SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 22, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Friedman, J.P., Acosta, Andrias, Richter, JJ.

16483 Anonymous, Index 300009/13
Plaintiff-Appellant,

-against-

Anonymous,
Defendant-Respondent.

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Aronson Mayefsky & Sloan, LLP, New York (Allan E. Mayefsky of counsel), for appellant.

Cohen Clair Lans Greifer & Thorpe LLP, New York (Bernard E. Clair of counsel), for respondent.

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Order, Supreme Court, New York County (Ellen Gesmer, J.), entered May 4, 2015, which, to the extent appealed from, denied plaintiff wife's cross motion for partial summary judgment declaring that a condominium apartment located at 195 Hudson Street is the sole and separate property of plaintiff under the terms of the parties' prenuptial agreement, and granted defendant husband's motion for temporary maintenance, modified, on the law, to deny defendant's motion for temporary maintenance, and otherwise affirmed, without costs.

The parties executed a trust agreement that designates the parties, individually and collectively, as "Trustor" of a trust that purchased the apartment at issue. The agreement was not valid because the parties' signatures were never properly acknowledged. We agree with the wife that the agreement, which is unenforceable, cannot be considered as evidence (*Selinger v Selinger*, 44 AD3d 341, 342 [1st Dept 2007]). Nonetheless, issues of fact exist whether the parties intended to jointly own the apartment, and whether the husband was involved in any fraud in the preparation and execution of the trust agreement (*see generally Ta Chun Wang v Chun Wong*, 163 AD2d 300 [2d Dept 1990], *lv denied* 77 NY2d 804 [1991], *cert denied* 501 US 1252 [1991]). Thus, upon the motion court's invalidation of the trust agreement, it properly declined to decide whether the deed should be reformed to reflect the wife or both parties as the true owner (*US Bank N.A. v Lieberman*, 98 AD3d 422, 423-424 [1st Dept 2012]).

Although the wife funded the purchase of the apartment and ordinarily would be considered the settlor (*see Guaranty Trust Co. of New York v N.Y. Trust Co.*, 297 NY 45, 50 [1947]), the husband avers that the parties had agreed that the apartment would be joint property, and that consistent with that intention, he made certain payments towards maintenance and renovations.

The parties' prenuptial agreement is not dispositive of the issue, as it does not list the apartment as the wife's separate property. In addition, it merely defines joint property as that "titled in the joint names of the parties," and in this case the apartment is titled in the name of the invalidated trust. Reformation is an equitable remedy and the parties' intent, as well as any questions of unclean hands, are relevant to the court's determination. These issues must be explored at a hearing. Thus, the wife's cross motion for partial summary judgment was properly denied.

After this action was commenced, the husband moved for an order awarding him temporary spousal support. The wife opposed the motion arguing, inter alia, that the parties' prenuptial agreement contains a waiver of maintenance, both temporary and final. The court granted the husband's motion and awarded him interim support, finding that the agreement did not contain the statutory language for waiving temporary maintenance, purportedly required by Domestic Relations Law former § 236B(5-a)(f).

The motion court improperly granted the husband's application for temporary maintenance. At the outset, the court should not have applied the requirements of Domestic Relations Law former § 236B(5-a)(f) to the parties' prenuptial agreement.

That subdivision, which mandated the inclusion of certain language about temporary maintenance, is not applicable because the parties' prenuptial agreement was entered into prior to the effective date of this statutory provision.

New York has a "strong public policy favoring individuals ordering and deciding their own interests through contractual arrangements, including prenuptial agreements" (*Matter of Greiff*, 92 NY2d 341, 344 [1998]). "Duly executed prenuptial agreements are accorded the same presumption of legality as any other contract" (*Bloomfield v Bloomfield*, 97 NY2d 188, 193 [2001]), and like all contracts, "are construed in accord with the parties' intent, which is generally gleaned from what is expressed in their writing" (*Van Kipnis v Van Kipnis*, 11 NY3d 573, 577 [2008]). Thus, a waiver of temporary maintenance will be enforced as long as the parties' intent to do so is "clearly evidenced by the writing" (*Strong v Dubin*, 75 AD3d 66, 68 [1st Dept 2010] [internal quotation marks omitted]).

Applying these principles, we find that the broad and expansive language used by the parties in their agreement forecloses the husband from seeking any kind of spousal support, including temporary support. After acknowledging and representing that they are "fully capable of being self

supporting," the parties agreed to "waive any and all claims for spousal support and/or maintenance" "both now and in the future." By using the words "any and all," the parties, in this particular agreement, clearly signaled their intention that the waiver would encompass both temporary and final awards of spousal support. And the words "in the future" can only mean any time after the agreement was executed, which necessarily includes when the husband's present motion was made.

Further, in the agreement, the maintenance waiver appears below the heading "MAINTENANCE/SPOUSAL SUPPORT UPON TERMINATION OF MARRIAGE." Under Article I of the agreement, the "termination of the marriage" is "deemed to have occurred," inter alia, "upon commencement or institution of any matrimonial action to dissolve or annul the marriage . . . by either party." Thus, by tying the maintenance waiver to the "termination of the marriage," as that term is defined in the agreement, the parties clearly intended the waiver to cover any maintenance request made, as here, after the commencement of a divorce action (*see Valente v Valente*, 269 AD2d 389, 389-390 [2d Dept 2000] [temporary maintenance foreclosed where the parties, who were separated, agreed to waive maintenance in the event of separation, divorce or annulment]; *Clanton v Clanton*, 189 AD2d 849, 850 [2d Dept 1993] [denying

request for temporary maintenance where the prenuptial agreement renounced all claims "under any circumstances" for maintenance in the event of the "breakup" of the marriage by "separation or otherwise"]).

The parties' failure to use the terms "temporary support" or "interim support" does not warrant a different result. Although the dissent acknowledges that "no particular catechism is required to waive temporary maintenance claims," it nevertheless finds the agreement ambiguous and suggests that the parties may only have intended to waive a final award of maintenance. No fair reading of the agreement supports that conclusion. When read as a whole, the agreement contains no ambiguity as to whether the parties intended to waive temporary maintenance. As noted, the agreement waives "any and all" maintenance claims, "now and in the future." Contrary to the dissent's view, there is nothing imprecise about the phrase "any and all." Indeed, this Court has repeatedly found the use of that phrase to be "clear" (*see e.g. Miller v Miller*, 82 AD3d 469, 469 [1st Dept 2011]; *Coby Group, LLC v Kriss*, 63 AD3d 569, 570 [1st Dept 2009]; *Broadcast News Networks, Inc. v Loeb & Loeb, LLP*, 40 AD3d 441 [1st Dept 2007]). Further, although minimized by the dissent, the agreement explicitly states that the parties are "fully

capable of being self supporting," which is another indicia that neither intended to seek any kind of maintenance.

The dissent also discounts the heading above the maintenance waiver that makes clear that the parties intended to waive "any and all" spousal support claims that arise after the initiation of a divorce action, which necessarily includes temporary support. The definition in Article I of "termination of the marriage" shows that the parties, who were both represented by counsel, recognized that there is a difference between the filing of a divorce action and the issuance of a final judgment of divorce. They specifically provided that the agreement's broad maintenance waiver goes into effect upon the initiation of the divorce case, and not when the final judgment is rendered.

The cases relied upon by the dissent are distinguishable. In the prenuptial agreement in *Lennox v Weberman* (109 AD3d 703, 704 [1st Dept 2013]), the defendant waived any claim to a *final* award of maintenance, and there was no express agreement to exclude an award of temporary maintenance. Here, in contrast, the parties did not limit themselves to waiving final maintenance, but rather waived "any and all" maintenance "now and in the future." Thus, unlike *Lennox*, the prenuptial agreement here, especially when read in conjunction with the parties'

definition of "termination of the marriage," reflects a clear intent to exclude temporary support. In *Tregellas v Tregellas* (169 AD2d 553, 553 [1st Dept 1991]), the Court merely found that the particular prenuptial agreement in that case did not bar an award of temporary support. There is no indication in *Tregellas* that the parties used the expansive language employed here or that they tied the waiver of maintenance to all support requests made after commencement of a matrimonial action. Finally, *McKenna v McKenna* (121 AD3d 864 [2d Dept 2014]) contains no facts as to the specific wording of the prenuptial agreement and does not resolve the issue presented here.

The dissent effectively holds that parties to a prenuptial agreement must include the terms "temporary maintenance" or "interim spousal support" if they wish to waive these claims. No case has ever held this, and it is inaccurate for the dissent to claim that such a requirement is not mandating a particular catechism. Counsel who represented the parties when they signed the agreement cannot be faulted, as the dissent implies, for failing to include these "magic words" because no court had ever required that they do so. Although the current dispute would have been obviated by the use of such language, the critical question is whether the waiver executed by the parties

unambiguously encompassed both temporary and final maintenance, which it did.

