

SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 18, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Friedman, J.P., Sweeny, Kapnick, Gesmer, JJ.

2346N- Noah H. Silverman, Index 107586/11
2346NA & Plaintiff-Respondent,
M-307

-against-

Mary Jo D'Arco,
Defendant-Appellant.

- - - - -

Legal Services NYC, the Legal
Aid Society, and NYC Public
Advocate Letitia James,
Amici Curiae.

Law Offices of Sanford F. Young, P.C., New York (Sanford F. Young
of counsel), for appellant.

Borah, Goldstein, Altschuler, Nahins & Goidel, P.C., New York
(Paul N. Gruber of counsel), for respondent.

Legal Services NYC, Brooklyn (Edward Josephson of counsel), for
amici curiae.

Judgment, Supreme Court, New York County (Manuel J. Mendez,
J.), entered September 10, 2014, in favor of plaintiff,
unanimously reversed, on the law and the facts, without costs,
the answer reinstated, and the matter remanded for further
proceedings to determine the correct amount of use and occupancy

due, taking into account the lawful regulated rent for the unit during the relevant period and any evidence of defendant tenant's defenses and counterclaims that might offset the sum due. Appeal from order, same court and Justice, entered August 13, 2014, which, among other things, granted the landlord's motion for a default judgment in the amount of \$40,700.50 for use and occupancy arrears unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Supreme Court has subject matter jurisdiction over this dispute (see *Chelsea 18 Partners, LP v Sheck Yee Mak*, 90 AD3d 38, 41 [1st Dept 2011]). However, the court improperly directed defendant to pay into the court, while the matter was pending, a sum for use and occupancy for the unit that constituted 32 months of rent in a matter that was then 20 months old, and thus exceeded the sums that could have been alleged to have come due from and after the date of service of the complaint on defendant, and failed to consider defendant's defenses and counterclaims (RPAPL 745[2]; see also *Lang v Pataki*, 271 AD2d 375, 376 [1st Dept 2000], appeal dismissed 95 NY2d 886 [2000]; *664 W. 161 St. Tenants Assn v Leal*, 154 AD2d 238, 239-240 [1st Dept 1989]). Furthermore, the landlord failed to meet his burden to prove the amount of use and occupancy due, since no proof of the lawful

regulated rent during the relevant time period was submitted to the court, and the sum directed was apparently based solely on the landlord's affidavit alleging an unexplained and undocumented "[b]alance [f]orward" due as of January 2011, which was more than five months before commencement of the action (*Mushlam, Inc. v Nazor*, 80 AD3d 471, 472 [1st Dept 2011]).

The court also improperly struck the answer based solely on defendant's failure to pay into the court the sum directed, since defendant had proffered a certified check for approximately two-thirds of the amount, and had applied to the Human Resources Administration for a "one-shot deal" to pay the balance. Accordingly, her good faith efforts to comply with the court's directive did not constitute "willful and contumacious behavior" that could have justified the "drastic remedy" of striking her answer (*Henderson-Jones v City of New York*, 87 AD3d 498, 504 [1st Dept 2011] [internal quotation marks omitted]).

The Decision and Order of this Court entered herein on November 29, 2016 is hereby recalled and vacated (see M-49 decided simultaneously herewith).

M-307 **Noah H. Silverman v Mary Jo D'Arco**
Motion for permission to file amicus curiae brief granted, and the brief deemed filed.

THIS CONSTITUTES THE DECISION AND ORDER
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the crime was committed in such a manner that the absence of defendant's DNA from any or all of the crime scene evidence at issue would not be exculpatory. There is no reasonable probability that DNA testing would have led to a verdict more favorable to defendant.

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Tom, J.P., Acosta, Richter, Manzanet-Daniels, Kahn, JJ.

3298N Prince Fashions, Inc., Index 651255/16
Plaintiff-Appellant,

-against-

60G 542 Broadway Owner, LLC,
Defendant-Respondent.

Herrick Feinstein LLP, New York (Scott E. Mollen of counsel), for
appellant.

Cole Schotz P.C., New York (Joseph Barbieri of counsel), for
respondent.

Order, Supreme Court, New York County (Richard F. Braun,
J.), entered July 1, 2016, which denied plaintiff's motion for a
Yellowstone injunction, unanimously affirmed, without costs.

Defendant's representations to this Court, uncontroverted by
plaintiff, are that immediately following Supreme Court's denial
of plaintiff's *Yellowstone* motion, on July 1, 2016, defendant
served a notice of lease cancellation on plaintiff terminating
the lease effective July 5, 2016 and commenced a holdover
proceeding against plaintiff. Although plaintiff had the
opportunity to seek injunctive relief from either Supreme Court
or from this Court pursuant to CPLR 5519 between July 1, 2016 and
July 5, 2016, when the cure period expired, it failed to do so.
Because by that time, plaintiff's lease was terminated, and a

holdover proceeding had been commenced, appellate relief is barred (*PJ Hanley's Corp. v Kiwi Pub Corp.*, 116 AD3d 607 [1st Dept 2014], *lv denied* 23 NY3d 1016 [2014]; see *166 Enters. Corp. v I G Second Generation Partners, L.P.*, 81 AD3d 154, 159 [1st Dept 2011] ["Since there was no temporary restraining order in place at [the] time [that the notice of termination was served], the notice was validly served and the lease was terminated. Once the lease was terminated in accordance with its terms, the court lacked the power to revive it"])).

Were we to consider plaintiff's arguments on their merits, we would reject them. The notice of default delivered by defendant to plaintiff stated that plaintiff had breached its obligations to defendant under the terms of the lease by failing to "maintain general public liability insurance [policies] . . . in favor of Landlord and Tenant against claims . . . occurring in or upon the [Retail] [P]remises" and by failing to deliver such policies to defendant.

The default alleged is incurable for several reasons. First, the period in question involves commercial general liability (CGL) insurance policies for the periods 2014-2015 and 2015-2016. These policies were all obtained by, and named, plaintiff's subtenants as the insureds, but did not name

defendant as a certificate holder or additional insured. Additionally, the evidence plaintiff proffers as to one of the 2014-2015 policies evinces that no party, not even defendant's predecessor, was named as an additional insured. These policies would not cure the default, not only because they are not "in favor" of defendant, but also because a "landlord is not required to accept [a] subtenant's performance in lieu of tenant's'" (*116 Enters. Corp. v I G Second Generation Partners, L.P.*, 81 AD3d at 158, quoting *Federated Retail Holdings, Inc. v Weatherly 39th St., LLC*, 77 AD3d 573, 574 [1st Dept 2010]).

