fairness (*see Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 234 [1974]).

While the dissent finds that petitioner had a "long-term pattern of inadequate performance," that "pattern" involves the same class from which petitioner sought a transfer. In actuality, petitioner had a lengthy unblemished record prior to being assigned that class, which consisted of students at their most difficult age. Petitioner asked for a transfer, and at least for an aide to be assigned. His requests were ignored and instead he was kept with the same students for three years without an aide, even though the principal found his ability to handle that specific group of students unsatisfactory. The dissent notes that petitioner's spotless record for the previous 18 years is not determinative, but it is still an important factor to be considered (*see Matter of Riley v City of New York*, 84 AD3d 442 [1st Dept 2011] [termination disproportionate where student was not injured and the petitioner had a 15-year

unblemished record]). Moreover, remediation efforts that were made proved unsuccessful at least in part because the advice given was neither consistent nor adequately targeted.

Although the dissent provides a litany of incidents in which petitioner failed to control the class, most of these incidents occurred in petitioner's first year with the class. The remainder of the incidents occurred the second year, and there were no incidents in the third year. Of the seven charges of which petitioner was found guilty, petitioner improved his management of the class so that the types of incidents underlying six of the charges did not recur in his final year with the class. His control of the class improved dramatically, as did the quality of his instruction and his compliance with DOE guidelines. The incident, of which petitioner was not aware, in which students were observing pornography on a computer in petitioner's classroom in the first year occurred because respondent's filters did not block the sites as petitioner had a right to expect. We note that all of petitioner's students were promoted after the 2008-2009 school year.

Respondent cites *Matter of Curtis v Black* (2012 NY Slip Op 30457[U] [Sup Ct, NY County 2012]) and *Matter of Ebewo v New York, City Dept. of Educ.* (2011 NY Slip Op 32384[U] [Sup Ct, NY County, 2011]) for the proposition that incompetence can be the

basis of termination. In *Curtis* the Hearing Officer determined that termination was necessary to ensure the students' safety because the teacher's courses involved dangerous tools and equipment. There is no evidence here that petitioner's continued employment would endanger the safety and well-being of his students. In *Ebewo* the Hearing Officer determined that the teacher should be terminated because he was incompetent and was not making any improvements. Here, the Hearing Officer, PIP Plus professional, and others found that petitioner was improving despite the substantial challenges that his students presented.

In conclusion, we reiterate that it is troubling to see respondent's apparent determination to terminate petitioner, a 21-year veteran with 18 years of satisfactory ratings, because of his difficulty with one class in which he was kept for three years.

Accordingly, we find the Hearing Officer's decision to dismiss the teacher to be manifestly disproportionate to petitioner's conduct and remand the matter for the imposition of a lesser penalty.

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

SWEENY, J. (dissenting)

The majority agrees that the Hearing Officer's determination that petitioner was guilty of the seven specified charges spanning a three-year period, was supported by adequate evidence (*see Lackow v Department of Educ. [or "Board"] of City of N.Y.*, 51 AD3d 563, 567 [1st Dept 2008]). However, because they find that the Hearing Officer's recommendation of termination as a penalty for those offenses is disproportionate and remand for consideration of a lesser penalty, I must dissent.

The majority credits petitioner's assertion that the assistance given to him by his supervisors and colleagues was inadequate. The record reveals however, that petitioner appealed his unsatisfactory ratings for school years 2008-2009 and 2009-2010 and those appeals were denied. Petitioner received 14 observations from his principal and assistant principals containing recommendations for the improvement of his performance. The school's administration also prepared three different "Plans of Assistance" for him each year after he was warned that he was in danger of receiving an unsatisfactory rating. His principal recommended that petitioner participate in the Peer Intervention Plus Program, and a mentor was assigned to work with petitioner.

The majority minimizes the nature and extent of

petitioner's shortcomings. The charges that were sustained by the Hearing Officer, and not disputed by the majority, involved more than simply an inability to control his classroom in the face of a difficult group of students. They include allegations of neglect and disregard for student health, safety and well-being, failing to timely and/or properly manage his classroom, failing to properly and/or adequately engage students in instruction, failure to attend mandated faculty meetings, failure to properly, adequately and/or effectively plan and/or execute lessons, failure to timely, properly, adequately and/or effectively update, draft and/or implement his students' Individualized Educational Plans (IEPs), and failure to implement professional development recommendations. Significantly, petitioner did not dispute some of the more serious charges made by respondent. For example, he did not testify regarding two incidents where students were entering and leaving the classroom without permission and where students were rolling around on the floor. Nor did he testify regarding the allegation that he took no action when students were observed by another teacher viewing pornographic material on a school computer, as well as an allegation that he failed to prepare his classroom properly because it lacked, among other things, bulletin boards, charts, information about reading and writing, and a daily schedule.

With respect to the other charges, the Hearing Officer found more than adequate testimony, supported by contemporaneous records, to sustain those charges. Additionally, despite petitioner's claims to the contrary, the Hearing Officer found that his colleagues repeatedly entered his classroom to assist with student instruction, control student behavior, model lessons for him, and assist him with IEPs. The record does not support petitioner's claims that these remediation efforts were, as the majority finds, "neither consistent nor adequately targeted." In fact, the Hearing Officer's findings were supported by evidence which showed, among other things, that petitioner received observations, both formal and informal, beyond the required amount, which served to provide him with guidance and feedback as to his performance, as well as suggestions for improvement. Importantly, he participated in pre-observation conferences during which he was advised of his supervisors' expectations.

The Hearing Officer's credibility findings in favor of respondent's witnesses are entitled to deference and neither petitioner nor the majority has advanced any reason to disturb those findings (*Matter of Colon v City of N. Y. Dept. of Educ.*, 94 AD3d 568 [1st Dept 2012]; *Matter of Douglas v New York City Bd./Dept. of Educ.*, 87 AD3d 856, 857 [1st Dept 2011]).

In determining the appropriate penalty, the Hearing Officer

properly considered, at petitioner's request, the efforts that respondent made to provide remediation, and his conclusion that those efforts were adequate is supported by the record. Petitioner received feedback and suggestions for improvement through observation reports and pre-observation conferences, plans of assistance and support from his colleagues, and he participated in the Peer Intervention Plus program (*see* Education Law § 3020-a[4]).

The standard for reviewing a penalty imposed after a hearing pursuant to Education Law § 3020-a is whether the punishment of dismissal was so disproportionate to the offenses as to be shocking to the court's sense of fairness (*Matter of Harris v Mechanicville Cent. School Dist.*, 45 NY2d 279, 285 [1978]; *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 233 [1974]). Contrary to the majority's conclusion, the record here supports the Hearing Officer's determination that termination is appropriate.

While it is true that petitioner has an unblemished record prior to the 2008-2009 school year, that factor alone is not determinative (*see e.g. Matter of Ajeleye V New York City Dept. of Educ.*, 112 AD3d 425, 425-426 [1st Dept 2013] [termination "does not shock one's sense of fairness" where the petitioner was

found guilty of insubordination, neglect of duty and conduct unbecoming his position, after a 14 year unblemished record]). In light of the Hearing Officer's findings of a long-term pattern of inadequate performance by petitioner and that sufficient attempts at remediation had been unsuccessful, the penalty of termination is not disproportionate to the offenses (*see Lackow*, 51 AD3d at 569). "That reasonable minds might disagree over what the proper penalty should have been does not provide a basis for vacating the arbitral award or refashioning the penalty" (*City School Dist. of the City of N. Y. v McGraham*, 17 NY3d 917, 920 [2011]).

I would therefore affirm the order and confirm the arbitration award.

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

ENTERED: JULY 3, 2014

DEPUTY CLERK

Sweeny, J.P., Acosta, Saxe, Manzanet-Daniels, Clark, JJ.

12315 Paul DeSimone, Index 22656/05
Plaintiff-Appellant-Respondent, 85888/07

Joann DeSimone,
Plaintiff,

-against-

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

A.J. McNulty & Company, Inc.,
Defendant,

Hugh O'Kane Electric Co. LLC,
Defendant-Respondent-Appellant.

[And a Third-Party Action]

_____

Louis A. Badolado, Roslyn Harbor, for appellant-respondent.

Wade Clark Mulcahy, New York (Gabriel Darwick of counsel), for respondent-appellant.

Dopf, P.C., New York (Martin B. Adams of counsel), for The City of New York, The Dormitory Authority of The State of New York and Bovis Lend Lease LMB, Inc., respondents.

Rende, Ryan & Downes, LLP, White Plains (Roland T. Koke of counsel), for Maximum Security Products Corp, respondent.

Faust, Goetz, Schenker & Blee, LLP, New York (Peter Kreymer of counsel), for Danco Electrical Contractor, Inc., respondent.

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Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered January 4, 2013, which, insofar as appealed from as limited by the briefs, granted defendants' motions for summary judgment

dismissing plaintiff Paul DeSimone's Labor Law § 241(6) claim, granted the motions of Maximum Security Products Corp., doing business as Hillside Iron Works Corp. (Hillside), and Danco Electrical Contractor, Inc. (Danco) for summary judgment dismissing the common-law negligence claims against them, denied plaintiff's cross motion to submit an expert disclosure pursuant to CPLR 3101(d)(1)(i), and conditionally granted the motion of defendants Dormitory Authority of the State of New York (DASNY) and Bovis Lend Lease LMB, Inc. (Bovis) for contractual indemnification against defendant Hugh O'Kane Electric Co. LLC (O'Kane), unanimously modified, on the law, to reinstate the Labor Law § 241(6) claim except as against defendant the City of New York, and otherwise affirmed, without costs.

The court dismissed the claim as against the City in view of plaintiff's lack of opposition to its motion for summary judgment, and plaintiff does not present any basis to reverse this determination.

The court providently exercised its discretion in denying plaintiff's cross motion to submit a disclosure of his expert professional engineer, since it was first submitted in opposition to defendants' motions for summary judgment dismissing the complaint, and subsequent to the filing of the note of issue and certificate of readiness (*see Garcia v City of New York*, 98 AD3d

857, 858-859 [1st Dept 2012]).

Plaintiff's Labor Law § 241(6) claim was improperly dismissed on the ground that plaintiff was not covered under the statute. Plaintiff testified that he was an onsite project manager, employed by one of multiple general contractors on the subject construction project, whose job pertained to financial issues such as billing of subcontractors and revenue projections for the project. He testified that he tripped and fell in a vestibule he was walking through, intending to conduct a visual inspection of a condition alleged by O'Kane to support a back charge for "additional work," in order to determine whether this claim was substantiated. Thus, plaintiff was not merely working in a building that happened to be under construction (*cf. Coombs v Izzo Gen. Contr., Inc.*, 49 AD3d 468 [1st Dept 2008]). Rather, his job duties, including the inspection he was conducting at the time of the accident, were contemporaneous with and related to ongoing work on the construction project (*see Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 881 [2003]). Thus, plaintiff was covered under the statute even though he did not perform the "labor-intense aspects of the project" (*id.*).

The court properly dismissed plaintiff's common-law negligence and Labor Law § 200 claims against defendants Hillside and Danco. Plaintiff seeks to hold Hillside liable for the

placement of steel handrails in an area of the fifth floor of the subject building, causing him to trip over them. He seeks to hold Danco liable for inadequate temporary lighting in the area. However, both of these defendants met their burden by submitting evidence showing that they had no "authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" (*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317 [1981]; *see Jehle v Adams Hotel Assoc.*, 264 AD2d 354, 355 [1st Dept 1999]). The deposition testimony of project managers for Hillside and third-party defendant PII, LLC established that Hillside, a steel subcontractor, merely manufactured steel handrails and delivered them in a truck, which a Hillside driver would park outside the building as PII employees unloaded them. The remaining work to be done with these products, including their placement and storage in the building, was delegated by Hillside to PII pursuant to their subcontract.

Similarly, Danco met its burden by submitting testimony and documentary evidence indicating that it was retained by O'Kane, the prime electrical contractor, merely to perform the initial installation of temporary lighting, which was completed on the fifth floor well before the accident occurred. According to the relevant testimony, Danco had no continuing responsibility for

maintaining or replacing the temporary lighting. Plaintiff is correct that the court improperly excluded some of his submissions in opposition to Danco's motion. He relies on alleged business records of DASNY, the owner, referring to Danco's work repairing damaged wires on the fifth floor nine days before the accident, and on nearby floors on the subsequent days leading up to and including the accident. Although these records were admissible under the "party admission" exception to the hearsay rule (*see K&K Enters. Inc. v Stemcor USA Inc.*, 100 AD3d 415, 415-416 [1st Dept 2012]), there is no indication that any such repairs were connected to the temporary lighting; Danco also performed work on the building's fire alarm system. Plaintiff also testified that he heard the site safety manager for defendant Bovis, the general contractor or construction manager, discussing a power outage on the fifth floor and instructing electricians to fix it immediately. This testimony was admissible under the "principal/agent admission" exception to the hearsay rule (*Navedo v 250 Willis Ave. Supermarket*, 290 AD2d 246 [1st Dept 2002]). However, this evidence failed to raise an issue of fact as to whether Danco breached a duty to maintain or repair the temporary lighting.

The court properly conditionally granted summary judgment in favor of DASNY and Bovis's contractual indemnification claim

against O'Kane. The relevant provision of the contract between DASNY and O'Kane broadly required O'Kane to indemnify DASNY and Bovis for any injuries "caused by, resulting from, arising out of, or occurring in connection with the execution of the Work." It is uncontested that plaintiff's injuries were caused by or occurred in connection with O'Kane's work. Moreover, the indemnification provision precludes DASNY and Bovis from obtaining indemnification for their own negligence, if any. Under these circumstances, notwithstanding the pending negligence claims against DASNY and Bovis, the court properly granted conditional contractual indemnification (*see Burton v CW Equities, LLC*, 97 AD3d 462 [1st Dept 2012]; *Hughey v RHM-88, LLC*, 77 AD3d 520, 522-523 [1st Dept 2010]).

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

ENTERED: JULY 3, 2014

Margaret Sarah
DEPUTY CLERK

Sweeny, J.P., Acosta, Saxe, Manzanet-Daniels, Clark, JJ.

12318 Irene Boateng, Index 16620/07
Plaintiff-Appellant,

-against-

Ye Yiyan, et al.,
Defendants-Respondents.

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Lawrence S. Hyman, Kew Gardens, for appellant.

Cheven, Keely & Hatzis, Esqs., New York (William B. Stock of counsel), for Ye Yiyan and Cheng Ping, respondents.

Marjorie E. Bornes, Brooklyn, for Juan Dume, respondent.

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Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered March 26, 2012, which granted the motions of defendant Juan Dume and defendants Ye Yiyan and Chen Ping for summary judgment dismissing the complaint on the threshold issue of serious injury within the meaning of Insurance Law § 5102(d), unanimously modified, on the law, the motions denied as to plaintiff's serious injury claims, the matter remanded for further proceedings, including disposition of that branch of defendant Dume's motion that sought summary judgment on the issue of his liability, and otherwise affirmed, without costs.

Preliminarily, plaintiff waived her argument that defendant Dume was not entitled to move for summary judgment because he had not filed an answer, by joining in his application for leave to

interpose a late answer. Her acquiescence in his request avoided the possibility that his alternate request, that the court dismiss the complaint against him as abandoned (CPLR 3215[c]), would be granted.

Defendants made a prima facie showing that plaintiff did not suffer a serious injury involving a permanent consequential or significant limitation in use of her cervical spine or any other claimed body part by submitting expert medical reports finding normal ranges of motion in those body parts (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350, 352 [2002]; *Vega v MTA Bus Co.*, 96 AD3d 506 [1st Dept 2012]). In opposition, plaintiff raised a triable issue of fact as to whether she sustained a permanent consequential or significant limitation of use of any body part. The affirmed report of plaintiff's physician was admissible, even though relying in part on unsworn contemporaneous MRI reports and medical evaluations (*see Byong Yol Yi v Canela*, 70 AD3d 584 [1st Dept 2010]; *Rivera v Super Star Leasing, Inc.*, 57 AD3d 288, 288 [1st Dept 2008]). The MRI reports and evaluations may be considered for the further reason that they were reviewed by defendants' experts in preparing their reports (*see Johnson v KS Transp., Inc.*, 115 AD3d 425 [1st Dept 2014]).

