SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 23, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Sweeny, J.P., Acosta, Andrias, Moskowitz, JJ.

16332 Amalgamated Bank, etc., Index 101283/10
Plaintiff-Appellant,

-against-

Fort Tryon Tower SPE LLC et al.,
Defendants-Respondents,

Marson Contracting Co., Inc., et al.,
Defendants.

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Kramer Levin Naftalis & Frankel LLP, New York (Jeffrey W. Davis of counsel), for appellant.

Higgins & Trippett LLP, New York (Lewis Trippett of counsel), for respondents.

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Order and judgment (one paper), Supreme Court, New York County (Saliann Scarpulla, J.), entered June 12, 2014, which, insofar as appealed from, denied the motion by plaintiff Amalgamated Bank, as trustee of Longview Ultra I Construction Loan Investment Fund (now known as Longview Ultra Construction Loan Investment Fund), individually and as administrative agent for itself and the other Lenders signatory thereto (Amalgamated),

for summary judgment, and granted the cross motion by defendants Fort Tryon Tower SPE LLC and Rutherford Thompson III for summary judgment, unanimously modified, on the law, to deny defendants' cross motion, and otherwise affirmed, without costs.

On June 15, 2007, Amalgamated and co-lender Petra Mortgage Capital Corp. LLC entered into various agreements (collectively, loans or loan agreements) by which they agreed to lend up to $95 million to defendant Fort Tryon Tower SPE LLC. Fort Tryon, in turn, planned to use the funds to develop a luxury condominium building in Washington Heights in Manhattan. The loans were to provide the amounts necessary to fund all costs associated with the project.

The loans were due on June 30, 2009, and Fort Tryon had the option of extending them for up to six months as long as it was not in default. Under the terms of the loan agreements, a failure to pay any portion of the total debt when due constituted an event of default. Defendant Rutherford Thompson III, Fort Tryon's managing director, guaranteed Fort Tryon's obligations.

Amalgamated and Petra agreed together to lend $50 million of the $95 million, and Amalgamated agreed to lend $45 million. Petra was to fund the first $30 million, and Petra and Amalgamated would equally fund the next $40 million. Amalgamated

would then fund the last $25 million, if drawn. To receive advances under certain of the loans, Fort Tryon had to provide numerous documents, including architect's certificates, construction manager's certificates, and payment receipts. Furthermore, all the loan agreements contained various antiwaiver provisions.

On June 18, 2007, Fort Tryon requested, and the lenders advanced, approximately $21 million under the loan. After this first draw request, Fort Tryon submitted requests and received payments approximately every month through September 2008. For each draw request, Fort Tryon would prepare a "pencil" requisition for payment of completed work or other costs associated with the project. Amalgamated's project manager would review the "pencil" requisition and make revisions to it. Fort Tryon would then submit a final draw request with the supporting documentation; if everything was in order, Amalgamated would certify that the loan was in balance and that Fort Tryon had met all requirements for the draw, including no event of default.

After submitting 15 draw requests between July 17, 2007 and September 18, 2008, Fort Tryon submitted draw request #16 on or about September 18, 2008, and less than a week later, on or about September 24, 2008, submitted preliminary draw request #17. On

September 25, 2008, an officer of Amalgamated informed Fort Tryon that it was not advisable to combine draws #16 and #17 because most of the work was already done on draw #16, and that he could turn draw #17 around quickly when Fort Tryon sent the necessary supporting documents the next week. On September 30, draw #16 was funded. The record, however, contains no evidence that Fort Tryon sent the package for draw #17 to Amalgamated; Thompson avers in an affidavit that he did not send the documents because in September 2008, Amalgamated refused to process any further draws.

Meanwhile, before October 15, 2008, certain of Petra's senior executives had informed defendant Thompson that Petra was having financial difficulties and would not be able to continue funding construction draws for the project after draw #16. As a result, Petra asked Amalgamated, as trustee of the LongView Ultra Construction Loan Investment Fund (Ultra), to buy Petra out of the loan completely. Amalgamated informed Petra that the Fund would not be interested in buying out Petra's portion of the loan, but that it would ask the Ultra investment committee to consider assuming the future fundings of $20 million.

In meetings of the Ultra investment committee between October 2008 and May 2009, the committee discussed the proposal

to assume Petra's funding obligations; however, the committee never made any decision on the matter during that period. At the meeting of the investment committee held on June 18, 2009, approximately two weeks before the loans' maturity date, the committee decided to place the Fort Tryon loans on a "non-accrual" status and downgrade the loan's risk rating. According to the minutes of the meeting, the committee decided that, because of the state of the economy, the overall project was no longer viable. Two months later, on August 19, 2009, Amalgamated sent a letter to Fort Tryon stating that Fort Tryon was in default because it had failed to pay the loan by the maturity date. Amalgamated also stated that Fort Tryon was in default because, insofar as relevant to this action, Fort Tryon had failed to maintain the required insurance policies and failed to pay taxes on the property – all valid bases for declaring a default under the loan agreements' terms.

In January 2010, Amalgamated commenced this action seeking foreclosure of the mortgages (first cause of action) and a deficiency judgment based on Thompson's guaranties (second cause of action). In an amended answer, Fort Tryon interposed a counterclaim seeking a declaration that the loan was not, in fact, due and payable; that Fort Tryon was not in default; and

that Amalgamated was obliged to approve advances for the balance of the loan (first counterclaim). Fort Tryon also interposed a counterclaim seeking a decree of specific performance compelling Amalgamated to provide funding for the remaining balance of the building loan and project loan (second counterclaim). Amalgamated moved for summary judgment on its complaint and for an order dismissing the counterclaims. Defendants cross-moved for summary judgment on their first and second counterclaims and for an order dismissing the complaint.

The IAS court denied Amalgamated's motion for summary judgment and granted defendants' cross motion for summary judgment. In so doing, the court noted that while Fort Tryon provided evidence that it submitted a 17th draw request, it was undisputed that Amalgamated failed to pay it. Thus, the court found, Amalgamated had presented no evidence to contradict Fort Tryon's prima facie showing that it presented enough of a 17th draw request to require Amalgamated to at least move toward a finalization of that request and that Amalgamated failed to do so. For the same reasons, the court granted defendants' cross motion for dismissal of Amalgamated's action.

The IAS court also granted defendants' motion for summary judgment on their first counterclaim for a declaratory judgment

on the basis that Amalgamated failed to fund the 17th request, thus violating its obligation to do so. Finally, the court granted defendants' request for specific performance on the basis that Fort Tryon, at a minimum, initiated the 17th request, and Amalgamated was required to at least move toward a finalization of that request.

Contrary to Amalgamated's claim, defendants raised a triable issue of fact as to whether Amalgamated caused their defaults. To be sure, the record contains no evidence that Fort Tryon sent the package for draw #17 even though the officer from Amalgamated apparently told Fort Tryon that he could turn draw #17 around quickly when Fort Tryon sent the necessary supporting documents the next week. However, Thompson submitted an affidavit stating that in September 2008, Amalgamated had refused to process any further draws; Amalgamated submitted no affidavit or any other evidence contradicting Thompson's affidavit.

Hence, Thompson's averment could support a conclusion that Amalgamated had wrongfully refused to act on a properly supported preliminary draw request as required under the loan agreements. Thus, according Fort Tryon every favorable inference, there would be no reason for Fort Tryon to make a fruitless effort to submit a package of documents for draw #17 (*see ADC Orange, Inc. v*

Coyote Acres, Inc., 7 NY3d 484, 490 [2006] ["[a] party to a contract cannot rely on the failure of another to perform a condition precedent where he has frustrated or prevented the occurrence of the condition"] [internal quotation marks and brackets omitted]; *see also Nassau Trust Co. v Montrose Concrete Prods. Corp.*, 56 NY2d 175, 185 [1982]).

Amalgamated further contends that the court erred in finding that it had waived the requirement of supporting documentation. This argument is a straw man, as the IAS court did not find that Amalgamated waived the requirements of a draw request, and Fort Tryon has not made that argument. In fact, defendants expressly argue that Fort Tryon never claimed that Amalgamated modified or eliminated the draw request requirements, but rather, that Fort Tryon did its part to start the process for draw request #17 and that Amalgamated wrongfully prevented completion of the process.

Nonetheless, for the same reasons as support the IAS court's denial of Amalgamated's motions for summary judgment, we find that the IAS court should also have denied defendants' cross motion to dismiss the complaint and for summary judgment on their first and second counterclaims. The record presents issues of fact as to whether the "pencil" requisition was a properly supported draw request, or, instead, whether the requisition was

inadequately supported with the required background documents and thus did not constitute a valid request. Likewise, given the fact that Amalgamated, not Petra, was the agent and lead lender for the loan, the record presents issues of fact as to whether defendants had a valid basis for failing to submit a completed draw request based on its discussions with Petra.

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: JUNE 23, 2016

CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Kapnick, Gesmer, JJ.

947-
948 Shoshanah B.,
Petitioner-Appellant,

-against-

Lela G.,
Respondent-Respondent.

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Preston Stutman & Partners, P.C., New York (Scott G. Drucker of counsel), for appellant.

Dobrish Michaels Gross LLP, New York (Nina S. Gross of counsel), for respondent.

Karen Freedman, Lawyers For Children, Inc, New York (Shirim Nothenberg of counsel), attorney for the child.

Order, Family Court, New York County (George L. Jurow, J.H.O.), entered on or about November 5, 2014, which granted respondent custodial parent's motion to vacate an order temporarily suspending the commencement of therapy for the parties' child, permitted respondent to enroll the child in therapy with a clinician of her choice, and suspended petitioner's Wednesday overnight visits, unanimously modified, on the law, to the extent of vacating the portion of the order that suspended petitioner's Wednesday overnight visits, and otherwise affirmed, without costs. Appeal from oral rulings, same court and Judicial Hearing Officer, rendered November 5, 2014,

unanimously dismissed, without costs.

The parties are the mothers of a son born in 2008. They executed a custody agreement dated January 26, 2012, which was so-ordered by the Family Court (the custody order). Pursuant to the custody order, respondent has sole legal and primary residential custody. The custody order provides that she shall "consult" and "seek out the opinions" of petitioner with regard to nonemergency major decisions about the child, but respondent has the right to make the final decision in the event of a disagreement.

On or about April 24, 2014, respondent took the child to be evaluated by a psychiatrist, Dr. Harold S. Koplewicz, without first consulting petitioner. After learning of this, in or about May 2014, petitioner filed a petition in Family Court seeking, inter alia, to transfer sole legal and physical custody to her, and to direct respondent not to make any nonemergency medical decisions concerning their son without consulting her, as required by the custody order. In or about June 2014, respondent filed a petition seeking to dismiss petitioner's May application, to direct petitioner to participate in Dr. Koplewicz's assessment of the child, and to modify the custody order by eliminating petitioner's Monday night dinners and Wednesday overnights

pending completion of Dr. Koplewicz's assessment. Petitioner opposed respondent's June application and filed a cross motion seeking various relief, including appointment of a therapist for the child recommended by the child's attorney, appointment of a neutral forensic evaluator, and modification of the custody order to award petitioner sole custody after completion of a forensic evaluation. On the return date of respondent's June application and petitioner's June cross motion, petitioner consented to, and agreed to participate in, Dr. Koplewicz's assessment, and the matter was adjourned to November 20, 2014.

On or about October 1, 2014, Dr. Koplewicz sent his assessment and recommendations to the parties. The assessment included a recommendation that the child be enrolled in behavioral therapy, and that weeknight overnights with petitioner be eliminated to facilitate the treatment.

On or about October 23, 2014, the attorney for the child sought and obtained an ex parte temporary restraining order prohibiting the parties from enrolling the child in therapy (the October application).[1] On or about October 30, 2014, respondent filed an order to show cause seeking an order directing

[1]The October application is not in the record before this court.

petitioner not to interfere with implementation of the recommendations in the assessment (respondent's October motion).[2] The Family Court directed that respondent serve her order to show cause by the next day, a Friday, by overnight mail and email, made the motion returnable the following Wednesday, and did not include a briefing schedule.

On the return date of respondent's October motion, the court questioned the child's attorney's social worker without swearing her in, and marked the unsworn assessment as a "Court Exhibit for today's purposes so that ... it's clear what the reference is to." Petitioner's attorney argued, inter alia, that the court did not have sufficient information before it to modify the parenting time schedule, and requested time to put in opposition papers, including the affidavit of a mental health professional who would critique the assessment. The Family Court denied that request. Respondent's counsel took the position that the "limited question" before the court that day was when and by whom the child would be treated; she asked only that the court permit her client to enroll the child in therapy with the therapist

[2] Respondent's October motion also sought an ex parte interim order vacating the temporary restraining order in the child's attorney's October application. The Family Court denied that request for relief.

recommended by Dr. Koplewicz. The child's attorney took the position that the child should be in therapy, and did not address the issue of modification of parenting time. Later the same day, the Family Court made oral rulings on the record, and then issued a written order that addressed only two issues,[3] stating:

> after hearing exhibits etc. and testimony of [the child's] social worker the temporary suspension of child initiating therapy is vacated. Custodial parent ... may proceed to enroll child in therapy consistent with ... the [assessment] and Wednesday night overnight visits are temporarily suspended (see oral bench decision).

Family Court properly determined that respondent acted appropriately, within the bounds of her authority under the custody order and in the best interests of the child, in seeking psychiatric assessment and treatment for the child, who, by all accounts, was in severe emotional distress. Moreover, respondent's decision to promptly engage the child in therapy was consistent with the recommendations made by the psychiatrist who conducted an extensive diagnostic assessment of the child, which

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[3]The Family Court stated on the record that it would deny petitioner's June cross motion to the extent that she sought appointment of a forensic evaluator and modification of custody. However, no appeal lies from Family Court's rulings in open court, as the transcript of that proceeding was not "so-ordered" by the court, and those rulings were not included in the court's written order (*see Matter of Melissa M.*, 290 AD2d 219, 220 [1st Dept 2002]).

petitioner consented to and participated in.

Petitioner failed to object to the marking in evidence of the assessment, the "unsworn testimony" of the child's attorney's clinical social worker, and to Family Court's limitation of petitioner's questioning of the social worker, and we decline to consider her objections on appeal (*Matter of Shemeek D. v Teresa B.*, 89 AD3d 608, 608 [1st Dept 2011]).

Even if petitioner had preserved her objections, we would affirm as to the Family Court's directive that respondent be permitted to enroll the child in therapy with the therapist she had selected over petitioner's objection. While respondent may not have followed the custody order's consultation provision to the letter in initiating the assessment without first consulting with petitioner, respondent ultimately consented to, and agreed to participate in, the assessment. Respondent properly notified petitioner about her intention to enroll the child in therapy with the therapist recommended by Dr. Koplewicz prior to doing so, but petitioner chose not to engage in the consultation process provided for in the custody order. Even if respondent had failed to follow the custody order in this regard, the Family Court had enough information before it, without a full hearing, to determine that the child's prompt enrollment in therapy with

the therapist selected by respondent after consultation with a psychiatrist was in his best interests, particularly given that there was no dispute that the child needed treatment (*Steck v Steck*, 307 AD2d 819 [1st Dept 2003]). Accordingly, the November 5, 2014 order is affirmed to the extent that it vacated the restraining order prohibiting the child's enrollment in therapy and granted the custodial parent's motion for an order permitting her to enroll the child in therapy with the therapist she had selected.