Even though one of this Court's cases uses the word "express" when talking about waivers of temporary maintenance, in *Strong v Dubin* (75 AD3d 66), we emphasized that when interpreting a prenuptial agreement "'[p]articular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby'" (*id.* at 69, quoting *Kass v Kass*, 91 NY2d 554, 566 [1998]). All that is required for an effective waiver is that the parties' intent to opt out of the statutory scheme be "clearly evidenced by the writing" (*Strong v Dubin*, 75 AD3d at 68 [internal quotation marks omitted]).[1] The maintenance provision here, read as a whole and in the context of the entire agreement, showed the parties' clear intent to waive all forms of spousal support. It is difficult to understand how a broad provision such as the one here could be interpreted in any way except as a complete waiver of all maintenance.

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[1] Although Domestic Relations Law § 236B(3) also provides that maintenance provisions be fair and reasonable at the time the agreement was entered into, and not unconscionable at the time of entry of final judgment, this case presents no challenge to the prenuptial agreement on either of these grounds.

This case presents a simple question of contractual interpretation, and has nothing to do with the court's discretion in fashioning maintenance awards. It involves the interpretation of a duly executed prenuptial agreement, which is given the same presumption of legality as any other contract (*Bloomfield v Bloomfield*, 97 NY2d at 193), a principle that is well established in this state's jurisprudence. Here, both parties, represented by counsel, contracted to waive all claims of spousal support, both temporary and final, and they should be held to their bargain.

All concur except Acosta, J. who dissents in part in a memorandum as follows:

ACOSTA, J. (dissenting in part)

In analyzing and interpreting a prenuptial agreement to determine the parties' intent, we must be guided by the plain language of the agreement. The majority eschews this basic principle of contract law in this matter, finding that an imprecise and murky waiver of maintenance in the prenuptial agreement nevertheless bars the defendant husband from an award of temporary maintenance. Since our precedent has long required waivers of temporary maintenance to be clear and unequivocal, and because the waiver here did not satisfy that standard, I respectfully dissent and part company with the majority's finding that the motion court abused its discretion by awarding temporary maintenance to defendant.

For a quarter century, our jurisprudence has adhered to the principle that "[a] prenuptial agreement waiving any right to maintenance does not bar temporary relief prior to dissolution of the marriage" (*Tregellas v Tregellas*, 169 AD2d 553, 553 [1st Dept 1991]; *see also Lennox v Weberman*, 109 AD3d 703, 704 [1st Dept 2013]; *Vinik v Lee*, 96 AD3d 522, 522-523 [1st Dept 2012]; *Solomon v Solomon*, 224 AD2d 331 [1st Dept 1996]; *accord McKenna v McKenna*, 121 AD3d 864, 867 [2d Dept 2014]). This Court recently reaffirmed that rule in *Lennox v Weberman*, where it held that

"the [motion] court was entitled, in its discretion, to award pendente lite relief in the absence of an express agreement to exclude an award of temporary maintenance" (109 AD3d at 704). Although the majority acknowledges the general principle, it misapplies it by finding an express waiver of temporary maintenance where none was included in the agreement. Thus, while the motion court may have erred in applying Domestic Relations Law former § 236B(5-a)(f) to the parties' prenuptial agreement, it retained its discretion to award defendant temporary maintenance inasmuch as there was no clear waiver of that specific relief.

The majority ignores the significant distinction between maintenance and temporary maintenance, a distinction underlying the rationale of *Tregellas* and its progeny.[1] Indeed, the

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[1] The terminology used herein, "maintenance" and "temporary maintenance," reflects that which appears in the version of the Domestic Relations Law that was in effect when the parties executed their agreement and married in March 2010 (Domestic Relations Law former § 236B[6][a] [absent prenuptial agreement, "the court may order temporary maintenance or maintenance"]; *see also* Alan D. Scheinkman, Practice Commentaries, McKinney's Cons Laws of NY, Book 14, Domestic Relations Law C236B:35 ["Maintenance refers to the spousal support award made after trial; temporary maintenance is pendente lite spousal support."]).

The current version of the statute and the version in effect when this action was commenced use the terms "temporary maintenance" and "post-divorce maintenance" (Domestic Relations

Domestic Relations Law and our case law treat these two types of monetary spousal support as fundamentally different forms of relief. The purpose of maintenance, on the one hand, "is to give the [less-monied] spouse economic independence" (*Cohen v Cohen*, 120 AD3d 1060, 1065 [1st Dept 2014] [internal quotation marks omitted], *lv denied* 24 NY3d 909 [2014]) or "a sufficient period to become self-supporting" (*Sheila C. v Donald C.*, 5 AD3d 123, 124 [1st Dept 2004]) after a marriage has ended. The purpose of temporary maintenance, by contrast, is to provide for the reasonable needs of the less-monied spouse during the pendency of a matrimonial action, allowing him or her to adequately litigate the matter without being forced to capitulate to the demands of the other spouse because of financial pressures (*see Brenner v Brenner*, 52 AD3d 322, 323 [1st Dept 2008]; *see also* 2 New York Matrimonial Law and Practice § 17:15 [2015] [a temporary maintenance award is "designed to ensure the economic survival of the dependent spouse . . . until the case is reached for trial and to prevent the economically stronger spouse from starving the

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Law § 236B[5-a], [6]; Domestic Relations Law former § 236B[5-a], [6]). Although "maintenance" and "post-divorce maintenance" can technically be temporary, because they may be awarded for a definite period of time after a divorce, "temporary maintenance" continues to be used in reference to pendente lite maintenance awards.

dependent party into submission"]). The current Domestic Relations Law also reflects this distinction, by dividing the two types of relief into separate subdivisions, each containing its own calculations and factors to be used in determining the amount of maintenance or temporary maintenance to be awarded (*compare* Domestic Relations Law § 236B[5-a] *with* § 236B[6]).

Affianced parties may opt out of the Domestic Relations Law's provisions of both maintenance and temporary maintenance awards, through the use of prenuptial agreements (Domestic Relations Law § 236B[3]), provided, of course, that such agreements are not "the product of fraud, duress, overreaching resulting in manifest unfairness, or other inequitable conduct" (*Gottlieb v Gottlieb*, -- AD3d --, 2016 NY Slip Op 00613, *6 [1st Dept 2016], citing *Christian v Christian*, 42 NY2d 63, 72 [1977]).

However, any waiver, including a waiver of temporary maintenance, must be clear. This standard, articulated most recently in this Court's decision in *Lennox* (109 AD3d at 704), mandates that a purported waiver of temporary maintenance be "express" in order to effectively deprive the court of its inherent discretion to award such relief. In light of the unique purposes of temporary maintenance discussed above, this is an appropriate and rational requirement. The question, then, is

whether the prenuptial agreement here satisfies our standard of clarity; that is, does the provision in which the parties agreed to waive "maintenance" contain an express waiver of temporary maintenance? I say "no."

Black's Law Dictionary defines "express" as "[c]learly and unmistakably communicated; stated with directness and clarity" (Black's Law Dictionary [10th ed 2014], express). Although the parties agreed to "waive any and all claims for spousal support and/or maintenance . . . both now and in the future," their omission of the term "temporary maintenance" or other language referring to pendente lite relief signals their intent to limit the scope of that language to maintenance (and to exclude a waiver of temporary maintenance). Considering the distinct usage of the terms "maintenance" and "temporary maintenance" in former Domestic Relations Law § 236B (which was in effect at the time the parties executed their agreement) and in case law, the parties' use of the term "maintenance" does not "[c]learly and unmistakably communicate[]" that the waiver is meant to encompass temporary maintenance.

The use of the phrase "any and all" does not create the clear and unmistakable waiver of temporary maintenance that is needed. The term is imprecise, demonstrates an element of

carelessness, and has been criticized by several commentators (*see* Bryan A. Garner, Garner on Language and Writing 316 [2009] [condemning as fallacious the argument "that superfluities seldom create unclarity"]; David S. Elder, *"Any and All": To Use Or Not To Use?*, 70 Mich Bar J 1070, 1070 [Oct 1991] ["any" can mean "one, some, or all," and "'all' can mean any one"]). Yet, the majority's interpretation depends on an inference that the phrase necessarily incorporates pendente lite relief.

Nor does the agreement's temporal reference to "now and in the future" necessarily justify the inference that the parties intended to refer to temporary maintenance; the phrase could simply mean that neither spouse would seek an award for maintenance (i.e., what the current statute terms "[p]ost-divorce maintenance") at any point after the execution of the prenuptial agreement or upon the marriage's termination or dissolution.