Defendants failed to make a prima facie showing that

plaintiff did not sustain a medically determined injury of a nonpermanent nature that prevented her from performing substantially all of her customary and daily activities for 90 of the 180 days immediately following the accident (*see Delgado v Papert Tr., Inc.*, 93 AD3d 457 [1st Dept 2012]). Defendants' physicians' examinations took place well after the relevant 180-day period, and defendants submitted no other evidence disproving plaintiff's claim that she was disabled and unable to return to her work as a hotel chamber maid for six months following the accident due to a medically determined injury caused by the accident (*see Jeffers v Style Tr. Inc.*, 99 AD3d 576 [1st Dept 2012]; *Quinones v Ksieniewicz*, 80 AD3d 506, 506-507 [1st Dept 2011]). In light of defendants' failure to meet their initial burden on the 90/180-day claim, plaintiff's proof need not be reviewed (*see Jeffers* at 577-578). If plaintiff ultimately prevails on her 90/180-day claim, she will be entitled to recover damages for all her injuries proximately caused by the accident (*Martinez v Goldmag Hacking Corp.*, 95 AD3d 682 [1st Dept 2012]; *Rubin v SMS Taxi Corp.*, 71 AD3d 548 [1st Dept 2010]).

Because the motion court denied, as moot, the branch of defendant Dume's motion for summary judgment dismissing the complaint and all cross claims on the ground that he was not

liable for the underlying vehicular collision here, the matter is remanded for disposition of that branch of his motion (*see Rivera v Berrios Trans Serv. Inc.*, 64 AD3d 416 [1st Dept 2009]).

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

ENTERED: JULY 3, 2014

DEPUTY CLERK

Sweeny, J.P., Renwick, Saxe, Freedman, Richter, JJ.

12448 The People of the State of New York, Ind. 1203/09
Respondent,

-against-

Kevin Fisher,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of The Appellate Defender, New York (Samantha L. Stern of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Karinna M. Rossi of counsel), for respondent.

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Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered March 14, 2011, convicting defendant, upon his plea of guilty, of hindering prosecution in the second degree, and sentencing him, as a second felony offender, to a term of 1½ to 3 three years, affirmed.

This appeal stems from defendant's 2009 indictment for hindering prosecution in the first degree and criminal possession of a weapon in the third degree. The hindering prosecution count alleged that defendant "rendered criminal assistance to Clovis Roche who had committed a class A felony, to wit, Murder in the Second Degree, knowing and believing that such person had engaged in conduct constituting Murder in the Second Degree." By the same indictment, codefendant Roche was charged with murder in the second degree and two counts of criminal possession of a weapon

in the second degree.

In sum and substance, the People alleged that on January 28, 2009, Rodney Lewis, and three other men, including Lewis's brother, Richard Lamar, went to Roche's apartment to retrieve a television that belonged to Lewis's cousin. Roche did not want Lewis to take the television and a fight ensued, during which Roche shot Lewis with a gun he had earlier received from defendant. After the shooting, defendant took the gun, which was never recovered, and he and Roche fled the apartment. Lewis died at the hospital a short time later.

On July 16, 2010, on the eve of trial, defendant pleaded guilty to the lesser included offense of hindering prosecution in the second degree, in exchange for a promised sentence of 1 1/2 to 3 years. Notably, before pleading guilty, defendant received *Brady* material that consisted of notes from Detectives Melino and Purcell indicating that Lamar had told Melino and Purcell that he had not witnessed the shooting because he was on a different floor smoking a cigarette. In pleading guilty, defendant admitted that he "rendered criminal assistance to Clovis Roche who had committed a class A felony, to wit, murder in the second degree, knowing and believing that such person had engaged in conduct constituting murder in the second degree."

Roche proceeded to a trial at which Lamar, the victim's

brother, was the prosecution's main witness. Lamar testified that he saw Roche shoot Lewis and that he told the detectives so when interviewed after the shooting. He denied telling the detectives that he did not actually see the shooting. Detective Melino testified that Lamar had told her that he did not see the shooting.

On the evening after Lamar and Melino testified, an Assistant District Attorney discovered handwritten notes he had taken during an interview with Lamar. The People disclosed that they had unintentionally failed to turn over these notes to defendant. The notes consisted of a series of "blurbs" summarizing statements by Lamar during his interview with the prosecutor. For example the notes stated that "1 wk b/f" someone "had been robbed" and that Roche "had been hit in head." The notes also said, "crack head at door," "guys from E. River rushed in," and that Lamar saw Roche "bleeding from."

With regard to the January 28, 2009 shooting incident that resulted in Lewis's death, the notes indicated that Lamar was "unsure," "saw punch thrown," and that when Roche "start[ed] pulling out gun," Lewis "grabbed gun." After reviewing the notes, the court found – and defense counsel and the prosecutor agreed – that the notes constituted *Rosario* material as to Roche, but not *Brady* material.

Roche testified in his own behalf that he did not intend to shoot Lewis, but that he shot him by accident as the pair struggled over the gun. Even though Roche did not claim that he had shot Lewis in self-defense, defense counsel asked the court, in the alternative, to charge the jury on self-defense, and the court did so. On or about July 27, 2010, before defendant's sentencing had been scheduled, the jury acquitted Roche of all felony charges, and convicted him of criminal possession of a weapon in the fourth degree.

In August 2010, after Roche's acquittal, but prior to defendant's sentencing, defendant moved to withdraw his guilty plea pursuant to CPL 220.60(3). He argued that the People's failure to provide him with the belatedly disclosed notes, which reflected the Assistant District Attorney's interview with Lamar, was a *Brady* violation that undermined the voluntariness of his plea. In the alternative, defendant argued that he should be allowed to withdraw his plea based on Roche's acquittal of the felony charges. Defendant reasoned that because the crime of hindering prosecution "require[d] that the principal be guilty of a felony," Roche's acquittal rendered him innocent of hindering prosecution. The court denied defendant's motion to withdraw his plea, explaining that the notes did not constitute *Brady* material, and that Roche's acquittal of second-degree

murder did not present a legal impediment to defendant's guilty plea.

We find that the court properly exercised its discretion in denying defendant's motion to withdraw his guilty plea (*see generally People v Frederick*, 45 NY2d 520, 525 [1978]). "The established rule is that a guilty plea will be upheld as valid if it was entered voluntarily, knowingly and intelligently" (*People v Fiumefreddo*, 82 NY2d 536, 543 [1993]). "A defendant is not entitled to withdraw his guilty plea based on a subsequent unsupported claim of innocence, where the guilty plea was voluntarily made with the advice of counsel following an appraisal of all the relevant factors" (*People v Dixon*, 29 NY2d 55, 57 [1971]).

Here, the plea colloquy reveals that defendant knowingly and voluntarily admitted the factual allegations of the crime, namely that he rendered criminal assistance to Clovis Roche while knowing and believing that Roche had engaged in conduct constituting murder in the second degree. At no time, during his allocution or at any other time, did defendant make any protest of innocence.

Defendant's subsequent claim of innocence arising out of codefendant Roche's acquittal at trial must be rejected because a person may validly plead guilty to hindering prosecution in the

first degree without knowing whether or not the assisted person will be convicted of the underlying felony at the subsequent trial. Indeed, as the Court of Appeals has noted, the hindering prosecution statute does not require proof that the assisted person was ever arrested or convicted of the underlying felony (*see People v Chico*, 90 NY2d 585, 588 [1977]).

Nor do we find any merit to defendant's allegations that the belatedly disclosed notes would have affected his decision to plead guilty rather than proceed to trial. We reject defendant's argument that the previously undisclosed witness interview notes tended to exculpate Roche, and were thus exculpatory of defendant because of the requirement of proof of the assisted person's commission of an underlying felony. On the contrary, we conclude that these notes had little or no exculpatory value, and that they were essentially inculpatory of Roche. Accordingly, we find that there was no *Brady* violation, and that in any event, the nondisclosure could not have materially affected defendant's decision to plead guilty (*see People v Martin*, 240 AD2d 5, 8-9

[1st Dept 1998], *lv denied* 92 NY2d 856 [1998]), notwithstanding his assertion to the contrary.

All concur except Saxe, J. who concurs in result only.

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

ENTERED: JULY 3, 2014

DEPUTY CLERK

Acosta, J.P., DeGrasse, Richter, Manzanet-Daniels, Feinman, JJ.

12743 In re Margaret Dillin, Index 100575/13
Petitioner-Respondent-
Appellant,

-against-

Waterfront Commission of
New York Harbor,
Respondent-Appellant-
Respondent.

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Phoebe S. Sorial, New York, for appellant-respondent.

Kantor, Davidoff, Mandelker, Twomey, Gallanty & Olenick, P.C., New York (Matthew C. Kesten of counsel), for respondent-appellant.

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Order and judgment (one paper), Supreme Court, New York County (Alice Schlesinger, J.), entered August 21, 2013, which granted the petition to the extent of annulling the determination of the Waterfront Commission of New York Harbor (Commission) revoking petitioner's longshoreman's registration, effective December 18, 2012, and remanded to the Commission for further proceedings before a different administrative law judge and a new determination consistent with the terms of the court's decision, unanimously reversed, on the law, without costs, the order and judgment vacated, the petition treated as one transferred to this court for de novo review, and, upon such review, the determination of the Commission confirmed, the petition denied

and the proceeding brought pursuant to CPLR article 78 dismissed.

Since the petition raises an issue of substantial evidence, in the absence of "other objections as could terminate the proceeding" (CPLR 7804[g]), "the proceeding should have been transferred to this Court pursuant to CPLR 7804(g)" (*Matter of Cruz v New York City Hous. Auth.*, 106 AD3d 631, 631 [1st Dept 2013]).

The finding that petitioner violated a prohibition against association with an identified member of an organized crime family is supported by substantial evidence. This prohibition was imposed by, inter alia, a federal court order (*United States v ILA Local 1588*, 2003 WL 221851, 2003 US Dist LEXIS 1229 [SD NY, Jan. 30, 2003], *affd* 77 Fed Appx 542 [2d Cir 2003]), pursuant to a provision of the Waterfront and Airport Commission Act (WCA) (McKinney's Unconsolidated Laws of NY § 9801, *et seq.* [L 1953, ch 882]) prohibiting such association under circumstances rendering a person's continued participation in any activities requiring registration pursuant to the WCA to be "inimical to the policies of" the WCA (Uncons Laws § 9913[6]). The policies of the WCA include countering organized crime and corruption which have been found to be endemic in waterfront labor practices (*see generally Matter of CC Lbr. Co. v Waterfront Commn. of N.Y. Harbor*, 31 NY2d 350, 358 [1972]; Uncons Laws § 9802).

In this case, there was testimony that petitioner attended two parties that were also attended by an associate of an organized crime group. The parties were hosted by the crime associate's son, who invited petitioner (*see Matter of Beneky v Waterfront Commn. of N.Y. Harbor*, 42 NY2d 920, 921 [1977], *cert denied* 434 US 940 [1977]). There was sufficient evidence to refute petitioner's claim that her attendance at the same parties as the person in question was accidental or inadvertent. Petitioner also admitted to making remarks to coworkers about being "best friends" with this person and "hanging out" with him, and insofar as petitioner suggested that she was not serious about such remarks, the ALJ was not required to credit her testimony (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]).

When a court finds an agency's determination to be supported by substantial evidence, the court should not upset the penalty imposed unless it is "so disproportionate to the offense . . . as to be shocking to one's sense of fairness" (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 233 [1974] [internal quotation marks omitted]). Here, we find that the penalty of revocation of petitioner's registration does not shock one's sense of fairness. By associating with individuals

with connections to organized crime and boasting about such associations to other longshoremen, petitioner engaged in conduct which potentially undermines the Commission's continuing efforts to ensure public safety by reducing corruption on the waterfront.

Additionally, petitioner does not have a perfect record [*contra Matter of McDougall v Scoppetta*, 76 AD3d 338, 342-343 [2d Dept 2010] [dismissal of firefighter for an isolated incident, where he had an otherwise unblemished record, shocked one's sense of fairness]). Previously, petitioner was suspended by the Commission for 15 days for filing a false application for longshoreman registration. On her application, petitioner failed to disclose two arrests and falsely stated that she attended high school. Petitioner was also previously found guilty of theft by deception for continuing to receive food stamps after she had

become ineligible. In light of petitioner's behavior in connection with the instant misconduct and on previous occasions, revocation of petitioner's registration does not shock our sense of fairness.

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

ENTERED: JULY 3, 2014

DEPUTY CLERK

Friedman, J.P., Sweeny, Andrias, Saxe, Kapnick, JJ.

12915 Thomas Toth, Index 102132/12
Plaintiff-Appellant,

-against-

New York City Department of
Citywide Administrative Services,
Defendant-Respondent.

_____

Kreisberg & Maitland, LLP, New York (Jeffrey L. Kreisberg of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Jonathan A. Popolow of counsel), for respondent.

_____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered May 29, 2013, which granted defendant's motion to dismiss the complaint, unanimously affirmed, without costs.

Construing the complaint liberally, presuming its factual allegations to be true, and according the complaint the benefit of every possible favorable inference (*see Vig v New York Hairspray Co., L.P.*, 67 AD3d 140, 144-145 [1st Dept 2009]*; 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]), plaintiff has not adequately pled or established a recognized disability under either the State or City Human Rights Law (HRL) (see Executive Law § 292 (21); Administrative Code of City of NY § 8-102 (16)(b)). His medical proof only established that he was extremely anxious and stressed because of his

daughter's medical condition. Plaintiff also failed to adequately plead discriminatory animus which is fatal to his discrimination claims under the State and City HRL (*see Matter of McEniry v Landi*, 84 NY2d 554, 558 [1994]).

We note that defendant agency is not a proper party (see NY City Charter § 396).

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

ENTERED: JULY 3, 2014

Margaret Saval
DEPUTY CLERK

Friedman, J.P., Sweeny, Andrias, Saxe, Kapnick, JJ.

12916 John R. Gochberg, et al., Index 652382/12
Plaintiffs-Appellants,

-against-

Sovereign Apartments, Inc., et al.,
Defendants-Respondents.

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Storch Amini & Munves PC, New York (Jason Levin of counsel), for appellants.

Cantor, Epstein & Mazzola, LLP, New York (Gary Ehrlich of counsel), for respondents.

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Order, Supreme Court, New York County (Anil C. Singh, J.), entered April 10, 2013, which granted defendants Alan Kersh and Paul Bloom's (defendants) motion to dismiss the fifth cause of action pursuant to CPLR 3211(a)(7), unanimously reversed, on the law, without costs, and the motion denied.

Since the fifth cause of action (breach of fiduciary duty) is a tort – not a contract – claim, plaintiffs are not required to allege that defendants' actions were taken in their individual capacity instead of as directors of defendant Sovereign Apartments, Inc. (SAI) (*see Fletcher v Dakota, Inc.*, 99 AD3d 43, 49 [1st Dept 2012]). Contrary to defendants' contention, plaintiffs' breach of fiduciary duty claim is not a breach of contract claim in disguise. Unlike *Brasseur v Speranza* (21 AD3d 297 [1st Dept 2005]), on which defendants rely, the complaint in

the instant action alleges that individual board members "breached a duty other than, and independent of, those contractually imposed upon the board" (*id.* at 298). In particular, it alleges that defendants interfered with plaintiff John Gochberg's contract with nonparty EMSL Analytical Inc. by surreptitiously inducing EMSL to send to the board, rather than Mr. Gochberg, the results of the testing for which Mr. Gochberg had contracted. Such interference, if proven, would constitute a tortious act of affirmative malfeasance for which a board member, if proven personally to have committed it or to have caused its commission, would be subject to personal liability. Further, whether the business judgment rule protects defendants' actions cannot be determined as a matter of law on the pleadings since defendants' alleged action in going behind Mr. Gochberg's back to have EMSL's analysis delivered to SAI instead of Mr. Gochberg smacks of bad faith (*Ackerman v 305 E. 40th Owners Corp.*, 189 AD2d 665, 667 [1st Dept 1993]).