Further, the policy obtained by plaintiff after receiving the notice of default on March 4, 2016, and covering the policy period March 10, 2016 to March 10, 2017, cannot cure the default. The fact that plaintiff obtained this prospective CGL insurance coverage cannot retrospectively cure the default arising from plaintiff's failure to have continuously maintained insurance coverage in the landlord's favor as required by its commercial lease (*Kyung Sik Kim v Idylwood, N.Y., LLC*, 66 AD3d 528, 529 [1st Dept 2009]; see *117-119 Leasing Corp. v Reliable Wool Stock, LLC*, 139 AD3d 420, 421 [1st Dept 2016]). Because plaintiff's evident

failure to obtain insurance naming defendant as an additional insured constitutes an incurable default, were we to consider the merits, plaintiff would not be entitled to *Yellowstone* injunctive relief.

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enclosure framework, declaring that they are entitled to complete the enclosure, and enjoining defendant from interfering with or otherwise preventing them from completing it. The preliminary injunction should have been denied.

To the extent plaintiffs request an order declaring that they are entitled to complete the enclosure and enjoining defendant from interfering with such completion, such an order is improper because it would upset, rather than maintain, the status quo and would effectively grant the ultimate relief sought (see *Second on Second Café, Inc. v Hing Sing Trading, Inc.*, 66 AD3d 255, 264-265 [1st Dept 2009]; see also *LGC USA Holdings, Inc. v Taly Diamonds, LLC*, 121 AD3d 529, 530 [1st Dept 2014]).

Plaintiffs' request for a preliminary injunction against removal of the enclosure framework also must fail because plaintiffs have not demonstrated the requisite irreparable harm (see generally *Doe v Axelrod*, 73 NY2d 748, 750 [1988]). Any costs incurred in removing the enclosure framework would be compensable in money damages and do not warrant injunctive relief (see *Goldstone v Gracie Terrace Apt. Corp.*, 110 AD3d 101, 105-106 [1st Dept 2013]; *Louis Lasky Mem. Med. & Dental Ctr. LLC v 63 W. 38th LLC*, 84 AD3d 528, 528 [1st Dept 2011]; *Schleissner v 325 W. 45 Equities Group*, 210 AD2d 13, 14 [1st Dept 1994]). Plaintiffs

speculate that they may, at some point, lose their lease, but this matter is not an eviction proceeding brought by defendant. Therefore, because plaintiffs failed to allege damages of a noneconomic nature, plaintiffs failed to show irreparable harm, and injunctive relief is inappropriate.

Defendant's cross motion to dismiss should have been granted as to the Business Corporation Law § 501(c) claim. Plaintiffs do not claim that the terms of their lease or shares are any different from those of the other shareholders. Rather, they claim that they were treated differently from other shareholders because they alone were not permitted to construct an enclosure without first obtaining defendant's written permission. Assuming arguendo plaintiffs were in fact treated differently, this is not the type of differential treatment that Business Corporation Law 501(c) was designed to address (see *Razzano v Woodstock Owners Corp.* 111 AD3d 522 [1st Dept 2013]; *Spiegel v 1065 Park Ave. Corp.*, 305 AD2d 204 [1st Dept 2003]).

The cross motion to dismiss was properly denied, however, as to the claim for injunctive relief. The documentary evidence submitted by defendant was not sufficient to establish its entitlement to judgment as a matter of law (see generally *Beal Sav. Bank v Sommer*, 8 NY3d 318, 324 [2007]). It is undisputed

that defendant's written consent to the alterations was never obtained, even though it was expressly required by the lease and no oral waivers or modifications of the lease were permitted. Although a lease term requiring any modification to be in writing generally precludes oral modifications, the requirement of a writing may be avoided under certain circumstances pursuant to the doctrines of partial performance or equitable estoppel (see *Joseph P. Day Realty Corp. v Lawrence Assoc.*, 270 AD2d 140, 141 [1st Dept 2000]). Because issues of fact exist, judgment as a matter of law is not appropriate at this stage.

We do not reach the parties' requests for attorney's fees, as these requests are premature.

THIS CONSTITUTES THE DECISION AND ORDER
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Friedman, J.P., Sweeny, Renwick, Andrias, Manzanet-Daniels, JJ.

3533- Index 161799/15
3534 & Timothy Reif, et al.,
M-408 & Plaintiffs-Respondents,
M-1187

-against-

Richard Nagy, et al.,
Defendants-Appellants,

Artworks by the Artist Egon Schiele
Known as Woman in a Black Pinafore,
and Woman Hiding Her Face,
Defendants.

- - - - -

ARIS Title Insurance Corporation,
Amicus Curiae.

- - - - -

Timothy Reif, et al.,
Plaintiffs-Respondents,

-against-

Richard Nagy, et al.,
Defendants,

ARIS Title Insurance Corporation,
Proposed Intervenor-Appellant.

Nixon Peabody LLP, New York (Thaddeus J. Stauber of counsel), for
Richard Nagy and Richard Nagy Ltd., appellants.

Wiggin and Dana LLP, New Haven, CT (Jonathan M. Freiman of the
bar of the State of Connecticut, admitted pro hac vice, of
counsel), for ARIS Title Insurance Corporation, appellant.

Dunnington, Bartholow & Miller, LLP, New York (Raymond J. Dowd
and Samuel Blaustein of counsel), for respondents.

Wiggins and Dana LLP, New York (Adam Farbiarz of counsel), for

ARIS Title Insurance Corporation, amicus curiae.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered on or about September 13, 2016, which denied the motion of defendants Richard Nagy and Richard Nagy Ltd. (collectively Nagy) to dismiss the complaint, unanimously modified, on the law, to dismiss plaintiffs' claim pursuant to General Business Law § 349, and otherwise affirmed, without costs. Order, same court and Justice, entered September 14, 2016, which denied the motion of ARIS Title insurance Company (ARIS) to intervene pursuant to CPLR 1012 and/or 1013, unanimously affirmed, without costs.

This action arises from two pieces by the artist Egon Schiele alleged to have been looted by the Nazis during World War II from cabaret artist Fritz Grunbaum, who, along with his wife Elisabeth, was executed during the Holocaust. The pieces came into the possession of art dealer Nagy sometime after 2013.