To the extent that respondent argues that Family Court's order suspending petitioner's Wednesday overnight visitation with the child was a temporary order, we disagree. Although the Family Court characterized its order as "temporary," it set no limit on the duration of the order, and canceled the next court date without scheduling any future appearances. Therefore, the suspension of visitation was only temporary in the same sense as any visitation order, in that it can always be modified upon application showing changed circumstances requiring a modification in the child's best interest (*Santiago v Halbal*, 88 AD3d 616, 617 [1st Dept 2011]). Accordingly, the order modifying the access schedule was temporary in name only and is appealable. Alternatively, we exercise our discretion to treat the appeal of

the order suspending petitioner's Wednesday overnight visitation as a motion for leave to appeal, and grant that request, nunc pro tunc (Family Ct Act § 1112[a]; *Matter of Jeremy A. v Vianca G.*, 120 AD3d 1147 [1st Dept 2014]).

Modification of custody or visitation, even on a temporary basis, requires a hearing, absent a showing of an emergency (*Matter of Martin R.G. v Ofelia G.O.*, 24 AD3d 305 at 305-306 [1st Dept 2005]; *Matter of Rodger W., II v Samantha S.*, 95 AD3d 743, 743 [1st Dept 2012]). Here, the court modified the custody order based on information provided almost exclusively by the custodial parent, including the unsworn recommendation of a mental health professional who was not the professional who would ultimately treat the child, and whose recommendation petitioner was not given the opportunity to challenge, either in papers or by testimony. While it was clear that the child's need for treatment was urgent, there was no showing that immediate modification of the parenting schedule was necessary to address the child's distress. The fact that the custodial parent's counsel agreed that the issue of modification of the parenting schedule was not before the court that day, and the child's attorney did not address modification at all, indicates that they did not view the parenting schedule as an emergency issue. At

the time that the Family Court issued the order appealed from, respondent's June application and petitioner's June cross motion (which sought modification of the custody order) had been adjourned to November 20, 2014. In view of the parties' conflicting factual accounts in their papers on those motions and the absence of any showing of an emergency requiring an immediate modification of the parenting schedule, the court should not have modified the schedule without a hearing at which petitioner and the child's attorney had an opportunity to present testimony and evidence (*Santiago*, 88 AD3d at 617). While we have stated that such a hearing may be "as abbreviated, in the court's broad discretion, as the particular allegations and known circumstances warrant" (*Matter of Martin R.G.*, 24 AD3d at 306), it must include an opportunity for both sides, and the children's attorney when there is one, to present their respective cases, and the "factual underpinnings of any temporary order [must be] made clear on the record" (*id.*). Accordingly, that portion of the Family Court's order suspending petitioner's Wednesday overnight visits is vacated. This order shall take effect 30 days after the date of this order, to enable the parties to make appropriate applications.

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

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

ENTERED: JUNE 23, 2016

CLERK

Sweeny, J.P., Acosta, Manzanet-Daniels, Gische, Gesmer, JJ.

1063 Nicholas Hill, Index 301526/13
Plaintiff-Appellant, 83921/13

-against-

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

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City of New York,
Third-Party Plaintiff-Respondent,

-against-

C&C Meats Corp.,
Third-Party Defendant-Respondent.

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Shapiro Law Offices, PLLC, Bronx (Jason S. Shapiro of counsel), for appellant.

Bartlett, McDonough & Monaghan, LLP, Mineola (Robert G. Vizza of counsel), for The City of New York, respondent.

Milber Makris Plousadis & Seiden, LLP, Woodbury (Sarah M. Ziolkowski of counsel), for C&C Meats Corp., respondent.

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Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered February 23, 2015, which denied plaintiff's motion for summary judgment as to liability on his Labor Law §§ 240(1) and 241(6) claims, unanimously modified, on the law, to grant the motion for summary judgment as to the Labor Law § 240(1) claim, and otherwise affirmed, without costs.

Plaintiff sustained serious injuries when he fell from a

ladder while working at the Hunts Point Market in the Bronx. The premises were owned by defendant City of New York, with defendant C&C Meats Corp. as the tenant-in-possession of the accident site. At the time of the accident, plaintiff, an HVAC mechanic employed by Hunts Point Cooperative Market, was installing pipes for an overhead refrigerator unit on C&C Meats's premises, when the ladder he was using wobbled, causing him to fall. Plaintiff typically used forklifts and scissor lifts during the actual mounting of the refrigeration unit in the ceiling. In contrast, plaintiff used ladders to install the new units' pipes.

On the day of the accident, plaintiff did not have any harness equipment. After ensuring that the ladder was steady, he ascended to the sixth rung and started to tighten pipe fittings. His coworker did not steady the ladder for him, and eventually left the room to retrieve a pipe fitting. As plaintiff continued to work, "the ladder wobbled. I lost my balance. The wrench slipped and I fell backward." According to plaintiff, the pipe wrench did not slip before the wobbling started.

After falling to the ground, plaintiff saw that the ladder was missing two of its four rubber foot pads, a condition he had not previously noticed, which he assumed caused it to wobble.

Ernesto Conde, C&C Meats's owner, testified that plaintiff's

accident was recorded by the surveillance video system installed on the premises. Based on the video footage, Conde described the accident as follows:

> "Standing on the ladder, what I saw was the -- from the distance, from waist down I saw the ladder go right and then come left and that's when I saw him. As if he fell from that height and bounced on the ground, that's what I remember seeing.
>
> "He wobbled this way to the right; it went to the right which is correct and then went to the left, that's when it went too far and he tumbled."

Conde was unable to ascertain exactly what caused the ladder to move. Plaintiff instantly fell to the floor on his back after the ladder wobbled. Conde admitted that C&C Meats had not provided plaintiff with any safety devices.

Labor Law § 240(1) places a nondelegable duty on owners, contractors, and their agents to furnish safety devices giving construction workers adequate protection from elevation-related risks. As relevant, the statute provides:

> "All contractors and owners and their agents ... in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders ... and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

"Liability under Labor Law § 240(1) depends on whether the

injured worker's 'task creates an elevation-related risk of the kind that safety devices listed in section 240(1) protect against'" (*Salazar v Novalex Contr. Corp.*, 18 NY3d 134, 139 [2011]). "[T]he single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2007]). Under this section of the Labor Law, a plaintiff's comparative fault is not a defense (*Romanczuk v Metropolitan Ins. & Annuity Co.*, 72 AD3d 592, 593 [1st Dept 2010]). "Where a ladder is offered as a work-site safety device, it must be sufficient to provide proper protection. It is well settled that [the] failure to properly secure a ladder, to ensure that it remain[s] steady and erect while being used, constitutes a violation of Labor Law § 240(1)" (*Montalvo v J. Petrocelli Constr., Inc.*, 8 AD3d 173 [1st Dept 2004]).

At both his deposition and General Municipal Law § 50-h hearing, plaintiff consistently testified that he fell from the sixth rung of an eight-foot ladder after the ladder unexpectedly wobbled. Conde corroborated plaintiff's account by testifying, "I saw the ladder go right and then come left and that's when I

saw [plaintiff fall] . . . He wobbled this way to the right; [the ladder] went to the right . . . and then to the left, that's when it went too far and [plaintiff] tumbled."

Plaintiff's affidavit in support of his motion for summary judgment did not contradict these earlier statements. In the affidavit plaintiff averred that, as he was working on the piping atop the ladder, he "lost [his] balance and fell off the ladder to the ground below." The fact that he did not mention the ladder wobbling is of no moment. Taken together, all of his and Conde's statements, including Conde's account of the videotape footage, which he viewed twice, support plaintiff's position that he fell because the ladder wobbled. Plaintiff did not offer a different reason for falling. Nor did the unsigned Workers' Compensation Form C-2 report prepared by plaintiff's employer, which stated that plaintiff "was tightening a plumbing fitting when the wrench he was using slipped, he lost his balance and fell off of an 8 ft ladder," contradict plaintiff's statement that the ladder wobbled, causing him to drop his wrench.

In any event, it is irrelevant whether he fell because the ladder wobbled or because he dropped his wrench. "[I]t is clear that the ladder did not prevent plaintiff from falling and there is no dispute that no safety devices, other than the ladder, were

provided" (*Yu Xiu Deng v A.J. Contr. Co.*, 255, AD2d 202, 202-203 [1st 1998].

Defendants' argument that plaintiff was required to demonstrate that the ladder was defective in order to satisfy his burden as to the Labor Law § 240(1) claim is without merit. "It is sufficient for purposes of liability under section 240(1) that adequate safety devices to prevent the ladder from slipping or to protect plaintiff from falling were absent" (*Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289, 291 [1st Dept 2002]; *see also Estrella v GIT Indust., Inc.*, 105 AD3d 555 [1st Dept 2013]; *McCarthy v Turner Constr., Inc.*, 52 AD3d 333 [1st Dept 2008]).

Inasmuch as there is no evidence that plaintiff was a recalcitrant worker or that he was not engaged in covered activity, it is sufficient for his Labor Law § 240(1) claim that his injuries were the direct consequence of using a ladder that did not provide adequate protection (*Runner v New York Stock Exch.*, 13 NY3d at 603; *see also Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 288-289 [2003], citing *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001] ["Not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240(1). *Rather, liability is contingent upon the existence*

of a hazard contemplated in section 240(1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein"] [emphasis added]).

The motion court correctly denied plaintiff's Labor Law § 241(6) claim, predicated on an alleged violation of the Industrial Code (*see* 12 NYCRR 23-1.21[b][3][i], [iv]), since there are issues of fact as to which ladder was used by plaintiff on the day of the accident and whether it was missing rubber feet (*see Juchniewicz v Merex Food Corp.*, 46 AD3d 623, 625 [2d Dept 2007]; *Ferrero v Best Modular Homes, Inc.*, 33 AD3d 847, 851-852 [2d Dept 2006], *lv dismissed* 8 NY3d 841 [2007]).

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

ENTERED: JUNE 23, 2016

CLERK

Acosta, J.P., Saxe, Gische, Webber, Kahn, JJ.

1344 Raidy J. G., an Infant by His Mother and Natural Guardian, etc., et al., Plaintiffs-Respondents,

-against-

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

Jane ("Ana") Doe, etc., Defendant.

Index 155866/06

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

Gray Law Firm PLLC, New York (Peter J. Eliopoulos of counsel), for respondents.

Order, Supreme Court, New York County (Barbara Jaffe, J.), entered February 5, 2014, which granted plaintiffs' motion to vacate a prior order dismissing the complaint due to plaintiffs' failure to appear for scheduled depositions, unanimously affirmed, without costs.

It was not an improvident exercise of the court's broad discretion to give plaintiffs one final opportunity to appear within two months for depositions on an agreed-upon date, and to

provide that the action would be restored to the court's calendar if plaintiffs complied with that condition, or dismissed if they did not.

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

ENTERED: JUNE 23, 2016

CLERK

Sweeny, J.P., Renwick, Manzanet-Daniels, Webber, JJ.

1526 The People of the State of New York, Ind. 4204/11
Respondent,

-against-

Angellove Vasquez,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered May 23, 2012, convicting defendant, after a jury trial, of criminal possession of a weapon in the second degree, and sentencing him to a term of nine years, unanimously affirmed.

The court properly exercised its discretion in permitting the jury to conduct an experiment with physical evidence by placing, in the backpack worn by defendant at the time of his arrest, the pistol and clothing that the police had found in the backpack (*see People v Gomez*, 273 AD2d 160 [1st Dept 2000], *lv denied* 95 NY2d 890 [2000]). The fact that defendant testified that items not introduced into evidence were also in the bag did not result in the experiment being under different conditions

from those existing at the time of the arrest, because the jury could have discredited that testimony. In any event, the court minimized any prejudice by reminding the jury of that testimony in its instruction permitting the jury to conduct the experiment. In any event, any error was harmless in light of the overwhelming evidence of guilt (*see People v Crimmins*, 36 NY2d 230 [1975]).

Defendant did not preserve his contention that the court's instruction to the jury regarding the experiment misstated the evidence by referring to purported testimony that "video games" were in the backpack, and we decline to review it in the interest of justice. As an alternative holding, we find that although, as the People concede, the court's statement was unsupported by any evidence, the error was likewise harmless (*see id.*). We do not find that the lack of preservation should be excused on the ground of ineffective assistance.

Upon our review of the sealed transcript of a *Darden* hearing, we find that the confidential informant existed (*see* e.g. *People v Rivera*, 138 AD3d 401 [1st Dept 2016]), that "the information from the informant provided ample basis to conclude that the informant had a basis for his or her knowledge that defendant was in possession of [the pistol], and that it further sufficed to establish probable cause to arrest" (*People v Lowe*,

50 AD3d 516, 516 [1st Dept 2008], *affd* 12 NY3d 768 [2009]). We decline to unseal the transcript, since its disclosure, "even with redactions, would jeopardize the safety of the confidential informant" (*id.*).

We find no merit to defendant's due process and ineffective assistance of appellate counsel claims in connection with the sealing of the *Darden* hearing transcript (*see People v Castillo*, 80 NY2d 578, 584 [1992], *cert denied* 507 US 1033 [1993]) or this Court's denial of his motion to enlarge the record to include the minutes of grand jury testimony (*see People v Campbell*, 90 NY2d 852, 853 [1997]).

We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 23, 2016

CLERK

Sweeny, J.P., Renwick, Manzanet-Daniels, Webber, JJ.

1527 Michael Reifsnyder, etc., Index 108546/09
Plaintiff-Respondent,

-against-

Penske Truck Leasing Corporation., et al.,
Defendants-Appellants,

PHS Group, Inc., et al.,
Defendants.

_____

Murphy Higgins & Schiavetta PLLC, New Rochelle (Dan Schiavetta, Jr. Of counsel), for appellants.

Finkelstein & Partners, Newburgh (Sharon A. Scanlan of counsel), for respondent.

_____

Order, Supreme Court, New York County (Leticia M. Ramirez, J.), entered March 2, 2016, which, insofar as appealed from, denied defendants Penske Truck Leasing Corporation and Penske Truck Leasing Co., L.P.'s (together, Penske) motion for summary judgment dismissing the complaint and all cross claims against them, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Penske established its entitlement to summary judgment under the Graves Amendment (*see* 49 USC § 30106[a]) by showing that the accident in which a truck owned by it struck and killed

plaintiff's decedent was not caused by any negligent maintenance on its part (*see Villa-Capellan v Mendoza*, 135 AD3d 555 [1st Dept 2016]; *see also Costello v Panavision of N.Y.*, 8 AD3d 143, 143 [1st Dept 2004], *lv denied* 4 NY3d 703 [2005]). Penske submitted evidence that it regularly maintained the truck, including the brakes, that it had inspected the brakes two months before the accident and found no defect, and that there was no report or other evidence of any brake failure before the accident.