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

ENTERED: JULY 3, 2014

Margaret Sowal
DEPUTY CLERK

Friedman, J.P., Sweeny, Andrias, Saxe, Kapnick, JJ.

12917 The People of the State of New York, Ind. 1562/11
Respondent,

-against-

Melvin Swint,
Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Ramandeep Singh of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Doris M. Gonzalez, J.), rendered on or about November 21, 2011,

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.

ENTERED: JULY 3, 2014

DEPUTY CLERK

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

Friedman, J.P., Sweeny, Andrias, Saxe, Kapnick, JJ.

12918- Valentin Sixto Castillo Gonzalez, Index 20712/12
12918A Plaintiff-Appellant, 20508/12

-against-

Fidelity and Deposit Company of Maryland, et al.,
Defendants,

Galaxy G.C. Group, LLC, etc.,
Defendant-Respondent.

- - - - -

Patricio Marquez, et al.,
Plaintiffs-Appellants,

-against-

Fidelity and Deposit Company of Maryland, et al.,
Defendants,

Galaxy G.C. Group, LLC, etc.,
Defendant-Respondent.

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Law Offices of William Cafaro, New York (Bill Cafaro of counsel), for appellants.

Farrell Fritz, P.C., Uniondale (Heather P. Harrison of counsel), for respondent.

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Orders, Supreme Court, Bronx County (Alexander W. Hunter, Jr., J.), entered April 5, 2013, and on or about April 5, 2013, which granted defendant Galaxy G.C. Group, LLC's (Galaxy) motions to dismiss the complaints insofar as asserted against it, and denied plaintiffs' respective cross motions for leave to amend the complaints, unanimously affirmed, without costs.

The court properly granted defendant Galaxy's motions to dismiss the initial complaints, as those pleadings failed to allege facts sufficient to show that plaintiffs were the intended third-party beneficiaries of any wage and benefits provisions set forth in the general contract (*see Oursler v Women's Interart Ctr.*, 170 AD2d 407 [1st Dept 1991]; *Alicea v City of New York*, 145 AD2d 315, 317-318 [1st Dept 1988]). Because the proposed amended complaints suffer from the same deficiencies, the court also properly denied leave to amend (*see Davis & Davis v Morson*, 286 AD2d 584, 585 [1st Dept 2001]).

We do not consider plaintiff's arguments under the Davis-Bacon act since they were raised for the first time on appeal.

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

ENTERED: JULY 3, 2014

DEPUTY CLERK

Friedman, J.P., Sweeny, Andrias, Saxe, Kapnick, JJ.

12919 Avail Shipping, Inc., et al. Index 600112/09
Plaintiffs,

Bhupinder Grewal, doing
business as United Shipping
Solutions, et al.,
Plaintiffs-Respondents,

Shero Shipping, LLC, doing
business as United Shipping
Solutions, et al.,
Plaintiffs-Intervenors,

-against-

DHL Express (USA), Inc.,
Defendant-Appellant.

_____

Dechert LLP, Los Angeles, CA (Christopher S. Ruhland, of the Bar of the State of California, admitted pro hac vice, of counsel), for appellant.

K&L Gates LLP, Boston, MA (Steven P. Wright, of the Bar of the State of Maine and the State of Massachusetts, admitted pro hac vice, of counsel), for respondents.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered August 21, 2013, which denied defendant's motion for summary judgment dismissing the first cause of action for breach of contract, unanimously affirmed, without costs.

Defendant, a global shipping company that sells its services to "resellers" that negotiate shipping rates with it and then resell the shipping services to their customers at higher rates, entered into a Reseller Agreement with USS Logistics, LLC in

January 2003. Plaintiffs are franchisees or former franchisees of United States Shipping Solutions, LLC, an affiliate of USS Logistics, LLC. Pursuant to the agreement, which is governed by California law, defendant agreed to provide "Services," defined as, inter alia, "domestic door-to-door air express services for documents and/or packages or freight being sent to various locations throughout the United States." More specifically, the agreement requires defendant "to provide Services to RESELLER['s] customers to fulfill RESELLER['s] customers' needs for Services." It further provides that "Shipments will originate at RESELLER['s] customers' locations at which DHL regularly provides collection service with its own personnel and will be delivered to any destination regularly serviced by DHL or its designated agents." In 2006, the agreement was extended to January 29, 2015.

In November 2008, defendant announced that it was discontinuing domestic U.S. service as of January 30, 2009. Subsequently, but prior to January 30, 2009, defendant eliminated drop boxes and guaranteed delivery times, invalidated plaintiffs' customers' account numbers and required them to pay cash for deliveries, and allegedly took other steps to end domestic service. Thereafter, plaintiffs commenced this action for breach of contract.

Defendant moved for summary judgment, arguing that nothing in the contract requires it to maintain domestic shipping services throughout the term of the agreement. Rather, it maintains, it is only obligated to pick up packages where it "regularly provides" domestic collection and delivery. Contrary to defendant's argument, the contract explicitly states that "DHL agrees to provide . . . to RESELLER[']s] customers to fulfill RESELLER[']s] customers' needs" "Services," defined to include "domestic door-to-door air express services for documents and/or packages or freight being sent to various locations throughout the United States." Defendant's interpretation renders meaningless the agreement's definition of "Services," in contravention of California Civil Code § 1641. It also renders defendant's promise to provide domestic delivery service through January 29, 2015 illusory.

Defendant's argument that it is entitled to summary judgment on plaintiffs' claims for damages after January 16, 2009, when it maintains the agreement terminated due to nonpayment, is also unavailing. Issues of fact exist as to whether defendant breached or repudiated the agreement by terminating domestic service, removing drop boxes, eliminating driver pickups and

delivery guarantees, invalidating plaintiffs' customers' account numbers, and requiring cash payments directly from plaintiffs' customers (*see Central Valley Hosp. v Smith*, 162 Cal App 4th 501, 514, 75 Cal Rptr 3d 771 [5th Dist 2008]).

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

ENTERED: JULY 3, 2014

DEPUTY CLERK

Friedman, J.P., Sweeny, Andrias, Saxe, Kapnick, JJ.

12920- 12920A — The People of the State of New York, Respondent, — Ind. 3187/10, 6334/10

-against-

Emanuel Quilez,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Ellen Dille of counsel), for appellant.

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

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Judgments, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered February 6, 2012, convicting defendant, after a jury trial, of assault in the first degree and menacing a police officer, and sentencing him to an aggregate term of 13 years, unanimously affirmed.

Defendant's legal sufficiency claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The evidence, including the type of wound inflicted, supports the inference that defendant intended to cause serious physical injury when he stabbed the victim in the chest.

Defendant's challenges to the court's jury instructions and its comments during jury selection are unpreserved, and we decline to review them in the interest of justice. As an alternate holding, we find no basis for reversal.

Defendant received effective assistance of counsel under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown that his attorney's failure to raise the above-discussed issues concerning legal sufficiency and the court's remarks was objectively unreasonable, or that it had any reasonable possibility of affecting the outcome or depriving defendant of a fair trial.

We perceive no basis for reducing the sentence.

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

ENTERED: JULY 3, 2014

DEPUTY CLERK

Friedman, J.P., Sweeny, Andrias, Saxe, Kapnick, JJ.

12921-
12922-
12923-
12924-
12925- In re Devin M.,
12925A
A Child Under the Age
of Eighteen Years, etc.,

Margaret W.,
Respondent-Appellant,

Administration for Children's
Services,
Petitioner-Respondent.

- - - - -

In re Richard Allen M.,
Petitioner-Respondent,

-against-

Margaret W.,
Respondent-Appellant.

- - - - -

In re Margaret W.,
Petitioner-Appellant,

-against-

Richard Allen M.,
Respondent-Respondent.

_____

Bruce A. Young, New York, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Marta Ross of counsel), for Administration for Children's Services, respondent.

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), for Richard Allen M., 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 (Rhoda J. Cohen, J.), entered on or about October 5, 2012, which upon a fact-finding determination that appellant mother had neglected the subject child due to her mental illness, released the child to respondent father's custody, unanimously affirmed, without costs. Order, same court and Judge, entered on or about September 20, 2012, which granted the father's petition for custody of the child, unanimously affirmed, without costs. Order, same court and Judge, entered on or about September 21, 2012, which dismissed the mother's family offense petition against the father, unanimously affirmed, without costs. Appeal from order of fact-finding, same court and Judge, entered on or about February 15, 2012, unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition. Appeals from orders of protection, same court and Judge, entered on or about January 23, 2012 and September 20, 2012, to the extent not abandoned, unanimously dismissed, without costs, as moot.

A preponderance of the evidence supports the court's finding that the subject child was neglected, since the child was harmed and at imminent risk of harm due the mother's mental condition (*see Matter of Cerenithy Ecksthine B. [Christian B.]*, 92 AD3d 417 [1st Dept 2012]; *see also* Family Ct Act § 1012[f][i]). Although

various experts provided a variety of diagnoses, the lack of a definitive diagnosis does not preclude a neglect finding based on mental illness (*see Matter of Liarah H. [Dora S.]*, 111 AD3d 514, 515 [1st Dept 2013]). It was undisputed that the mother had an extensive history of psychiatric hospitalizations, both before and after the child was removed from her care, and that she continued to engage in irrational conduct, including pushing the child down the steps of a fire escape in order to avoid her own mother in the apartment, leaving numerous bizarre telephone messages for the father, the caseworker and various personnel at the child's school, and repeatedly making unfounded accusations of misconduct against the father and school personnel.

A preponderance of the evidence supports the court's determination that it is in the child's best interests to award custody to the father (*see Eschbach v Eschbach*, 56 NY2d 167, 173-174 [1982]). The evidence shows that the father has provided a stable and loving home, where the child is happy and thriving, while the mother's mental condition has not improved. The mother has not shown that she is better able to provide for the child financially. The mother failed to preserve her challenge to the consolidation of the dispositional and custody hearings (*see Matter of Princess Ashley C. [Florida S.C.]*, 96 AD3d 682, 683 [1st Dept 2012]). In any event, the focus of both proceedings is

the best interests of the child (*see id.*), and the mother failed to demonstrate any prejudice by the consolidation. The mother also failed to preserve her claim that the Indian Child Welfare Act (25 USC § 1901, *et seq.*) was applicable and, in any event, she failed to demonstrate that she or the child qualified for its protection (*see* 25 USC § 1903[4]; *see Matter of Cain Keel L. [Derzerina L.]*, 78 AD3d 541, 542 [1st Dept 2010], *lv dismissed* 16 NY3d 818 [2011]). The mother failed to present evidence that she received ineffective assistance of counsel or that she was prejudiced by ineffective representation. The mother's attorney actively participated in the proceedings, presented evidence and witnesses, cross-examined witnesses, made arguments and objected appropriately (*see Matter of Sanovia G.*, 245 AD2d 207, 208 [1st Dept 1997]).

The court properly found that the mother failed to demonstrate, by a fair preponderance of the evidence, the allegations of the family offense petition (*see* Family Ct Act § 832). There is no evidence that the court relied on anything other than the testimony of the mother and the father, and the court's credibility determinations are entitled to deference (*see Matter of Melind M. v Joseph P.*, 95 AD3d 553, 555 [1st Dept 2012]).

To the extent the mother has not abandoned the appeals from the orders of protection, the appeals are dismissed since the terms of the orders have expired.

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

ENTERED: JULY 3, 2014

DEPUTY CLERK

Friedman, J.P., Sweeny, Andrias, Saxe, Kapnick, JJ.

12926-
12927

In re East 91st Street Crane Collapse Litigation

Index 117294/08
117469/10
771000/10

- - - - -

Donald Raymond Leo, etc.,
Plaintiff-Respondent,

-against-

The City of New York, et al.,
Defendants,

Howard I. Shapiro & Associates Consulting Engineers, P.C.,
Defendant-Appellant.

- - - - -

[And Third-Party Actions]

- - - - -

Xhevahire Sinanaj, et al.,
Plaintiffs-Respondents,

-against-

The City of New York, et al.,
Defendants,

Howard I. Shapiro & Associates Consulting Engineers, P.C.,
Defendant-Appellant.

_____

Gogick, Byrne & O'Neill, LLP, New York (Kevin J. O'Neill of counsel), for appellant.

Bernadette Panzella, P.C., New York (Bernadette Panzella of counsel), for Donald Raymond Leo, respondent.

Susan M. Kerten & Associates, New York (Craig Snyder of counsel), for Xhevahire Sinanaj and Selvi Sinanovic, respondents.

_____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered June 12, 2013, which denied defendant Howard I. Shapiro & Associates Consulting Engineers, P.C.'s (Engineers) motion for summary judgment dismissing the complaints and all cross claims against it, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Engineers, a professional engineering firm, established its entitlement to summary dismissal of the claims alleging that it negligently inspected the crane and should have noticed that the turntable mechanism connecting the operator's cab to the tower contained defective steel welding, which allegedly caused the cab to break loose and fall to the ground. Its principal stated that the services it was retained to provide on the subject construction project largely concerned the capacity of the site to accommodate the massive tower crane, as well as the proper installation and placement of the crane to allow it to operate without obstruction, and that these duties did not include inspection of the component parts of the crane.

Issues of fact are not raised by Engineers' principal's letter to defendant New York City Department of Buildings nine days before the accident stating that he had directed a technician to inspect the crane earlier that day, and that the

technician had found "no notable deficiencies." The letter indicates that the inspection was limited in scope, and does not amount to an assurance that the crane's internal parts were free of defects. Thus, Engineers did not have "the opportunity to avoid or correct the unsafe condition" and cannot be held liable for negligent inspection (*Carter v Vollmer Assoc.*, 196 AD2d 754, 754 [1st Dept 1993]).

Engineers established its entitlement to summary dismissal of the Labor Law §§ 240(1), 241(6), and 241-a claims, since there is no evidence that it had "any duty or authority to direct that any action be taken by the [owner or contractor] in response to its inspection" (*Carter*, 196 AD2d at 754).

Insofar as the motion court may have denied otherwise-warranted relief based on its refusal to consider pages in the moving papers in excess of the court's page limits, we note that

this refusal was an improvident exercise of discretion, given that the court accepted the papers and ruled on the motion (*see Macias v City of Yonkers*, 65 AD3d 1298 [2d Dept 2009]).

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

ENTERED: JULY 3, 2014

DEPUTY CLERK

Friedman, J.P., Sweeny, Andrias, Saxe, Kapnick, JJ.

12930 The People of the State of New York, Respondent, Ind. 3164/10

-against-

Richard Porter, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Gregory Carro, J. at motion for reassignment of counsel; Edward J. McLaughlin, J., at jury trial and sentencing), rendered July 6, 2011, convicting defendant of grand larceny in the fourth degree (seven counts), criminal possession of stolen property in the fourth degree (six counts), criminal possession of stolen property in the fifth degree (two counts) and jostling, and sentencing him, as a persistent felony offender, to an aggregate term of 15 years to life, unanimously affirmed.

Defendant's claim that the court failed to deliver suitable accompanying instructions when it gave the jury a verdict sheet containing annotations that distinguished among various counts is a claim requiring preservation (*see People v Collins*, 99 NY2d 14 [2002]), and we decline to review it in the interest of justice.

As an alternate holding, we find no basis for reversal. The annotated verdict sheet complied with CPL 310.20(2), and defendant was not prejudiced by any deficiency in the court's oral instructions in this regard.

Defendant also failed to preserve his argument that the court was required to instruct the jury not to commingle the evidence relating to separate thefts, and we likewise decline to review it in the interest of justice. As an alternate holding, we find it to be without merit. The court gave an appropriate instruction that the jury was to reach a separate determination as to each count. An instruction against commingling of evidence would have been incorrect because the evidence of the separate larcenies overlapped, and the evidence of each larceny tended to prove the other (*see People v Hyatt*, 38 AD3d 233 [1st Dept 2007], *lv denied* 9 NY3d 845 [2007]).