In 2005, David Bakalar, a Massachusetts industrialist turned sculptor, brought suit against the heirs of Grunbaum seeking, inter alia, a declaration that he was the rightful owner of the Schiele work "Seated Woman," a piece he had owned for over 40 years (*Bakalar v Vavra*, 851 F Supp 2d 489 [SD NY 2011]; *Bakalar v*

Vavra, 819 F Supp 2d 293 [SD NY 2011], *affd* 500 F Appx 6 [2d Cir 2012]). Nagy's contention that the dismissal in *Bakalar*, which was based upon application of the doctrine of laches, collaterally estops plaintiffs from pursuing their claims to two other Schiele pieces, "Woman in a Black Pinafore" and "Woman Hiding Her Face," is misplaced. Collateral estoppel requires the issue to be identical to that determined in the prior proceeding, and requires that the litigant had a full and fair opportunity to litigate the issue (see *Schwartz v Public Adm'r of County of Bronx*, 24 NY2d 65 [1969]). Neither of those requirements has been shown here where the purchaser, the pieces, and the time over which the pieces were held differ significantly. The three works are not part of a collection unified in legal interest such to impute the status of one to another (compare *Poindexter v Cash Money Records*, 2014 WL 818955, 2014 US Dist LEXIS 26985 [SD NY 2014]; *Poindexter v EMI Record Group Inc.*, 2012 WL 1027639, 2012 US Dist LEXIS 42174 [SD NY 2012]).

Plaintiffs' General Business Law § 349 claim, however, should be dismissed for failure to state a cause of action. The transaction at issue here, a single attempted transaction, to which plaintiffs were not a party but an alleged "competitor," is not the type of consumer-oriented harm contemplated by the

statute (see *Shou Fong Tam v Metropolitan Life Ins. Co.*, 79 AD3d 484 [1st Dept 2010]).

The court correctly denied ARIS intervenor status. While intervention is liberally granted, ARIS's interest as the title insurer to "Woman Hiding Her Face" is purely derivative, no different from that of any insurer. And since it is entitled to approve of counsel selected by Nagy, with whom its interests are aligned, its position is well protected (compare *Yuppie Puppy Pet Prods., Inc. v Street Smart Realty, LLC*, 77 AD3d 197, 201 [1st Dept 2010]).

Lastly, plaintiffs' motion to dismiss the appeals based upon the Holocaust Expropriated Art Recovery Act (HEAR) is moot in light of this Court's finding that the motion court's order denying collateral estoppel should be affirmed. The issue of whether HEAR would apply to bar Nagy's defense of laches in its entirety is not before this Court, having not been decided by the motion court.

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

M-408 - Timothy Reif, et al. v Richard Nagy, et al.

Motion to dismiss appeals and for related relief denied as moot.

M-1187 - Motion for permission to file amicus curiae brief denied.

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

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doubt on defendant's guilt (see *People v Toxey*, 86 NY2d 725 [1995]). To the extent defendant made a remark that warranted further inquiry by the court, the court's inquiry was sufficient to establish that defendant understood the charges and admitted her guilt. To the extent defendant asserts that motion practice involving other defendants in the same case affected the validity of her plea, that claim is likewise unpreserved and unavailing.

Defendant made a valid waiver of her right to appeal (see *People v Bryant*, 28 NY3d 1094 [2016]), which forecloses review of her excessive sentence claim. Regardless of whether defendant validly waived her right to appeal, we perceive no basis for reducing the sentence.

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Sweeny, J.P., Richter, Andrias, Webber, Gesmer, JJ.

3734-

Index 650047/13

3734A Abax Lotus Ltd., et al.,
Plaintiffs-Appellants,

-against-

China Mobile Media Technology
Inc., et al.,
Defendants,

Zhang Zhengyu, etc.,
Defendant-respondent.

Weil, Gotshal & Manges LLP, New York (Jessie B. Mishkin of
counsel), for appellants.

Malecki Law, New York (Jenice L. Malecki of counsel), for
respondent.

Orders, Supreme Court, New York County (O. Peter Sherwood,
J.), entered December 14, 2015, which denied plaintiffs' motion
for partial summary judgment on the claims asserted against
defendant Zhang, and granted Zhang's motion for summary judgment
dismissing the claims against him, unanimously modified, on the
law, to deny Zhang's motion for summary judgment, and reinstate
the claims asserted against him, and to grant plaintiffs' motion
for summary judgment on its claim for liquidated damages in
connection with the breach of section 2(e) of the Investors
Rights Agreement, and otherwise affirmed, without costs.

The court erred in dismissing plaintiffs' claims based on its finding that the indemnification provision in the Investors Rights Agreement is limited to third-party claims. Rather, the provision, which states that indemnification applies to any loss "whether or not arising out of any claims by or on behalf of any third party," and includes a distinct section referencing third-party claims, clearly implies that the parties intended the provision to apply to certain intra-party claims (see *Sagittarius Broadcasting Corp. v Evergreen Media Corp.*, 243 AD2d 325, 326 [1st Dept 1997]).

The court also erred to the extent it declined to find that defendant Dr. Zhang could be held individually liable, either directly or as an indemnitor, for certain alleged breaches under the Investors Rights Agreement, to which he, along with another "Controlling Shareholder," is a named party. The agreement set forth certain obligations on Dr. Zhang, including, as relevant here, to cause each "Group Company" to fulfill the covenants and agreements in section 2, and to jointly and severally indemnify plaintiffs for losses in connection with any breach of a covenant or agreement in the Investors Rights Agreement.

Given the above, the claims are reinstated, and since the record evidence shows that Dr. Zhang breached his section 2.2(e)

obligation to cause the Group Company to retain a qualified accounting firm, and that the parties agreed to liquidated damages in the event the accounting firm was not hired within the requisite time frame, plaintiffs are entitled to summary judgment on their claim for liquidated damages in connection with this breach. On the other hand, issues of fact exist with respect to the remaining claims, including the claim seeking indemnification in connection with the Group Company's section 7.1 failure to redeem warrants tendered by plaintiffs. Given the strict manner in which indemnification clauses are construed, especially when imposing obligations similar to a guaranty (see *Weissman v Sinorm Deli*, 88 NY2d 437 [1996]), it is not clear, as a matter of law, that the parties intended the section 8 indemnification provision to encompass the Group Company's failure to redeem the warrants.

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Sweeny, J.P., Richter, Andrias, Webber, Gesmer, JJ.

3735 Michael Berr, Index 154360/14
Plaintiff-Respondent,

-against-

Ron Grant, et al.,
Defendants-Appellants.

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

Goldberg & Carlton, PLLC, New York (Robert H. Goldberg of
counsel), for respondent.

Order, Supreme Court, New York County (Cynthia S. Kern, J.),
entered December 6, 2016, which denied defendants' motion for
summary judgment dismissing the complaint, unanimously affirmed,
without costs.

Plaintiff rented a house with a back deck containing a pool
and hot tub from defendants. He testified that, while hosting a
party on the deck, he sustained injuries when he was walking on a
narrow brick passageway between the swimming pool and hot tub,
and slipped and fell into the tub.