The majority also makes much of the fact that the heading above the maintenance waiver mentions "termination of marriage" (emphasis omitted), which the agreement defines as occurring, inter alia, when divorce proceedings are commenced. This, however, does not change the analysis. The result of the parties' failure to expressly waive temporary maintenance, read together with the heading, only signifies that the parties agreed

to refrain from raising claims for "maintenance" once these divorce proceedings were commenced. The provision's silence on whether temporary maintenance is also waived makes the definition of "termination of the marriage" immaterial here.[2] In addition, whether the parties stated their capability of being "self supporting" or whether they are in fact so capable is not dispositive, because any inequities in a temporary maintenance award are best resolved by a speedy trial (*see e.g. Tregellas*, 169 AD2d at 553).

Although no particular catechism is required to waive temporary maintenance claims, parties to a prenuptial agreement should use express language that includes terms such as "temporary maintenance" or "interim spousal support," as distinct from terms like "maintenance" and "post-divorce maintenance," if they wish to waive those claims. Only then will their intent be clear. The majority mischaracterizes my position by claiming that I would require the use of "magic words." I do no such

[2] Moreover, I note that although the majority relies on two Second Department cases to support its contention on this point, those cases preceded that Department's more recent decision in *McKenna v McKenna* (121 AD3d 864 [2d Dept 2014]), a case that approvingly cited our decision in *Vinik*, among others, for the proposition that a prenuptial agreement that contains a waiver of maintenance does not automatically result in a waiver of pendente lite relief (*see id.* at 867).

thing. Instead, I recognize, as the majority does, that the existing standard is one of clarity (*see Strong v Dubin*, 75 AD3d 66, 68 [1st Dept 2010] [parties' intent "must be clearly evidenced by the writing"] [internal quotation marks omitted]), and provide above a nonexhaustive list of terms that may be used to expressly waive temporary maintenance. Rather than mandate a particular phrase, I would simply apply the standard of clarity, consistent with our precedent.

The majority essentially rewrites the parties' agreement by inferring the inclusion of temporary maintenance in a waiver that addresses only claims to "maintenance." Indeed, the final sentence of its opinion - stating that the parties "contracted to waive all claims of spousal support, *both temporary and final*" (emphasis added) - highlights how the majority strains to find express language that is not present in the agreement. Simply put, the parties, represented by able counsel, could have easily drafted their agreement to expressly include a waiver of temporary maintenance by employing the language that the majority now imputes to them.

Indeed, practitioners of matrimonial law ought to be aware of the standard of clarity that has been the law in the First Department since at least 1991 (*Tregellas*, 169 AD2d at 553 ["The

prenuptial agreement waiving *any right to maintenance* does not bar temporary relief prior to dissolution of the marriage"] [emphasis added]). Significantly, the supplementary practice commentaries accompanying Domestic Relations Law § 236 state that while parties may waive temporary maintenance in a prenuptial agreement, "the agreement must do so explicitly or else temporary maintenance will not be waived. Language waiving maintenance, as distinguished from maintenance and temporary maintenance, will only result in a waiver of maintenance and not of temporary maintenance" (Alan D. Scheinkman, Supp Practice Commentaries, McKinney's Cons Laws of NY, Book 14, Domestic Relations Law C236B:40 [2014]; 445 NY Jur 2d, Domestic Relations § 188, citing *Lennox* (109 AD3d 703) and *Tregellas* (169 Ad2d 553)]).

I agree with the majority that this appeal boils down to a simple matter of contract interpretation, and that a court interpreting a prenuptial agreement should consider "'[p]articular words . . . not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby'" (*Strong v Dubin*, 75 AD3d at 69 [alteration added], quoting *Kass v Kass*, 91 NY2d 554, 566 [1998]). Nonetheless, the agreement must also be interpreted in light of our precedent holding that temporary maintenance is not

waived absent express and unequivocal language to that effect. That the provision at issue is susceptible to more than one reasonable interpretation demonstrates a lack of clarity with respect to the parties' intent (*see Foot Locker, Inc. v Omni Funding Corp. of Am.*, 78 AD3d 513, 515 [1st Dept 2010]). Altogether, the purported waiver of temporary maintenance in the agreement before us was anything but clear and unmistakable.

I do not dispute our state's "strong public policy favoring individuals ordering and deciding their own interests through contractual arrangements, including prenuptial agreements" (*Matter of Greiff*, 92 NY2d 341, 344 [1998]), but this policy does not direct courts to uphold prenuptial agreements (or other contracts) as unassailable when they employ language that fails to clearly express the intent of the parties. The majority unconvincingly attempts to distinguish our prior cases on their facts – for example, by stating that there is "no indication" that the parties used expansive language in *Tregellas*, despite our holding that the prenuptial agreement's waiver of "*any right* to maintenance" did not bar a temporary maintenance award in that case (169 AD2d at 553 [emphasis added]). In doing so, it misapplies the broader principle first announced in *Tregellas* and followed by this Court until now (*see e.g. Solomon*, 224 AD2d at

331; *Lennox*, 109 AD3d at 704). The prenuptial agreement in this case failed to expressly waive temporary maintenance; consequently, the motion court was not stripped of its inherent discretion to award that form of pendente lite relief.

Accordingly, the order of Supreme Court should be affirmed in all respects.

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

ENTERED: MARCH 22, 2016

CLERK

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

199 Cambridge Capital Real Estate Investments, LLC,
Plaintiff-Respondent-Appellant,

-against-

Archstone Enterprise LP, et al.,
Defendants-Appellants-Respondents,

Jeffrey Fitts, etc., et al.,
Defendants.

Index 654471/12

Weil, Gotshal & Manges LLP, New York (Jonathan D. Polkes of counsel), for appellants-respondents.

Wolf Haldenstein Adler Freeman & Herz, New York (Benjamin Y. Kaufman of counsel), for respondent-appellant.

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered October 10, 2014, which, to the extent appealed from as limited by the briefs, granted defendants' motion to dismiss the causes of action for breach of contract for failing to obtain authorization and breach of the implied covenant of good faith and fair dealing, and denied defendants' motion to dismiss the causes of action for breach of contract with regard to the sale transaction, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, and an accounting, unanimously modified, on the law, to dismiss the causes of action for breach of contract with regard to the sale transaction, breach of fiduciary duty,

aiding and abetting breach of fiduciary duty, and an accounting, and otherwise affirmed, without costs. The Clerk is directed to enter judgment dismissing the complaint.

In October 2007, plaintiff invested $20 million in Archstone Multifamily JV LP (the Fund), in exchange for an approximate 1% interest. Defendant Archstone Multifamily GP, LLC is the general partner of the Fund (Fund GP). The Fund acquired and took private what is now known as Archstone Enterprise LP (Archstone). Archstone controls the assets of Archstone-Smith Real Estate Investment Trust (REIT), one of the largest multi-family REITs in the United States, with assets valued at approximately $23.7 billion. Lehman Bros. Holding, Inc. and affiliates were sponsors of the transaction, providing $3 billion in secured financing, or 47% of the total. (Bank of America and Barclay's provided 28% and 25% of the remaining financing, respectively.) Less than a year later, on September 15, 2008, Lehman entered into bankruptcy.

In January 2009, the sponsors committed an additional $485 million in financing to Archstone. On March 31, 2009, the original limited partnership agreement was amended and restated in its entirety. On December 1, 2010, the sponsors exchanged approximately $5.2 billion in debt, plus accrued interest, for

new preferred equity interests in Archstone. The recapitalization left Archstone with two classes of interests, the preferred interests held by the sponsors, and the common interest held by the Fund (and thus indirectly by plaintiff).

On January 20, 2012, Lehman acquired half of the other sponsors' interests in Archstone for $1.33 billion. On June 6, 2012 it purchased the remaining interests of the sponsors for $1.65 billion. Upon consummation of the second acquisition, Lehman owned nearly all of Archstone.

On November 26, 2012, Lehman announced that it had entered into an asset purchase agreement whereby Archstone would sell its assets to Equity Residential and AvalonBay Communities, Inc. for $2.7 billion in cash, $3.8 billion in stock, and the assumption of $9.5 billion in debt. Plaintiff alleges that the sale will generate enough to pay Lehman's preferred interests, but "essentially wipe out" the minority interests. Plaintiff alleges that the sale is motivated by Lehman's desire to pay its creditors and satisfy obligations relating to its 2008 bankruptcy.

Plaintiff alleges that it became aware of the transaction on November 27, 2012, after it was publicly announced. The transaction closed on February 27, 2013.

In or about December 2012, plaintiff commenced this action alleging, inter alia, breach of the limited partnership agreement, breach of the implied covenant of good faith and fair dealing, and breach of fiduciary duty as against the fund's general partner; aiding and abetting breach of fiduciary duty as against the other defendants; and fraud and conversion as against all defendants. Plaintiff alleged that Lehman and related entities sold their most valuable real estate assets, i.e., the Archstone portfolio of properties, in a process and at a price "grossly unfair" to plaintiff minority limited partner investor. Plaintiff alleges that the portfolio sale was undertaken solely for the benefit of Lehman and its creditors and in disregard of the rights of the minority investors.