Defendant received effective assistance of counsel under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown that his attorney's lack of objection concerning the above-discussed issues was objectively unreasonable, or that it had any reasonable possibility of affecting the outcome or depriving defendant of a fair trial.

Neither defendant's standard form motion for reassignment of

counsel, nor his negative comments about his relationship with his attorney (made in a different context from a request for new counsel), contained the specific factual allegations necessary to trigger the court's obligation to make a "minimal inquiry" into the need for new counsel (*see People v Porto*, 16 NY3d 93, 100 [2010]).

We have considered and rejected defendant's challenges to the sufficiency of the evidence supporting those convictions that involved a nontestifying victim. The totality of circumstances warranted the inference that the property at issue was "stolen either by common-law trespassory taking or by acquiring lost property, as defined in Penal Law § 155.05(2)(b)" (*People v Meador*, 279 AD2d 327, 328 [2001], *lv denied* 96 NY2d 865 [2001]).

The court properly exercised its discretion when it adjudicated defendant a persistent felony offender, based on his very extensive criminal record. Defendant has repeatedly been convicted of larceny-related crimes at the class E felony level, and he has demonstrated that the sentences available for such felonies are inadequate to deter him from criminal activity.

Defendant's challenge to the constitutionality of the adjudication is unavailing (*see People v Battles*, 16 NY3d 54 [2010]; *People v Quinones*, 12 NY3d 116 [2009]).

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

ENTERED: JULY 3, 2014

DEPUTY CLERK

Friedman, J.P., Sweeny, Andrias, Saxe, Kapnick, JJ.

12931-
12931A

Isabelis M., an Infant by Her Mother and Natural Guardian, Lucy A.,
Plaintiff-Appellant,

-against-

Kimberly Mudge, M.D., et al.,
Defendants-Respondents.

Index 350259/08

The Fitzgerald Law Firm, P.C., Yonkers (Mitchell Gittin of counsel), for appellant.

Dopf, P.C., New York (Martin B. Adams of counsel), for respondents.

Judgment, Supreme Court, Bronx County (John J. Barone, J.), entered October 19, 2012, dismissing the complaint upon a jury verdict in defendants' favor, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered September 5, 2012, which denied plaintiff's motion to set aside the verdict, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

In this action alleging medical malpractice in connection with the prenatal care provided to plaintiff by defendant doctor, we perceive no basis for disturbing the jury's verdict crediting the testimony of defendant doctor as well as that of defendants' expert obstetrician. Defendant doctor and her expert determined that ordering urinalysis testing, rather than a urine culture,

was appropriate under the circumstances and was the proper standard of care during plaintiff's treatment. Although plaintiff's expert disagreed, the weight to be accorded the conflicting expert testimony is within the province of the jury (*see Torricelli v Pisacano*, 9 AD3d 291 [1st Dept 2004], *lv denied* 3 NY3d 612 [2004]).

The testimony of defendants' expert neonatologist was properly admitted and was not cumulative. Even assuming that it was error to permit this testimony, the error was harmless since the testimony was relevant to the issue of causation, an issue not reached by the jury since it found that defendants were not negligent (*see Gilbert v Luvin*, 286 AD2d 600 [1st Dept 2001]).

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

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

ENTERED: JULY 3, 2014

Margaret Sawal
DEPUTY CLERK

Friedman, J.P., Sweeny, Andrias, Saxe, Kapnick, JJ.

12932 In re Patricia Benjamin, Index 104087/12
Petitioner-Appellant,

-against-

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

_____

Law Offices of Nicholas A. Penkovsky, P.C., New York (Nicholas A. Penkovsky of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Karen M. Griffin of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Eileen A. Rakower, J.), entered April 5, 2013, granting respondents' cross motion to deny the petition seeking to, among other things, remove petitioner's name from an "ineligible/inquiry list" maintained by respondent New York City Department of Education (DOE), and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Respondent DOE placed petitioner's name on the "ineligible/inquiry list" after her employment as a tenured school teacher was terminated following a disciplinary hearing pursuant to Education Law § 3020-a (*see Matter of Benjamin v New York City Bd./Dept. of Educ.*, 105 AD3d 677 [1st Dept 2013]). Pursuant to a DOE Chancellor regulation, entry on the list is an

automatic consequence of termination and indicates that petitioner is ineligible for reemployment with the DOE absent express approval by the Chancellor.

Supreme Court properly found that the proceeding is time-barred, since it was commenced more than four months after petitioner received notice of the DOE's determination (*see Matter of Biondo v New York State Bd. of Parole*, 60 NY2d 832, 834 [1983]; *see also* CPLR 217[1]). Petitioner is deemed to be on notice of the DOE Chancellor regulation regarding automatic ineligibility for reemployment upon termination (*see Salamino v Board of Educ. of the City School Dist. of the City of N.Y.*, 85 AD3d 617, 618-619 [1st Dept 2011]), and therefore she was "aggrieved" for the purposes of the running of the statute of limitations upon notice of her termination in April 2011 (*see Biando*, 60 NY2d at 834; *see also Matter of Johns v Rampe*, 23 AD3d 283, 284-285 [1st Dept 2005], *lv denied* 6 NY3d 715 [2006]). Accordingly, her commencement of this CPLR article 78 proceeding on or about October 23, 2012 was untimely.

The proceeding is also barred by the doctrine of collateral estoppel, insofar as petitioner seeks to re-litigate issues determined in a prior CPLR article 75 proceeding challenging the termination of her employment (*see Benjamin*, 105 AD3d 677). Indeed, petitioner's challenge to her placement on the

ineligibility list is, for all intents and purposes, a challenge to her termination, which she already had a full and fair opportunity to litigate (*see Ryan v New York Tel. Co.*, 62 NY2d 494, 500-501 [1984]).

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

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

ENTERED: JULY 3, 2014

DEPUTY CLERK

Friedman, J.P., Sweeny, Andrias, Saxe, Kapnick, JJ.

12933- Index 154749/12
12934- Leggiadro, Ltd., et al.,
12934A Plaintiffs-Appellants-
Respondents,

-against-

Winston & Strawn, LLP,
Defendant-Respondent-
Appellant.

_____

Robinson Brog Leinwand Greene Genovese & Gluck P.C., New York (Lawrence L. Hirsh of counsel), for appellants-respondents.

Arthur M. Handler Law Offices LLC, New York (Arthur M. Handler of counsel), for respondent-appellant.

_____

Judgment, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered June 3, 2013, dismissing the claims of plaintiffs Brooks Ross and Ann Ross and dismissing the claims of plaintiff Leggiadro, Ltd., except for the claim related to the New York City general corporation tax, unanimously affirmed, without costs. Appeals from order, same court and Justice, entered March 6, 2013, unanimously dismissed, without costs, as subsumed in the appeals from the judgment.

In this legal malpractice action, the individual plaintiffs, who are not identified as clients in the written retainer agreement and did not sign the retainer in an individual capacity, failed to establish the existence of an attorney-client

relationship (*see Federal Ins. Co. v North Am. Specialty Ins. Co.*, 47 AD3d 52, 59 [1st Dept 2007]; *cf. Huffner v Ziff, Weiermiller, Hayden & Mustico, LLP,* 55 AD3d 1009 [3d Dept 2008]). Brooks Ross's claim to have requested that defendant advise of "any and all tax liabilities arising from [a] Buy-Out" of Leggiadro's commercial lease, does not, without more, create a duty to advise the individual plaintiffs of the personal income tax ramifications of the buy-out arising by virtue of their status as S-Corporation shareholders. No "special circumstances" upon which to find a "near privity" relationship and extend liability to the individual plaintiffs have been alleged (*compare Good Old Days Tavern v Zwirn*, 259 AD2d 300 [1st Dept 1999]; *Town Line Plaza Assoc. v Contemporary Props.*, 223 AD2d 420 [1st Dept 1996]). Moreover, the individual plaintiffs' history of paying pass-through taxes on the S-Corporation precludes them from reasonably relying on defendant's alleged failure to identify such liability here (*see Ableco Fin. LLC v Hilson*, 109 AD3d 438 [1st Dept 2013], *lv denied* 22 NY3d 864 [2014]).

In order to defeat the motion to dismiss, Leggiadro only needed to "plead allegations from which damages attributable to defendant's conduct might be reasonably inferred" (*InKine Pharm. Co. v Coleman*, 305 AD2d 151, 152 [1st Dept 2003] [internal quotation marks and brackets omitted]). Leggiadro's claim that,

had it known of the full tax ramifications of the buy-out, it would have either insisted that the landlord account for such amount in the settlement figure, in order to make relocation financially viable, or refused to relocate, is not speculative and is instead based upon, inter alia, Leggiadro's alleged strong bargaining position with its landlord, as evidenced by the amount of time left on the lease, the absence of an immediate need to relocate, and the alleged importance of the leased space in the landlord's conversion plans (*see Fielding v Kupferman*, 65 AD3d 437 [1st Dept 2009]; *cf. Sherwood Group v Dornbush, Mensch, Mandelstam & Silverman*, 191 AD2d 292, 294 [1st Dept 1993]).

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

ENTERED: JULY 3, 2014

Margaret Sawal
DEPUTY CLERK

Friedman, J.P., Sweeny, Andrias, Saxe, Kapnick, JJ.

12935 Coldwell Banker Commercial Hunter Realty, Plaintiff-Respondent, Index 654393/12

-against-

Rainbow Holding Company LLC, Defendant-Appellant,

Edward Penson, Defendant.

_____

Law Office of Allison M. Furman, P.C., New York (Allison M. Furman of counsel), for appellant.

Nesenoff & Miltenberg, LLP, New York (Kimberly C. Lau of counsel), for respondent.

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Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered May 3, 2013, which, to the extent appealed from, denied defendant's motion to dismiss the first and third causes of action, unanimously modified, on the law, to grant the motion to the extent of dismissing the third cause of action, and otherwise affirmed, without costs.

Plaintiff, seeking to recover a real estate brokerage fee, alleges that, although it performed under the parties' agreement by procuring ready, willing and able buyers interested in purchasing the property within the three month exclusive period, the corporate defendant breached the agreement by benefitting from those services, yet failing to pay the commission earned

(*see Noise In The Attic Prods., Inc. v London Records*, 10 AD3d 303, 306 [1st Dept 2004]). Plaintiff further alleged, "Through their surreptitious acts, Defendants breached the implied covenant of good faith and fair dealing." Taking these allegations as true, and recognizing that plaintiff, at this juncture, is not required to prove its allegations, the question is whether the facts fit within any cognizable legal theory (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Here, the four corners of the complaint state a cause of action for breach of contract and the implied covenant of good faith and fair dealing (*see Forman v Guardian Life Ins. Co. of Am.*, 76 AD3d 886, 888 [1st Dept 2010]).

Specifically, plaintiff alleged that the corporate defendant reaped the benefit of its brokerage services for the sole purpose of eliciting a better deal with a third party, without any intention of paying a commission to Coldwell. During the course of the three month exclusive arrangement, plaintiff alleged that it worked diligently to obtain three interested buyers that were ready, willing and able to close at an acceptable purchase price, but that the defendant property owner defeated plaintiff's reasonable expectations by refusing to provide information needed by prospective buyers, allowing its principal with decision-making authority to make himself unavailable during most of the

relevant period, and otherwise failing to cooperate with plaintiff's performance. Accordingly, the motion court properly sustained plaintiff's first cause of action.

We modify, however, to dismiss the third cause of action, for unjust enrichment, on the ground that it is undisputed that the parties had entered into a valid and enforceable written agreement and, therefore, plaintiff's entitlement to relief, if any, must spring from that contract (*see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382 [1987]).

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

ENTERED: JULY 3, 2014

DEPUTY CLERK

Friedman, J.P., Sweeny, Andrias, Saxe, Kapnick, JJ.

12936-
12937 The People of the State of New York,
Respondent,

-against-

Rafael Bayron, etc.,
Defendant-Appellant.

Ind. 2682/11

Steven Banks, The Legal Aid Society, New York (Amy Donner of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered January 31, 2012, convicting defendant, upon his plea of guilty, of persistent sexual abuse, and sentencing him, as a second felony offender, to a term of three years, unanimously affirmed.

Defendant's motion to suppress identification testimony was properly denied without a hearing. Although defendant asserted in his moving papers that there was a factual issue as to whether the identification was police-arranged, he did so in conclusory terms. Furthermore, defendant did not dispute the detailed factual assertions in the People's response, which set forth a sequence of events establishing that the identification was completely civilian-initiated and not police-arranged, and was

therefore outside the category of identifications subject to *Wade* hearings (*see People v Dixon*, 85 NY2d 218, 222-223 [1995]). Accordingly, there was no factual issue requiring a hearing (*see People v Lewis*, 258 AD2d 287 [1st Dept 1999]).

Defendant did not preserve his claim that the court improperly relied on grand jury minutes in denying a hearing, and we decline to review it in the interest of justice. As an alternative holding, we find that it was permissible for the court to review the grand jury minutes simply to confirm the facts asserted in the People's response (*see People v Rumph*, 248 AD2d 142 [1st Dept 1998], *lv denied* 92 NY2d 860 [1998]).

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

ENTERED: JULY 3, 2014

Margaret Sowal

DEPUTY CLERK

Friedman, J.P., Sweeny, Andrias, Saxe, Kapnick, JJ.

12938 The People of the State of New York, Ind. 3706/12
Respondent,

-against-

Michael Fox,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Heidi Bota of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered on or about September 25, 2012, unanimously affirmed.

Application by appellant'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 appellant'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: JULY 3, 2014

Margaret Sowal
DEPUTY CLERK

Friedman, J.P., Sweeny, Andrias, Saxe, Kapnick, JJ.

12939N In re Barbara Moriarty, MD, etc., Index 400942/11
Petitioner.
- - - - -
Jeanette M. Westphal,
Nonparty Appellant,

_____

Jeanette M. Westphal, New York, appellant pro se.

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Order and judgment (one paper), Supreme Court, New York County (Laura Visitacion-Lewis, J.), entered on or about April 2, 2013, which, to the extent appealed from, awarded nonparty counsel Jeanette Westphal $2,736 of the requested amount of $25,869 in legal fees in connection with Westphal's representation of the alleged incapacitated person, unanimously reversed, on the law, without costs, to the extent of remanding the matter to Supreme Court for reconsideration before another justice.

Supreme Court has broad discretion in determining the reasonable amount of attorneys' fees to be awarded in a guardianship proceeding and, absent an abuse of that discretion, the court's determination will be upheld *(see Matter of Tijuana M.*, 303 AD2d 681 [2d Dept 2003]). The court must ascertain "whether the fee requested is necessary, fair and reasonable" (*Matter of Linda R.*, 304 AD2d 832, 833 [2d Dept 2003]), and in order to permit a proper appellate review, the court must

"'provide a concise but clear explanation of its reasons for the fee award,'" or the lack thereof (*Rucciuti v Lombardi*, 256 AD2d 892, 893 [3d Dept 1998] quoting *Hensley v Eckerhart*, 461 US 424, 437 [1983]).

Here, Supreme Court failed to provide its reasoning for denying Westphal the total amount of her fee. Accordingly, the matter is remanded to Supreme Court *(see e.g. Matter of Verdejo*, 5 AD3d 307 [1st Dept 2004]).

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

ENTERED: JULY 3, 2014

DEPUTY CLERK

Friedman, J.P., Sweeny, Andrias, Saxe, Kapnick, JJ.

12940N Danielle Pecile, et al., Index 110490/10
Plaintiffs-Appellants,

-against-

Titan Capital Group, LLC, et al.,
Defendants-Respondents.

_____

Wigdor LLP, New York (David E. Gottlieb of counsel), for appellants.