In support of their motion, defendants failed to submit
admissible evidence sufficient to demonstrate that the
configuration of the deck, pool and hot tub was code compliant.
Their expert engineer opined that the code violations identified

by plaintiff in his bill of particulars and proposed expert affidavit were "irrelevant" because plaintiff could have taken another path around the pool, but did not affirmatively state that the configuration of the pool and hot tub was code compliant. Defendants also submitted copies of their application for a building permit, a site survey, and the certificate of occupancy, which they argued showed that the layout of the swimming pool and hot tub was approved by the village in which the house was located. However, the certificate of occupancy does not mention any hot tub, and defendants did not submit an affidavit of any person with knowledge explaining the significance of these documents (see CPLR 3212[b]).

Even if these documents were sufficient to demonstrate an absence of violations, plaintiff raised an issue of fact by submitting the affidavit of his engineering expert, who opined that the walkway between the pool and hot tub, as well as the normal path of travel around the east end of the pool, were dangerous and not compliant with applicable building code provisions. The expert also measured height differentials between the bricks on the passageway where plaintiff fell.

Defendants also contend that plaintiff's deposition testimony concerning how the accident occurred failed to identify

the cause of plaintiff's accident with sufficient specificity to permit a jury to find liability. However, plaintiff's testimony specifying where he fell, together with his engineer's affidavit about the defects, dangerous conditions, and code violations at that site, were sufficient to enable a jury to draw the reasonable inference that plaintiff's accident was caused by the alleged defective conditions present at the accident site (see *Rodriguez v Leggett Holdings, LLC*, 96 AD3d 555 [1st Dept 2012]; *Babich v R.G.T. Rest. Corp.*, 75 AD3d 439, 440 [1st Dept 2010]).

Defendants' argument that the uneven bricks were a trivial defect and nonactionable as a matter of law is made for the first time on appeal and is therefore not properly before this Court (see *Salierno v City of Mount Vernon*, 107 AD3d 971, 972 [2d Dept 2013]). In any event, the argument would not entirely dispose of plaintiff's case, as it pertains to only one of the categories of

defects and violations identified by plaintiff's expert.

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

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generally unreviewable on direct appeal because they involve 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 claims may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (see *People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

We have considered defendant's remaining contentions and find them to be without merit.

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obtained by adding the maintenance (rent) paid by all the 'tenant-stockholders' . . . in the cooperative housing corporation which owns the Property, pursuant to the regular assessment, . . . but excluding any special, one-time or non-recurring assessments not related to the normal and recurring maintenance of the Building." It does not say, "excluding capital expenditures." Thus, the court properly rejected plaintiff's interpretation of Aggregate Maintenance (see *Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004]).

Under the circumstances of this case, where one person (the then-principal of both plaintiff-tenant and the original landlord) drafted the lease and executed it on behalf of both plaintiff and the original landlord, we are not persuaded by plaintiff's arguments that a literal interpretation of Aggregate Maintenance conflicts with paragraph 6.2.2 of the lease, places plaintiff at defendant's mercy, and violates the implied covenant of good faith and fair dealing.

Plaintiff failed to satisfy the requirements of equitable estoppel (see *BWA Corp. v Alltrans Express U.S.A.*, 112 AD2d 850, 853 [1st Dept 1985]). Moreover, "[t]he circumstances set forth by plaintiff simply do not rise to a level of unconscionability warranting application of equitable estoppel" (*American*

Bartenders School v 105 Madison Co., 59 NY2d 716, 718 [1983]).

Plaintiff failed to raise the statute of limitations below; hence, we decline to consider it on appeal (see *Matter of Rella*, 67 AD3d 493 [1st Dept 2009]).

We modify to the extent indicated because it was error to dismiss plaintiff's fifth cause of action seeking declaratory relief on the basis that plaintiff is not entitled to the declaration sought. The proper course is to issue a declaration (see *Lanza v Wagner*, 11 NY2d 317, 334 [1962], *cert denied* 371 US 901 [1962]).

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

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arguments fall on the merits. Plaintiffs were clearly in default regarding provisions in the lease requiring insurance coverage. Most significantly, they failed to obtain continuous insurance coverage for the entire lease term (see *Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assoc.*, 93 NY2d 508, 514 [1999]). It is undisputed that there were two gaps in insurance coverage. The failure to obtain insurance is a material breach that may not be cured by the purchase of prospective insurance, as such insurance “does not protect defendant [owner] against the unknown universe of any claims arising during the period of no insurance coverage” (*Kyung Sik Kim v Idylwood, N.Y., LLC*, 66 AD3d 528, 529 [1st Dept 2009]; accord *117-119 Leasing Corp. v Reliable Wool Stock, LLC*, 139 AD3d 420, 421 [1st Dept 2016]). Nor was defendant obligated to exercise its option of securing insurance on plaintiffs’ behalf (see *Jackson 37 Co., LLC v Laumat, LLC*, 31 AD3d 609, 610 [2d Dept 2006]).

Plaintiffs cannot complain that they were not granted an evidentiary hearing, since no such hearing was ever requested. In any event, plaintiffs have not shown that any additional evidence could change the result.

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

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Sweeny, J.P., Richter, Andrias, Webber, Gesmer, JJ.

3739-

3739A In re Antonio E. B.,

A Dependent Child Under Eighteen
Years, etc.,

- - - - -

In re Maritza J.,
Petitioner-Appellant,

-against-

Ramona J., et al.,
Respondents-Respondents.

Douglas H. Reiniger, New York, for appellant.

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

Order of fact-finding and disposition (one paper), Family Court, New York County (Jane Pearl, J.), entered on or about July 21, 2015, to the extent it denied, after a hearing, petitioner maternal aunt's petition for custody of the subject child, unanimously affirmed, without costs. Appeal from permanency hearing order, same court (Christopher W. Coffey, Referee), entered on or about July 23, 2015, which determined that petitioner agency had exercised reasonable efforts to make and finalize the permanency plan of adoption, unanimously dismissed, without costs.

A preponderance of the evidence supports the Family Court's order denying petitioner maternal aunt's application to have custody of the child returned to her (see *Matter of Keith H. [Logann M.K.]*, 113 AD3d 555, 556-557 [1st Dept 2014]). The hearing demonstrated that the child has special needs that are being met by his foster mother, he is thriving in her care and he is living with his two older siblings, who had already been adopted by the foster mother (see *Matter of Ender M.Z.-P. v Administration for Children's Servs.*, 128 AD3d 713 [2d Dept 2015]). Although appellant loves the child and stopped caring for him through no fault of her own, the testimony adduced at the hearing demonstrated that she was physically incapable of providing the child with proper care after suffering an aneurism and stroke (see *Matter of Peter L.*, 59 NY2d 513, 521 [1983]; *Matter of Angellynn S.H.W. [Vivian N.V.]*, 93 AD3d 1349, 1351 [4th Dept 2012]). The testimony also established that appellant lacked insight into the child's special needs and lacked the parental judgment necessary to provide him with proper custody and guardianship, because she allowed people she did not know very well to live in her home and continued to allow them to stay there even after one of them began using marijuana (see e.g. *Matter of Nikole S. v Jordan W.*, 123 AD3d 497 [1st Dept 2014], *lv*

dismissed 24 NY3d 1211 [2015], *lv denied* 24 NY3d 916 [2015]).