In opposition, plaintiff failed to raise a triable issue of fact as to whether the brakes were negligently maintained. The Penske employee who made repairs to the truck following the accident changed his deposition testimony to clarify that a damaged part discarded and replaced at that time (the charge air cooler) was not a component of the truck's air brake system; the change was timely and was accompanied by a statement of the witness's reasons for the change (*see* CPLR 3116[a]; *Cillo v Resjefal Corp.*, 295 AD2d 257 [1st Dept 2002]). This correction of the testimony also refutes plaintiff's contention that Penske spoliated evidence by permitting its employee to discard brake parts.

Plaintiff's contention that he lacked an adequate opportunity to have the truck's brakes fully tested rings hollow

in light of his failure to request a follow-up inspection of the truck in the many months that passed after Penske's initial inspection, which found no defects in the brakes.

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

ENTERED: JUNE 23, 2016

CLERK

Sweeny, J.P., Renwick, Manzanet-Daniels, Webber, JJ.

1528-
1529 In re Demetrius R., and Another,

Children Under Eighteen Years of Age, etc.,

Elsie R.,
Respondent-Appellant,

Commissioner of Social Services of the City of New York,
Petitioner-Respondent,

Danian C.,
Respondent.

_____

Steven N. Feinman, White Plains, for appellant.

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

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

_____

Order of disposition, Family Court, New York County (Stewart H. Weinstein, J.), entered on or about January 22, 2015, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about June 18, 2014, which found that respondent mother medically neglected the subject child, Kassandra C., unanimously affirmed, without costs. Appeal from fact-finding order, unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

A preponderance of the evidence supports the court's finding of neglect based on the facts that the mother minimized the danger to the child from a vegan diet, which resulted in a diagnosis of failure to thrive, her refusal to permit the child to be vaccinated, and her failure to act promptly to obtain medical assistance and nutritional advice to ameliorate the child's condition (*see Matter of Joshua Hezekiah B. [Edgar B.]*, 77 AD3d 441, 442 [1st Dept 2010], *lv denied* 15 NY3d 716 [2010]).

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

ENTERED: JUNE 23, 2016

CLERK

Sweeny, J.P., Renwick, Manzanet-Daniels, Webber, JJ.

1530 John Sada, Index 152499/13
Plaintiff-Respondent,

-against-

August Wilson Theater,
Defendant-Appellant.

_____

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

Krentsel & Guzman, LLP, New York (Steven E. Krentsel of counsel), for respondent.

_____

Order, Supreme Court, New York County (Jennifer G. Schecter, J.), entered October 26, 2015, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff alleges that as he was returning to a show at defendant August Wilson Theater after having gone outside during intermission, he slipped on a wet staircase, causing him to sustain injuries. The evidence submitted by defendant was insufficient to establish prima facie that it lacked constructive notice of the alleged water hazard. Although defendant described its general cleaning routines at the theater, it failed to offer specific evidence as to its activities on the day of the accident, including evidence indicating the last time the

staircase was inspected or maintained before plaintiff fell (*see Pineda v 1741 Hone Realty Corp.*, 135 AD3d 567, 567 [1st Dept 2016]; *Lorenzo v Plitt Theatres*, 267 AD2d 54, 56 [1st Dept 1999]).

In any event, in opposition, plaintiff raised an issue of fact as to notice of the alleged wet condition and whether defendant had adequate time to remedy the condition, based on his testimony that he told an usher prior to going outside of the theater at intermission that the area was wet, and when he returned 15 minutes later, he slipped and fell in the same area (*see Rosa v Da Ecib USA*, 259 AD2d 258, 260 [1st Dept 1999].

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

ENTERED: JUNE 23, 2016

CLERK

Sweeny, J.P., Renwick, Manzanet-Daniels, Webber, JJ.

1532 Yolanda Mero, as Administrator of the Estate of Elsa Samayoa, Deceased, Plaintiff-Respondent-Appellant, Index 105113/10 590743/10

-against-

Anna Vuksanovic, et al., Defendants-Appellants-Respondents.

- - - - -

[And a Third-Party Action]

_____

Lester Schwab Katz & Dwyer, LLP, New York (Stewart G. Milch of counsel), for appellants-respondents.

Alexander P. Kelly, New York, for respondent-appellant.

_____

Order, Supreme Court, New York County (Barbara Jaffe, J.), entered May 15, 2015, which granted defendants/third-party plaintiffs Anna Vuksanovic and Caco Son Realty Corp.'s motion for summary judgment only to the extent of dismissing claims premised on a failure to install operational smoke detectors and post fire safety notices, unanimously modified, on the law, to reinstate the allegations concerning a failure to install smoke detectors, and otherwise affirmed, without costs.

In this action for wrongful death arising from a fire in a residential apartment building owned and managed by defendants, is undisputed that the fire ignited in apartment 18, which was located on the fifth floor of defendants' building and rented by

third-party defendant George Deegan, who was living in the apartment with a roommate on the date of incident. It is also undisputed that the decedent lived in apartment 23, which was on the sixth floor of the subject building, was found unconscious on her bathroom floor when she was removed from the premises by fire fighters, and later died from smoke inhalation.

Defendants failed to establish their prima facie entitlement to summary judgment regarding the issue of whether apartments 18 and 23 were equipped with operational smoke detectors when either Deegan or the decedent commenced their tenancies, as required by Administrative Code of City of NY § 27-2045, because they submitted no evidence that one was installed and operational at that time (*see Vanderlinde v 600 W. 183rd St. Realty Corp.*, 101 AD3d 583 [1st Dept 2012]; *see Peyton v State of Newburgh, Inc.*, 14 AD3d 51, 53-54 [1st Dept 2004], *lv denied* 5 NY3d 704 [2005]). Given the undisputed testimony of nonparty witness Mary Schieffen that no alarm sounded during the fire, there are triable issues of fact as to whether the smoke detectors in the building were functioning properly on the night of the fire and whether operational smoke detectors would have given adequate warning of fire to the decedent (*see Bulluck v Fields*, 132 AD3d 1382, 1382 [4th Dept 2015]; *Taylor v New York City Hous. Auth.*, 116 AD3d

695, 695-696 [2d Dept 2014]).

Contrary to plaintiff's contention, her expert's affidavit has no foundational facts to support his opinion that the decedent would have responded to the fire differently if a fire safety notice had been posted in her apartment (*see Romano v Stanley*, 90 NY2d 444, 451-452 [1997]).

There are issues of fact as to whether the decedent's decision to remain in her apartment during the fire was so extraordinary as to interrupt the causal chain stemming from defendants' alleged negligence in keeping the premises in a reasonably safe condition and constitute an intervening and superseding cause of injury (*see Wiggins v City of New York*, 1 AD3d 116, 117 [1st Dept 2003]).

Defendants failed to preserve for appellate review their contention that the motion court erred in considering plaintiff's expert affidavit because it raised new theories of liability that had not been properly pleaded, and we decline to review it (*see Inwood Sec. Alarm, Inc. v 606 Rest., Inc.*, 35 AD3d 194 [1st Dept 2006]). Lastly, we find that defendants failed to make a prima facie showing that Deegan caused the fire, as the Fire Department Incident Report states that the cause of the ignition was "under investigation" and that the area of origin was

undetermined, and the expert's affidavit does not conclusively establish that the fire's origin was entirely unrelated to the building's electrical system.

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

ENTERED: JUNE 23, 2016

CLERK

Sweeny, J.P., Renwick, Manzanet-Daniels, Webber, JJ.

1533 The People of the State of New York, Ind. 1991N/12
Respondent,

-against-

Gregory Crockett, Jr.,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Jahaan Shaheed of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Arlene D. Goldberg, J.), rendered June 27, 2013, convicting defendant, upon his plea of guilty, of conspiracy in the fourth degree, and sentencing him, as a second felony offender, to a term of two to four years, unanimously affirmed.

The court properly rejected defendant's challenges to a search warrant. Defendant's arguments are essentially similar to

arguments this Court rejected on a codefendant's appeal (*People v Danclair*, 139 AD3d 541, [1st Dept 2016]), and we find no reason to reach a different result.

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

ENTERED: JUNE 23, 2016

CLERK

Sweeny, J.P., Renwick, Manzanet-Daniels, Webber, JJ.

1534 Pac Fung Feather Co. Ltd., Index 600865/10
Plaintiff/Defendant-Respondent, 590549/10

-against-

Porthault NA LLC,
Defendant.

- - - - -

Porthault NA LLC,
Third-Party Plaintiff-Appellant,

-against-

Davide Fanelli,
Third-Party Defendant-Respondent,

Luca Lucarelli,
Third-Party Defendant.

_____

Press Law Firm PLLC, New York (Matthew J. Press of counsel), for appellant.

Benowich Law, LLP, White Plains (Leonard Benowich of counsel), for Pac Fung Feather Co. LTD., respondent.

Norwick Schad & Goering, New York (Kevin W. Goering of counsel), for Davide Fanelli, for respondent.

_____

Order, Supreme Court, New York County (Barbara Kapnick, J.), entered on or about December 23, 2011, which granted the motion of third-party defendant Davide Fanelli to dismiss Porthault's third-party claims against him and compel arbitration, unanimously modified, on the law and the facts, to reinstate those claims, and otherwise affirmed, without costs.

The issue of whether arbitration was properly compelled is moot in light of its termination upon Fanelli withdrawing his demand, but the issue of whether the motion court was correct in dismissing the third-party complaint is not moot. On this point, the court erred, and should have stayed, rather than dismissed, the claims, after granting the motion to compel arbitration (*see Matter of Princeton Info.*, 235 AD2d 234 [1st Dept 1997]). Nor is this appeal untimely, since none of the copies of the orders annexed to various instruments served below were stamped by a clerk with the date and place of entry, nor did the instruments themselves draw attention to the entry and note such a date (*see Matter of Reynolds v Dustman*, 1 NY3d 559, 561 [2003]).

Under the circumstances presented here, Porthault did not waive its right to appeal the order on review. While it preliminarily participated in the arbitration, it only agreed not to object to termination of that proceeding on the condition that Fanelli would submit himself to the jurisdiction of the Supreme Court in the underlying action and a reservation of its rights and remedies with respect to its third-party complaint against Fanelli (*compare Matter of Commerce & Indus. Ins. Co. v Nester*, 90 NY2d 255 [1997]; *Matter of SSL Intl., PLC v Zook*, 44 AD3d 429, 430 [1st Dept 2007]). Having made that agreement, Fanelli cannot

now claim that Porthault waived its right to appeal the procedurally improper dismissal of that very action against him.

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

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

ENTERED: JUNE 23, 2016

CLERK

Sweeny, J.P., Renwick, Manzanet-Daniels, Webber, JJ.

1535 Louis Bacon, Index 150400/15
Plaintiff-Appellant,

-against-

Peter Nygard, et al.,
Defendants-Respondents.

_____

Gibson Dunn & Crutcher LLP, New York (Orin Snyder of counsel), for appellant.

Kasowitz, Benson, Torres & Friedman LLP, New York (Aaron H. Marks of counsel), for respondents.

_____

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered on or about July 31, 2015, which dismissed the defamation claims based on 105 of 135 allegedly defamatory statements as time-barred, the claims for intentional infliction of emotional distress and prima facie tort as duplicative and/or time barred, and the aiding and abetting and conspiracy claims to the extent the intentional infliction of emotional distress and prima facie tort claims were dismissed, unanimously affirmed without costs.

Plaintiff failed to establish that the doctrine of equitable estoppel bars defendants from asserting a statute of limitations defense to his time-barred defamation claims. He contends that defendants' fraud and misrepresentations prevented him from discovering defendants' identity – not that he "was lulled into

inaction by defendant[s] in order to allow the statute of limitations to lapse" (*East Midtown Plaza Hous. Co. v City of New York*, 218 AD2d 628, 628 [1st Dept 1995]). Further, plaintiff does not allege a fiduciary relationship between himself and defendants (*id.* at 629).

In any event, plaintiff's allegations that he acted diligently in bringing this action are utterly refuted by the two open letters he published (*see Lezama v Cedano*, 119 AD3d 479, 480 [1st Dept 2014]). The letters demonstrate that plaintiff had sufficient knowledge to bring an action for more than a year before he commenced this action (*see Simcuski v Saeli*, 44 NY2d 442, 450 [1978]).

The intentional infliction of emotional distress and prima facie tort claims are duplicative since the underlying allegations fall "within the ambit of" the defamation causes of action (*see Fleischer v NYP Holdings, Inc.*, 104 AD3d 536, 538-539 [1st Dept 2013], *lv denied* 21 NY3d 858 [2013]). The non-time-barred "hate rally" allegations were intended to show that plaintiff was defamed, not that he suffered emotional distress. The continuing tort doctrine is not applicable since there was not a "final actionable event" that occurred within the statutory limitations period (*see Shannon v MTA Metro-N. R.R.*, 269 AD2d

218, 219 [1st Dept 2000). The non-time-barred, non-defamation allegations that were dismissed cannot form a basis for invoking the continuing tort doctrine.

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

ENTERED: JUNE 23, 2016

CLERK

Sweeny, J.P., Renwick, Manzanet-Daniels, Webber, JJ.

1537 The People of the State of New York, Ind. 2319/03
Respondent,

-against-

Bryant Whitaker,
Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Charles H. Solomon, J.), entered on or about October 15, 2013, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Defendant's challenge to the court's calculation of his point score is unpreserved, and we decline to review it in the interest of justice. In any event, while the court did make a calculation error, it caused no prejudice, because the record clearly establishes that the correct score is 150, which is well in excess of the threshold for a level three adjudication, and

that there is no basis for a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). Under the circumstances, a remand for further proceedings would serve no useful purpose.

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

ENTERED: JUNE 23, 2016

CLERK

Sweeny, J.P., Renwick, Manzanet-Daniels, Webber, JJ.

1538 Tejwati Seepersaud, Index 309175/11
Plaintiff-Appellant,

-against-

L&M Bus Corp., et al.,
Defendants-Respondents.

_____

Dubow, Smith & Marothy, Bronx (Steven J. Mines of counsel), for appellant.

Goldberg Segalla LLP, Garden City (Brendan T. Fitzpatrick of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered on or about April 7, 2015, which, insofar as appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing plaintiff's claim that she sustained a serious injury under the 90/180-day category of Insurance Law § 5102(d), unanimously reversed, on the law, without costs, and the motion denied.

Defendants failed to meet their prima facie burden as to plaintiff's 90/180-day claim. Defendants' experts did not examine plaintiff until over three years after the accident and did not offer an opinion concerning her condition during the relevant period. Nor did defendants submit other evidence, such as medical records or deposition testimony, to disprove

plaintiff's claim that she was confined to home and disabled from work during the relevant 180-day period (*see Silverman v MTA Bus Co.*, 101 AD3d 515, 517 [1st Dept 2012]; *Jeffers v Style Tr. Inc.*, 99 AD3d 576 [1st Dept 2012]; *Quinones v Ksieniewicz*, 80 AD3d 506 [1st Dept 2011]). Defendants also failed to offer evidence showing a lack of a causal connection between plaintiff's claimed physical injuries and the accident (*cf. Jimenez v Polanco*, 88 AD3d 604 [1st Dept 2011]).

In view of defendants' failure to meet their initial burden on the 90/180-day claim, plaintiff's opposition need not be reviewed (*see Boateng v Ye Yiyan*, 119 AD3d 424, 426 [1st Dept 2014]).