Gordon & Rees, LLP, New York (Dianne Krebs of counsel), for respondents.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered June 19, 2013, which, to the extent appealed from as limited by the briefs, denied plaintiffs' motion to compel certain discovery, unanimously modified, on the law and the facts, to grant the motion to the extent of requiring production of (1) all documents concerning complaints of sexual harassment and/or retaliation, whether internal or external, made by defendants' current and/or former employees who worked at defendant Titan Capital Group, LLC (Titan), from any time between January 1, 2005 and the present, as well as the identities of any such complaining employees; and (2) all communications between defendants and members of the press or public relations firms that relate to this lawsuit or plaintiffs' claims, to the extent such communications are not protected by the attorney work

product doctrine or attorney-client or other applicable privilege, and otherwise affirmed, without costs.

The motion court correctly found that the documents plaintiffs seek relating to communications involving Jaffe & Asher LLP (a law firm that represented defendant Sandra Abrams in a related action against the plaintiffs here), Epstein Becker & Green, P.C. (a former defendant in this action and counsel to defendant Titan and defendant Sandra in related actions), and defendant Marc Abrams's personal counsel, are protected from production by the attorney-client privilege (*see U.S. Bank N.A. v APP Intl. Fin. Co.*, 33 AD3d 430, 431 [1st Dept 2006], *lv dismissed* 8 NY3d 830 [2007]; *Gulf Is. Leasing, Inc. v Bombardier Capital, Inc.*, 215 FRD 466, 470-471 [SD NY 2003]).

Plaintiffs' request for production of documents relating to complaints of sexual harassment and/or retaliation, as well as any complainants' identities, for the period from January 1, 2005 to the present, was reasonably calculated to elicit relevant information. Accordingly, to the extent the court limited production of these documents to the period of plaintiffs' employment, we modify the order to remove that restriction (*see Abbott v Memorial Sloan-Kettering Cancer Ctr.*, 276 AD2d 432, 433 [1st Dept 2000]; *Chan v NYU Downtown Hosp.*, 2004 WL 1886009, *5, 2004 US Dist LEXIS 16751, *15 [SD NY, Aug. 23, 2004, No. 03-Civ-

3003(CBM)]).

We also modify the order to require production of any press release or other communication between defendants and members of the press or public relations firms that relates to this lawsuit or plaintiffs' claims, to the extent such communications are not protected by the attorney work product doctrine or attorney-client or other applicable privilege (*see In re Copper Market Antitrust Litig.*, 200 FRD 213, 218-219 [SD NY 2001]).

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

ENTERED: JULY 3, 2014

Margaret Sowal
DEPUTY CLERK

Mazzarelli, J.P., Friedman, DeGrasse, Richter, Manzanet-Daniels, JJ.

11498- Index 190134/10
11499- 190196/10
11500 In re: New York City Asbestos Litigation

- - - - -

Ruby E. Konstantin, etc.,
Plaintiff-Respondent,

-against-

630 Third Avenue Associates, et al.,
Defendants,

Tishman Liquidating Corporation,
Defendant-Appellant.

- - - - -

Doris Kay Dummitt, etc.,
Plaintiff-Respondent,

-against-

A.W. Chesterton, et al.,
Defendants,

Crane Co.,
Defendant-Appellant.

_____

Pillsbury Winthrop Shaw Pittman LLP, New York (E. Leo Milonas of counsel), for Tishman Liquidating Corporation, appellant.

K&L Gates LLP, New York (Michael J. Ross, of the Bar of the State of Pennsylvania, admitted pro hac vice, of counsel), for Crane Co., appellant.

Belluck & Fox, LLP, New York (Seth A. Dymond of counsel), for respondents.

_____

Judgments, Supreme Court, New York County (Joan A. Madden, J.), entered November 28, 2012, and October 26, 2012, affirmed, without costs. Appeal from order, same court and Justice, entered October 4, 2012, dismissed, without costs, as subsumed in the appeal from the October 26, 2012 judgment.

Opinion by Mazzarelli, J.P. All concur except Friedman and DeGrasse, JJ. who dissent in part in an Opinion by Friedman, J.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
David Friedman,
Leland G. DeGrasse,
Rosalyn H. Richter,
Sallie Manzanet-Daniels, JJ.

11498-
11499-
11500
Index 190134/10
190196/10

_____x

In re: New York City Asbestos Litigation

- - - - -

Ruby E. Konstantin, etc.,
Plaintiff-Respondent,

-against-

630 Third Avenue Associates, et al.,
Defendants,

Tishman Liquidating Corporation,
Defendant-Appellant.

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Doris Kay Dummitt, etc.,
Plaintiff-Respondent,

-against-

A.W. Chesterton, et al.,
Defendants,

Crane Co.,
Defendant-Appellant.

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Defendant Tishman Liquidating Corporation appeals from the judgment of the Supreme Court, New York County (Joan A. Madden, J.), entered November 28, 2012, after a jury trial, awarding plaintiff Ruby E. Konstantin damages. Defendant Crane Co. appeals from the judgment of the same court and Justice, entered October 26, 2012, after a jury trial, awarding plaintiff Doris Kay Dummitt damages, and from the order, same court and Justice, entered October 4, 2012, to the extent it denied Crane's posttrial motion to set aside the verdict.

Pillsbury Winthrop Shaw Pittman LLP, New York (E. Leo Milonas, David G. Keyko and Anne C. Lefever of counsel), and Patton Boggs LLP, New York (John M. Nonna, Larry P. Schiffer and Kate S. Woodall of counsel), for Tishman Liquidating Corporation, appellant.

K&L Gates LLP, New York (Michael J. Ross, of the Bar of the State of Pennsylvania, admitted pro hac vice, Eric R.I. Cottle and Angela DiGiglio of counsel), for Crane Co., appellant.

Belluck & Fox, LLP, New York (Seth A. Dymond of counsel), for respondents.

MAZZARELLI, J.P.

From 1973 to 1977, plaintiff Ruby Konstantin's decedent, Dave John Konstantin (Konstantin) worked as a carpenter at two Manhattan construction sites where defendant Tishman Liquidating Corporation (TLC) was the general contractor. During that time he worked on a regular basis in close proximity to drywall contractors who sanded joint compound, and he was exposed to the dust from the sanding. The pre-mixed compound was manufactured by the Georgia Pacific, Kaiser Gypsum, and U.S. Gypsum companies, and contained asbestos. TLC supervised and controlled the work conducted at the building sites where Konstantin was employed, but took no steps to protect the workers from the hazards of exposure to asbestos dust. It admits that it became aware of those hazards approximately at the time that Konstantin was working at the sites. Indeed, it appears that TLC knew that asbestos was dangerous as early as 1969. Before working as a carpenter, Konstantin worked at a gas station, from the late 1960s to the early 1970s. As part of his job duties, he performed hundreds of brake jobs, sanding down brake pads made by the Bendix Corporation.

In January 2010, Konstantin was diagnosed with mesothelioma of the tunica vaginalis, an asbestos-related cancer of the tissue lining the testicles. He endured five surgeries, including the

removal of one testicle and his scrotum; two rounds of chemotherapy; and one round of "broad-ranged" radiation. By the summer of 2010, the mesothelioma had spread to his pleura, the membrane that lines the lungs. Konstantin began to develop chest-related symptoms, and endured a simultaneous course of pain-reducing and other necessary treatment directed to the groin and chest. He suffered nearly three years of, in his words, "extreme pain and swelling," which he characterized as often "unbearable" and a "10 out of 10" on the pain scale. Konstantin died on June 6, 2012.

From 1960 to 1988, plaintiff Doris Kay Dummitt's decedent, Ronald Dummitt (Dummitt), was an enlisted man in the United States Navy. From 1960 to 1977, Dummitt served on seven naval vessels as a boiler technician. The typical naval destroyer had two boiler rooms, each containing approximately 600 valves. The valves restricted or admitted the flow of steam or other fluid into the equipment. They contained gaskets, which were ring-like components used to seal, among other things, the internal valve bonnet. Packing was also used with the valves; the packing was a rope-like material used to seal the valve stem. Lagging pads were wrapped on the valves for insulation. These components were routinely replaced as a result of the extremely hot environment around the valves.

The majority of the valves used on the ships Dummitt worked on were manufactured by defendant Crane Co. For each type of valve, Crane provided a detailed drawing identifying the specific components and the exact system in which the valve was to be used. The purpose of furnishing the diagram was to create "standardization," so the Navy would know exactly which replacement components to use with each valve. Crane also created Navy-specific symbol numbers, so that, for example, the correct components for a specific valve and system could be determined by reference to a component table.

While not every Crane valve used components such as gaskets, packing, and lagging pads made of asbestos, those that did were typically identified in the drawings. For these valves, Crane supplied the Navy with original asbestos gaskets and packing, made by other manufacturers, that was later branded as "Cranite," Crane's in-house asbestos component brand. The standard asbestos components were assigned the symbol "1108." The asbestos components were typically 85% asbestos and 15% rubber binder. Over time, Crane successfully lobbied the Navy to replace components made by other manufacturers with Cranite. In addition to the gaskets and packing, the lagging pads were also asbestos. The lagging pads were meant to provide insulation for the valves, a requirement for all equipment that would run higher than a

temperature of 125 degrees. The Navy required Crane to test these pads prior to Naval use. Indeed, Crane helped write the Navy's machine manual, "Naval Machinery," in 1946, which specifically directed the use of asbestos for insulation.

Dummitt testified that his exposure to asbestos came from having to maintain the valves. He admitted, however, that it was not the initial use of the valves and components that caused the release of asbestos dust, since the ships he served were too old for him to have been exposed to the original components. Rather, it was the process of replacing the components that caused the exposure. When a component needed to be replaced, the deteriorated gaskets would need to be scraped or wire-brushed off the valve. Packing would be pulled off with a hook and blasted with compressed air. In addition, before maintenance of the valves could be performed, the lagging pads needed to be removed, which also created dust. Indeed, Dummitt stated that it was almost impossible not to be exposed to asbestos dust when removing the pads. Dummitt conceded that he was never exposed to asbestos from products that were either supplied or sold by Crane.

Dummitt was diagnosed with pleural mesothelioma in April 2010. He endured four "very painful" thoracentesis procedures to relieve the "crushing" pressure in his lungs, thoracic surgery, a

complete lung collapse, and three rounds of chemotherapy.

Konstantin, and his wife derivatively, commenced this action against TLC, among others, alleging that TLC was liable under Labor Law § 200 for negligently supervising and controlling the work of the drywall subcontractors, and was directly liable in common-law negligence for its own workers' power-sweeping activities, which created additional and greater asbestos dust exposure. Dummitt, and his wife derivatively, who were represented by the same lawyers as Konstantin and his wife, commenced a separate action against Crane, among others, alleging that Crane acted negligently in failing to warn Dummitt of the hazards of asbestos exposure for the components used with its valves, and that such negligence was a proximate cause of his injuries.

The two actions were grouped with a cluster of 10 cases and assigned to an in extremis calendar. Three of the plaintiffs suffered from lung cancer and seven from mesothelioma. Upon motion by all of the plaintiffs, the seven mesothelioma cases, including Konstantin's and Dummitt's, were set for a joint trial. In consolidating the cases, the trial court rejected defendants' contention that specific commonality of work sites and occupations was necessary for consolidation, finding that a strict construction of that requirement would not conserve

judicial resources or reduce litigation expenses. The court noted that in the mesothelioma cluster, five of the plaintiffs were in the construction trade, and two worked on ships and alleged exposure from pumps and valves and their component parts. The court determined that the medical evidence would overlap, the "state-of-the-art" evidence would overlap, and there were sufficient commonalities among the types of work and manner of exposure to warrant consolidation.

Before the trial began, five of the mesothelioma cases settled, leaving only Konstantin's and Dummitt's to be tried. They were tried between July 5, 2011 and August 17, 2011. Only Konstantin testified live at trial; Dummitt was not well enough to come to court, and the jury viewed excerpts from his videotaped deposition. TLC was found 76% liable for Konstantin's injuries, and each of the three joint compound manufacturers 8% liable. The jury awarded Konstantin damages of $7 million for past pain and suffering, $12 million for future pain and suffering, $64,832 for past lost earnings, and $485,325 for future lost earnings, for a total of more than $19 million in damages. They also found that TLC was reckless.

Crane was held 99% liable for Dummitt's injuries, and Elliott, another defendant, 1% liable, for their negligence in failing to warn Dummitt about the dangers of asbestos. The jury

determined that such negligence was a proximate cause of Dummitt's injuries and that Crane was reckless. Dummitt was awarded a total of $32 million, including $16 million for pain and suffering.

TLC moved to set aside the *Konstantin* verdict, arguing, inter alia, that the trials should not have been consolidated, that the jury's allocation of fault was improper, that the evidence did not support a finding that TLC was reckless, and that the damage awards deviated from reasonable compensation and should be remitted. The court granted TLC's motion to the extent of setting aside the damages verdict and ordering a new trial on the issue of damages, unless Konstantin stipulated to reduce the awards to $4.5 million for past pain and suffering and $3.5 million for future pain and suffering. The award broke down to about $157,000 per month based on Konstantin's 33 months of past pain and suffering and (likely) 18 months of future pain and suffering. Konstantin accepted the remittitur of the award, and judgment was entered.

Crane sought to set aside the *Dummitt* verdict, arguing, inter alia, that it was not liable for the placement of products it did not manufacture into the stream of commerce. Crane contended that since the asbestos-containing components were manufactured by unrelated third parties, it could not be held

liable for a failure to warn Dummitt concerning the dangers of asbestos in those products. Like TLC, Crane argued that the jury's finding of recklessness should be set aside, that the allocation of fault was improper, and that the damages should be remitted.

The court granted Crane's motion only to the extent of reducing Dummitt's damages to $5.5 million for past pain and suffering and $2.5 million for future pain and suffering. In so doing, the court rejected Crane's theory that it could not be liable because it did not place the asbestos-containing components into the stream of commerce. The court found that Crane was liable because it knew or should have known that the components, which were meant to be used in conjunction with its product, contained asbestos and were therefore likely hazardous. The court noted that, despite Dummitt's argument to the contrary, Crane's liability was not based solely on whether it was foreseeable to Crane that asbestos-containing components would be used with its products, but rather on "circumstances which strengthen the connection between Crane's valves and the defective gaskets, packing, and insulation."

Dummitt stipulated to the reduction in damages, and judgment was entered in the amount of $4,438,318.87 in his favor, after accounting for certain setoffs to which Crane was entitled.

TLC (but not Crane) argues that the two actions should not have been consolidated because they involved different factual and legal issues. It asserts that the difference between the work environments of Navy ships and construction sites is vast, as is the nature of work plaintiffs' decedents were engaged in during their exposures. TLC also focuses on the different types of products to which the two men were exposed, one having worked with asbestos in the components used in valves and pumps on ships, and the other having been near dust from joint compounds. TLC also asserts that Konstantin and Dummitt were exposed to asbestos for different lengths of time, with Dummitt being exposed on many different ships between 1960 and 1976 and Konstantin exposed from 1974 to 1977, a fraction of Dummitt's time.

TLC further contends that consolidation was improper because plaintiffs' decedents suffered from different mesothelioma subtypes, with Dummitt having pleural mesothelioma and Konstantin experiencing it in the lining of the testicles. The decedents also were at different stages of their illnesses, Dummitt being so gravely ill he could not testify live, whereas Konstantin was well enough to appear before the jury. TLC alleges that because Dummitt was so much more gravely ill than Konstantin, there was a danger of the jury conflating the two in their minds.

TLC also argues that plaintiffs' decedents were pursuing different legal theories, since Dummitt was advancing a product liability/failure to warn claim, and Konstantin was asserting a negligence claim and a violation of Labor Law § 200. TLC contends that trying these two cases together required the jury to grapple with different elements of liability and to sort through voluminous evidence, much of which was relevant only to one case or the other.

TLC also asserts that the decision to consolidate directly led to a confusing and disjointed trial, with different witnesses in the different cases focusing on different theories of recovery, sometimes following each other on the same day. For example, Dr. Jacqueline Moline, one of Konstantin's experts, began testifying on July 11, 2011. She was followed by Dummitt's video deposition, and then Konstantin's direct examination. Konstantin's testimony was then interrupted for testimony from Dummitt's oncologist, which was followed by another portion of Dummitt's video deposition focusing on his pain and suffering. Konstantin then resumed his direct testimony on July 15. Later in the trial, on July 26, 2011, Konstantin read to the jury the deposition testimony of Charles DeBenedittis, an executive of Tishman Speyer, from an unrelated case. This was followed by testimony concerning only Dummitt's case. More than a week

later, testimony concerning Konstantin resumed.