The purported appeal from the July 23, 2015 permanency hearing order is dismissed because appellant was not a party to the termination proceeding and never sought to intervene pursuant to Family Court Act § 1035 (*see Harris v City of New York*, 28 AD3d 223, 224 [1st Dept 2006], *lv denied* 7 NY3d 704 [2006]; *Matter of Dana XX*, 28 AD3d 1025, 1026 [3d Dept 2006]).

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Sweeny, J.P., Richter, Andrias, Webber, Gesmer, JJ.

3741 Alberto DiCembrino, et al., Index 161670/14
Plaintiffs-Appellants,

-against-

Verizon New York Inc., et al.,
Defendants-Respondents.

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Verizon New York Inc., et al.,
Third-Party Plaintiffs-Respondents,

-against-

James F. Volpe Electric Co.,
Third-Party Defendant-Respondent.

Law Office of Daniel J. McKenna, P.C., White Plains (Daniel J. McKenna of counsel), for appellants.

Cullen and Dykman LLP, New York (Thomas J. Abernethy of counsel), for Verizon New York Inc., 435 West 50 Property Owner, L.P. and Arrow Alliance Construction Corp., respondents.

Milber Makris Plousadis & Seiden, LLP, Woodbury (Lorin A. Donnelly of counsel), for James F. Volpe Electric Co., respondent.

Order, Supreme Court, New York County (Barbara Jaffe, J.), entered May 25, 2016, which, insofar as appealed from as limited by the briefs, denied plaintiffs' motion for partial summary judgment on the issue of liability on the Labor Law § 240(1) claim, unanimously affirmed, without costs.

Plaintiffs did not establish their entitlement to judgment

as a matter of law because their own submissions raised an issue of fact as to whether the injured plaintiff's conduct was the sole proximate cause of the accident (see *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003]). At his deposition, the injured plaintiff testified that he fell because he missed a step on the ladder as he descended from it, and he did not attribute his fall to any inadequacy of the 12-foot A-frame ladder that he was using at that time. In contrast, his affidavit stated that the accident occurred when the ladder wobbled, and his foot slipped on debris placed on a ladder rung that lacked any non-slip treads. Thus, the conflict inherent in the injured plaintiff's own account of the accident raised an issue of fact as to whether it was caused by defendants' failure to provide an adequate safety device, or solely by plaintiff's own conduct (see *Ellerbe v Port Auth. of N.Y. & N.J.*, 91 AD3d

441, 442 [1st Dept 2012]; *Hamill v Mutual of Am. Inv. Corp.*, 79 AD3d 478, 479 [1st Dept 2010]).

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: APRIL 18, 2017

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

CLERK

Sweeny, J.P., Richter, Andrias, Webber, Gesmer, JJ.

3742 In re Gregory D.,
 Petitioner-Respondent,

-against-

Athena Q.,
 Respondent-Appellant.

Steven N. Feinman, White Plains, for appellant.

Andrew J. Baer, New York, for respondent.

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

Order, Family Court, New York County (Susan M. Doherty, Referee), entered on or about February 25, 2016, which, after a hearing, granted the father's petition for modification of a custody order and awarded him sole custody of the parties' three children, unanimously reversed, on the law and the facts, without costs, the petition denied, and sole custody awarded to respondent mother.

The Referee's determination awarding custody to petitioner father lacked a sound and substantial basis in the record (see *Eschbach v Eschbach*, 56 NY2d 167 [1982]) since the mother has been the children's primary caretaker and, sole source of financial support, for the majority of the children's lives (see

e.g. Matter of Timothy M. v Laura A.K., 204 AD2d 325 [2d Dept 1994]). During the approximately two-year period, from 2011 through 2013, the father scarcely visited or spoke with the children, while the mother had enrolled them in a charter school and extracurricular activities, including dance and karate, and the children were thriving in her care. The mother moved the family into an apartment in Manhattan, and was in the process of changing schools to remedy the issue of the children's tardiness due to their long commute.

The mother's past poor judgment and misconduct which led to a neglect finding against her in 2013 after being the victim of domestic violence, and subsequent relocation of the children, understandably evoked the court's concern (*see Matter of Tonisha J. v Paul P.*, 55 AD3d 386, 387 [1st Dept 2008]). However, the record reflects that the mother has complied with all of the court's directives in an effort to regain custody of the children, who were in the father's care. The mother has spent significant time with the children, and continues to take them to their medical appointments and pay for their dental and eye care. The mother has maintained a spacious and suitable home for the children, in contrast to the overcrowded conditions at the father's home. The mother has also pursued higher education,

found employment and dedicated herself to planning for her and the children's future (*id.*).

Further, it is the children's clear preference to reside with the mother (*Melissa C.D. v Rene I.D.*, 117 AD3d 407, 407-408 [1st Dept 2014]). We note that the Referee also dismissed the observations and conclusions of the neutral, court-appointed evaluator, regarding, *inter alia*, the parties' respective interactions with the children, but credited the testimony of the two experts who had never met the mother or evaluated her parenting ability (*see Matter of Custody of Rebecca B.*, 204 AD2d 57 [1st Dept 1994], *lv denied* 84 NY2d 808 [1994]).

Thus, on balance, it is in the children's best interest to remain with the mother, and custody should be awarded to her (*see Tonisha J. v Paul P.*, *supra* 55 AD3d at 388).

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

ENTERED: APRIL 18, 2017

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CLERK

Sweeny, J.P., Richter, Andrias, Webber, Gesmer, JJ.

3746 Douglas Elliman, LLC, Index 160945/13
Plaintiff-Appellant,

-against-

East Coast Realtors, Inc.,
Defendant-Respondent,

Glenn Busch, P.C., etc.,
Defendant.

Lieb at Law, P.C., Center Moriches (Dennis C. Valet of counsel),
for appellant.

Panteris & Panteris, LLP, Bayside (Lauren Varrone of counsel),
for respondent.

Order, Supreme Court, New York County (Robert D. Kalish,
J.), entered on or about April 14, 2016, which granted defendant-
respondent's motion for summary judgment dismissing the
complaint, and denied plaintiff's motion for summary judgment on
its claims, unanimously affirmed, with costs.