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

ENTERED: JUNE 23, 2016

CLERK

Sweeny, J.P., Renwick, Manzanet-Daniels, Webber, JJ.

1540 Estate of Victor Mojica, etc., Index 21302/13
Plaintiff-Respondent,

-against-

Harlem River Park Houses, Inc.,
et al.,
Defendants-Appellants,

River Park Tower Management, Inc.,
et al.,
Defendants.

_____

The Cartwell Law Offices, LLP, New York (Ryan F. Blackmer of counsel), for appellants.

Rosenberg, Minc, Falkoff & Wolff, LLP, New York (Jesse Minc of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered on or about October 27, 2015, which, inter alia, denied defendants Harlem River Park Houses, Inc. and West East Food Corp. s/h/a Associated Supermarket's motion (1) to dismiss the complaint pursuant to CPLR 3126(3); (2) for a preclusion order pursuant to CPLR 3126(2); (3) to compel plaintiffs to comply with defendants' outstanding discovery demands; and (4) for an order pursuant to CPLR 3123 deeming plaintiff to have admitted all the facts set forth in defendant's notice to admit and precluding plaintiffs from offering evidence at trial and/or

otherwise raising issues as to those items plaintiffs admitted do not exist, unanimously affirmed, with costs.

The motion court providently exercised its discretion in denying defendants' discovery motions (*Gumbs v Flushing Town Ctr. III, L.P.*, 114 AD3d 573, 574 [1st Dept 2014]) and in determining that there was no basis to impose discovery sanctions on plaintiffs (*see e.g. Sowerby v Camarda*, 20 AD3d 411 [2d Dept 2005]).

We have considered the remaining arguments, including plaintiffs' request for sanctions, and find them unavailing.

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

ENTERED: JUNE 23, 2016

CLERK

Sweeny, J.P., Renwick, Manzanet-Daniels, Webber, JJ.

1541 The People of the State of New York, Ind. 703/14
Respondent,

-against-

Vladimir Columna,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Anastasia Heeger of counsel), for appellant.

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Gregory Carro, J.), rendered August 13, 2014,

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: JUNE 23, 2016

CLERK

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

Sweeny, J.P., Renwick, Manzanet-Daniels, Webber, JJ.

1542 Nancy Rivas, Index 300070/11
Plaintiff-Appellant,

-against-

New York City Housing Authority,
Defendant-Respondent,

City of New York,
Defendant.

_____

Lynch Lynch Held Rosenberg, P.C., New City (James S. Lynch of counsel), for appellant.

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

_____

Order, Supreme Court, Bronx County (Barry Salman, J.), entered March 30, 2015, which granted defendant New York City Housing Authority's motion for summary judgment, dismissing the complaint, unanimously affirmed, without costs.

Defendant established its entitlement to judgment as a matter of law, in this action where plaintiff alleges that she was injured when she slipped and fell on ice on a sidewalk abutting defendant's property. Defendant submitted evidence, including an affidavit from the property's caretaker, showing that it made efforts to clear the sidewalks of snow within a reasonable amount of time after the snowfall had ended (*see e.g.*

Robinson v 156 Broadway Assoc., LLC, 99 AD3d 604 [1st Dept 2012]; *Valentine v City of New York*, 86 AD2d 381, 383 [1st Dept 1982], *affd* 57 NY2d 932 [1982]).

In opposition, plaintiff failed to raise a triable issue of fact. Plaintiff failed to offer a basis from which it could be reasonably inferred that defendant's snow-removal efforts "created or heightened" the alleged hazardous condition (*Rios v Acosta*, 8 AD3d 183, 185 [1st Dept 2004] [internal quotation marks omitted]). Plaintiff submitted an expert affidavit from a meteorologist, who concluded that ice could only have been present due to an inadequate salting of the snow that caused the snow to melt, but did not prevent it from refreezing. However, the expert did not explain how the application of salt lowers the freezing temperature for water; what amount of salt would have been sufficient, given the temperature that day, to keep melted snow from refreezing; or the basis for his statement that defendant applied too little salt. Accordingly, plaintiff's arguments as to the origination of the allegedly dangerous

condition are speculative and conclusory, and insufficient to defeat the motion (*see Acar v Ecclesiastical Assistance Corp.*, 125 AD3d 464 [1st Dept 2015]).

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

ENTERED: JUNE 23, 2016

CLERK

Sweeny, J.P., Renwick, Manzanet-Daniels, Webber, JJ.

1543- Index 153917/12
1544 Nathan M. Ferst,
Plaintiff-Respondent,

-against-

Gideon Abraham,
Defendant-Appellant.

_____

Schwartzman, Garelik, Walker & Troy, P.C., New York (Donald A. Pitofsky of counsel), for appellant.

Olshan Frome Wolosky LLP, New York (Mark J. Sugarman of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Carol Edmead, J.), entered October 5, 2015, awarding plaintiff the sum of $113,667.83, plus costs, disbursements, and interest, and bringing up for review an order, same court and Justice, entered June 30, 2015, which, after a bench trial, directed that judgment be entered in favor of plaintiff in the principal amount, unanimously reversed, on the law, without costs, the judgment vacated, and plaintiff's fourth cause of action, for costs of collection in the amount of $56,846.93, dismissed. The Clerk is directed to enter an amended judgment in the principal amount of $56,820.90. Appeal from the order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The record supports the trial court's finding that defendant client had entered into a written agreement retaining plaintiff attorney to represent him in two litigations at an agreed hourly rate, and that defendant breached his obligation to pay $26,243.75 in attorney's fees and disbursements in connection with those matters. Plaintiff further demonstrated that he performed services for defendant on two other matters. Even if a further retainer was required for those other matters (*see* 22 NYCRR 1215.1), plaintiff is not precluded from seeking recovery of legal fees under a quantum meruit theory (*see Roth Law Firm, PLLC v Sands*, 82 AD3d 675, 676 [1st Dept 2011]; *Miller v Nadler*, 60 AD3d 499, 50 [1st Dept 2009]). The record supports the trial court's award of $30,577.15 in fees and disbursements with respect to the other matters on a quantum meruit basis. Plaintiff demonstrated that the alleged fee arrangement was "fair, understood, and agreed upon" (*Seth Rubenstein, P.C. v Ganea*, 41 AD3d 54, 64 [2d Dept 2007]), that he performed services in good faith with an expectation of compensation, and that the services were accepted by defendant (*see Soumayah v Minnelli*, 41 AD3d 390, 391 [1st Dept 2007]). He also showed the reasonable value of the services (*id.*).

Plaintiff cannot recover the costs of collecting his

attorney's fees, including the costs of preparing motions to be relieved as counsel, participating in mediation, and participating in this action. The provision of the retainer agreement holding defendant liable for attorney's fees incurred in the collection of fees, without a reciprocal allowance for attorney's fees should defendant prevail, is void and unenforceable (*see* Ween v Dow, 35 AD3d 58, 63-64 [1st Dept 2006]). Although this issue was not raised by defendant until his reply papers on appeal, we consider it because courts have a special obligation to give scrutiny to fee arrangements (*id.* at 63), and the arrangement at issue is "not entitled to judicial sanction" (*id.* at 64).

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

ENTERED: JUNE 23, 2016

CLERK

Sweeny, J.P., Renwick, Manzanet-Daniels, Webber, JJ.

1545-
1545A Index 652296/15

GE Oil & Gas, Inc.,
Plaintiff-Respondent,

-against-

Turbine Generation Services, L.L.C. et al.,
Defendants-Appellants.

_____

Mintz & Gold LLP, New York (Elliot G. Sagor of counsel), for appellants.

Reed Smith LLP, New York (Casey Laffey of counsel), for respondent.

_____

Orders, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered December 21, 2015, to the extent they denied defendants' motion to dismiss the complaint pursuant to CPLR 327(a) and CPLR 3211(a)(4), or, alternatively, to stay the action pursuant to CPLR 2201 in favor of a first-filed action in Louisiana, unanimously affirmed, with costs.

Defendants failed to establish that enforcing the forum designation in the loan documents, i.e., New York, would be unreasonable and unjust or that the forum-selection clause is invalid because of fraud or overreaching (*see British W. Indies Guar. Trust Co. v Banque Internationale A Luxembourg*, 172 AD2d 234 [1st Dept 1991]).

Nor did defendants demonstrate that New York is an inconvenient forum (*see Sterling Natl. Bank v Eastern Shipping Worldwide, Inc.*, 35 AD3d 222 [1st Dept 2006]). Indeed, New York is an appropriate and convenient forum for the determination of this dispute as a matter of law, because the loan agreement, of which the aggregate value is more than $1 million, contains a provision whereby defendants agreed that New York law would govern their rights and duties under the agreement and agreed to submit to the jurisdiction of the New York courts (General Obligations Law § 5-1402; *see Sebastian Holdings, Inc. v Deutsche Bank AG*, 78 AD3d 446 [1st Dept 2010]). In any event, the relevant factors favor New York over Louisiana (*see Sebastian Holdings*, 78 AD3d at 447). New York courts "routinely adjudicate commercial disputes of this nature" (*Hudson Ins. Co. v Oppenheim*, 35 AD3d 168, 169 [1st Dept 2006]), and the alleged joint venture was negotiated at plaintiff's offices in New York (*see Terrones v Morera*, 295 AD2d 254 [1st Dept 2002]).

With respect to CPLR 3211(a)(4), as the service of process in the New York action preceded the service of process in the Louisiana action, the New York court was the first to take jurisdiction over this matter (*see Syncora Guar. Inc. v J.P. Morgan Sec. LLC*, 110 AD3d 87, 95 [1st Dept 2013]). While the

application of the first-in-time rule is discretionary and not controlling, especially where, as here, the competing actions were commenced within a short time (*see White Light Prods. v On The Scene Prods.*, 231 AD2d 90, 99 [1st Dept 1997]), there is another factor that weighs heavily in favor of maintaining jurisdiction in New York: the New York action is based solely on the loan documents, while the pending Louisiana action includes claims related to the purported joint venture (*see id.* at 94). Thus, the court also providently exercised its discretion in declining to stay the action pursuant to CPLR 2201 (*see 952 Assoc., LLC v Palmer*, 52 AD3d 236, 236-237 [1st Dept 2008]).

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

ENTERED: JUNE 23, 2016

CLERK

Sweeny, J.P., Renwick, Manzanet-Daniels, Webber, JJ.

1546N B.S., Index 312262/14
Plaintiff-Respondent,

-against-

B.F.,
Defendant-Appellant.

_____

Blank Rome LLP, New York (Brett S. Ward of counsel), for appellant.

Kasowitz Benson Torres & Friedman LLP, New York (Adam J. Wolff of counsel), for respondent.

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Order, Supreme Court, New York County (Deborah A. Kaplan, J.), entered December 18, 2015, which, to the extent appealed from, denied defendant husband's motion to compel discovery from plaintiff wife, unanimously affirmed, without costs.

The motion court providently exercised its discretion in denying defendant's motion seeking records regarding plaintiff's mental and medical health, since plaintiff did not waive the physician-patient privilege by making any claims or taking any positions that placed her physical or mental condition "in controversy" (CPLR 3121[a]; *see generally Wegman v Wegman*, 37 NY2d 940, 941 [1975]; *see also Proschold v Proschold*, 114 Misc 2d 568, 569 [Sup Ct, Suffolk County 1982]). Her specification of her health conditions in her net worth statement did not place

her health conditions in controversy, since such specification is required in a contested divorce proceeding (*see* 22 NYCRR 202.16[b]; 22 NYCRR subtit D, ch III, subch A, forms; *see also Proschold*, 114 Misc 2d at 569). Nor did plaintiff's denial of certain medical conditions in response to defendant's allegations place those conditions in controversy (*see Koump v Smith*, 25 NY2d 287, 294 [1969]).

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

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

ENTERED: JUNE 23, 2016

CLERK

Sweeny, J.P., Renwick, Manzanet-Daniels, Webber, JJ.

1547N Tomas Arias, Index 304499/11
Plaintiff-Respondent,

-against-

MSC Express Inc., et al.,
Defendants-Appellants.

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Shafer Glazer, LLP, New York (David A. Glazer of counsel), for appellants.

Law Offices of Nonna Shikh, Bronx (Henry Nachtman of counsel), for respondent.

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Order, Supreme Court, Bronx County (Laura G. Douglas, J.), entered September 10, 2015, which denied defendants' motion to dismiss or strike plaintiff's back injury claims as a spoliation sanction, unanimously affirmed, with costs.

The motion court providently exercised its discretion in denying the motion, since plaintiff did not violate any order (*see* CPLR 3126), and did not intentionally or negligently dispose of crucial items of evidence (*Baldwin v Gerard Ave., LLC*, 58 AD3d 484, 485 [1st Dept 2009]). Plaintiff's refusal to appear at an independent medical examination (IME) before his back surgery did not constitute spoliation of evidence regarding the cause of his back injuries, since the parties had entered into a so-ordered stipulation expressly providing for only one IME to take place,

after plaintiff's surgery. Defendants did not seek to modify the terms of the stipulation to require plaintiff to appear for an IME both before and after his surgery. We have considered defendants' remaining arguments and find them unavailing.

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

ENTERED: JUNE 23, 2016

CLERK

Sweeny, J.P., Renwick, Manzanet-Daniels, Webber, JJ.

1548N The Bank of New York Mellon, etc., Index 654464/12
Plaintiff-Respondent,

-against-

WMC Mortgage, LLC,
Defendant-Appellant,

J.P. Morgan Mortgage Acquisition Corporation, et al.,
Defendants.

_____

Jenner & Block LLP, Washington, D.C. (Matthew S. Hellman of the bar of the District of Columbia, admitted pro hac vice, of counsel), for appellant.

Holwell Shuster & Goldberg LLP, New York (Daniel P. Goldberg of counsel), for respondent.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered on or about December 21, 2015, which, insofar as appealed from, granted plaintiff's motion to compel defendant WMC Mortgage, LLC to produce certain repurchase analyses, unanimously affirmed, with costs.

Although the order did not resolve a motion made on formal notice, it is appealable as of right because it "affects a substantial right" (CPLR 5701[a][2][v]), and the parties were able to "fully set forth before the motion court their positions and the bases for them" (*Lissak v Cerabona*, 10 AD3d 308, 309 [1st

Dept 2004]).

The motion court correctly found that the repurchase analyses are not protected work product (*see* CPLR 3101[d][2]), because the documents were not "primarily prepared in anticipation of litigation," but were "an inherent and long-standing part of [WMC's] business" (*MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 93 AD3d 574, 574, 575 [1st Dept 2012]; *Deutsche Bank Natl. Trust Co. v WMC Mtge., LLC*, 2015 WL 1650835, *18, *20, 2015 US Dist LEXIS 49158, *51, *56 [D Conn, Apr. 14, 2015, Nos. 3:12-CV-933 (CSH), 3:12-CV-969 (CSH), 3:12-CV-1699 (CSH), 3:13-CV-1347 (CSH)]).