The motion court dismissed the first cause of action for breach of contract in part as time-barred under the Colorado statute of limitations. The court declined to dismiss the claim to the extent premised on Section 6.01(e) and (g) of the amended limited partnership agreement (LPA). The court declined to dismiss the breach of fiduciary duty claims against the Fund GP or plaintiff's aiding and abetting allegations (other than against defendants Fitts and Thomas), reasoning that applicability of the exculpatory provision in the amended LPA

awaited development of the factual record.[1]

We now modify to dismiss the remaining causes of action. The motion court correctly dismissed the breach of contract action as time-barred to the extent predicated on allegations concerning the original LPA. The claim, however, should be dismissed in its entirety. Section 6.01(e) does not require "delivery of a written notice" to all limited partners; it requires merely that a "Major Decision" be "approved (or deemed approved) by a Requisite Interest of the Limited Partners," defined elsewhere in the agreements as limited partners holding more than 50% of the total percentage interest represented by the limited partners. Section 6.01(g) similarly does not require delivery of a written notice. Rather, it provides that whenever the consent of the partners is requested with respect to a "Major Decision," consent shall be deemed to have been given if such partner fails to respond within 10 days. Here, the transaction was overwhelmingly approved by 99% of all partnership interests. Plaintiff's consent was not requested nor required for approval of the transaction.

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[1] The court granted the motion to dismiss the fifth cause of action for conversion and the sixth cause of action for fraud. Plaintiff's brief does not address the dismissal of those claims.

The motion court properly dismissed the second cause of action for breach of the implied covenant of good faith and fair dealing as there is an express contract addressing the issue in dispute, i.e., whether the transaction required limited partner approval.

The claim that the Fund GP breached its fiduciary duty when it amended the original LPA without consent is time-barred pursuant to the three-year statute of limitations for claims of breach of fiduciary duty (10 Del C § 8106).

The motion court should have dismissed the remainder of the claim for breach of fiduciary duty against the Fund GP. Even under the heightened entire fairness standard advocated by plaintiff, the claim is insufficient. An "entire fairness" analysis focuses on two entwined considerations: fair dealing and fair price (*see In re Crimson Exploration Inc. Stockholder Litig.*, 2014 WL 5449419, *9, 2014 Del Ch LEXIS 213, *30 [Del Ch 2014]). Plaintiff fails to allege facts demonstrating the absence of fairness, or that it did not "receive the substantial equivalent in value of what [it] had before" (*In re Trados Shareholder Litig.*, 73 A3d 17, 76 [Del Ch 2013] [directors did not breach their fiduciary duties by approving merger in which the common shares received nothing since the common shares, which

had no economic value before the merger, received the substantial equivalent of what they had before]). Conclusory assertions that amounts paid were "unfair" are insufficient (*see Monroe County Employees' Ret. Sys. v Carlson*, 2010 WL 2376890, *2, 2010 Del Ch LEXIS 132, *4-5 [Del Ch 2010]). Plaintiff concedes that the $16 billion transaction price attained Archstone's current value at the time of the transaction. Plaintiff also admits that the transaction "represented a premium of approximately 15% over the implied purchase price of Lehman's combined acquisitions of the interests of the other [s]ponsor [b]anks' interests earlier in 2012." Plaintiff identifies no alternative transactions, let alone one that would have achieved more value for the Fund. Fiduciaries are "not required to abandon [a] transaction simply because a better deal *might* have become available in the future" (*McGowan v Ferro*, 859 A2d 1012, 1035 [Del Ch 2004], *affd* 873 A2d 1099 [Del 2005]).

Plaintiff's allegations that the Fund GP "failed to engage in any reasonable alternative analysis to ensure the protection

of the Fund's assets"[2] are predicated on alleged breaches of the duty of care (as opposed to breaches of the duty of loyalty), and thus barred by the exculpatory provision in the amended LPA (*see* 6 Del C § 17-1101[d]).

As the complaint fails to state a cause of action for breach of fiduciary duty, the claim for aiding and abetting a breach of fiduciary duty must also be dismissed (*Malpiede v Townson*, 780 A2d 1075, 1096, 1098 [Del 2001]).

The cause of action for an accounting is in fact a remedy pleaded as a cause of action. Since the underlying causes of action are dismissed, the claim for an accounting must be dismissed as well (*see MCG Capital Corp. v Maginn*, 2010 WL 1782271, *25, 2010 Del Ch LEXIS 87, *93-94 [Del Ch May 5, 2010]).

[2] Plaintiff does not specify the results such an analysis might have generated. Plaintiff concedes that the Fund GP considered an initial public offering of Archstone, and does not allege that the IPO would have offered more value to the limited partners.

We have considered and rejected plaintiff's additional arguments.

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

ENTERED: MARCH 22, 2016

CLERK

Tom, J.P., Saxe, Richter, Kapnick, JJ.

371 In re Tzefang Frances Chang, Index 100361/14
Petitioner-Appellant,

-against-

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

Stewart Lee Karlin Law Group, P.C., New York (Daniel Dugan of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Emma Grunberg of counsel), for respondents.

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered September 8, 2014, which denied the petition challenging respondents' determination, dated January 14, 2014, terminating petitioner's contract as a bilingual speech pathologist, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The court properly found that the agreement with petitioner afforded respondents the unconditional right to terminate the contract without cause and that such contract termination clauses

are enforceable (*see Red Apple Child Dev. Ctr. v Community Sch. Dists. Two*, 303 AD2d 156, 157-158 [1st Dept 2003], *lv denied* 1 NY3d 503 [2003]; *Ying-Qi Yang v Shew-Foo Chin*, 42 AD3d 320 [1st Dept 2007], *lv denied* 9 NY3d 812 [2007]). Moreover, respondents' determination was rational. The agency did not have to accept petitioner's claim that the complaint was an exaggeration of the actual events.

Petitioner was not entitled to a name-clearing hearing because she presented no evidence to refute the statements of respondent's director of employee relations that the code placed on petitioner's file was for internal use only, and therefore she failed to show a likelihood of dissemination of the stigmatizing material (*see Matter of Swinton v Safir*, 93 NY2d 758, 764-765 [1999]).

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

ENTERED: MARCH 22, 2016

CLERK

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

407-
408 Index 108934/10

Michael Todres, as the Executor of
the Estate of Sarah Carter Collyer,
Plaintiff-Respondent-Appellant,

-against-

W7879, LLC, et al.,
Defendants-Appellants-Respondents.

_____

Kucker & Bruh LLP, New York (Saul D. Bruh of counsel), for appellants-respondents.

Morton S. Minsley, New York, for respondent-appellant.

_____

Judgment, Supreme Court, New York County (Arthur F. Engoron, J.), entered November 10, 2014, against defendants in plaintiff's favor, unanimously modified, on the law, to reduce the principal amount awarded to plaintiff (before the setoff from plaintiff to defendants) from $131,042.94 to $2,618, to adjust the interest calculation and total amount awarded accordingly, and otherwise affirmed, without costs. The Clerk is directed to enter an amended judgment accordingly. Appeal from decision, same court and Justice, entered October 3, 2014, unanimously dismissed, without costs, as taken from a nonappealable paper.

Plaintiff waited until his reply brief on his cross appeal to make the legal argument that the court should have precluded

two defense witnesses from testifying at trial. This argument is made too late (*see e.g. Schultz v 400 Coop. Corp.*, 292 AD2d 16, 21 [1st Dept 2002]). Were we to consider it, we would find that it was not an improvident exercise of the court's discretion to allow those witnesses to testify (*see* CPLR 3101[h]). Unlike the precluded witness in *Corso v State of New York* (23 Misc 3d 1132[A], 2009 NY Slip Op 51053[U], *3-4 [Ct Cl 2009], *affd* 73 AD3d 1116 [2d Dept 2010]), the witnesses in the case at bar were not under defendants' control.

Based on the evidence that was properly admitted, and given the deference due to the trial court (*see Thoreson v Penthouse Intl.*, 80 NY2d 490, 495 [1992]), the court properly found that defendants did not engage in a "fraudulent deregulation scheme to remove an apartment from the protections of rent stabilization" (*Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.*, 15 NY3d 358, 367 [2010]; *see Matter of Boyd v New York State Div. of Hous. & Community Renewal*, 23 NY3d 999 [2014]). Having so found, however, the court should not have looked at "the rental history of the housing accommodation prior to the four-year period immediately preceding the commencement of the action" (CPLR 213-a). In addition, the court

should not have awarded treble damages (*see Borden v 400 E. 55th St. Assoc., L.P.*, 24 NY3d 382, 398 [2014]).

Neither plaintiff nor defendants are entitled to recover attorneys' fees.

We have considered the remaining arguments and find them unavailing.