Given that plaintiff represented on the New York State
Disclosure Form that it was the buyers' agent, it could not deny
that it had an express contract with buyers covering the subject
matter of this action (see Real Property Law § 443[c]; *Julien J.
Studley, Inc. v New York News*, 70 NY2d 628, 629 [1987]). The
existence of such an agreement was fatal to plaintiff's quantum

meruit and unjust enrichment claims (see *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]).

Moreover, the mere listing of the property on the consumer site Streeteasy.com, which by its terms precludes the use of the site other than for the provision of information on listings, and which ad contained no solicitation of any kind for any other broker, could not constitute any offer to plaintiff. Thus, the work plaintiff did, which was for the buyers, was not done at defendant's behest. This was fatal to both of its quasi contractual claims (see *Kagan v K-Tel Entertainment*, 172 AD2d 375, 376 [1st Dept 1991]).

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

ENTERED: APRIL 18, 2017

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CLERK

Sweeny, J.P., Richter, Andrias, Webber, Gesmer, JJ.

3747-

Ind. 4155/11

3747A The People of the State of New York,
Respondent,

1081/12

-against-

Raymond Marquez,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Jeffrey A. Wojcik of counsel), for respondent.

Judgments, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered October 2, 2012, convicting defendant, upon his pleas of guilty, of two counts of criminal possession of a weapon in the second degree, and sentencing him to an aggregate term of seven years, unanimously modified, on the law, to the extent of vacating the sentence and remanding the matter for a youthful offender determination, and otherwise affirmed.

As the People concede, defendant is entitled to an express youthful offender determination pursuant to *People v Rudolph* (21 NY3d 497 [2013]).

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

ENTERED: APRIL 18, 2017

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CLERK

"Renewal is not available as a 'second chance' for parties who have not exercised due diligence in making their first factual presentation" (*Chelsea Piers Mgt. v Forest Elec. Corp.*, 281 AD2d 252 [1st Dept 2001]).

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

ENTERED: APRIL 18, 2017

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CLERK

Sweeny, J.P., Richter, Andrias, Webber, Gesmer, JJ.

3749 Hutchinson Burger, Inc., et al., . Index 302046/11
Plaintiffs-Appellants,

-against-

Kathleen R. Bradshaw,
Defendant-Respondent,

Hutch Restaurant Associates, L.P.,
et al.,
Defendants.

Law Offices of K.C. Okoli, P.C., New York (K.C. Okoli of
counsel), for appellants.

Kathleen R. Bradshaw, Bronx, for respondent.

Order, Supreme Court, Bronx County (Julia Rodriguez, J.),
entered December 10, 2015, which granted defendant Kathleen R.
Bradshaw's motion for reargument, and, upon reargument, denied
plaintiffs' motion for an extension of time to serve the summons,
complaint, and amended complaint and for a default judgment
against defendant, and dismissed all claims against defendant,
without prejudice, unanimously reversed, on the law, without
costs, and defendant's motion denied in all respects.

The proper vehicle for defendant to challenge the October
2012 order, which was granted on her default, was a motion to
vacate a default order under CPLR 5015(a)(1), and not a motion

for renewal or reargument under CPLR 2221(d) and (e) (see *Country Wide Home Loans, Inc. v Dunia*, 138 AD3d 533 [1st Dept 2016] ["The court properly denied plaintiff's motion since the prior order was granted on default, and the proper remedy for plaintiff was to move to vacate the default pursuant to CPLR 5015, rather than by motion to renew"]; *300 W. 46th St. Corp. v Clinton Hous. W. 46th St. Partners, L.P.*, 19 AD3d 136 [1st Dept 2005]; *Vazquez v Koret*, 151 AD2d 448 [1st Dept 1989]; Siegel, *New York Practice* § 426). Accordingly, the motion court should have denied defendant's motion to renew or reargue.

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

ENTERED: APRIL 18, 2017



CLERK

was returned on a bench warrant (see *People v Lopez*, 16 NY3d 375, 385-86, 385 n 6 [2011]; *People v Garcia*, 40 AD3d 541 [1st Dept 2007, lv denied 9 NY3d 961 [2007]; *People v Clarke*, 298 AD2d 259 [1st Dept 2002], lv denied 99 NY2d 613 [2003])). We see no reason to abandon our line of cases stating this principle, especially since these precedents are entirely consistent with the Court of Appeals' subsequent discussion of the issue in *Lopez* (see also *People v Bing*, 76 NY2d 331 [1990]).

We reject defendant's arguments concerning the sufficiency and weight of the evidence supporting the unlawful entry element of burglary. Although the victim permitted defendant to enter the building where the crime occurred, the evidence established that the victim was not a resident, and was present for the purpose of selling marijuana in the lobby. Therefore, the victim was not authorized to grant anyone a license to enter (see Penal Law § 140.00[5]), and was in any event not authorized to grant entry "to conduct illegal activity" (*People v Williams*, 174 Misc 2d 868, 871 [Sup Ct Queens County 1997]). The evidence also supports a reasonable inference that defendant knew he was entering unlawfully. Furthermore, defendant's entry was unlawful for the separate reason that he entered by means of a ruse (see e.g. *People v Mitchell*, 254 AD2d 830 [4th Dept 1998], lv denied, 92 NY2d 984 [1998][posing as utility worker]). The evidence

supports the conclusion that defendant entered the building, not merely with the secret intent to rob the victim, but by misrepresenting himself to be part of the line of people waiting to buy marijuana.

We perceive no basis for reducing the sentence.

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

ENTERED: APRIL 18, 2017

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CLERK

1995]). Even if the contracts had been cancelled due to defendant's incorrect test results regarding arsenic in the toys manufactured by plaintiff, the record contains no evidence that defendant gave false test results with the intention of procuring a breach by Kellogg (see *Lama*, 88 NY2d at 424; *Dermot Co., Inc. v 200 Haven Co.*, 58 AD3d 497, 497 [1st Dept 2009]). To the contrary, defendant actively attempted to determine the reason why its testing showed high levels of arsenic while other labs' testing did not, and it informed Kellogg as soon as it determined that its results were wrong.

Plaintiff failed to preserve its argument that defendant's motion was defective because the motion did not include a copy of defendant's answer (see *Medina v MSDW 140 Broadway Prop., L.L.C.*, 13 AD3d 67, 67-68 [1st Dept 2004]).

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: APRIL 18, 2017



CLERK

law, and was not irrational, unreasonable, or arbitrary and capricious" (*Matter of Pietropolo v New York City Dept. Of Hous. Preserv. & Dev.*, 39 AD3d 406, 406 [1st Dept 2007]; CPLR 7803[3]).