Defendants put on a case that was similarly disjointed. First, on August 2 and 3, testimony revolved around Dummitt's case, followed by Dr. Michael Siroky, a Konstantin-only witness, whose testimony was interrupted by testimony from two more Dummitt witnesses. Siroky, due to scheduling issues, never retook the stand, and completing his testimony by videotape. TLC emphasizes the fact that the court repeatedly acknowledged and apologized for these scheduling issues. It further states that the jury was given confusing and misleading information on causation. For example, it points to the fact that Dr. Moline, Konstantin's expert, testified concerning whether sweeping could create asbestos fiber dust, which was directly related to causation in Konstantin's case. However, plaintiffs' counsel told the jury that Moline was testifying in Dummitt's, and not Konstantin's, case.

On the issue of damages, TLC contends that the testimony was also confusing. As an illustration, it points to the fact that plaintiffs' counsel told the jury that Dr. Moline was testifying solely as to Dummitt's claim, and not as to the specifics in the *Konstantin* case, but then Dr. Moline gave general testimony concerning the pain associated with mesothelioma without distinguishing between the two men.

Initially, the issue of consolidation is properly before us and we reject the *Konstantin* plaintiff's contention that by not taking an interlocutory appeal from the consolidation order, TLC waived its right to our review. The judgment on appeal brings up the consolidation order (*see* CPLR 5501[a][1]). In this circumstance, TLC had no obligation to appeal that order separately after it was issued. Nor was a renewed objection to consolidation necessary after the court whittled down the cases to his and Dummitt's only. Further, the *Konstantin* plaintiff's argument that we should not review the issue based on her claim that the record is incomplete is not persuasive. The *Konstantin* plaintiff should have moved to dismiss the appeal or to supplement the record. She did neither. In any event, we deem the record to be sufficient. The question is whether "[m]eaningful appellate review . . . has . . . been rendered *impossible*" (*UBS Sec. LLC v Red Zone LLC*, 77 AD3d 575, 579 [1st Dept 2010], *lv denied* 17 NY3d 706 [2011] [emphasis added]). This record provides adequate facts to meaningfully determine whether consolidation was properly granted.

Consolidation of cases is authorized by CPLR 602(a), which provides:

> "When actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of any or all the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay."

As the statutory language suggests, joining cases together is designed to "reduce the cost of litigation, make more economical use of the trial court's time, and speed the disposition of cases" (*Matter of New York City Asbestos Litig. [Brooklyn Nav. Shipyard Cases]*, 188 AD2d 214, 225 [1st Dept 1993], *affd* 82 NY2d 821 [1993]). Further, "[g]reat deference is to be accorded to the motion court's discretion" in joining cases together (*Matter of Progressive Ins. Co. [Vasquez-Countrywide Ins. Co.]*, 10 AD3d 518, 519 [1stt Dept 2004]).

Malcolm v National Gypsum Co. (995 F2d 346 [2d Cir 1993]) is the seminal case concerning consolidation in asbestos cases. There, the Second Circuit endorsed

> "[a standard set of] criteria . . . as a guideline in determining whether to consolidate asbestos exposure cases[, including]: (1) common worksite; (2) similar occupation; (3) similar time of exposure; (4) type of disease; (5) whether plaintiffs were living or deceased; (6) status of discovery in each case; (7) whether all plaintiffs were

> represented by the same counsel; and (8) type of cancer alleged" (995 F2d at 350-351).

The court entertaining a consolidation motion is further required to take into consideration the number of separate cases (*id.* at 352). This Court has applied the *Malcolm* factors to asbestos cases (*see Matter of New York City Asbestos Litig.*, 99 AD3d 410, 411 [1st Dept 2012]). Not all of the factors need be present; consolidation is appropriate so long as "individual issues do not predominate over the common questions of law and fact" (*id.*). However, in asbestos cases, it has been "routine" to join cases together for a single trial (*see e.g. Bischofsberger v A.O. Smith Water Prods.*, 2012 NY Slip Op 32414[u], *2 [Sup Ct, NY County 2012]).

TLC's argument primarily concerns the first five *Malcolm* factors. Regarding the first two, some trial courts have rejected a narrow focus on the specific locations of the exposures and types of work in favor of an analysis that considers whether two or more plaintiffs were "engaged in an occupation related to maintenance, inspection and/or repair and [were] 'exposed to asbestos in the "traditional" way, that is, by working directly with the material for years'" (*see e.g. Matter of New York City Asbestos Litig. [Batista]*, 2010 WL 9583637, *2 [Sup Ct, NY County 2010] [joining cases of residential drywaller,

Navy pipefitter, home renovator, plant electrician, powerhouse worker, and Navy electrician for trial, where their injuries "resulted from 'insulation exposure from boilers, valves, pumps, and other insulated equipment"]). Other courts have focused on the types of asbestos product to which the plaintiffs were exposed, and whether they were manufactured and distributed by different defendants (*see e.g. Bischofsberger,* 2012 NY Slip Op 32414[u]).

With respect to the third factor, whether two or more asbestos plaintiffs' times of exposure were common, the focus is on evidence of the state of the art at the time (*see Malcolm*, 995 F2d at 351). In *Malcolm*, there was no commonality where exposures among the plaintiffs began in the 1940s and ended in the 1970s, and some plaintiffs were exposed throughout that period but others were exposed for much shorter periods within it. In considering the fourth factor, type of disease, trial courts have ruled inconsistently where different plaintiffs who propose joint trials have different types of mesothelioma (*compare Matter of New York City Asbestos Litig. [Adler]*, 2012 NY Misc LEXIS 3828, 27 ([Sup Ct, NY County 2012] [finding that peritoneal mesothelioma is a "distinct disease from . . . pleural mesothelioma]), *with Bischofsberger* (2012 NY Slip Op 32414 [u], *6 [pleural mesothelioma and peritoneal mesothelioma "are the

same disease, albeit they present in different parts of the body"]). In determining the fifth *Malcolm* factor, the effect of different plaintiffs' "statuses" (i.e., living or dead), trial courts have looked to whether the defendants would be prejudiced by the presence of deceased plaintiffs in the case (*compare Matter of New York City Asbestos Litig. [Capozio]*, 22 Misc 3d 1109(A), 2009 NY Slip Op 57002[u], *3 [Sup Ct, NY County 2009] [declining to join cases involving deceased plaintiffs with living plaintiffs who were not at risk of imminent death] *with Matter of New York City Asbestos Litig. [Altholz]*, 11 Misc 3d 1063[A], 2006 NY Slip Op 50375[u], *3 [Sup Ct, NY County 2006] [observing that there was no prejudice in joining deceased plaintiffs with terminally ill plaintiffs]).[1]

Giving deference to the trial court, as we must, and considering that the *Malcolm* factors are to be applied flexibly, we find that the trial court properly consolidated the cases. We recognize that a shipboard boiler room is a different physical environment than a building under construction, and that the work performed by the two plaintiffs' decedents was somewhat different. Fundamentally, however, Konstantin and Dummitt were

[1] There is no dispute that the sixth and seventh *Malcolm* factors, state of discovery and identity of attorneys, are satisfied here. TLC makes no separate argument concerning the eighth factor, which involves the type of cancer alleged.

both exposed to asbestos in a similar manner, which was by being in the immediate presence of dust that was released at the same time as they were performing their work. TLC has failed to articulate why the differences in the environments and job duties had such an impact on the manner of exposure that it was necessary for the evidence of exposure to be heard separately. Further, while again not purely overlapping, the exposure periods are sufficiently common. Significantly, both plaintiffs' decedents exposure periods ended in 1977, meaning that the state of the art was the same for both cases. We disagree with TLC that the difference in the types of mesothelioma the plaintiffs' decedents had compels separate trials. TLC can point to no medical evidence in the record suggesting why the differences between the pleural and peritoneal types of mesothelioma are sufficiently significant that to have both types of the disease present in the same case thwarts the purpose of consolidation.

Further, that Dummitt was too ill to appear in court does not confer upon him a different "status" from Konstantin for purposes of whether consolidation was proper. There is no evidence that the jury was aware that his physical condition was dire at the time of trial, so that it would have conflated his condition with that of the less ill Konstantin.

In addition to the factors discussed above, TLC argues that

consolidation was unwarranted because each plaintiff asserted a different theory of liability. It is true that the *Konstantin* plaintiff asserted a claim for a violation of Labor Law § 200 and common- law negligence, and that the *Dummitt* complaint asserted a claim under the traditional products liability theory of failure to warn. While Konstantin needed to establish TLC's control of the worksite, and Dummitt was required to demonstrate that the defendants in his case breached a duty to warn, both theories ultimately required a showing that defendants failed to act reasonably in permitting the men to become exposed to asbestos. This common element predominates over any tangential elements inherent in the different theories.

Because the claims presented by plaintiffs had more facts and issues in common than unique to each, we find that the goals of consolidation were met here. TLC, claiming that it was prejudiced, still argues that plaintiffs' motion should have been denied. To successfully oppose consolidation, a party must demonstrate prejudice to "a substantial right" (*Chinatown Apts. v New York City Tr. Auth.*, 100 AD2d 824, 825 [1st Dept 1984]). The allegations of prejudice must be specific and non-conclusory (*see Champagne v Consolidated R.R. Corp.*, 94 AD2d 738 [2d Dept 1983]).

TLC's argument that it was prejudiced is based primarily on the disjointed nature of the trial. However, its position that

this was solely a result of the joinder of the two claims is inaccurate. The reason witnesses were presented out of order, in most instances, was to accommodate the trial court's hours of operations, which prohibited it from continuing testimony past a certain time, due to budgetary constraints. Indeed, the court expressly stated that this was the case multiple times during the trial, and apologized to the jury for the inconvenience. Compounding the problem was one juror who repeatedly arrived late for the proceedings, ultimately necessitating his removal from the panel in the middle of the trial.

The additional argument made by TLC that the jury was confused by the nature of the trial is speculative, especially in light of the steps the court took to minimize any unfairness. The court carefully and appropriately provided nearly continuous limiting, explanatory and curative instructions, and regularly reminded the jury that a particular line of testimony applied to one plaintiff or the other (*see Cason v Deutsche Bank Group*, 106 AD3d 533 [1st Dept 2013]). The court also implemented other management devices to alleviate and limit any potential juror confusion, such as providing the jurors with notebooks for taking notes, to assist them in recording and distinguishing the evidence in each case. The jurors were also provided with plaintiff-specific interrogatories and jury sheets.

Ultimately, the verdicts support the conclusion that consolidation was proper. The jury demonstrated its understanding of the different nuances in the two cases. It imposed 76% liability on TLC and 8% liability on each of the manufacturers in that case, while assessing Crane 99% liability in the other. This reflects that the jury was able to distinguish between the evidence presented in each case, recognizing the culpability of the joint compound manufacturers in the *Konstantin* case and the negligible culpability on the part of the valve component manufacturers in the *Dummitt* case. Further, the jury awarded substantially different pain and suffering awards, and assessed a different life expectancy for each plaintiff. Had the jury been confused, as TLC asserts it must have been, it could not have rendered an individualized verdict for each plaintiff consistent with the specific evidence presented with reference to that plaintiff. For these reasons, we find that TLC was not unduly prejudiced by the consolidation of the two cases.

Finally, we decline to adopt TLC's argument, improperly made for the first time in its reply brief, that consolidation of asbestos cases is no longer a compelling policy because the "crisis" that arose when a crushing number of workers became sick as a result of their exposure to the substance has diminished.

This policy question is not within our purview to decide, nor is it relevant. The CPLR provides for consolidation where appropriate, without reference to whether the matter concerns asbestos or some other issue.

We now turn to the substantive challenges to the verdicts. TLC maintains that the jury's apportionment to it of 76% liability was against the weight of the evidence. It contends that there was no evidence that it manufactured, bought, sold, distributed, or used the joint compounds that Konstantin was exposed to, or even caused them to be present on the work site. It further claims that it was error for the court to refuse TLC's request that the jury's verdict sheet ask if brake pad manufacturer Bendix Corp., whom Konstantin had specifically identified, exposed him to asbestos, and whether it was a substantial factor in causing his illness.

A verdict can only be set aside as against the weight of the evidence where it could not have been reached based on any fair interpretation of the evidence (*Berry v Metropolitan Transp. Auth.*, 256 AD2d 271 [1st Dept 1998]). Further, the burden of establishing the equitable share of nonparties' liability falls on the party seeking to reduce its own culpability (*see Matter of NY Asbestos Litig. [Marshall]*, 28 AD3d 255 [1st Dept 2006]). Here, the verdict accurately apportioned liability because TLC

did not adduce any evidence demonstrating the joint compound manufacturers' responsibility. Moreover, Konstantin presented evidence of direct liability against TLC, and supported his theory that TLC violated its duty to responsibly supervise and control the asbestos joint compound work and to protect workers such as himself from exposure. Indeed, since Konstantin was a bystander who was not himself using the product, he would not have seen any warnings that the manufacturers may have attached to it, putting TLC in the best and only position to protect him. In addition, Konstantin adduced evidence sufficient for the jury to infer that TLC knew that asbestos compound was being used on its job sites and that asbestos compound was known to be injurious. Insofar as TLC argues that Bendix should have been included on the verdict sheet, it is submitted that that corporation was properly excluded, since no evidence was adduced at trial showing that the brakes Konstantin worked with contained asbestos.

Crane also argues that the jury's apportionment of liability was against the weight of the evidence. It maintains that the evidence at trial showed that Dummitt was exposed to numerous asbestos-containing products during his Navy service and that there was no evidence that Crane made or supplied those materials. Crane contends that as a consequence, there is no

logical basis for it to be held 99% liable for Dummitt's injuries. Indeed, Crane asserts that the evidence showed that Dummitt was exposed to asbestos-containing materials associated with at least 32 different entities, and that none of those entities warned him of the dangers of exposure to asbestos.

The verdict withstands Crane's challenge because, like TLC, Crane adduced no evidence that any of the other parties were negligent in failing to warn Dummitt. Instead, Crane relies on plaintiffs' state-of-the-art witness, who testified generally to what was historically available in the public domain about the dangers of asbestos, without opining as to whether any party or nonparty knew of the dangers of asbestos. By contrast, Dummitt offered evidence concerning both Crane's general and its specific knowledge of the dangers of asbestos. Moreover, the allocation of 99% liability to Crane was supported by the evidence. As discussed below, Crane was the main source of Dummitt's exposure, through its efforts to market asbestos as the preferred insulation of choice for its valves.

It was also rational for the jury to conclude that TLC and Crane acted recklessly. Konstantin adduced evidence that as early as 1969, five years before he began working at any TLC work site, James Endler, a TLC corporate officer and the head of construction, issued a letter admitting that asbestos fibers "had

been proved to be injurious to the health of those people exposed to them over prolonged periods of time." Accordingly, he directed that any asbestos dust should be "cleaned up immediately so that men working on the floor would not track the material elsewhere and inject additional fallout material into the air." In 1973, TLC issued a press release for the Olympic Towers construction site, one of the sites where Konstantin worked, advertising its development of a "non-asbestos fire spray" to help protect construction workers from potential health hazards. One can only conclude, then, that TLC had actual knowledge of the dangers of asbestos.

That these admissions did not specifically relate to asbestos-containing joint compound is of no moment. TLC admitted that it knew asbestos joint compound was used on its work sites in the 1970s, and Konstantin adduced evidence that TLC worked with U.S. Gypsum, a joint compound manufacturer, to develop an asbestos-based product. Accordingly, it was rational for the jury to conclude that it should have been at least "obvious" to TLC that by permitting the use of joint compound it was "highly probable that harm would follow" (*Matter of New York City Asbestos Litig. [Maltese]*, 89 NY2d 955, 956 [1997] [internal quotation marks omitted]).