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

ENTERED: MARCH 22, 2016

CLERK

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

550 Verlene Gause, Index 303876/12
Plaintiff-Respondent,

-against-

2405 Marion Corp.,
Defendant-Appellant,

Rosario Marino,
Defendant.

_____

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, Bronx County (Wilma Guzman, J.), entered on or about April 10, 2015,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated March 2, 2016,

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

ENTERED: MARCH 22, 2016

CLERK

Sweeny, J.P., Renwick, Moskowitz, Gische, JJ.

553-
554 Ind. 48/05

The People of the State of New York,
Respondent,

-against-

Gustavo Morales,
Defendant-Appellant.

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

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

An appeal having been taken to this Court by the above-named appellant from a judgment of resentence of the Supreme Court, New York County (Michael Obus, J.), rendered September 17, 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: MARCH 22, 2016

CLERK

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

Sweeny, J.P., Renwick, Moskowitz, Gische, JJ.

555 Kemar Barrette, Index 20344/12
Plaintiff-Appellant,

-against-

Albert Vicente,
Defendant-Respondent.

_____

Belovin & Franzblau, LLP, Bronx (David A. Karlin of counsel), for appellant.

Law Office of Lord Chester So, Jericho (Thomas Torto of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Lizbeth Gonzalez, J.), entered December 23, 2014, which, insofar as appealed from as limited by the briefs, granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The record demonstrates that defendant, while driving in the center lane of the Grand Concourse, first saw plaintiff a "millisecond" before impact, when he was approximately one car length away from plaintiff. Defendant, who was traveling below the 30 mile per hour speed limit, swerved his car to the right, moving into the outermost lane of travel, avoiding full-on impact with plaintiff. However, the rear tire of defendant's car ran over plaintiff's foot. The record further shows that plaintiff

was dressed in dark clothing from head to foot, was attempting to cross the Grand Concourse at night while outside of a crosswalk, and stepped directly in front of defendant's vehicle. Under these circumstances, dismissal of the complaint was warranted (*see Ramirez v Molina*, 114 AD3d 540 [1st Dept 2014]).

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

ENTERED: MARCH 22, 2016

CLERK

Sweeny, J.P., Renwick, Moskowitz, Gische, JJ.

556 In re Aissatou D.,
Petitioner-Appellant,

-against-

Mamadou D.,
Respondent-Respondent.

_____

Carol L. Kahn, New York, for appellant.

Neal D. Futerfas, White Plains, for respondent.

Leslie S. Lowenstein, Woodmere, attorney for the child.

_____

Order, Family Court, New York County (Fiordaliza A. Rodriguez, Special Referee), entered on or about February 10, 2015, which, after a fact-finding hearing, dismissed petitioner mother's family offense petition, unanimously affirmed, without costs.

Family Court's determination that the mother failed to establish, by a fair preponderance of the evidence, that respondent father had committed acts warranting an order of protection, has a sound and substantial basis in the record (*Matter of Everett C. v Oneida P.*, 61 AD3d 489, 489 [1st Dept 2009]; Family Ct Act § 812[1]; Penal Law §§ 240.26[3], 240.30[2]). Family Court's finding that the father's testimony

was more credible than the mother's is entitled to great deference, and will not be disturbed on appeal (61 AD3d at 489). We have considered the mother's argument that she is entitled to a de novo review, and find it unavailing.

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

ENTERED: MARCH 22, 2016

CLERK

Sweeny, J.P., Renwick, Moskowitz, Gische, JJ.

557 Jerusalem Avenue Taxpayer, LLC, et al., Plaintiffs-Respondents, Index 159842/13

-against-

Liberty Mutual Insurance Company, Defendant-Appellant.

_____

Jaffe & Asher LLP, New York (Marshall T. Potashner of counsel), for appellant.

Carroll McNulty & Kull LLC, New York (Max W. Gershweir of counsel), for respondents.

_____

Order, Supreme Court, New York County (Carol Edmead, J.), entered on or about January 14, 2015, which, to the extent appealed from as limited by the briefs, granted plaintiffs' motion for summary judgment seeking to reform defendant's insurance policy to add plaintiff Jerusalem Avenue Taxpayer, LLC (Jerusalem) as an additional insured, ordered defendant to defend and indemnify Jerusalem in an underlying action and to reimburse plaintiff CastlePoint for reasonable costs and expenses it spent defending and indemnifying Jerusalem in that action, unanimously reversed, on the law, with costs, plaintiffs' motion denied with leave to renew upon joinder of Best Yet Markets, Inc. (Best Yet), and the complaint dismissed unless Best Yet is joined within a

reasonable time.

Best Yet is a necessary party to the plaintiffs' reformation claim. Plaintiffs seek reformation of an insurance policy to which they are not parties, and which was executed between defendant Liberty and nonparty Best Yet, on the ground that the parties to the policy intended that Best Yet, as lessor, obtain insurance coverage for plaintiff, Jerusalem, as lessee of the Best Yet premises in Hicksville. The issue of whether Best Yet intended to obtain coverage from Liberty for Jerusalem, which it was not obliged to do in the underlying lease, and whom Best Yet never expressly requested be included in the Liberty insurance policy, is at the heart of the reformation claim (*see Warberg Opportunistic Trading Fund, L.P. v GeoResources, Inc.*, 112 AD3d 78, 85-86 [1st Dept 2013]; *Greater N.Y. Mut. Ins. Co. v United States Underwriters Ins. Co.*, 36 AD3d 441, 442-443 [1st Dept 2007]). More importantly, the reformation claim would have adverse effects on Best Yet, which would be obligated to pay the deductible if Liberty is ordered to indemnify Jerusalem, and who could incur increased premiums. It would also affect the amount of insurance coverage available at that Best Yet location. In addition, as Best Yet would not otherwise be bound by the trial court's order, there could be inconsistent results where Best Yet

argues that Liberty improperly paid the claim (*see Steinbach v Prudential Ins. Co. of Am.* (172 NY 471, 477-478 [1902]).

Accordingly, plaintiffs' summary judgment motion should not have been granted, nor should the case continue without joinder of Best Yet within a reasonable time (CPLR 1001[a]; *L-3 Communications Corp. v SafeNet, Inc.*, 45 AD3d 1, 10-11 [1st Dept 2007]; *Safena v Giuliano*, 53 AD3d 650, 650 [2d Dept 2008]; *see also Steinbach*, 172 NY at 477-478).

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

ENTERED: MARCH 22, 2016

CLERK

Sweeny, J.P., Renwick, Moskowitz, Gische, JJ.

558-
559 Ind. 6315/10

The People of the State of New York
Respondent,

-against-

Cachin Anderson,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered January 11, 2013, as amended March 13, 2014, convicting defendant, after a jury trial, of attempted murder in the second degree, assault in the first degree, robbery in the first degree (two counts) and robbery in the second degree, and sentencing him to concurrent terms of 10 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The evidence supports the conclusion that although defendant actually stabbed the victim in the leg, defendant was also trying, with homicidal intent, to

stab him in the chest.

The court's ruling prohibiting impeachment of the victim through questions regarding his immigration status fell within the court's wide latitude to place reasonable limits on cross-examination and did not deprive defendant of his right of confrontation (*see Delaware v Van Arsdall*, 475 US 673, 678-679 [1986]). The victim was legally in the United States at the time of the incident, and it appears that a problem about his status, not necessarily impacting his credibility, arose thereafter and was under review at the time of the trial. There is no reason to believe that the victim's immigration status gave him a motive to fabricate his accusation of defendant, or that defendant was prejudiced by the limitation on cross-examination.

The court properly exercised its discretion in denying defendant's mistrial motion, based on a remark in the prosecutor's summation for which the court had provided a suitable curative instruction. Defendant's remaining challenges to arguments by the prosecutor are unpreserved and we decline to review them in the interest of justice. As an alternative

holding, we find no basis for reversal (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]).

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

ENTERED: MARCH 22, 2016

CLERK

Sweeny, J.P., Renwick, Moskowitz, Gische, JJ.

560 In re Henry Phipps Plaza South Associates, Petitioner-Respondent, Index 571049/12 59418/12

-against-

Judith Quijano, et al., Respondents-Appellants.

_____

William E. Leavitt, New York, for appellants.

Gutman, Mintz, Baker & Sonnenfeldt, LLP, New Hyde Park (Arianna Gonzalez-Abreu of counsel), for respondent.

_____

Order of the Appellate Term of the Supreme Court, First Department, entered December 1, 2014, which, in this summary holdover proceeding, affirmed a judgment of the Civil Court, New York County (Peter M. Wendt, J.), entered August 6, 2012, after a nonjury trial, awarding possession of the subject apartment to petitioner landlord, unanimously reversed, on the law, without costs, the judgment of possession vacated and the proceeding

dismissed with prejudice, based upon the reasoning set forth in the dissenting opinion of Schoenfeld, J. at Appellate Term (45 Misc 3d 12 [2014]).