Petitioner rested his succession claim on the fact that he was included on the 2011 and 2012 income affidavits for the subject premises as proof that he resided there, and attempted to explain the lack of documentation during the co-residency period as a result of his "young age and status as a college student." However, petitioner's inclusion on the income affidavits "[does] not, in and of itself, establish his entitlement to succession rights as a matter of law" (*Matter of Pietropolo*, 39 AD3d at 406-407).

Petitioner further relied on the "student exception" to the primary residency requirement, which provides that the relevant time period to establish residency is not interrupted by any period during which the family member seeking succession rights temporarily relocates because he is enrolled as a full-time student *and* that he reside in the subject apartment as his primary residence for at least two years immediately before enrolling as a full-time student (28 RCNY 3-02(p)(5)(ii)). However, he enrolled at Morehouse College in the fall of 2011, and failed to establish that he primarily resided in the subject

premises for the two years prior to starting college in 2011.

Petitioner also failed to submit any documents to establish proof of residency which were dated during the two years prior to the death of Lorraine Simmons, i.e., March 4, 2014, or that he was a full-time student at Morehouse College during that period. Petitioner did not submit his transcript until after the hearing officer issued her August 11, 2014 decision; however, even considering the transcript, discrepancies such as the absence of classes for the spring 2012 semester, and the fact that petitioner graduated from a high school in New Jersey made the provision of additional information supporting his primary residency all the more relevant.

Petitioner was not entitled to an evidentiary hearing (28 RCNY 3-02(p)(8)(ii)); see *Matter of Pietropolo*, 39 AD3d at 407; *Matter of Cadman Plaza N. v New York City Dept. of Hous. Preserv. & Dev.*, 290 AD2d 344, 345 [1st Dept 2002]).

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

ENTERED: APRIL 18, 2017



CLERK

attempted first-degree robbery charges that the firearm displayed "was not a loaded weapon from which a shot, readily capable of producing death or other serious physical injury, could be discharged" (Penal Law § 160.15[4]). There was expert testimony that, although the revolver was missing the spring that creates tension on the hammer, the revolver could be fired by using, as a replacement for the spring, a rubber band that had been found wrapped around its barrel when it was recovered. The expert testified that she test fired the revolver several times, and found that it could easily be fired by means of the rubber band (see *People v Francis*, 126 AD2d 740 [2d Dept 1987]). A firearm that is no longer in the condition in which it was manufactured, but that can nevertheless be fired as the result of being modified or repaired using some expedient device, is still an operable firearm.

We perceive no basis for reducing the sentence.

We have considered and rejected defendant's pro se claims.

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

ENTERED: APRIL 18, 2017



CLERK

Friedman, J.P., Renwick, Moskowitz, Feinman, Kapnick, JJ.

3756-

Index 651006/11

3756A B.D. Estate Planning Corp.,
Plaintiff-Respondent,

-against-

Marcy Trachtenberg, as Trustee of
the Ellis Limquee Family Insurance
Trust,
Defendant,

Carolyn Limquee,
Defendant-Appellant.

Eaton & Van Winkle LLP, New York (Adam J. Rader of counsel), for
appellant.

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

Orders, New York County (Shirley Werner Kornreich, J.),
entered October 28, 2016, which, to the extent appealed from as
limited by the briefs, denied defendant Carolyn Limquee's motion
for summary judgment dismissing the complaint as against her on
the ground of the affirmative defense of recovery of fruits of
the crimes barred, granted plaintiff's motion for summary
judgment dismissing defendant's affirmative defense of bribery
and corruption, and granted plaintiff's motion to confirm a
referee's report and hold defendant in civil contempt,
unanimously affirmed, without costs.

Summary dismissal of the complaint as against defendant Limquee is not mandated by the doctrine of law of the case. In a prior appeal, this Court granted defendant leave to amend her answer to plead the affirmative defense of recovery of fruits of crimes barred, finding that the record indicated that the insurance policy at issue "may have been part of the scheme to defraud that resulted in the criminal conviction of plaintiff's principal" (see *B.D. Estate Planning Corp. v Trachtenberg*, 134 AD3d 650 [1st Dept 2015]). In her motion for summary judgment, defendant failed to establish prima facie that the insurance policy at issue actually was part of the scheme to defraud. The materials she submitted from the federal criminal sentencing proceedings against plaintiff's principal demonstrate that the federal government neither charged plaintiff's principal with fraud in procuring the subject policy nor presented any proof of such fraud at trial, and defendant submitted no other evidence of such fraud. Since, contrary to defendant's contention, the issue whether the subject policy was procured by fraud was not litigated in the federal action, it is not barred by the doctrine of collateral estoppel (see *Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 455 [1985]).

We perceive no basis for disturbing the motion court's

finding of civil contempt (see *El-Dehdan v El-Dehdan*, 26 NY3d 19, 29 [2015]). The record demonstrates that defendant knowingly disobeyed a court order directing her not to invade the corpus of the trust during the pendency of this action.

The court correctly dismissed defendant's unsupported defense of bribery and corruption.

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

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

ENTERED: APRIL 18, 2017

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CLERK

Friedman, J.P., Renwick, Moskowitz, Feinman, Kapnick, JJ.

3757-

3758 In re Ivy Garduno,
 Petitioner-Appellant,

-against-

 Franklin Valdez,
 Respondent-Respondent.

Plaine & Katz, LLP, Kew Gardens (Joshua R. Katz of counsel), for
appellant.

Treuhافت & Zakarin, LLP, New York (Miriam Zakarin of counsel),
for respondent.

 Order, Family Court, New York County (Adetokunbo O.
Fasanaya, J.), entered on or about October 13, 2016, which, to
the extent appealed from, granted respondent-ex-husband's
objections to a modification of an earlier support order (the
modified order) and remanded the matter for recalculation by the
Support Magistrate, unanimously reversed, on the law and the
facts, without costs, the objections denied, and the modified
order reinstated. Appeal from order, Family Court, New York
County (Karen D. Kolomechuk, Support Magistrate), entered on or
about November 15, 2016, issued upon the aforementioned remand,
unanimously dismissed, without costs, as academic.

 The modified order was consistent with the application of

the statutory formula followed in *Matter of Cassano v Cassano* (85 NY2d 649, 651 [1995], citing Family Ct Act § 413; Domestic Relations Law § 240)), and the Support Magistrate did not improvidently exercise her discretion in issuing it. The Support Magistrate properly calculated the husband's 2015 salary as \$126,160.15, which was the salary the husband testified to at the support hearing and the amount of his gross income as reflected on his 2015 W-2. The husband's voluntarily deferred income in the form of his 401(k) contributions was properly included in his income (Family Ct Act § 413(1)(b)(5)(iii); see also *Gilbert v Gilbert*, 32 AD3d 414, 416 [2d Dept 2006]).