There was also sufficient evidence showing Crane's reckless

disregard for the hazards posed by asbestos.[2] The evidence demonstrated that Crane had received warnings about the dangers of asbestos as early as the 1930s from various trade associations, and Crane admitted it knew of the dangers of asbestos by the early 1970s.

Crane makes the separate argument that as a manufacturer of valves, it had no legal duty pertaining to any asbestos-containing valve components manufactured and sold by others. It claims that, by charging the jury that it should find against Crane if it was merely "foreseeable" that the Navy would later replace components made with asbestos, the court ignored well settled precedent that manufacturers can only be held liable for defective products they place in the stream of commerce. According to Crane, the touchstone for this proposition is *Rastelli v Goodyear Tire & Rubber Co.* (79 NY2d 289 [1992]).

In *Rastelli*, the Court of Appeals declined to impose liability on defendant, a tire manufacturer, when a rim that Goodyear did not manufacture and that was attached by a third party after the tire entered the stream of commerce exploded. The Court stated that "under the circumstances of this case," a

[2] We reject Crane's contention that Dummitt did not plead recklessness. While Dummitt's complaint did not use the word "recklessness," the allegations unquestionably support the claim.

manufacturer had no duty to warn "about another manufacturer's product when the first manufacturer produces a sound product which is compatible for use with a defective product of the other manufacturer" (79 NY2d at 297-298). The Court noted that Goodyear had "no control of the production of the subject multipiece rim, no role in placing that rim in the stream of commerce, and derived no benefit from its sale" (*id.* at 298). The Court further noted that Goodyear's tire "did not create the alleged defect in the rim that caused the rim to explode" (*id.*).

Crane contends that *Rastelli* was extended to the asbestos context in *Matter of Eighth Jud. Dist. Asbestos Litig. (Drabczyk)* (92 AD3d 1259 [4th Dept 2012], *lv denied* 19 NY3d 803 [2012]). There, the Court, relying on *Rastelli*, held that it was error for the trial court to charge the jury that a valve manufacturer could be held liable where components manufactured by a different company contained asbestos insulation. Although that decision reports very few facts, the *Dummitt* plaintiff supplemented the record with excerpts from the manufacturer's appellate brief, in which it stated that its valves did not need insulation at all. Crane also cites *Surre v Foster Wheeler LLC* (831 F Supp 2d 797 [SD NY 2011]). There, Crane was awarded summary judgment dismissing the plaintiff's failure to warn claim. The plaintiff had worked on Navy ships, but had no knowledge whether Crane

manufactured any of the equipment he used. He also worked as a boiler insulator in apartment buildings, and serviced "Pacific" boilers, which Crane was in the business of selling. However, although Crane generally promoted the use of asbestos insulation with its boilers, the plaintiff had no evidence that Pacific boilers required asbestos or that it was "specified for the exterior of any Pacific boiler" (831 F Supp 2d at 802). The court held that "[u]nder these circumstances, as a matter of New York law, Crane had no duty to warn [the plaintiff] against the dangers of asbestos exposure" (*id.*, citing *Rastelli*, 79 NY2d at 297-298). It further stated:

> "Asbestos was one of several materials that could have been used to insulate Crane products. While this might have made its installation on Pacific boilers foreseeable to Crane, there is no evidence that Crane played any role in choosing the type of insulation [the plaintiff] applied. Crane did not place into the stream of commerce the asbestos to which [the plaintiff] was exposed, and there is no evidence that Crane had any control over its production" (*id.*).

Finally, Crane cites *Tortoriello v Bally Case* (200 AD2d 475 [1st Dept 1994]). There, the plaintiff slipped and fell on the quarry tile floor of a walk-in freezer. She asserted a strict products liability claim against the manufacturer of the freezer, claiming that the floor was defective, although the manufacturer of the freezer did not ship it with the floor installed and had

no knowledge of the type of floor installed. This Court held that the manufacturer's inclusion in its literature of quarry tile as one of three available floor materials for walk-in freezers was insufficient to establish liability, since there was "no evidence that [the manufacturer] had anything to do with the actual choice of flooring made by the architect and general contractor" (200 AD2d at 477).

These cases, and others cited by Crane, together stand for the rather unremarkable proposition that where there is no evidence that a manufacturer had any active role, interest, or influence in the types of products to be used in connection with its own product after it placed its product into the stream of commerce, it has no duty to warn. The cases cited by the *Dummitt* plaintiff, however, demonstrate that where a manufacturer does have a sufficiently significant role, interest, or influence in the type of component used with its product after it enters the stream of commerce, it may be held strictly liable if that component causes injury to an end user of the product. For example, in *Berkowitz v A.C. & S., Inc.* (288 AD2d 148 [1st Dept 2001]), this Court affirmed the denial of summary judgment to a manufacturer of pumps on Navy ships, although the plaintiff

conceded that the manufacturer did not necessarily install asbestos on the pumps. According to the decision,

> "While it may be technically true that its pumps could run without insulation, defendants' own witness indicated that the government provided certain specifications involving insulation, and it is at least questionable whether pumps transporting steam and hot liquids on board a ship could be operated safely without insulation, which [the defendant] knew would be made out of asbestos" (288 AD2d at 149).

The *Dummitt* plaintiff also relies on *Rogers v Sears, Roebuck & Co.* (268 AD2d 245 [1st Dept 2000]). In *Rogers*, the plaintiffs were injured when a propane tank that one of them was attempting to attach to the barbecue grill manufactured by the defendant exploded. Although the defendant did not place the tank in the stream of commerce, this Court affirmed the denial to it of summary judgment, since "its grill could not be used without the tank" (268 AD2d at 246).

The facts here are much closer to those at issue in *Berkowitz* and *Rogers* than they are to *Rastelli*, *Drabczyk*, *Surre and Tortoriello*. In the former two cases, as in this case, there was sufficient evidence to tie the manufacturer directly to the injurious agent. At the same time, it cannot be said that, as in the latter set of cases, Crane was *indifferent to* the types of components that would be used. To the contrary, the evidence

demonstrates that Crane influenced the Navy's choice of valve components following the initial shipment, and played a leading role in creating the culture and regulations that encouraged and eventually mandated the use of asbestos for insulation. First, Crane helped write the Navy's manual for machinery in 1946, "Naval Machinery," which specifically directed the use of asbestos for boiler-room component insulation. Second, Crane provided the Navy with detailed drawings specifying the components to use with each valve, to create a level of "standardization" so that the Navy would know which replacement component parts would be used with each valve. Many of the specifications for the type of valves on which Dummitt worked contemplated the use of asbestos. Lastly, while it did not manufacture the asbestos-laden components, Crane took certain asbestos-laden components that had been manufactured by a third party, rebranded them as "Cranite," and sold them as its own product. Indeed, the record is replete with examples of Crane, in its catalogs, extolling the virtues of Cranite and, by extension, asbestos-laden insulation products as the industry standard, from 1938 to at least 1962.

These facts collectively "strengthen the connection" between Crane's valves and the asbestos-containing components that made Dummitt sick (*see Surre*, 831 F Supp 2d at 801, citing *Rogers*, 268

AD2d at 245). Indeed, considering the substantial interest Crane showed in having asbestos become the standard insulation in the components to be placed in its valves, it was entirely appropriate for the jury to find that Crane had the burden of warning workers such as Dummitt of the hazards of asbestos exposure.

Crane argues that the use of the word "foreseeability" in the jury charge was so prejudicial to it that, at the very least, a new trial is necessary. We disagree. There is a place for the notion of foreseeability in failure to warn cases where, as here, the manufacturer of an otherwise safe product purposely promotes the use of that product with components manufactured by others that it knows not to be safe. To be sure, mere foreseeability is not sufficient (*see Surre*, 831 F Supp 2d at 802 ["a duty to warn against the dangers of a third party's product does not arise from foreseeability alone"]). This explains why the manufacturer was absolved of liability in *Rastelli*, where it was not concerned with what type of rims would be used with its tires. However, this case is not even close to *Rastelli* because of Crane's demonstrated interest in the use of asbestos components with its valves. Accordingly, the charge as given had no potential to communicate the wrong standard to the jury.

We reject Crane's further argument based on the component parts doctrine.

> "[W]here a component part manufacturer produces a product in accordance with the design, plans and specifications of the buyer and such design, plans and specifications *do not reveal any inherent danger* in either the component part or the assembled unit, the component part manufacturer will be held blameless for an injury to the buyer's employee in a strict products liability action" (*Leahy v Mid-West Conveyor Co.*, 120 AD2d 16, 18 [3d Dept 1986][emphasis added], *lv denied* 69 NY2d 606 [1987]).

Crane argues that its valves were merely components of the Navy ships on which they were installed. However, the component parts doctrine does not absolve Crane here because the evidence showed that Crane itself promoted its valves for use with asbestos parts, which could not be considered inherently safe.

On the question of causation, there was plainly a line of reasoning sufficient for the jury to conclude that Crane's failure to warn was a proximate cause of Dummitt's injuries. Dummitt testified that he was the staff liaison on his ships, responsible for enforcing safety procedures. Any warning would have been received by him, and Dummitt clearly testified that he would have heeded those warnings and taken steps to protect himself and his boiler room crew. Accordingly, whether the court erroneously charged a presumption on the matter is irrelevant,

because, as the dissent recognizes, Dummitt did not rely on any such presumption.

Further, we disagree with the dissent that Crane was prejudiced by the trial court's refusal to permit Admiral Sargent to testify about whether the Navy would have permitted asbestos warnings. Crane had made an offer of proof that, had Admiral Sargent been allowed to testify about the nameplates attached to valves sold to the Navy, he would have stated that the specification provided an exhaustive list of items to be included, and that the exclusion of hazard warnings from the list meant that the Navy had determined that it was not to be included. However, in a case with substantially similar facts, the Second Circuit rejected such a theory (*see In re Joint E. and S. Dist. New York Asbestos Litig. [Grispo]*, 897 F2d 626 [2d Cir 1990]). In that case, men who had worked at the Brooklyn Navy Yard during World War II had been exposed to asbestos. The Navy had issued detailed specifications for the packaging in which the asbestos-containing product had been shipped, and for the labeling on the packaging. Like Crane here, the contractor argued that "the relevant packaging, packing, and labeling specification for its asbestos-based cement . . . precluded it

from furnishing product warnings" (897 F2d at 633).[3] The Second Circuit rejected this position, finding that the specification, which stated that shipping containers were to be "marked with the name of the material, the type, and the quantity contained therein, . . . the name of the contractor, the number of the contract or order, and the gross weight" (*id.* at 627) merely created a "floor" for the information the contractor had to provide (*id.* at 633). It found that "[j]ust as nothing in the relevant specification discusses product warnings, nothing in the specification purports to place a limit upon any additional information a manufacturer may have wished to convey to those using the product" (*id.* at 633).

The record does not include the valve specification that was shown to Admiral Sargent during his testimony, and that he stated set forth the information that was required to be placed on a

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[3] The contractor's argument was part of a "government contractor defense" that the United States Supreme Court recognized in *Boyle v United Tech. Corp.* (487 US 500 [1988]). The defense displaces state law products liability claims "when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States" (*id.* at 512). Crane raised the government contractor defense below but does not pursue it on appeal. Nevertheless, the logic of *Grispo* holds for Crane's proximate cause argument, which the trial court properly found was a mere "recast[ing]" of its government contractor defense.

nameplate. However, the record does contain specifications for other parts, which have similar requirements for nameplates. For example, a specification for deaerating feed tanks[4] states that "[n]ameplates shall include the following: (a) Manufacturer's name; (b) Government contract number; (c) Bureau agency stock number . . (d) Date of manufacture; (e) Blank space for Government inspector's stamp; (f) blank space for ship's identifying number." This specification is similar to the one in *Grispo*, and, as the court found in *Grispo*, nothing therein even remotely suggests that the Navy was precluding other relevant information, including warnings, that the contractor may have desired to add. Accordingly, we are not persuaded that it would have made a difference had the Admiral been permitted to testify that the nameplate requirements for valves was exhaustive.

Finally, Crane offered no evidence that it ever attempted to warn the Navy that its products carried the risk of exposure to asbestos. The Supreme Court in *Boyle* explained that this element of the government contractor defense

> "is necessary because, in its absence, the displacement of state tort law would create some incentive for the manufacturer to

[4] The section describing nameplates in the specification for deaerating feed tanks is located in the same section, 3.4, as the specification for valves that Admiral Sargent referred to during his testimony.

> withhold knowledge of risks, since conveying that knowledge might disrupt the contract but withholding it would produce no liability. We adopt this provision lest our effort to protect discretionary functions perversely impede them by cutting off information highly relevant to the discretionary decision" (*Boyle*, 487 US at 512-513).

Although Crane does not invoke the government contractor defense on this appeal, the same policy concern applies. To permit Crane to argue lack of proximate cause in the absence of any evidence that it attempted to warn the Navy about asbestos dangers would promote, rather than deter, the failure to warn about hazardous substances.

Finally, the trial court properly calculated Konstantin's pain and suffering from late 2008 with the onset of the apple-sized hyrdrocele in his testes, which was caused by his mesothelioma. Accordingly, the 33 months of past pain and suffering was accurately calculated. The award for past pain and suffering of $4.5 million equates to $136,000 per month, plainly within the range of what even TLC argues is accurate. Moreover, Konstantin endured five surgeries, two rounds of chemotherapy, and one round of broad radiation. Konstantin testified that the swelling in his testicle was "very sore" and uncomfortable. It was also recurrent, swelling eventually to the size of an avocado. Eventually, he underwent the first surgery, to remove

his testicle and part of his scrotum, which he claimed caused "extreme pain and swelling" and which he described as a "10 out of 10" on the pain scale. The asbestos then migrated to his pleura, requiring procedures to drain the fluid in his chest cavity. In addition, the scar from his testicle removal did not heal properly, requiring additional surgery, the pain of which the *Konstantin* plaintiff described as "unbearable." The jury's award of $3.5 million for 18 months of future pain and suffering, which Konstantin concedes is unprecedented, is supported by the fact that, until the end of his life, he suffered two mesotheliomas, in his testes and chest, tantamount to twice as much pain and suffering.

We also find that the award of damages to Dummitt was justified. The award is clearly supported by the evidence of the pain and suffering Dummitt endured over a 27-month period beginning at the age of 66. This included "thoracentesis" procedures to drain the fluid and relieve the pressure in his lungs, a complete lung collapse, thoracic surgery, and three rounds of chemotherapy. In addition, the remittitur of future pain and suffering to $2.5 million was appropriate under the circumstances.

Accordingly, the judgment of the Supreme Court, New York County (Joan A. Madden, J.), entered November 28, 2012, after a

jury trial, awarding plaintiff Ruby E. Konstantin damages, and the judgment of the same court and Justice, entered October 26, 2012, after a jury trial, awarding plaintiff Doris Kay Dummitt damages, should be affirmed, without costs. The appeal from the order, same court and Justice, entered October 4, 2012, which denied defendant Crane Co.'s posttrial motion to set aside the verdict, should be dismissed, without costs, as subsumed in the appeal from the October 26, 2012 judgment.

All concur except Friedman and DeGrasse, JJ. who dissent in part in an Opinion by Friedman, J.

FRIEDMAN, J. (dissenting in part)

Before us are appeals from judgments for plaintiffs in two unrelated asbestos-related personal injury actions that were consolidated for trial in Supreme Court, New York County. The majority affirms each judgment. I concur in the affirmance of *Konstantin v 630 Third Avenue Assoc., et al.* (Index No. 190134/10, Appeal No. 11498), although, because we have not been provided with the record upon which the motion for consolidation was decided, I would not consider the argument by the appealing defendant (Tishman Liquidating Corporation) that the two actions should not have been consolidated. Upon the other appeal, *Dummitt v A.W. Chesterton, et al.* (Index No. 190196/10, Appeal Nos. 11499-11500), I respectfully dissent from the affirmance of the judgment for plaintiff because the trial court erred (1) in excluding certain evidence offered by the appealing defendant (Crane Co.) on the issue of causation and (2) in its charge to the jury on that issue. Accordingly, I would reverse the judgment for plaintiff in *Dummitt* and order a new trial on the issues of whether Crane's failure to issue warnings about the danger of asbestos-containing gaskets, packing, and insulation used with its valves was a proximate cause of the injury suffered by plaintiff's decedent and, if so, what percentage of fault is attributable to Crane.