ACE Sec. Corp., Home Equity Loan Trust, Series 2006-SL2 v DB Structured Prods., Inc. (25 NY3d 581 [2015]), a statute of limitations case, does not mandate a different result. Whether the documents were prepared before or after WMC's alleged breach is not dispositive as to whether they were created for a business or litigation purpose. Nor does the *ACE* Court's characterization of repurchase obligations as "procedural prerequisite[s] to suit" render WMC's repurchase analyses litigation documents (*id.* at 598). As WMC admits, responding to repurchase requests is part of the ordinary course of a loan originators' business and often has nothing to do with litigation (*see MBIA*, 93 AD3d at 575).

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

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

ENTERED: JUNE 23, 2016

CLERK

Tom, J.P., Friedman, Richter, Kapnick, Gesmer, JJ.

1550 Hafiz Baghban, et al., Index 154912/12
Plaintiffs-Respondents,

-against-

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

Judlau Contracting, Inc.,
Defendant,

The 153 Chambers Condominium,
Defendant-Appellant.

- - - - -

[And a Third-Party Action]

_____

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

Cellino & Barnes, P.C., New York (John H. Shields of counsel), for Hafiz Baghban and Marcia Baghban, respondents.

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

Wilson Elser Moskowwitz Edelman & Dicker LLP, New York (Patrick J. Lawless of counsel), for Coastal Communications Services, Inc., respondent.

_____

Order, Supreme Court, New York County (Frank P. Nervo, J.), entered May 12, 2015, which, insofar as appealed from as limited by the briefs, denied as premature the motion of defendant 153 Chambers Condominium (153 Chambers) for summary judgment dismissing the complaint and all cross claims as against it,

unanimously affirmed, without costs.

Plaintiff Hafiz Baghban was injured when he tripped and fell on a raised piece of concrete, namely, the remnants of a phone booth that had been removed a year earlier, located on the sidewalk in front of 153 Chambers's premises. "Administrative Code of the City of New York § 7-210 imposes a nondelagable duty on the owner of the abutting premises to maintain and repair the sidewalk" in a reasonably safe condition (*Collado v Cruz*, 81 AD3d 542, 542 [1st Dept 2011]; *see Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517 [2008]). Rules of the City of New York Department of Transportation (34 RCNY) § 2-07(b)(1) is inapplicable because it applies only to "owners of covers or gratings" on the sidewalk. Here, the condition that caused Baghban's injury did not involve either a defective cover or grating, but rather a raised piece of the sidewalk itself (*cf. Lewis v City of New York*, 89 AD3d 410 [1st Dept 2011]; *Storper v Kobe Club*, 76 AD3d 426 [1st Dept 2010]).

The court also properly held that 153 Chambers's motion was premature (CPLR 3212[f]). Plaintiff and codefendants demonstrated that additional discovery was necessary because 153 Chambers's president had yet to be deposed, and the record suggested that there were issues of fact as to whether 153

Chambers had constructive notice of the sidewalk condition before the accident (*see Figueroa v City of New York*, 126 AD3d 438, 439 [1st Dept 2015]).

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

ENTERED: JUNE 23, 2016

CLERK

Tom, J.P., Friedman, Richter, Kapnick, Gesmer, JJ.

1551 In re Parrish P.,
Petitioner-Respondent,

-against-

Camille G.,
Respondent-Appellant.

_____

Law Firm of Natalia Skvortsova, PLLC, Brooklyn (Natalia Skvortsova of counsel), for appellant.

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

Andrew J. Baer, New York, attorney for child.

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Order, Family Court, Bronx County (Llinet M. Rosado, J.), entered on or about September 28, 2014, which, after a hearing, awarded sole legal and physical custody of the parties' child to petitioner father, with parenting time to respondent mother, unanimously affirmed, without costs.

The record supports Family Court's determination that it is in the child's best interest to award legal and physical custody to the father (*Eschbach v Eschbach*, 56 NY2d 167, 171 [1982]; *see Matter of Carl T. v Yajaira A.C.*, 95 AD3d 640, 641 [1st Dept 2012]). The father's testimony demonstrates that he is better able to provide a consistent and stable home environment for the child, and that the child would be able to live with his

biological sibling (*Eschbach*, 56 NY2d at 173). Further, the record shows that the mother is unstable in many ways and oblivious to the harmful effects of her actions on the child, including her efforts to eliminate the father from the child's life (*Bliss v Ach*, 56 NY2d 995, 998 [1982]). We have considered the mother's remaining contentions and find them unavailing.

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

ENTERED: JUNE 23, 2016

CLERK

Tom, J.P., Friedman, Richter, Kapnick, Gesmer, JJ.

1554- Index 114698/07
1555 Mary Anne Fletcher,
Plaintiff-Appellant,

-against-

Boies, Schiller & Flexner LLP, et al.,
Defendants-Respondents,

- - - - -

Ford Models, Inc.,
Nonparty Respondent.

_____

Capuder Fazio Giacoia LLP, New York (Douglas M. Capuder of counsel), for appellant.

Boies, Schiller & Flexner, LLP, New York (Robert J. Dwyer of counsel), for Boies, Schiller & Flexner, LLP and Andrew W. Hayes, respondents.

Arent Fox LLP, New York (Bernice K. Leber and Adrienne M. Hollander of counsel), for Ford Models, Inc., respondent.

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Judgment, Supreme Court, New York County (Eileen Bransten, J.), entered August 25, 2014, dismissing the complaint, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered on or about September 26, 2013, which granted nonparty Ford Models, Inc.'s motion to quash a subpoena, and denied plaintiff's cross motion to compel, unanimously dismissed, without costs, as moot.

Plaintiff failed to establish that defendants breached their duty by representing her despite a conflict of interest, in

violation of Code of Professional Responsibility DR 5-105 [22 NYCRR 1200.24), the conflicts rule in effect at the time. Unlike current Rules of Professional Conduct (22 NYCRR 1200.0) rule 1.7, DR 5-105 did not require that client consent to a conflict be confirmed in writing. An issue of fact exists whether defendants' clients consented orally.

In any event, the violation of a disciplinary rule, without more, is insufficient to support a legal malpractice cause of action (*Cohen v Kachroo*, 115 AD3d 512, 513 [1st Dept 2014]). Since plaintiff cannot prove that she suffered damages that were proximately caused by defendants' alleged misconduct, her cause of action must be dismissed (*see AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428, 434 [2007]).

Nor can plaintiff prove that defendants proximately caused her any injury with respect to her underlying claim for unauthorized use of her image, since that claim was time-barred and had already been released by the time she engaged defendants (*see* CPLR 215[3]; *Nussenzweig v diCorcia*, 9 NY3d 184 [2007]).

As for her other, potentially meritorious, claims, plaintiff settled those, and offers no evidence that, but for defendants' negligence, the settlement awards would have been higher (*see Fusco v Fauci*, 299 AD2d 263 [1st Dept 2002]).

Indeed, plaintiff failed to demonstrate that she suffered any harm at all as a result of defendants' alleged failings. Although defendants admittedly filed plaintiff's bankruptcy proof of claim one day late, the claim was accepted, and plaintiff received a substantial mediated settlement. Although she complains of defendants' alleged failure to join Elite S.A. as a party in one of the underlying actions, plaintiff nonetheless obtained a substantial settlement from that entity. Although plaintiff objects that she was not named as a class representative in one of the underlying actions, the deadline for adding class representatives had already passed by the time she engaged defendants, and nonetheless she received an incentive award for her active participation in the litigation.

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

ENTERED: JUNE 23, 2016

CLERK

Tom, J.P., Friedman, Richter, Gesmer, JJ.

1557 Jon Scott Lieberman, et al., Index 651402/12
Plaintiffs-Appellants,

-against-

Timothy A. Pappas, et al.,
Defendants-Respondents.

_____

Paul D. Wexler, New York, for appellants.

Lyons & Flood, LLP, New York (Jon Werner of counsel), for respondents.

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered on or about July 25, 2015, which, insofar as appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing the complaint as against defendant Timothy Pappas, unanimously reversed, on the law, with costs, and the motion denied.

The record demonstrates that defendant Timothy Pappas dominated defendant Trans Sport Racing LLC, and there is evidence that Pappas abused the corporate form first to induce plaintiff Jon Lieberman to advance money for the race car operation and later to shield assets from Lieberman. Moreover, there is evidence that Pappas moved funds among various of his entities without justification. Thus, an issue of fact exists as to

whether the corporate veil should be pierced to hold Pappas personally liable for plaintiffs' damages (*see TNS Holdings v MKI Sec. Corp.*, 92 NY2d 335, 339 [1998]).

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

ENTERED: JUNE 23, 2016

CLERK

Tom, J.P., Friedman, Richter, Kapnick, Gesmer, JJ.

1558 Jamie Hooker, Index 800192/11
Plaintiff-Appellant,

-against-

David Bryan Magill, et al.,
Defendants-Respondents.

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Pulvers, Pulvers, Thompson & Friedman, LLP, New York (Marc Thompson of counsel), for appellant.

Aaronson Rappaport Feinstein & Deutsch, LLP, New York (Deirdre E. Tracey of counsel), for respondents.

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Order, Supreme Court, New York County (Alice Schlesinger, J.), entered May 18, 2015, which to the extent appealed from as limited by the briefs, granted defendant medical center's (NYU) CPLR 3211(a)(7) motion to dismiss so much of the third cause of action as alleged negligence on its part in the hiring, supervision and credentialing of its employee, defendant physician (since deceased), unanimously reversed, on the law, without costs, and the claim reinstated.

On a motion addressed to the pleadings we are required to assume the truth of the allegations contained in the complaint. Plaintiff's pleadings and sworn statements in opposition to the motion, when viewed in the light most favorable to her and all reasonable inferences drawn in her favor, state a legally

sufficient claim for negligent hiring, supervision and credentialing, notwithstanding unsubstantiated averments from NYU's representatives to the effect that its internal records maintained in the ordinary course of business did not give notice of a sexual propensity by the physician, or indicate that he engaged in inappropriate sexual conduct while employed by NYU (*see generally Leo v Mt. St. Michael Academy*, 272 AD2d 145 [1st Dept 2000]). Moreover plaintiff should be permitted discovery of the relevant information in NYU's sole possession, as such discovery could lead to relevant evidence. We note defendant's motion to dismiss the complaint pursuant to CPLR 3211(a)(7) was not converted to a motion for summary judgment pursuant to CPLR 3211(c).

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

ENTERED: JUNE 23, 2016

CLERK

Tom, J.P., Friedman, Richter, Kapnick, Gesmer, JJ.

1559-
1560-
1561 Index 650487/13

Indigo Secured High
Income Note, Ltd.,
Plaintiff-Respondent,

-against-

HCI Secured Medical Receivables
Special Purpose Corporation etc., et al.,
Defendants-Appellants,

Michael Nitsberg,
Defendant.

_____

The Law Offices of Daniel S. Steinberg P.C., New York (Melissa Cohen of counsel), for appellants.

Kreisberg & Maitland LLP, New York (Gabriel Mendelberg of counsel), for respondent.

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Judgment, Supreme Court, New York County (O. Peter Sherwood, J.), entered February 27, 2015, which, to the extent appealed from as limited by the briefs, awarded plaintiff the total sum of $42,564,205.29 as against defendants Steven Nitsberg (Nitsberg) and Health Capital Investors, Inc., (Health Capital), unanimously affirmed, with costs. Appeals from orders, same court and Justice, both entered February 20, 2015, which, to the extent appealed from, granted plaintiff partial summary judgment on the first count of its first amended complaint as against Nitsberg

and Health Capital, and denied Nitsberg's motion to dismiss that count, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The motion court correctly determined that defendants Nitsberg and Health Capital are liable for the obligation of defendant HCI Secured Medical Receivables Special Purpose Corporation (NY) (HCI-NY) to make payments due to plaintiff under a settlement agreement (SA) and accompanying promissory notes. It is undisputed that Health Capital is the sole owner, and Nitsberg is the president and sole officer and director, of HCI-NY. Further, Nitsberg executed the SA and the notes in his capacity as president of HCI-NY almost two years after that entity was dissolved by proclamation pursuant to the Tax Law. Owners and officers of a corporation that is involuntarily dissolved under the Tax Law are individually liable for the debts of the corporation undertaken while dissolved (*see Sunquest Enters., Inc. v Zar*, 115 AD3d 486 [1st Dept 2014]; *Benfield Elec. Supply Corp. v C&L El. Controls, Inc.*, 58 AD3d 423, 423-424 [1st Dept 2009]; *Pennsylvania Bldg. Co. v Schaub*, 14 AD3d 365 [1st Dept 2005]).

We reject defendants Nitsberg and Health Capital's argument that plaintiff waived any claims based on HCI-NY's dissolution

because it was aware when it entered into the SA that HCI-NY had been dissolved. In the SA, defendants clearly and unambiguously "represent[ed] and warrant[ed]" that HCI-NY is "duly organized, validly existing and in good standing under the laws of the jurisdiction of its organization." Moreover, the SA is the best evidence of the parties' understanding and should be enforced according to its terms (*Ashwood Capital, Inc. v OTG Mgt., Inc.*, 99 AD3d 1, 7 [1st Dept 2012]), especially in view of the SA's valid merger clause. Moreover, there is insufficient evidence that plaintiff was aware of the dissolution at the time the parties entered into the SA.

We also reject the argument of defendants Nitsberg and Health Capital that they should not be held liable for HCI-NY's obligations under the SA and notes because those instruments were entered into as part of HCI-NY's postdissolution "wind up," during which HCI-NY enjoyed "de facto" corporate status. When HCI-NY was dissolved prior to entering into the SA and notes, it had no remaining assets or liabilities. Under the SA and Notes, however, it assumed about $31 million in new obligations. Further, under a management services agreement, HCI-NY agreed to pay a monthly management fee for a prospective 10-year term. HCI-NY's assumption of these obligations are not "acts directed

toward [its] liquidation" (*Matter of 172 E. 122 St. Tenants Assn. v Schwarz*, 73 NY2d 340, 349 [1989]; Business Corporation Law § 1005[a]), and, therefore, do not shield defendants Nitsberg and Health Capital from liability for HCI-NY's obligations to plaintiff (*see Pennsylvania Bldg. Co. v Schaub*, 14 AD3d 365, 366 [1st Dept 2005]).

We have considered defendants Nitsberg and Health Capital's remaining contentions and find them unavailing.

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

ENTERED: JUNE 23, 2016

CLERK

Tom, J.P., Friedman, Richter, Kapnick, Gesmer, JJ.

1562 Eric Privette, Index 13587/07
Plaintiff-Appellant, 86178/07
86144/08

-against-

Precision Elevator,
Defendant-Appellant,

Global Elevator, et al.,
Defendants,

260-261 Madison Avenue, LLC, et al.,
Defendants-Respondents.

- - - - -

[And Third-Party Actions]

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Tomkiel & Tomkiel, Scarsdale (Matthew Tomkiel of counsel), for Eric Privette, appellant.

Ahmuty, Demers & McManus, Albertson (Glenn A. Kaminska of counsel), for Precision Elevator, appellant.

Newman Myers Kreines Gross Harris, P.C., New York (Adrienne Yaron of counsel), for respondents.