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

ENTERED: MARCH 22, 2016

CLERK

Sweeny, J.P., Renwick, Moskowitz, Gische, JJ.

561 High Definition MRI, P.C., Index 650882/13
Plaintiff-Appellant,

-against-

The Travelers Companies, Inc., et al.,
Defendants-Respondents.

John Does 1-10,
Defendants.

_____

Smith Valliere PLLC, New York (Mark W. Smith of counsel), for appellant.

White and Williams LLP, New York (Jay Shapiro of counsel), for respondents.

_____

Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered July 14, 2014, which granted defendant insurance companies' motion pursuant to CPLR 3211(a)(7) to dismiss the complaint for failure to state a cause of action, unanimously reversed, on the law, with costs, and the motion denied.

A complaint must "be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions" that form the basis of the complaint and "the material elements of each cause of action" (CPLR 3013). The factual allegations of the complaint are accepted as true, and

afforded "every possible favorable inference" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). "[A] court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one (*id.* at 88 [internal citation and quotation marks omitted]). When such affidavits are considered, dismissal should not result unless "a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

Here, the complaint standing alone failed to apprise defendant insurance companies of basic pertinent information to put them on notice of the claims against them, such as the patients treated and the insurance policies issued by defendant, under which plaintiff submitted claims for treatment rendered. However, in opposition to defendant insurance companies' motion to dismiss, plaintiff submitted an affidavit from its principal with an exhibit attached providing such information. Thus, the complaint and affidavit submitted in opposition sufficiently apprise defendant insurance companies of the "transactions, occurrences, or series of transactions" that form the basis of

the complaint (CPLR 3013).

Contrary to defendant insurance companies' further contention, the complaint sufficiently alleges that plaintiff is the assignee of claims under the policies issued by defendant insurance companies. Defendant insurance companies' further contention that plaintiff failed to appear for examinations under oath, which is a condition precedent to coverage (*Hertz Corp. v Active Care Med. Supply Corp.*, 124 AD3d 411 [1st Dept 2015]), presents a factual issue not amenable to resolution on a motion to dismiss pursuant to CPLR 3211(a)(7).

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

ENTERED: MARCH 22, 2016

CLERK

Sweeny, J.P., Renwick, Moskowitz, Gische, JJ.

562 The People of the State of New York, Ind. 5040/11
Respondent,

-against-

Jose Hernandez,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Margaret E. Knight of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered April 5, 2012, convicting defendant, after a jury trial, of assault in the first degree (two counts), criminal use of a firearm in the first degree (two counts), and reckless endangerment in the second degree, and sentencing him to an aggregate term of 10 years, unanimously affirmed.

The court properly exercised its discretion in denying defendant's mistrial motion, made after the prosecutor asked a detective whether he had shown the victim any photographs (not necessarily of defendant). The court had sustained defendant's objection, and the prosecutor's unanswered question was not evidence. Moreover, the question did not imply that defendant had a criminal record or otherwise concern uncharged crimes (*see*

People v Enoch, 221 AD2d 253, 254 [1st Dept 1995], *lv denied* 88 NY2d 965 [1996]).

Defendant's remaining uncharged crimes claims are unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we reject them on the merits, since the testimony that defendant had sold marijuana to certain witnesses was probative in establishing that the witnesses were sufficiently familiar with defendant to be able to identify him as the person who fired shots in a crowded area under hectic circumstances (*see generally People v Morris*, 21 NY3d 588, 594 [2013]); and the remaining testimony at issue did not involve any uncharged crimes (*see Enoch*, 221 AD2d at 254).

By failing to object, by making only generalized objections, and by failing to request further relief after objections were sustained, defendant failed to preserve his present challenges to the People's summation, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]). Defendant has not established that his attorney's lack of proper objections deprived him of the effective assistance of counsel.

The court properly exercised its discretion in denying defense counsel's request for a missing witness charge. The request was untimely (*see People v Alamo*, 202 AD2d 349 [1st Dept 1994], *lv denied* 84 NY2d 822 [1994]), and defendant failed to show that the witnesses would have provided material noncumulative evidence, or that they could be presumed to favorable to the People (*see generally People v Gonzalez*, 68 NY2d 427-428 [1986]). In any event, the court permitted defense counsel to make a missing witness argument.

Moreover, any impropriety involving any of the above issues was harmless in light of the overwhelming evidence of guilt (*see People v Crimmins*, 36 NY2d 230 [1975]).

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

ENTERED: MARCH 22, 2016

CLERK

Sweeny, J.P., Renwick, Moskowitz, Gische, JJ.

563 In re Dysean R.,

A Person Alleged to
Be a Juvenile Delinquent,
Appellant.
- - - - -
Presentment Agency

_____

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), for appellant.

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

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Order of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about March 6, 2015, which adjudicated appellant a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would constitute the crime of criminal possession of a weapon in the second degree, and placed him with the Office of Children and Family Services for a period of 18 months, unanimously affirmed, without costs.

The disposition was the least restrictive alternative consistent with appellant's needs and the community's need for protection (*see Matter of Katherine W.*, 62 NY2d 947 [1984]). The delinquency adjudication was based on appellant's firing a handgun in a store while using a store employee as a shield

during an altercation with other youths. Appellant had a prior record of delinquency that included, among other things, another adjudication arising from his firing shots at other persons, as well as violation of probation. Other factors included appellant's gang activity, and his bad behavior while in custody.

The court properly exercised its discretion when, at the dispositional hearing, it qualified a police officer as an expert in identifying and interpreting gang activity through the use of social media, because the officer's training and experience provided a sufficient foundation (*see People v Siu Wah Tse*, 91 AD2d 350, 353 [1st Dept 1983], *lv denied* 59 NY2d 679 [1983]). In any event, the expert testimony was only one of many factors that led to the disposition.

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

ENTERED: MARCH 22, 2016

CLERK

Sweeny, J.P., Renwick, Moskowitz, Gische, JJ.

564 Doris Skisdopolus, Index 103169/11
Plaintiff-Respondent,

-against-

Jacqueline Edwards, et al.,
Defendants-Appellants,

Akam Associates, Inc., et al.,
Defendants.

_____

Law Office of James J. Toomey, New York (Evy L. Kazansky of counsel), for appellants.

Morrison & Wagner, LLP, New York (Eric H. Morrison of counsel), for respondent.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered February 20, 2015, which, to the extent appealed from as limited by the briefs, denied defendants Jacqueline Edwards and Jason Megson's 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.

Having dismissed the complaint as against defendants Akam Associates, Inc. and the Future Condominium on the ground that the condition over which plaintiff tripped in the hallway of her apartment building was an open, obvious and not inherently

dangerous condition, the court erred in failing to dismiss the complaint as against defendants Edwards and Megson on the same ground (*see Samantha R. v New York City Hous. Auth.*, 117 AD3d 600 [1st Dept 2014], *lv denied* 24 NY3d 904 [2014]).

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

ENTERED: MARCH 22, 2016

CLERK

Sweeny, J.P., Renwick, Moskowitz, Gische, JJ.

565 Eurotech Construction Corp., Index 651892/14
Plaintiff-Appellant,

-against-

QBE Insurance Corp.,
Defendant-Respondent.

_____

FG McCabe & Associates, PLLC, New York (Gerard McCabe of counsel), for appellant.

Goldberg Segalla, New York (Alex J. Yastrow of counsel), for respondent.

_____

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered January 30, 2015, which granted defendant's motion to dismiss the complaint, unanimously modified, on the law, to declare that defendant has no duty to defend or indemnify plaintiff in the underlying action, and, as so modified, affirmed, without costs.

The claims asserted against plaintiff in the underlying action arise from damage to plaintiff's own work product, i.e., the installation of defective fire stops and the failure to install wooden sub-flooring. There are no allegations in any of the underlying pleadings that plaintiff caused damage aside from or beyond its own work. Damage to an insured's own work or product does not constitute "property damage" caused by an

"occurrence" within the meaning of the policy (*George A. Fuller Co. v United States Fid. & Guar. Co.*, 200 AD2d 255, 259-260 [1st Dept 1994], *lv denied* 84 NY2d 806 [1994]; *National Union Fire Ins. Co. of Pittsburgh, Pa. v Turner Constr. Co.*, 119 AD3d 103, 107 [1st Dept 2014]).

The underlying allegations also fall squarely within the "business risk" exclusions of the policy, most pertinently, exclusions 2(j)(5) and (6), which have been held to bar coverage for damage to property resulting from the contractor's work (*see Fuller*, 200 AD2d at 260; *Pavarini Constr. Co. v Continental Ins. Co.*, 304 AD2d 501 [1st Dept 2003]).