I turn first to *Konstantin*. While I am in substantial agreement with the majority's resolution of the substantive issues raised on this appeal, I would not address Tishman's challenge to Supreme Court's pretrial order consolidating *Konstantin* and *Dummitt* for trial.[1] The consolidation order would be reviewable upon Tishman's appeal from the final judgment (*see* CPLR 5501[a][1]) if the record upon which that order was made were before us. Tishman, however, has not provided us with any of the papers upon which the consolidation order was made. Although it has prosecuted its appeal by the appendix system authorized by CPLR 5528(a)(5) and 22 NYCRR § 600.5(a), Tishman has neither caused the original record of the consolidation motion to be transmitted to this Court by the clerk of Supreme Court, as required by 22 NYCRR 600.5(a)(1), nor included the record of that motion in the reproduced appendix it has filed with this Court pursuant to CPLR 5528(a)(5). All we have before us is the consolidation order itself. Tishman's failure to place before this Court, in any form, any of the papers or exhibits submitted on the consolidation motion, either in support or in opposition, as required by CPLR 5526, renders "[m]eaningful

[1]Crane, the appellant in *Dummitt*, does not challenge the consolidation order on appeal, although it did oppose consolidation in Supreme Court.

appellate review of the [granting] of that motion . . . impossible" (*UBS Sec. LLC v Red Zone LLC*, 77 AD3d 575, 579 [1st Dept 2010], *lv denied* 17 NY3d 706 [2011]).

The majority appears to take the position that the record for the review of the consolidation order, while perhaps "incomplete," is "sufficient" to allow us "to meaningfully determine whether consolidation was properly granted." In fact, the record before us on the consolidation order is not merely "incomplete"; there is no record before us at all upon which to conduct a review of that order. The majority cites no authority permitting consideration of an appeal in the absence of any part of the record upon which the appealed order was made. Notably, while CPLR 5527 allows an appeal to be prosecuted upon a statement in lieu of a record on appeal, Tishman has not availed itself of that method, which would have required that the statement in lieu of the record be agreed upon by the parties and approved by the court from the which the appeal is taken. I do not understand why the majority insists on addressing the consolidation issue on the merits, in the absence of any record, when we are all agreed that the *Konstantin* judgment should be affirmed. When before has this Court addressed an issue for

which the parties have not seen fit to provide a record?[2]

Had Tishman's appeal challenged only the consolidation order, Tishman's "fail[ure] in its obligation to assemble a proper appellate record" for review of that order would have warranted dismissal of its appeal for want of proper perfection (*UBS*, 77 AD3d at 579; *see also Matter of Allstate Ins. Co. v Vargas*, 288 AD2d 309 [2d Dept 2001]). Since Tishman's appeal raises additional issues unrelated to consolidation, I believe that we should decide those other issues without addressing Tishman's challenge to the consolidation order. Accordingly, while I concur in the affirmance of the judgment in *Konstantin*, I take no position on the views expressed by the majority in its discussion of the consolidation issue.

In *Dummitt*, as discussed at greater length by the majority, plaintiff's decedent, Ronald Dummitt, in the course of his work from 1960 to 1977 as a boiler-room technician on United States Navy ships, was exposed to asbestos from gaskets, rope-like "packing" material, and insulation (also called "lagging pads") installed on valves manufactured by Crane, the sole appealing

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[2]In response to the majority's statement that the *Konstantin* plaintiff should have moved to dismiss the appeal or to supplement the record, I note that it is the obligation of the party seeking appellate relief — here, Tishman — to provide this Court with a record upon which to consider its appeal.

defendant in this action. It is undisputed that Crane, which manufactured and sold the valves to the Navy many years before the start of Mr. Dummitt's service (the ships on which he served were of World War II vintage), has not been shown to have been the manufacturer, seller, or distributor of any of the asbestos-containing material that was the source of plaintiff's exposure.[3] The asbestos-containing gaskets, packing, and insulation used in conjunction with the Crane valves had to be replaced periodically, and any such material that Crane had originally supplied with the valves had been removed long before Mr. Dummitt began his service. Mr. Dummitt's asbestos exposure arose from the removal from the valves of worn-out gaskets, packing, and insulation, a process that generated large amounts of dust. Again, it is undisputed that Crane neither manufactured nor sold nor distributed the particular materials that gave rise to Mr. Dummitt's asbestos exposure.

The jury was asked to determine whether Crane had breached a duty to warn those working with its valves about the danger of asbestos in the gaskets, packing, and insulation used in

[3]While the majority notes that Crane did distribute and sell an asbestos-containing material known as "Cranite," which was manufactured by other companies, it was stipulated at trial that "Mr. Dummitt does not allege [that] he was exposed to asbestos from Cranite products."

conjunction with the valves. In this regard, the court propounded the following instruction to the jury, over Crane's objection:

> "[A] manufacturer's duty to warn extends to known dangers or dangers which should have been known in the exercise of reasonable care of the uses of the manufacturer's product with the product of another manufacturer if such use was reasonably foreseeable."

The foregoing instruction was erroneous, as the majority appears to recognize, but I think we should say so more forthrightly. Under precedent of this Court, a firm's duty to warn about dangers arising from products that it neither manufactured nor sold nor distributed, but which could be used in conjunction with products that the firm did manufacture, sell, or distribute, does not extend to all such uses of other products that might be "reasonably foreseeable." For example, in *Tortoriello v Bally Case* (200 AD2d 475 [1st Dept 1994]), we held that the manufacturer of a walk-in freezer had no duty to warn users of the slipping danger posed by quarry tile flooring, manufactured and sold by others, that could be used in the freezer, notwithstanding that this kind of flooring was depicted in the freezer manufacturer's sales literature as "one of three available floor materials for walk-in freezers" (*id.* at 477). In view of that sales literature, it was plainly reasonably foreseeable to the manufacturer in *Tortoriello* that quarry tile

flooring would sometimes be used in its walk-in freezers, and yet we held that the manufacturer had no duty to warn users of the freezers about the hazards of that kind of flooring.

The error in the court's instruction on the scope of Crane's duty to warn was, however, harmless, inasmuch as "there is no view of the evidence under which appellant could have prevailed" (*Marine Midland Bank v Russo Produce Co.*, 50 NY2d 31, 43 [1980]) on the issue of whether Crane had a duty to warn people working with the valves in question of the danger of asbestos exposure from gaskets, packing, and insulation used in conjunction with those valves. This is because the record establishes — indeed, Crane itself does not dispute — that use of perishable asbestos-containing materials in conjunction with certain of its valves was a known certainty, not merely "reasonably foreseeable." Crane emphasizes that the Navy, not Crane, chose which gaskets, packing, and insulation it would use on the valves, and points to evidence that non-asbestos-containing versions of these items were available and sometimes used by the Navy during the period in question. Nonetheless, the evidence is uncontroverted that, as Crane knew very well, Navy specifications dictated that asbestos-containing components be used with many of the Crane valves with which Mr. Dummitt worked. In a previous asbestos case, we held that a manufacturer of pumps on Navy ships was not

entitled to summary judgment dismissing a failure-to-warn claim against it, notwithstanding that it did not manufacture or install the asbestos-containing insulation on its pumps, because an issue of fact was raised as to whether the manufacturer "knew [that the insulation to be installed on the pumps] would be made out of asbestos" (*Berkowitz v A.C. & S., Inc.*, 288 AD2d 148, 149 [1st Dept 2001]; *see also Rogers v Sears, Roebuck & Co.*, 268 AD2d 245, 246 [1st Dept 2000] [the manufacturer of a grill had a duty to give users adequate warnings about the dangers arising from the use of a propane tank, which it did not manufacture or sell, "where its grill could not be used without the tank"]).[4]

Although I believe that the *Dummitt* plaintiff is entitled, on this record, to prevail on the issue of duty, I believe that errors relating to the issue of proximate cause require us to reverse the *Dummitt* judgment and order a new trial as to causation-related issues. First, over Crane's objection, the trial court's charge to the jury on the issue of proximate cause

[4]By contrast, in an asbestos case against Crane in which the federal district court determined that the record would not have supported a finding that Crane knew for certain that the Navy would place asbestos-containing insulation on its boilers, the court granted Crane summary judgment dismissing the failure-to-warn claim, distinguishing our decision in *Berkowitz* on the ground that the latter case "involved more than a mere possibility that asbestos might be used" (*Surre v Foster Wheeler LLC*, 831 F Supp 2d 797, 802 [SD NY 2011]).

erroneously included the following instruction: "Mr. Dummitt is entitled to the presumption that had proper and adequate warnings been given regarding the use of the product, the warnings would have been heeded and injury avoided." This charge is contrary to precedent of this Court holding that, in a failure-to-warn case, the plaintiff has the burden of proving "that the user of a product would have read and heeded a warning had one been given" (*Sosna v American Home Prods.*, 298 AD2d 158, 158 [1st Dept 2002]). Further, to the extent certain federal court decisions purporting to apply New York law have applied such a presumption (contrary to this Court's precedent), that presumption is rebuttable (*see Santoro v Donnelly*, 340 F Supp 2d 464, 486 [SD NY 2004]), which is not the charge the jury was initially given. While the court subsequently attempted to cure its error by adding that the presumption could be rebutted,[5] it remains the case that, regardless of what some trial courts and federal courts applying New York law may have held, this Court has never held such a presumption, whether rebuttable or not, to apply in a

[5]After the initial charge, the court called back the jury and added the following "clarification" concerning the presumption the jury had been instructed to entertain in plaintiff's favor: "This, however, is a rebuttable presumption. In other words, you can consider other evidence in the case to see if that other evidence rebuts this presumption to which Mr. Dummitt is entitled."

personal injury case based on a failure-to-warn theory. Further, since the erroneous presumption charge was part of the instructions the jury actually received, it was prejudicial to Crane whether or not counsel for the *Dummitt* plaintiff — who requested the charge — made express reference to it in his argument to the jury.[6]

I do not believe that the error in the charge on causation can be deemed to have been cured by the court's subsequent "clarification" that the presumption the jury had been instructed to indulge in the *Dummitt* plaintiff's favor was rebuttable. Whether rebuttable or not, the presumption charge had the effect of shifting the burden of proof on the causation issue and was contrary to precedent of this Court by which the trial court was bound. However, even if it were possible to deem the erroneous

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[6]*Union Carbide Corp. v Affiliated FM Ins. Co.* (101 AD3d 434 [1st Dept 2012]) did not change this Department's law on this point. *Union Carbide* was an insurance coverage dispute, in which the insurer sought to avoid coverage for asbestos-related bodily injury claims against the policyholder on the ground that the policyholder "expected or intended" the injuries giving rise to the claims. In rejecting the insurer's appeal, we noted that the policyholder "offered, as further proof of any lack of intent, evidence that it . . . provided information regarding the dangers of asbestos, as well as guidance concerning its proper usage, to its clients and potential customers" (*id.* at 434), after which we cited *Santoro* for the proposition that "New York law presumes that users will heed warnings provided with a product" (*id.*). In the context of the issue that was before us in *Union Carbide*, that decision's citation of *Santoro* and recitation of the *Santoro* holding was plainly dicta.

instruction to have been rendered harmless by the curative instruction, the trial court compounded its error by improperly precluding Rear Admiral David Sargent, U.S.N. (ret.), who was called by Crane to testify as an expert on naval operations, from giving testimony highly relevant to the question of whether Crane's failure to give asbestos warnings was a proximate cause of Mr. Dummitt's injuries. Specifically, Crane sought to show through Admiral Sargent's testimony how the Navy would have reacted to an attempt by Crane to issue warnings about the dangers of asbestos used on its valves. This witness was prepared to testify that the Navy would have forbidden Crane to place asbestos warnings on its valves because they were not contained in the Navy equipment specifications. Although this testimony would have tended to show that the hypothetical warnings, even if given, would not have reached Mr. Dummitt, the court refused to allow the jury to hear it.

I do not take issue with the majority's statement that the *Dummitt* plaintiff presented evidence that Mr. Dummitt would have received "[a]ny warning . . . and . . . clearly testified that he would have heeded those warnings and taken steps to protect himself." Still, Crane was entitled to present its own proof rebutting this evidence, as well as the presumption that the jury had been erroneously instructed to indulge in the *Dummitt*

plaintiff's favor. Given that the excluded evidence was relevant and material, its preclusion constituted reversible error.

The majority mistakenly relies on a nearly quarter-century-old federal court decision — which neither side has cited on this appeal — in support of its view that the trial court's preclusion of Admiral Sargent's testimony did not constitute reversible error. In fact, *In re Joint E. and S. Dist. New York Asbestos Litig. (Grispo)* (897 F2d 626 [2d Cir 1990]) provides no support either for the preclusion of Admiral Sargent's testimony or for the majority's inappropriate and groundless speculation that this expert witness's testimony "would have made [no] difference" to the outcome of the trial had the jury been allowed to hear it. In *Grispo*, while the Second Circuit affirmed the denial of summary judgment to the defendant cement manufacturer (Eagle-Picher) on its military contractor affirmative defense, it also vacated the grant of summary judgment to the plaintiffs dismissing that defense and remanded for reconsideration by the district court of whether certain evidence in the record "establish[ed] a genuine issue of material fact [whether] the Government might have precluded Eagle-Picher from including any product warnings" (*id.* at 637). At the trial of the *Dummitt* case, on the other hand, the court effectively granted the plaintiff summary judgment on the issue of causation by refusing

to allow the jury to hear Admiral Sargent's expert testimony, based on his knowledge of the Navy's practices during the relevant period, that any warnings by Crane about the use of asbestos-containing materials in conjunction with its valves would not have reached Mr. Dummitt. Nothing in *Grispo* supports the preclusion of this testimony, since there is no indication in the Second Circuit's opinion that Eagle-Picher offered expert testimony similar to that of Admiral Sargent in support of its military contractor defense. Thus, while the *Grispo* court was unpersuaded by the raw documentary evidence Eagle-Picher offered in support of the defense (*see id.* at 632-633), it had no occasion to consider whether expert testimony about military practices, such as Crane sought to present to the jury here, would raise an issue of fact. Manifestly, Admiral Sargent's testimony — which is not even mentioned in the portion of the *Dummitt* plaintiff's appellate brief addressing the causation issue — raised such an issue and should have been heard by the jury. There is nothing in *Grispo* that suggests otherwise.

The majority also apparently takes the position that Crane's failure to present evidence that it warned the Navy about the dangers of asbestos in materials used with its valves should preclude Crane from contesting that its failure to provide such warnings to naval personnel was a proximate cause of the harm to

Mr. Dummitt. Even if one joins the majority in its dubious assumption that the Navy (unlike its product vendors) was in the dark about the dangers of asbestos during the relevant period, what the majority overlooks is that Admiral Sargent would have testified, based on his long experience in naval procurement practice, that, even if Crane had sought to provide such warnings, the Navy would have disallowed them. Stated otherwise, the Navy, according to Admiral Sargent, would have been unmoved by any warnings presented by Crane for transmission to servicemen like Mr. Dummitt. The jury might well have rejected Admiral Sargent's testimony on this point, but Crane had a right to present it to them. The preclusion of this expert testimony (the admissibility of which the *Dummitt* plaintiff does not dispute) constituted reversible error.

Finally, given my view that a new trial is required on the question of whether Crane's failure to give warnings was a substantial factor in causing Mr. Dummitt's injuries, I would

direct that, should the causation issue be resolved in the *Dummitt* plaintiff's favor, the issue of Crane's percentage of fault for the harm suffered by the plaintiff and her decedent be determined afresh at the new trial.

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

ENTERED: JULY 3, 2014

DEPUTY CLERK