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Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered March 20, 2015, which granted defendants 260-261 Madison Avenue LLC, 260/261 Madison Equities Corp., the Sapir Organization and Sapir Realty Management's motion for summary judgment dismissing the complaint as against them, unanimously modified, on the law, to deny the motion as to the Sapir Organization, and otherwise affirmed, without costs.

Plaintiff alleges that he was injured in an elevator located in a building at 261 Madison Avenue in Manhattan and maintained by defendant Precision Elevator. At the time, plaintiff was employed by the building's managing agent, defendant Sapir Realty Management, formerly known as Zar Realty Management. The record demonstrates that Zar Realty and the building owner, defendant 260-261 Madison Avenue, LLC, functioned as one company; thus, as plaintiff's employers, both are entitled to the benefits of Workers' Compensation Law § 11 (*see Clifford v Plaza Hous. Dev. Fund Co., Inc.*, 105 AD3d 609 [1st Dept 2013]; *Ramnarine v Memorial Ctr. for Cancer & Allied Diseases*, 281 AD2d 218 [1st Dept 2001]).

Defendant 260/261 Madison Equities Corp., the former owner, cannot be held liable for any alleged dangerous condition on the premises since it conveyed the property more than three months before plaintiff's accident, thus giving the new owner, 260-261 Madison Avenue, a reasonable time to discover and/or cure any such alleged condition (*see Bittrolff v Ho's Dev. Corp.*, 77 NY2d 896 [1991]; *Armstrong v Ogden Allied Facility Mgt. Corp.*, 281 AD2d 317 [1st Dept 2001]).

In opposition to defendants' prima facie showing that there is no such entity as "The Sapir Organization," plaintiff raised

an issue of fact via statements made in other cases involving that entity (*see e.g. GSO RE Onshore LLC v Sapir*, 29 Misc 3d 1234[A] [Sup Ct, NY County 2010] [affidavit by Alex Sapir stating that he is the president of the Sapir Organization, and his father, Tamir Sapir, is the chairman]).

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

ENTERED: JUNE 23, 2016

CLERK

Tom, J.P., Friedman, Richter, Kapnick, Gesmer, JJ.

1563 The People of the State of New York, Ind.1376/11
Respondent,

-against-

Julian James,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, Bronx County (John S. Moore, J. at plea; Albert Lorenzo, J. at sentencing), rendered February 6, 2014 convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fifth degree, and sentencing him to a term of 2 ½ years, unanimously affirmed.

Although we do not find that defendant made a valid waiver of the right to appeal, we perceive no basis for reducing the sentence.

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

ENTERED: JUNE 23, 2016

CLERK

Tom, J.P., Friedman, Richter, Kapnick, Gesmer, JJ.

1565 192nd Street LLC, Index 652190/11
Plaintiff-Respondent,

-against-

569 West 192nd Street, LLC, et al.,
Defendants-Appellants.

_____

Claude Castro & Associates PllC, New York (Claude Castro of counsel), for appellants.

Lance Falow, Scarsdale (Susan R. Nudelman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered on or about October 21, 2014, which granted plaintiff's motion for summary judgment directing specific performance of the contract and denied defendants' cross motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The court properly determined that the real property contract of sale containing a handwritten clause concerning the property's purchase price was enforceable. The handwritten clause provided that "if any lender's appraisal shows a value of the premises less than the purchase price, then the purchase price should be reduced to such appraised value." Since the

purchase price could be determined objectively when read in the context of the overall agreement, the clause did not render the contract indefinite (*see Tonkery v Martina*, 78 NY2d 893 [1991]).

Nor was the contract unconscionable, even if the clause at issue favored plaintiff (*see Gillman v Chase Manhattan Bank*, 73 NY2d 1, 10 [1988]). There was no lack of experience and education or a disparity in bargaining power, as both parties to the transaction were experienced real estate investors who negotiated through their attorneys for the sale of a multi-million dollar property. Plaintiff did not utilize deceptive or high-pressured tactics or fine print in the contract, and the record shows that the fair market value determined by the appraisal was not so low that it was substantively unconscionable.

Defendants did not demonstrate that plaintiff breached the implied covenant of good faith and fair dealing given the lack of any evidence of bad faith, and since such a claim would nullify the express terms of the contract (*see National Union Fire Ins. Co. of Pittsburgh, Pa. v Xerox Corp.*, 25 AD3d 309, 310 [1st Dept 2006], *lv dismissed* 7 NY3d 886 [2006]).

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

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

ENTERED: JUNE 23, 2016

CLERK

Tom, J.P., Friedman, Richter, Kapnick, Gesmer, JJ.

1566 The People of the State of New York, Ind. 1881/12
Respondent,

-against-

Erwyn Daly,
Defendant-Appellant.

_____

Law Offices of Iannuzzi and Iannuzzi, New York (John N. Iannuzzi of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Jill Konviser, J.), rendered June 14, 2013, convicting defendant, after a jury trial, of three counts each of robbery in the first and second degrees, and sentencing him to an aggregate term of 17 years, unanimously affirmed.

Defendant's claim that his right of confrontation was violated by the testimony of a DNA expert who prepared reports documenting the match between defendant's DNA and DNA found at the crime scenes, and referred to data gathered by nontestifying analysts, is unpreserved and we decline to review it in the interest of justice. When, at the outset of the analyst's testimony, the court inquired whether there was a Confrontation Clause issue, defense counsel remained silent, and he did not

object to any DNA evidence on constitutional or other grounds, or request that the People call any other analysts. Although counsel cross-examined the witness about the fact that he did not perform all the steps in the DNA analysis, this was for the purpose of undermining the jury's confidence in the DNA evidence, and it did not raise any legal issue for determination by the court (*see e.g. People v Johnson*, 117 AD3d 637, 639 [1st Dept 2014; *People v Rios*, 102 AD3d 473, 474 [2013], *lv denied* 20 NY3d 1103 [2013]). We decline to decide whether, by way of "independent analysis" or otherwise, this witness possessed the "requisite personal knowledge" to satisfy the requirements of *People v John* (__NY3d__, 2016 NY Slip Op 03208, *27-28 [2016]).

The court properly exercised its discretion in denying defendant's request for an adverse inference instruction regarding DNA-related physical evidence that was rendered unavailable by flooding of the storage facility during Hurricane Sandy, since that is not the type of loss that can be attributed to the People (*see People v Austin*, 134 AD3d 559 [1st Dept 2015]). Moreover, there had been no defense request for this evidence.

Defendant's claim that his counsel rendered ineffective assistance by failing to seek independent testing of the DNA

material is unreviewable on direct appeal because it involves matters not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claim may not be addressed on appeal.

Defendant's challenge to the prosecutor's summation is unpreserved because, to the extent defendant objected to the remarks at issue, he received all of the relief he requested from the court, and we decline to review this claim in the interest of justice. As an alternative holding, we find that the court's curative actions were sufficient and that the remarks did not deprive defendant of a fair trial.

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

ENTERED: JUNE 23, 2016

CLERK

Tom, J.P., Friedman, Richter, Kapnick, Gesmer, JJ.

1568 The People of the State of New York, Ind. 5704/08
Respondent,

-against-

Alejandrina Jaen,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Laura Lieberman Cohen of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Robert M. Stolz, J.), rendered September 1, 2010, convicting defendant, upon her plea of guilty, of criminal possession of a controlled substance in the third degree, and sentencing her to a term of five years' probation, unanimously affirmed.

The court properly denied defendant's motion to controvert the search warrant that led to the recovery of drugs from defendant's apartment. Probable cause was established by information provided by a reliable confidential informant regarding two controlled buys personally made by the informant, and sufficiently verified by the police who supervised the buys

(*see e.g. People v Freeman*, 106 AD3d 590 [1st Dept 2013], *lv denied* 21 NY3d 1073 [2013]; *People v Gramson*, 50 AD3d 294, 295 [1st Dept 2008], *lv denied* 11 NY3d 832 [2008]).

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

ENTERED: JUNE 23, 2016

CLERK

Tom, J.P., Friedman, Richter, Kapnick, Gesmer, JJ.

1569-
1570 Gronich & Company, Inc.,
Plaintiff-Respondent,

-against-

Longstreet Associates L.P.,
Defendant-Appellant.

Index 650846/12

Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (Leslie G. Fagen of counsel), for appellant.

Lionel A. Barasch, New York, for respondent.

Judgment, Supreme Court, New York County (Joan A. Madden, J.), entered April 29, 2015, awarding plaintiff the total sum of $2,540,337.19 against defendant, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered April 8, 2015, which, inter alia, denied defendant's cross motion for summary judgment, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

"Absent an affirmative assumption, a grantee is only liable for those covenants that run with [the] land" (*Longley-Jones Assoc. v Ircon Realty Co.*, 67 NY2d 346, 348 [1986] [citations omitted]). "A covenant in a lease to pay a broker's commission upon renewal of the lease does not run with the land" (*id.* [citations omitted]; *Cushman & Wakefield v Progress Corp.*, 172

AD2d 191, 193 [1st Dept 1991]). Applying these principles, paragraph 8 of the subject commission agreement, which relieved Longstreet of all liability to Gronich if Longstreet delivered an agreement by the purchaser or grantee of the subject building which assumed payment of the brokerage commission amounts due, was not satisfied by the lease assumption.

The lease assumption, which was included in the closing binder, and stated that the purchaser "hereby accepts the within assignment and assumes and agrees with [Longstreet] to perform and comply with and to be bound by all the terms, covenants, agreements, provisions and conditions of the Leases on the part of the landlord," was insufficient to constitute the affirmative agreement required by paragraph 8 (*see Longley-Jones*, 67 NY2d at 348 [citations omitted]; *cf. Dysal, Inc. v Hub Props. Trust*, 92 AD3d 826 [2d Dept 2012]). The delivery of brokerage agreements to the purchaser pursuant to section 4.1(f) of the sale contract did not mean they were assignable to, and assumed by, the purchaser absent an affirmative writing, and Longstreet has provided no documentation to the contrary.

Longstreet's argument that no commission is due because the lease option was exercised by the successor-in-interest and

assignee of the tenant is also unavailing (*see Sbarra v Totolis*, 191 AD2d 867, 870-871 [3d Dept 1993]).

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

ENTERED: JUNE 23, 2016

CLERK

Tom, J.P., Friedman, Richter, Kapnick, Gesmer, JJ.

1571 In re Anne Van Rabenswaay, Index 101036/14
Petitioner-Appellant,

-against-

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

_____

Glass Krakower LLP, New York (John Hogrogian of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Carol E. Huff, J.), entered on or about April 21, 2015, denying the petition to annul respondents' determination, which upheld petitioner's unsatisfactory rating (U-rating) for the 2012-2013 school year, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Petitioner has failed to show that the U-rating was arbitrary and capricious, or made in bad faith. The evidence that petitioner failed to timely complete individualized education plans (IEPs) for at least five of her students, despite repeated warnings and offers of assistance from the IEP coordinator, provided a rational basis for the rating (*see e.g. Matter of Murname v Department of Educ. of the City of N.Y.*, 82

AD3d 576 [1st Dept 2011]; *Batyreva v New York City Dept. of Educ.*, 50 AD3d 283 [1st Dept 2008]). Petitioner's various excuses, even if valid, would not warrant a finding that the U-rating was arbitrary and capricious under the circumstances. To accept them would amount to second-guessing the determination that her repeated failure to timely complete the IEPs reflected a pedagogical deficiency that merited the U-rating (*see Maas v Cornell Univ.*, 94 NY2d 87, 92 [1999]).

Furthermore, petitioner has failed to demonstrate the existence of any issue of fact that could show, even if resolved in her favor, arbitrary and capricious action under the circumstances. Thus, there was no need for the court to have conducted a hearing (*see* CPLR 7804[h]).

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

ENTERED: JUNE 23, 2016

CLERK

Tom, J.P., Friedman, Richter, Kapnick, Gesmer, JJ.

1572N Maria Alvarez, Index 306131/11
Plaintiff-Respondent,

-against-

Salvatore Feola,
Defendant-Appellant.

_____

Katz & Associates, Brooklyn (Anthony M. Grisanti of counsel), for appellant.

Shapiro Law Offices, PLLC, Bronx (Ernest Buonocore of counsel), for respondent.

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Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered May 18, 2015, which, insofar as appealed from as limited by the briefs, denied defendant's motion to strike the note of issue to permit him to undertake a medical examination of plaintiff, unanimously affirmed, without costs.

Plaintiff alleges that she suffered injuries to both shoulders when she slipped and fell on the sidewalk abutting defendant's premises. Following plaintiff's disclosure that she had arthroscopic surgery on both shoulders, defendant waived his right to a medical examination since he "willfully refused or simply failed to avail [himself] of the opportunity" to conduct plaintiff's medical examination within the deadlines set forth in the preliminary and compliance conference orders (*Rosenberg &*

Estis, P.C. v Bergos, 18 AD3d 218, 218 [1st Dept 2005]; *see Colon v Yen Ru Jin*, 45 AD3d 359 [1st Dept 2007]).

After plaintiff served a supplemental bill of particulars alleging another right shoulder surgery and filed a note of issue, the motion court providently exercised its discretion in denying defendant's motion to the extent he sought to compel plaintiff to appear for a medical examination. Defendant offered no reasonable explanation for his failure to notice an examination within the time frames set by the court's orders, and plaintiff alleged only new treatment, not any new injuries (*see Brown v Metropolitan Transp. Auth.*, 256 AD2d 17 [1st Dept 1998]; *Vargas v City of New York*, 4 AD3d 524, 525 [2d Dept 2004]). Notably, defendant was provided an authorization to obtain the relevant medical records and the court granted a further

deposition of plaintiff concerning the period between the two right shoulder surgeries, which provides reasonable disclosure concerning the additional treatment.

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

ENTERED: JUNE 23, 2016

CLERK

Tom, J.P., Friedman, Richter, Kapnick, Gesmer, JJ.

1573N Libby Friedman, Index 113119/10
Plaintiff-Appellant,

-against-

Adnoy S. Velasquez, et al.,
Defendants,
- - - - -
Norman Weitzman,
Nonparty Respondent,

_____

Napoli Shkolnik PLLC, New York (Joseph P. Napoli of counsel), for appellant.

Richard M. Maltz, PLLC, New York (Richard M. Maltz of counsel), for respondent.

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Appeal from order, Supreme Court, New York County (Arlene P. Bluth, J.), entered December 7, 2015, which denied plaintiff's counsel's motion for an order awarding it 100% of the contingency fee in the underlying action, unanimously dismissed, without costs.

Plaintiff's counsel filed a notice of appeal solely on plaintiff's behalf. Plaintiff is not aggrieved by the denial of present counsel's motion for an award of 100% of the contingency fee, since she will pay the contingency fee to present or former counsel or both, and has no interest in the allocation of the fee. Plaintiff thus lacks standing to bring the appeal (CPLR

5511; *see Arkin Kaplan Rice LLP v Kaplan*, 120 AD3d 427, 428 [1st Dept 2014])). Since present counsel, to the extent it is aggrieved, failed to file a notice of appeal on its behalf and is not a party to this appeal, we cannot grant it affirmative relief (*see Hecht v City of New York*, 60 NY2d 57 [1983]).

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

ENTERED: JUNE 23, 2016

CLERK

Tom, J.P., Friedman, Richter, Kapnick, Gesmer, JJ.