While the motion court correctly determined the merits of the complaint in this declaratory judgment action, rather than dismissing the complaint, it should have made a declaration in defendant's favor (*Maurizzio v Lumbermens Mut. Cas. Co.*, 73 NY2d 951, 954 [1989]).

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

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

ENTERED: MARCH 22, 2016

CLERK

Sweeny, J.P., Renwick, Moskowitz, Gische, JJ.

566 The People of the State of New York, Ind. 14646/89
Respondent, 8889/90
4403/92

-against-

Cordell Robinson,
Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Eduardo Padro, J.), entered on or about April 30, 2015, which denied defendant's CPL 440.46 motion for resentencing, unanimously affirmed.

The court properly exercised its discretion in determining that substantial justice dictated the denial of defendant's motion, since his escalating criminal behavior, including a relatively recent felony drug conviction, demonstrated a "chronic

inability to control his behavior while at liberty" (*People v Correa*, 83 AD3d 555, 556 [1st Dept 2011], *lv denied* 17 NY3d 805 [2011]).

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

ENTERED: MARCH 22, 2016

CLERK

Sweeny, J.P., Renwick, Moskowitz, Gische, JJ.

567 Destiny H., an Infant, by Her Mother and Natural Guardian Carmen J., et al., Plaintiffs-Respondents,

-against-

Bronx Lebanon Hospital, Defendant,

Richard Deveaux, M.D., et al., Defendants-Appellants.

Yves Georges Verna, M.D., et al., Defendants.

Index 21822/12E

_____

Marshall Dennehey Warner Coleman & Goggin, P.C., Rye Brook (Michael P. Kelly of counsel), for appellants.

Ronemus & Vilensky LLP, Garden City (Lisa M. Comeau of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Stanley Green, J.), entered April 13, 2005, which denied defendants Richard Deveaux and Monica Simons's motion for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Plaintiffs raised triable issues of fact in opposition to defendants' prima facie showing, via expert opinion, that they did not depart from good and accepted medical practice in allowing plaintiff mother to continue her pregnancy to term and inducing delivery in the 41st week and that there was no causal

connection between any alleged departure and the infant plaintiff's condition. Plaintiffs' expert in obstetrics and gynecology opined that defendant Deveaux departed from the standard of medical care by failing to have a C-section performed after the mother developed gestational hypertension in the 37th week of her pregnancy, and both defendants departed from the standard of medical care by attempting an induction and failing to perform a C-section on February 13, when Carmen was a week beyond her due date and had high blood pressure, and when fetal tracings were non-reassuring, and that these departures caused the infant to suffer hypoxia in utero. Plaintiffs' expert opined that an infant's Apgar scores are not determinative of the absence of injury, that the infant's medical records showed that within two days after her birth, she displayed seizure activity, and that brain imaging studies revealed early signs of edema, changes consistent with hypoxic-ischemic encephalopathy (HIE) and atrophy, an expected change due to HIE. Plaintiffs also submitted reports by a neuroradiologist, whose findings differed from those of defendants' expert concerning the imaging studies, and a pediatric expert, who opined that the infant plaintiff suffered an insult to the brain during labor and delivery on February 13. Contrary to defendants' contention, plaintiffs'

experts' opinions are supported by the record.

Plaintiffs did not assert a new theory of liability against Deveaux in their opposition papers. Plaintiffs' expert asserted only that the departures from good and accepted medical practice may have occurred as far back as the mother's 37th week of pregnancy, when she started showing signs of gestational hypertension, and while she was already under Deveaux's care. Although the initial bill of particulars stated the dates of Deveaux's alleged malpractice incorrectly, the supplemental bill made clear that the allegations related to his treatment of the mother before delivery; the expert disclosure also clarified the dates in issue.

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

ENTERED: MARCH 22, 2016

CLERK

Sweeny, J.P., Renwick, Moskowitz, Gische, JJ.

568 Meryl Tuppatsch, Index 115019/09
Plaintiff-Respondent,

-against-

Virginia LoPreto,
Defendant-Appellant.

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L'Abbate, Balkan, Colavita & Contini, L.L.P., Garden City (William T. McCaffery of counsel), for appellant.

Steven L. Barkan, P.C., Melville (Steven L. Barkan of counsel), for respondent.

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Order, Supreme Court, New York County (Joan M. Kenney, J.), entered August 11, 2014, which, to the extent appealed from as limited by the briefs, denied defendant's motion to dismiss the first cause of action for legal malpractice, unanimously affirmed, without costs.

In her first cause of action, plaintiff alleges that defendant attorney was negligent in, among other things, failing to advise her of her rights in an underlying divorce proceeding, and in pressuring her to settle the action before trial. According to plaintiff, but for defendant's negligence, she would have recovered a larger equitable distribution.

Defendant moved to dismiss plaintiff's malpractice claim, based on the express terms of the settlement agreement, in which

plaintiff acknowledged that she was apprised of her rights and that she was not entering into the settlement agreement under duress. In opposition to defendant's motion, plaintiff submitted her affidavit and several emails between the parties, in which plaintiff complains about defendant's representation of her during settlement negotiations and defendant urges plaintiff to settle the matter and contemplates withdrawal as counsel.

Under the circumstances, the motion court correctly sustained the first cause of action because plaintiff has properly pleaded a cause of action for legal malpractice (*see Fielding v Kupferman*, 65 AD3d 437 [1st Dept 2009]). Her affidavit and attached emails are sufficient to support her allegations (*see generally Global Bus. Inst. v Rivkin Radler LLP*, 101 AD3d 651, 651 [1st Dept 2012]).

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

ENTERED: MARCH 22, 2016

CLERK

Sweeny, J.P., Renwick, Moskowitz, Gische, JJ.

569 The People of the State of New York, Ind. 2647/13
Respondent,

-against-

Duwayne Chance,
Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Tomoeh Murakami Tse of counsel), for appellant.

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Patricia Nunez, J.), rendered on or about March 20, 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: MARCH 22, 2016

CLERK

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

Sweeny, J.P., Renwick, Moskowitz, Gische, JJ.

570-
571 Index 653011/11

Stilwell Value Partners, IV, L.P., etc.,
Plaintiff-Respondent,

-against-

Diane B. Cavanaugh, et al.,
Defendants-Appellants.

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Kilpatrick Townsend & Stockton LLP, New York (Jonathan E. Polonsky of counsel), for appellants.

Allegaert Berger & Vogel LLP, New York (Richard L. Crisona of counsel), for respondent.

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Orders, Supreme Court, New York County (Charles E. Ramos, J.), entered October 26, 2015, and October 27, 2015, which denied defendants' motion for summary judgment dismissing the second amended complaint, and partly granted plaintiff's cross motion for summary judgment, unanimously reversed, on the law, with costs, defendants' motion granted and plaintiff's cross motion denied.

Plaintiff – which bought stock in nominal defendant/ derivative plaintiff Northeast Community Bancorp, Inc. (Inc.) pursuant to a prospectus – may not complain about the very facts that the prospectus disclosed, e.g., that Inc. and defendant Northeast Community Bancorp, MHC (MHC) have the same board, that

MHC (as the majority owner of Inc.) can control Inc.'s affairs, that MHC's control could prevent a second-step conversion, that this could be contrary to the interest of Inc.'s minority shareholders, and that MHC's control of Inc. could result in the perpetuation of management and directors (*see e.g. Boxer v Husky Oil Co.*, 1983 WL 17937, *7, 1983 Del Ch LEXIS 436, *17-18 [June 28, 1983], *corrected on reargument by* 1984 WL 19476, 1984 Del Ch LEXIS 451 [Feb. 1, 1984], *affd* 483 A2d 633 [Del 1984]).

Plaintiff contends that *Boxer* and the other cases cited by defendants are distinguishable because they dealt with partnerships, and the case at bar involves a corporation. However, *Goodman v Futrovsky* (213 A2d 899 [Del 1965], *cert denied* 383 US 946 [1966]) applied the same rule to a corporation (*see id.* at 902-903). Furthermore, a general partner of a limited partnership is like a board of directors of a corporation (*see Cincinnati Bell Cellular Sys. Co. v Ameritech Mobile Phone Serv. of Cincinnati, Inc.*, 1996 WL 506906, *12, 1996 Del Ch LEXIS 116, *36 [Sept. 3, 1996], *affd* 692 A2d 411 [Del 1997]).

Sample v Morgan (914 A2d 647 [Del Ch 2007]), on which plaintiff relies, is distinguishable. First, it was decided on a motion to dismiss for failure to state a cause of action (*id.* at 661-662), so the standard differs from the standard for the

motions at issue in the instant action, which seek summary judgment. Second, the defendants "failed to demonstrate that they disclosed all the material facts relevant to the stockholders' consideration of the Charter Amendment and the Incentive Plan" (*id.* at 664-665 [footnote omitted]). Indeed, "the summary of material terms contained in the Proxy emerges at this stage as materially misleading" (*id.* at 667). By contrast, plaintiff does not claim that the prospectus pursuant to which it bought its Inc. shares was misleading or failed to disclose all material facts.