1574N Alexander Gliklad, Index 602335/09
Plaintiff-Respondent,

-against-

Michael Cherney,
Defendant-Appellant.

_____

Frankfurt Kurnit Klein & Selz, PC, New York (Brian E. Maas of counsel), for appellant.

Winston & Strawn LLP, New York (Thomas J. Quigley of counsel), for respondent.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered April 9, 2015, which, in an action to recover on a promissory note, inter alia, granted plaintiff's motion to hold defendant in civil contempt for failing to comply with a post-judgment subpoena duces tecum, and ordered defendant's arrest, unanimously affirmed, with costs.

Defendant does not dispute the trial court's finding of civil contempt for failure to comply with the subpoena or court orders. Rather, he contends that the trial court lacked personal jurisdiction to issue the contempt order. By decision entered January 21, 2014, this Court previously found, as law of the case, that the promissory note contained a forum selection clause which subjected defendant to the jurisdiction of New York courts

and barred him from asserting a defense of lack of jurisdiction (113 AD3d 505, 506 [1st Dept 2014]). Through that appeal, defendant had a full and fair opportunity to address the jurisdiction issue (*see People v Evans*, 94 NY2d 499, 502 [2000]).

After reviewing the record, this Court has determined that its prior decisions are not "clearly erroneous" requiring an abandonment of the law of the case doctrine (*Pepper v United States*, 562 US 476, 506 [2011] [internal quotation marks omitted]; *Matter of LaDelfa*, 107 AD3d 1562, 1563-1564 [4th Dept 2013]). Nor has defendant contended that there is any new evidence or change of law warranting a different result (*see Carmona v Mathisson*, 92 AD3d 492 [1st Dept 2012]).

The parties' remaining arguments, including plaintiff's request that defendant be sanctioned for bringing a frivolous appeal, are unavailing.

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

ENTERED: JUNE 23, 2016

CLERK

Mazzarelli, J.P., Acosta, Moskowitz, Gische, JJ.

219 & M-6494 & M-6484	Patrolmen's Benevolent Association of the City of New York, Inc., et al., Plaintiffs-Appellants,	Index 653550/13
	-against-	
	The City of New York, et al., Defendants-Respondents.	

_____

Dechert LLP, New York (James M. McGuire of counsel), for Patrolmen's Benevolent Association of the City of New York, Inc., appellant.

DLA Piper LLP (US), New York (Anthony P. Coles of counsel), for Sergeants Benevolent Association, appellant.

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

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Order and judgment (one paper), Supreme Court, New York County (Anil C. Singh, J.), entered June 19, 2014, affirmed, without costs.

Opinion by Acosta, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela Mazzarelli, J.P.
Rolando T. Acosta
Karla Moskowitz
Judith J. Gische, JJ.

219 &
M-6484 &
M-6494
Index 653550/13

_____x

Patrolmen's Benevolent Association of the City of New York, Inc., et al.,
Plaintiffs-Appellants,

-against-

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

_____x

Plaintiff appeals from the order and judgment (one paper), of the Supreme Court, New York County (Anil C. Singh, J.), entered June 19, 2014, insofar as appealed from as limited by the briefs, adjudging and declaring that Local Law 71 is not preempted by the Criminal Procedure Law.

Dechert LLP, New York (James M. McGuire and Paul C. Kingsbery of counsel), and Nancy Picknally, New York (Michael T. Murray of counsel), for Patrolmen's Benevolent Association of the City of New York, Inc., appellant.

DLA Piper LLP (US), New York (Anthony P. Coles, Courtney G. Saleski and Adam D. Brown of counsel), for Sergeants Benevolent Association, appellant.

Zachary W. Carter, Corporation Counsel, New York (Jeremy W. Shweder, Richard Dearing and Cecelia Chang of counsel), for respondents.

ACOSTA, J.

The question presented is whether Local Law No. 71 (2013) of City of NY § 1 (Local Law 71), which prohibits discriminatory policing in New York City, is preempted by the Criminal Procedure Law (CPL). We hold that the CPL does not preempt the local law for two main reasons: first, the two laws occupy different legislative fields (criminal procedure and antidiscrimination); and second, there is no direct conflict between them. We have great respect and appreciation for the important contributions of police officers who enforce our laws and protect us all daily at risk to their own personal safety. However, we also recognize the City's legitimate interest in protecting New Yorkers from discriminatory law enforcement. As the Court of Appeals has declared, "Discriminatory law enforcement has no place in our law" (*People v Robinson*, 97 NY2d 341, 352 [2001]). Local Law 71 is a step toward making that promise ring true.

Facts and Background

In 2004, defendant Council of the City of New York (the City Council) passed Local Law No. 30 (2004) § 1 (enacting Administrative Code of City of NY § 14-151). The law prohibited New York City-employed law enforcement officers from engaging in "[r]acial or ethnic profiling," which was defined as an act "that relies on race, ethnicity, religion or national origin as the

determinative factor in initiating law enforcement action against an individual, rather than an individual's behavior or other information or circumstances that links a person or persons of a particular race, ethnicity, religion or national origin to suspected unlawful activity." Local Law 30 did not provide for a cause of action against individual officers or for any other enforcement mechanism.

By 2013, the City Council had become concerned that Local Law 30 was ineffective in deterring racial and ethnic profiling by law enforcement, so it amended Administrative Code § 14-151 by enacting Local Law No. 71 (2013) § 1. In its Declaration of Legislative Intent and Findings, the City Council emphasized its "concern about the NYPD's growing reliance on stop-and-frisk tactics and the impact of this practice on communities of color." It noted that the number of stops by the NYPD had increased from approximately 97,000 in 2002 to more than 601,000 in 2010, and that "Black and Latino New Yorkers face the brunt of this practice and consistently represent more than 80 percent of people stopped despite representing just over 50 percent of the city's population." The City Council also stated that discriminatory policing "alienates communities from law enforcement, violates New Yorkers' rights and freedoms, and is a danger to public safety," and that Local Law 71 was intended to

be "construed broadly, consistent with the Local Civil Rights Restoration Act of 2005."

Local Law 71 ("Bias-based Profiling Prohibited") expanded the list of protected characteristics to include "actual or perceived race, national origin, color, creed, age, alienage or citizenship status, gender, sexual orientation, disability, [and] housing status."

In addition, Local Law 71 added "teeth" to the law by creating a private right of action; an individual subject to bias-based profiling may file an administrative complaint with the New York City Commission on Human Rights or may commence a civil action against individual officers or governmental bodies that employ such officers. A claim of bias-based profiling is "established," inter alia, when a claimant demonstrates that a law enforcement officer has intentionally engaged in bias-based profiling, and the officer fails to prove that the law enforcement action "was justified by [] factor(s) unrelated to unlawful discrimination" (Administrative Code 14-151[c][1][ii], as amended by Local Law No. 71 [2013] of City of N.Y.). The remedy in any such administrative proceeding or civil action is limited to injunctive and declaratory relief, and the courts may award attorneys' fees and expert fees to prevailing plaintiffs (*id.* [d][2], [3]).

Local Law 71 became effective on November 20, 2013. Shortly thereafter, the NYPD issued an internal memorandum (the 2013 Finest Message) characterizing Local Law 71 as "consistent with current department policy and training," which already prohibited reliance on any of the characteristics listed in Local Law 71 as the "determinative factor" in initiating law enforcement action.[1]

The instant challenge to Local Law 71 was brought by Patrolmen's Benevolent Association of the City of New York, Inc., an independent union representing more than 22,000 NYPD officers, and Sergeant's Benevolent Association, an independent union representing approximately 13,000 active and retired NYPD sergeants. They argue that Local Law 71 is invalid because it is preempted by the CPL.

Supreme Court rejected that argument and adjudged and declared that Local Law 71 is not preempted by the CPL. We now affirm.

II. Discussion

A. Standing

Initially, the motion court correctly determined that plaintiffs have standing to bring this action seeking declaratory

[1] In fact, the "determinative factor" standard appears to have originated in the NYPD's 2002 policy guidelines (NYPD Operations Order No. 11, Department Policy Regarding Racial Profiling, Mar. 13, 2002).

and injunctive relief. Local Law 71 specifically targets and regulates the conduct of plaintiffs' members, who have been subject to its provisions since it went into effect in 2013. In fact, plaintiffs have submitted, on a motion to expand the record, a statement by the Commission on Human Rights that a complaint pursuant to Local Law 71 has been filed against two police officers. Moreover, there is a likelihood that plaintiffs and their members will suffer reputational harm whenever an officer is charged with bias-based profiling under Local Law 71, and they risk the prospect of having to pay attorneys' fees if they are denied defense and indemnification by the City. Plaintiffs have demonstrated an "'injury in fact--an actual legal stake in the matter being adjudicated'" (*Security Pac. Natl. Bank v Evans*, 31 AD3d 278, 279 [1st Dept 2006], *appeal dismissed* 8 NY3d 837 [2007], quoting *Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 772 [1991]).

B. Preemption

Under New York's constitutional "home rule" provision, municipalities are accorded "broad police powers . . . relating to the welfare of [their] citizens," provided local governments refrain from adopting laws that are inconsistent with the Constitution or state statutes (*Jancyn Mfg. Corp. v County of Suffolk*, 71 NY2d 91, 96 [1987]; NY Const, art IX, § 2[c]). The

Court of Appeals has recognized two ways in which state law may preempt local law: through the doctrine of (1) field preemption, "when a local government legislates in a field for which the State Legislature has assumed full regulatory responsibility," or (2) conflict preemption, "when a local government adopts a law that directly conflicts with a State statute" (*DJL Rest. Corp. v City of New York*, 96 NY2d 91, 95 [2001]).

1. Field Preemption

With respect to field preemption, "[t]he State Legislature may expressly articulate its intent to occupy a field . . . [but] it may also do so by implication" (*id.*). Intent to preempt local law may be inferred "from the fact that the Legislature has enacted a comprehensive and detailed regulatory scheme in a particular area" (*id.* [internal quotation marks omitted]). However, the local law will not be preempted under implied field preemption unless the state has "clearly evinced a desire to preempt an entire field thereby precluding any further local regulation" (*Jancyn Mfg. Corp.*, 71 NY2d at 97). Moreover, "[s]tate statutes do not necessarily preempt local laws having only tangential impact on the State's interests. Local laws of general application--which are aimed at legitimate concerns of a local government--will not be preempted if their enforcement only incidentally infringes on a preempted field" (*DJL Rest. Corp.*, 96

NY2d at 97 [citations and internal quotation marks omitted]).

Plaintiffs' contention that the CPL expressly and impliedly evinces the State Legislature's intent to occupy the field of criminal procedure misses the mark. We do not doubt that the Legislature intended that the CPL would exclusively govern criminal procedure throughout the State (including investigative stops by police), but that is of no consequence here, where the local law at issue is not a criminal procedure law but a law concerning civil rights and preventing discrimination on the part of law enforcement. In arguing express field preemption, plaintiffs rely primarily on CPL 1.10(1), which provides that the CPL applies "exclusively to . . . [a]ll criminal actions and proceedings ... and ... [a]ll matters of criminal procedure" in the State of New York, including those that "do not constitute a part of any particular action or case" (subd [a], [b]). They further argue that the Legislature impliedly preempted the field of criminal procedure by enacting the CPL as a comprehensive and detailed regulatory scheme. However, the CPL occupies the field of criminal procedure, whereas the local law occupies the field of civil rights and antidiscrimination. In this context, the former is not so broad as to encompass the latter.

The Court of Appeals has noted that "the City possesses broad home rule power and the State concededly has not preempted

the area of antidiscrimination" (*New York State Club Assn v City of New York*, 69 NY2d 211, 219 [1987], *affd* 487 US 1 [1988]), so Local Law 71 is unquestionably valid insofar as it regulates within that field (and does not directly conflict with state law, an issue discussed below). Although the practice commentaries to the CPL make clear that the state statute does not exclude all laws touching on criminal procedure -- for example, special proceedings such as habeas corpus, mandamus, and prohibition proceedings, "though they may intimately affect criminal actions, proceedings and procedure, . . . are governed by the CPLR and not the CPL" (Peter Preiser, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 1.10) -- the CPL generally establishes a comprehensive and uniform system that defines the scope of lawful police action in New York (*see People v Douglass*, 60 NY2d 194, 205 [1983]). Thus, plaintiffs are correct that a local legislature could not pass a law regulating substantive matters of criminal procedure, such as the issuance or execution of an arrest warrant, since that obviously would usurp the State's authority in the realm of criminal procedure. However, the field that the State occupies in this regard is not so broad that localities cannot write ordinances that address police investigative conduct without encroaching on the area governed by the CPL.

To the extent the local law touches upon criminal procedure, it does so only tangentially (*see DJL Rest. Corp.*, 96 NY2d at 97). Local Law 71 is a law of general application that furthers the City's legitimate interest in protecting its citizens from discrimination by police officers, and it abuts criminal procedure only insofar as it prohibits police officers from engaging in bias-based profiling (*see id.*; *Matter of Lansdown Entertainment Corp. v New York City Dept. of Consumer Affairs*, 74 NY2d 761, 763 [1989] [laws of general application "are principally aimed at legitimate concerns of local government and do not directly affect the field preempted by the State law"]).[2]

Notably, although the CPL is comprehensive with respect to criminal procedure in general, it is not so comprehensive and detailed with respect to discriminatory policing (*see Lansdown Entertainment Corp.*, 74 NY2d at 762-763). Indeed, no provision in the statute directly addresses how police officers who commit acts of discrimination in their official investigative duties can or should be dealt with, and by which political entities. That certain provisions of the CPL relate to police officers'

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[2] Plaintiffs mistakenly argue that Local Law 71 is not a law of "general application"; the law applies generally to all law enforcement officers operating in New York City (*see People v De Jesus*, 54 NY2d 465, 471 [1981] [law requiring smoke alarms in all business premises is an example of a law of general application]).

authority to stop individuals (namely, CPL 140.10, 140.50, and the 2010 amendments to the latter provision [CPL 140.50(4)]) does not indicate the Legislature's intent to preempt any local laws concerning police officers' investigatory conduct. CPL 140 codified constitutional principles with respect to police stops and searches; its failure to address discrimination by police shows that it is not such a comprehensive and detailed regulatory scheme as to preclude local legislation concerning such conduct. In addition, the 2010 amendment to CPL 140.50, which prohibits police officers in New York City from recording personal identifying information of individuals who are stopped and released by the police (but permits the recording of generic non-identifying information such as race and gender) (CPL 140.50[4]), does not evince the Legislature's intent to preempt local laws such as the one at issue here. Indeed, the legislative history of the amendment indicates that its purpose was to "protect the privacy and due-process rights of innocent New Yorkers" who would otherwise be subject to permanent police surveillance, and that it had nothing to do with upholding New Yorkers' equal protection rights or preventing discriminatory policing (Sponsor's Bill Jacket S7945A [2010]). This fact provides additional support for our conclusion that the City may legislate in an area that incidentally touches upon criminal procedure, so that its

citizens may obtain redress for violations of their civil rights by police.

That the two laws emanate from different legal sources, serve different objectives, and provide for different remedies further underscores their occupation of distinct legislative fields. The CPL codifies and expands upon constitutional provisions governing criminal procedure - for example, the Fourth Amendment's "search and seizure" clause and its New York counterpart (NY Const, art I, § 12). Its objective in large part is to uphold the rights of criminal defendants, and where those rights are violated, it provides remedies in the form of suppressing evidence or dismissing criminal prosecutions (*see* CPL 170.40[1][e]; 710.10-70). Conversely, antidiscrimination laws like Local Law 71 give effect to the right to "equal protection of the laws" found in the Fourteenth Amendment and its New York counterpart (NY Const, art I, § 11); Local Law 71 does so by creating a private right of action with distinct remedies in the form of declaratory and injunctive relief.[3]

In short, the CPL and Local Law 71 involve "independent realm[s] of governance" (*DJL Rest. Corp.*, 96 NY2d at 97). The

[3] The Court of Appeals has already recognized a private right of action, including a remedy for damages, against the State to redress equal protection violations (*see Brown v State of New York*, 89 NY2d 172, 188 [1996]).

CPL, a state criminal procedure statute, does not evince the Legislature's "unmistakable desire" to preclude localities from addressing the discriminatory conduct of law enforcement officers and providing civil remedies to persons subjected to such conduct (*see People v New York Trap Rock Corp.*, 57 NY2d 371, 378 [1982]). Therefore, Local Law 71 is not invalid under the doctrine of field preemption.

2. Conflict Preemption

Conflict preemption occurs "where local laws prohibit what would be permissible under State law, or impose prerequisite additional restrictions on rights under State law, so as to inhibit the operation of the State's general laws" (*Zakrzewska v New School*, 14 NY3d 469, 480 [2010] [internal quotation marks omitted]). A local law will be struck down when, "in direct opposition to [a] pre-emptive scheme, [it] would render illegal what is specifically allowed by State law" (*Lansdown Entertainment Corp.*, 74 NY2d at 763 [internal quotation marks omitted]), or "when a 'right or benefit is expressly given . . . by . . . State law which has then been curtailed or taken away by the local law'" (*Chwick v Mulvey*, 81 AD3d 161, 167-168 [2d Dept 2010], quoting *Jancyn Mfg. Corp.*, 71 NY2d at 97). However, no conflict exists where a local law prohibits something that might generally be considered permissible by virtue of state law's

silence on an issue; it applies only where "the State *specifically permits* the conduct prohibited at the local level" (New York State Club Assn, 69 NY2d at 222 [emphasis added]; *see also Lansdown Entertainment Corp.*, 74 NY2d at 763; *People v Cook*, 34 NY2d 100, 109 [1974] [statement of law that "a locality may not enact a local law which prohibits conduct which is permitted by State law . . . is much too broad. . . . Any time that the State law is silent on a subject, the likelihood is that a local law regulating that subject will prohibit something permitted elsewhere in the State. That is the essence of home rule"] [internal quotation marks omitted]).

Applying these principles, we reject plaintiffs' argument that Local Law 71 conflicts with the CPL. Local Law 71 essentially prohibits discrimination by law enforcement, which it terms "bias-based profiling," defined as a law enforcement act "that relies on [an individual's protected status] as the determinative factor in initiating law enforcement action against an individual, rather than an individual's behavior or other information or circumstances that links a person or persons to suspected unlawful activity." Nowhere in the CPL is there language specifically permitting police officers to engage in such discriminatory conduct. Nor does the case law interpreting the CPL permit police officers to discriminate in this way.

The statute provides in pertinent part that a police officer may stop an individual when the officer "reasonably suspects" that the person is committing, has committed, or is about to commit a crime (CPL 140.50[1]), and may arrest an individual based on "reasonable cause to believe" that the person has committed a crime or offense (CPL 140.10[1][b]). These provisions are essentially a codification of the constitutional "search and seizure" standards for so-called "*Terry* stops" (*see Terry v Ohio*, 392 US 1 [1968]); they were further developed by the Court of Appeals in *People v De Bour* (40 NY2d 210, 223 [1976]).[4] It is undisputed that under the relevant case law, race may not be used by police as the sole factor in initiating a stop, and that such reliance on race would violate both the CPL and Local Law 71. The dispute focuses on whether the CPL permits police officers to use protected status as "the determinative

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[4] In *De Bour*, the Court of Appeals established a four-level approach to determining the legality of street-level police intrusions (40 NY2d at 223). This appeal primarily implicates level-three stops: "where a police officer entertains a reasonable suspicion that a particular person has committed, is committing or is about to commit a felony or misdemeanor, the CPL authorizes a forcible stop and detention of that person" (40 NY2d at 223, citing CPL 140.50[1]; *Terry v Ohio*, 392 US 1 [1968]).

Plaintiffs argue that a police stop would be lawful under *De Bour* and the CPL even where the officer relied on a protected characteristic (such as race or gender) as "the determinative factor," but that such a stop would be prohibited by Local Law 71.

factor" in initiating a stop. We hold that it does not.

Plaintiffs make much of the motion court's analysis equating the terms "sole factor" and "determinative factor." To be sure, the terms are not synonymous.[5] Yet this does not create a direct conflict between the local law and the CPL, because the CPL does not clearly permit a stop in which the officer relies on race as "the determinative factor." The statute itself does not employ either term; nor does it address whether race or other protected status may play any role in a police officer's decision to take action against an individual. Rather, plaintiffs rely on case law interpreting the "reasonable suspicion" and "reasonable cause" standards referenced in the CPL.

However, plaintiffs fail to point to any case in which a court has found reasonable suspicion where race was *the* determinative factor in initiating a law enforcement action. Nor could they, because courts evaluating reasonable suspicion do not look to an officer's subjective intent, but assess the

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[5] As plaintiffs correctly note, "sole" means "functioning independently and without assistance or interference" (Merriam-Webster's Collegiate Dictionary 1187 [11th ed 2003]), whereas "determinative" means "having power or tendency to determine; tending to fix, settle, or define something" (*id.* at 340).

The term "determinative factor" implies that it is one factor among others. In other words, the "sole factor" for a police stop will necessarily be the "determinative factor," but the converse is not necessarily true.

reasonableness of the officer's conduct based on the totality of the circumstances (*see United States v Cortez*, 449 US 411, 417 [1981]; *People v Robinson*, 97 NY2d 341, 350 [2001]; *People v Stephens*, 47 AD3d 586 [1st Dept 2008], *lv denied* 10 NY3d 940 [2008];). Plaintiffs argue that "while one characteristic such as race may not form the sole basis for stopping an individual, one feature among others may ultimately be the distinctive or determinative component matching an individual with a suspect description." This statement may be correct, but plaintiffs can only cite cases in which race was one factor *among others* and in which it is impossible to identify which factor was "the determinative factor" in stopping, searching, or arresting a suspect (*see e.g. People v Johnson*, 102 AD2d 616, 622 [4th Dept 1984] [stating that race is "an identifying factor which . . . assists the police in narrowing the scope of their identification procedure" but "cannot serve as the sole basis for suspicion"] [internal quotation marks omitted], *lv denied* 63 NY2d 776 [1984]; *United States v Brockington*, 378 Fed Appx 90, 92 [2d Cir 2010] ["Although the suspect's physical description was general—a black man wearing a red shirt—the totality of the circumstances included additional information (including the precise location and store into which he entered) giving rise to reasonable suspicion"]; *United States v Salazar*, 945 F2d 47, 48 [2d Cir

1991] [finding reasonable suspicion based on description of defendant as "a short, dark Hispanic male . . . (who) would come and go from (a particularly identified) apartment"], *cert denied* 504 US 923 [1992]).

In each case, race (or some other immutable characteristic) was undoubtedly *a* determinative factor in the law enforcement action, but it is impossible to identify which of several factors was *the* determinative one. Indeed, it is not even clear that there was one determinative factor that outweighed all the others. Two or more factors may be equally determinative. For example, plaintiffs rely heavily on *Johnson* (102 AD2d 616), in which the Fourth Department held that a stop was supported by reasonable suspicion where a police sergeant relied on the defendant's race *in addition to other factors*, such as the type of vehicle the defendant was driving and the vicinity in which he was located. In that case, the sergeant had learned that the suspect in a robbery was described as "a black male in a large, dark colored vehicle [who] was seen in the vicinity" of the robbery location (*id.* at 617). The next day, the sergeant received a call regarding another robbery at a particular location, and the suspect was described only as a "Black male" (*id.*). The sergeant strategically positioned himself "along one of the [suspect's] likely escape routes," and stopped a large

vehicle being driven by a black male (*id.* at 623-624). The Fourth Department upheld the stop as supported by reasonable suspicion.

Plaintiffs presume that the defendant's race in *Johnson* must have been the determinative factor in making the stop (i.e., the one factor that tended to settle the sergeant's decision to stop the defendant), but that presumption is unfounded. As the Court noted, "Race assumes importance in determining the existence of reasonable suspicion only when it is considered *in conjunction with* other facts which provide an articulable basis for suspicion" (*id.* at 622 [emphasis added]). In other words, although race was a factor in the sergeant's decision to stop the defendant, the defendant's vehicle and location were also factors on which the sergeant relied. As far as we can tell, all of the factors were determinative: the defendant was stopped not only because of his race, but also because of his gender, the size of the vehicle he was driving, and his location. Surely, the stop could not have been supported by reasonable suspicion if the defendant had been a black male riding a motorcycle, just as the officer could not have reasonably stopped a white male in a large vehicle.

Similarly, in *Brockington* (378 Fed Appx at 92), the police would not have had reasonable suspicion to stop the defendant if

he had been a black man wearing a blue shirt in a different location; nor would the police in *Salazar* (*see* 945 F2d at 48) have had reasonable suspicion to stop the defendant if he had entered a different apartment or was a *tall* Hispanic man. Based on these cases, it is just as inaccurate to say that a defendant's vehicle, location, height, or clothing was "the determinative factor" in making the arrest as it is to say that his race was "the determinative factor."

Because these cases employed a totality-of-the-circumstances test to determine whether a stop, arrest, or search was lawful for Fourth Amendment purposes, the courts did not engage in any analysis to decide which factor among several was *the* determinative one. To engage in that analysis now would be purely speculative. As plaintiffs cannot demonstrate that the CPL or related case law specifically permits police conduct prohibited by Local Law 71, we conclude that there is no direct conflict with state law that preempts the local law (*see DJL Rest. Corp.*, 96 NY2d at 95).[6]

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[6] With respect to preemption where a local law would "impose prerequisite additional restrictions on rights under State law" (*Zakrzewska*, 14 NY3d at 480), we question whether a police officer's authority to conduct a stop and frisk falls under the categories of "rights" or "benefits" to which this branch of the conflict preemption doctrine is ordinarily applied (*see id.*; *Jancyn Mfg. Corp.*, 71 NY2d at 97).

Plaintiffs argue that Local Law 71 conflicts with the CPL

Furthermore, we reject plaintiffs' argument that the local law conflicts with the CPL because the local law prescribes a subjective standard and the CPL prescribes an objective standard for evaluating police conduct. This argument conflates constitutional search-and-seizure standards (embodied in the CPL) with equal protection standards (embodied in Local Law 71), and suggests a conflict where none exists by comparing these distinct but compatible bodies of law. To be sure, police conduct that may be lawful for search and seizure purposes may nonetheless violate equal protection principles. These different outcomes result naturally from the distinct standards applicable to claims under the Fourth and Fourteenth Amendments (and their state counterparts). As previously stated, the CPL concerns defendants' rights under the search and seizure clauses of the US and New York Constitutions; under this standard, courts do not consider an officer's subjective intent, so a police stop that is motivated by discrimination or pretext may still be upheld if it

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because it restricts officers' authority to conduct stops and searches. Defendants contend that the CPL does not confer upon police officers an individual "right" to stop, frisk, and arrest individuals, but rather protects the rights of *civilians* against stops, searches, and arrests that are unlawful.

We agree with defendants. The CPL articulates the federal and state constitutional standards under which police officers may lawfully conduct warrantless stops, frisks, and arrests; it does not confer upon officers a specific "right" to do so.

is otherwise supported by reasonable suspicion (*see People v Robinson*, 97 NY2d 341). Conversely, Local Law 71, an antidiscrimination law, concerns individuals' equal protection rights, in which a subjective analysis of an officers' intentions is entirely relevant.

In *People v Robinson*, the Court of Appeals held that "a police officer who has probable cause to believe a driver has committed an infraction" does not violate the search and seizure clause of the State Constitution, even where the officer's "primary motivation is to conduct another investigation" (97 NY2d at 346). Yet, even as it declined to adopt the "primary motivation" test for search-and-seizure purposes, the Court noted that the "real concern of those opposing pretextual stops is that police officers will use their authority to stop persons on a selective and arbitrary basis" (*id.* at 351). The Court stated that *Whren v United States* (517 US 806 [1996]), which the *Robinson* Court adopted, "recognized that the answer to such action is the Equal Protection Clause of the Constitution" (97 NY2d at 351). Although an officer's subjective intent does not enter into an analysis of the reasonableness of a search or seizure, discriminatory intent can be considered under equal protection standards (*Whren*, 517 US at 813 ["[T]he Constitution prohibits selective enforcement of the law based on

considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis"]). The *Robinson* Court also acknowledged studies showing "that certain racial and ethnic groups are disproportionately stopped by police officers," and called for "both vigilance and concern about the protections given by the New York State Constitution. Discriminatory law enforcement has no place in our law" (97 NY2d at 352). Local Law 71 demonstrates the City's vigilance in preventing discriminatory law enforcement, and sensibly requires a subjective evaluation of police conduct to determine whether the officer was motivated by an intent to discriminate.

Finally, we disagree with plaintiffs' argument that Local Law 71's burden-shifting provision presents a conflict with the CPL. Plaintiffs contend that the local law's burden-shifting regime "contradicts the governing procedural rules set forth in the CPL for determining the lawfulness of law enforcement action by police officers." Again, plaintiffs overlook the fact that the CPL is concerned with evaluating the lawfulness of police conduct vis-a-vis search and seizure principles; the local law, on the other hand, evaluates police conduct to determine whether

a civil remedy applies as a consequence for discrimination. Thus, any inconsistency with respect to the CPL in this regard does not constitute a direct conflict or "inhibit the operation of the State's general laws" (*Zakrzewska*, 14 NY3d at 480 [internal quotation marks omitted]). In fact, the burden-shifting provision employed by Local Law 71 is consistent with burden shifting in other antidiscrimination laws (*see e.g. Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 34 [1st Dept 2011], *lv denied* 18 NY3d 811 [2012]), and is similar to the burden shifting in equal protection analysis (*see United States v City of Yonkers*, 96 F3d 600, 612 [2d Cir 1996]).

Conclusion

Accordingly, the order and judgment (one paper), of the Supreme Court, New York County (Anil C. Singh, J.), entered June 19, 2014, insofar as appealed from as limited by the briefs,

adjudging and declaring that Local Law 71 is not preempted by the Criminal Procedure Law, should be affirmed, without costs.

M-6484 &
M-6494 – *Patrolmen's Benevolent Assoc., et al., v City of New York*

Motions to expand the record granted.

All concur.

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

ENTERED: June 23, 2016

CLERK