In light of the foregoing, the parties' remaining arguments for affirmative relief are academic.

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

ENTERED: MARCH 22, 2016

CLERK

Sweeny, J.P., Renwick, Moskowitz, Gische, JJ.

572 Chana Uncyk, Index 158857/12
Plaintiff-Appellant,

-against-

Cedarhurst Property Management, LLC,
Defendant,

Spruce Street Associates, LLC, et al.,
Defendants-Respondents.

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Kramer & Dunleavy, LLP, New York (Lenore Kramer of counsel), for appellant.

Gladstein Keane & Partners PLLC, New York (Thomas F. Keane of counsel), for respondents.

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Order, Supreme Court, New York County (Joan M. Kenney, J.), entered April 9, 2015, which granted defendants-respondents' motion for summary judgment dismissing the complaint as against them, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff alleges that she tripped and fell on a broken sidewalk and curb in front of a strip mall owned by the Baumstein defendants and subleased to defendant Spruce Street Associates, LLC (SSA). Defendants made a prima showing of their entitlement to summary judgment, by submitting deposition testimony and an

affidavit from SSA's managing member stating that SSA never did any work on the sidewalk where plaintiff fell, that he never received complaints about the sidewalk or curb prior to plaintiff's accident, and that he never observed the alleged hazardous curb and sidewalk condition while making his regular, twice-weekly inspections of the strip mall (*see generally Vaughn v Harlem Riv. Yard Ventures II, Inc.*, 118 AD3d 604, 605 [1st Dept 2014]).

In opposition, plaintiff raised triable issues of fact. Plaintiff testified that she fell when her left foot stepped into a hole-like depression in the curb/sidewalk, and she marked photographs to show where she fell. Plaintiff also submitted her daughter's affidavit, wherein she averred that after receiving a call about her mother's fall, she responded quickly to the scene of the accident and found her mother on the sidewalk. According to the daughter, her mother pointed to a broken and cracked curb/sidewalk condition and stated that the defective condition caused her to fall. This hearsay statement may be relied upon to defeat summary judgment where, as here, it is not the only evidence submitted in opposition to the motion (*see e.g. Pena v Penny Lane Realty Inc.*, 129 AD3d 441, 442 [1st Dept 2015]). The daughter added that the photographs taken of the sidewalk/curb

seven months after the accident, and the area of the photographs her mother marked, accurately depicted the broken condition of the curb/sidewalk as it appeared on the date of the accident. The photographs show a broken curb/sidewalk. Taken together, the evidence raises triable issues of fact whether the broken sidewalk/curb caused plaintiff's fall, and whether the defective condition existed for a sufficient period of time prior to the accident for defendants to have discovered and remedied it (*see Hecker v New York City Hous. Auth.*, 245 AD2d 131 [1st Dept 1997]).

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

ENTERED: MARCH 22, 2016

CLERK

Sweeny, J.P., Renwick, Moskowitz, Gische, JJ.

573 In re Wayne Baum, Index 160258/14
Petitioner-Appellant,

-against-

The City of New York,
Respondent-Respondent.

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Sullivan Papain Block McGrath & Cannavo, P.C., New York (Stephen C. Glasser of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Marta Ross of counsel), for respondent.

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Order, Supreme Court, New York County (Frank P. Nervo, J.), entered November 5, 2014, which denied petitioner's application for leave to file a late notice of claim, unanimously affirmed, without costs.

Although the absence of a reasonable excuse does not compel denial of an application for leave to file a late notice of claim (*see Matter of Brennan v Metropolitan Transp. Auth.*, 110 AD3d 437 [1st Dept 2013]), petitioner has failed to demonstrate that respondent had actual knowledge of the claim within the statutory 90-day service period or a reasonable time thereafter (*see Gonzalez v City of New York*, 92 AD3d 619 [1st Dept 2012]; *Matter of Grande v City of New York*, 48 AD3d 565 [2d Dept 2008]). Indeed, petitioner failed to submit the report he claims was

generated by his supervisors at the Department of Buildings that sets forth the facts upon which respondent's liability is predicated, and there is no evidence that such a report was ever prepared (*see Matter of Barzaga v New York City Hous. Auth.*, 204 AD2d 163 [1st Dept 1994]). Petitioner also submitted no evidence that he made an attempt to procure the report he believes was prepared by his supervisors nor did he attempt to locate his supervisors even though the Department of Buildings allegedly had procedures in place which required them to notify respondent of the incident (*see Tavarez v City of New York*, 26 AD3d 297, 298 [1st Dept 2006]).

Furthermore, petitioner's unsupported assertion that the condition that caused his accident has remained unchanged since his fall is insufficient to demonstrate the lack of any prejudice to respondent from the more than one year delay (*see Matter of Santiago v New York City Tr. Auth.*, 85 AD3d 628 [1st Dept 2011]).

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

ENTERED: MARCH 22, 2016

CLERK

Sweeny, J.P., Renwick, Moskowitz, Gische, JJ.

574 The People of the State of New York, Ind. 4226N/12
Respondent,

-against-

Samuel Saunders,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Melissa C. Jackson, J.), rendered February 18, 2014, as amended March 5, 2014, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree (two counts), criminal possession of a weapon in the second degree (four counts), criminal possession of a weapon in the third degree (three counts), criminal possession of marijuana in the third degree, criminally using drug paraphernalia in the second degree (two counts), criminal possession of stolen property in the fifth degree, and unlawful possession of ammunition, and sentencing him, as a second felony drug offender previously convicted of a violent felony, to an aggregate term of seven years, unanimously affirmed.

Defendant made a valid waiver of his right to appeal (*see People v Lopez*, 6 NY3d 248, 256-257 [2006]). The court did not conflate the right to appeal with the rights automatically forfeited by pleading guilty. Instead, it separately explained to defendant that as part of his plea bargain, he was agreeing to waive his right to appeal. Defendant confirmed that he understood, and the oral colloquy was supplemented by a written waiver. The waiver forecloses review of defendant's suppression claims.

Regardless of whether defendant made a valid waiver of his right to appeal, we find, based on our in camera review of sealed materials, that there was probable cause for the issuance of a search warrant, and that defendant's suppression motion was properly denied.

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

ENTERED: MARCH 22, 2016

CLERK

Sweeny, J.P., Renwick, Moskowitz, Gische, JJ.

575N Alfred J. Martirano, Index 24698/14E
Plaintiff-Appellant,

-against-

Golden Wood Floors Inc., et al.,
Defendants-Respondents.

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

Keane & Bernheimer, PLLC, Hawthorne (Connor W. Fallon of counsel), for respondents.

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Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered April 6, 2015, which granted defendants' motion to change venue from Bronx County to Westchester County, unanimously reversed, on the law, without costs, and the motion denied.

The motion to change venue on the ground that the designated venue was improper should have been denied as untimely, since defendants did not move within the strict time limits provided by statute, and did not offer any explanation for their delay (CPLR 511[b]; CPLR 2103[b][2]; *see Jackson v City of New York*, 127 AD3d 552, 553 [1st Dept 2015]). Even if the merits were considered, defendants failed to demonstrate that venue was improperly placed in Bronx County (*see* CPLR 510[1]). Although the individual defendant averred that he has operated the corporate defendant

from a principal office in Westchester County since 2007, seven years before the accident at issue, defendants submitted evidence from the New York State Department of State showing that the corporate defendant's principal place of business is in Bronx County (*see* CPLR 503[a], [c]; *see also Job v Subaru Leasing Corp.*, 30 AD3d 159, 159 [1st Dept 2006]). Further, defendants essentially acknowledged that the business was incorporated in the Bronx in 2005. "The designation of a county as the location of a corporation's principal office in a certificate of incorporation is controlling in determining corporate residence for the purposes of venue . . . Since the certificate of incorporation here was never formally amended to change the principal place of business, the original designation governs" (*Krotcha v On Time Delivery Serv., Inc.*, 62 AD3d 579, 580 [1st Dept 2009] [internal quotation marks omitted]). Lastly,

defendants made no attempt to show that a change of venue to Westchester County would be warranted based on the convenience of material witnesses (*see id.* at 580-581; CPLR 510[3]).

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

ENTERED: MARCH 22, 2016

CLERK

Sweeny, J.P., Renwick, Moskowitz, Gische, JJ.

576 In re Aharon Noe, Index 48/16
[M—365] Petitioner,

-against-

Hon. James M. Burke, etc., et al.,
Respondents.

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Edelstein & Grossman, New York (Jonathan I. Edelstein of counsel), for petitioner.

Eric T. Schneiderman, Attorney General, New York (Michelle R. Lambert of counsel), Hon. James M. Burke, respondent.

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

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

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

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

ENTERED: MARCH 22, 2016

CLERK