The Family Court also incorrectly found that the Support Magistrate improperly applied the Child Support Standards Act (CSSA) to the parties' combined income above the statutory cap of \$143,000. The Support Magistrate had the option of applying the statutory percentage (here, 17% for one child) "and/or" the statutory factors contained in subsection (f) of Family Ct Act § 413, or some combination of those two methods (see *Cassano*, 85 NY2d at 653-654; see also *Gina P. v Stephen S.*, 33 AD3d 412 [1st Dept 2006]). The Support Magistrate elected to apply the statutory percentage to the parties' above-the-cap income and provided three sound reasons for doing do, including the child's

special needs, which was not an improvident exercise of discretion (*id.*; see also *Anonymous v Anonymous*, 286 AD2d 585 [1st Dept 2001]).

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

ENTERED: APRIL 18, 2017

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CLERK

established all the necessary elements, including the requisite course of conduct, which in this case included conduct not involving physical contact (see *People v Noka*, 51 AD3d 468 [1st Dept 2008], *lv denied* 11 NY3d 739 [2008]), and the People did not have to prove more than one act of forcible touching.

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

ENTERED: APRIL 18, 2017

A handwritten signature in black ink, appearing to read "Susan R. Jones", written in a cursive style. The signature is positioned above a horizontal line.

CLERK

Friedman, J.P., Renwick, Moskowitz, Feinman, Kapnick, JJ.

3760-

Index 652316/11

3761 Oorah, Inc., doing business as
Cucumber Communications,
Plaintiff-Appellant,

-against-

Covista Communications, Inc.,
Defendant-Respondent.

Storch Amini PC, New York (Steven G. Storch of counsel), for
appellant.

Kane Kessler, P.C., New York (Jeffrey H. Daichman of counsel),
for respondent.

Judgment, Supreme Court, New York County (Eileen Bransten,
J.), entered September 1, 2016, awarding a sum of money to
defendant, unanimously reversed, on the law, with costs,
defendant's motion for summary judgment on its breach of contract
counterclaim denied, and plaintiff's motion for summary judgment
dismissing the counterclaim granted. Appeal from order, same
court and Justice, entered on or about August 23, 2016, deciding
the parties' motions, unanimously dismissed, without costs, as
subsumed in the appeal from the judgment.

Defendant counterclaimed for breach of the provision of the
parties' "Reseller Agreement" that required plaintiff, as
reseller of defendant's telecommunications services, to purchase

a minimum amount of services from defendant each month or pay for the shortfall. Contrary to the motion court's determination, we conclude that the Reseller Agreement, executed in 2001, was superseded by the parties' 2004 "Independent Authorized Master Agent Agreement" (Agent Agreement), which covers the same subject matter and contains a provision that conflicts with the provision in the Reseller Agreement that defendant claims was breached. Therefore, the counterclaim must be dismissed.

The merger clause in the Agent Agreement provides, in pertinent part, "This Agreement ... constitutes the entire agreement between the parties relating to the subject matter hereunder, and supersedes any and all oral and/or written statements, discussions, representations and agreements made by either party to the other." While the agreements differ as to the nature of the relationship between the parties, i.e., plaintiff went from being a reseller of defendant's services to defendant's agent, the subject matter of both agreements is the telecommunications services provided by defendant, specifically, those available through the Simplicity 2001 product offering.

Both agreements provide for plaintiff to be compensated through commissions. However, there are differences in the pertinent provisions. Under the Reseller Agreement, commissions

are based on the difference between plaintiff's "buy" prices and end-user retail pricing; as indicated, plaintiff is required to purchase a minimum amount of services each month or pay defendant for the shortfall. Under the Agent Agreement, commissions are calculated as a percentage of the retail rate; plaintiff is not required to make a minimum purchase, but defendant has the right to terminate the contract if the customers that plaintiff introduces to it do not purchase certain minimums, and the Agreement expressly states that it does not matter whether those customers were introduced under the Reseller Agreement. Given these conflicting provisions, those in the Reseller Agreement were replaced when the Agent Agreement, with its unambiguous merger clause, was executed.

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

ENTERED: APRIL 18, 2017

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

CLERK

Friedman, J.P., Renwick, Moskowitz, Feinman, Kapnick, JJ.

3762 Maritza P., as Mother and Index 101423/10
Guardian ad Litem of Ismael
Daniel M., et al.,
Plaintiffs-Respondents,

-against-

Devereux Foundation, et al.,
Defendants-Appellants,

Brian Washington,
Defendant.

Phelan, Phelan & Danek, LLP, Albany (Timothy S. Brennan of
counsel), for appellants.

Alexander J. Wulwick, New York, for respondents.

Order, Supreme Court, New York County (Geoffrey D. Wright,
J.), entered on or about December 17, 2015, which, to the extent
appealed from, denied defendants-appellants' (defendants) motion
for summary judgment dismissing the complaint, unanimously
affirmed, without costs.

Defendants having satisfied their initial burden on summary
judgment, the burden shifted to plaintiffs to raise a triable
issue of fact (see CPLR 3212[b]; *Alvarez v Prospect Hosp.*, 68
NY2d 320, 324 [1986]). In satisfaction of their burden,
plaintiffs offered competent proof in the form of deposition

testimony, medical records and police records, which raised triable issues (see generally *N.X. v Cabrini Med. Ctr.*, 97 NY2d 247 [2002]; *Kelly G. v Board of Educ. of City of Yonkers*, 99 AD3d 756 [2d Dept 2012]).

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

ENTERED: APRIL 18, 2017

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CLERK

Friedman, J.P., Renwick, Moskowitz, Feinman, Kapnick, JJ.

3764 Verina Rose, Index 301666/13
Plaintiff-Appellant,

-against-

Ousmane Tall, et al.,
Defendants-Respondents,

Colete Dana Jones,
Defendant.

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

Marjorie E. Bornes, Brooklyn, for respondents.

Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.),
entered on or about March 30, 2016, which granted defendants'
motions for summary judgment dismissing the complaint based on
plaintiff's inability to meet the serious injury threshold under
Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendants established prima facie that plaintiff did not
sustain a serious injury to her lumbar spine through the affirmed
reports of their neurologist, who found no limitations as a
result of the accident, and radiologist, who, after review of
plaintiff's MRI films, found no injuries related to the subject
accident (see *Green v Jones*, 133 AD3d 472 [1st Dept 2015]).
Defendants also relied on reports prepared by plaintiff's

treating neurologist, who found minimal limitations in range of motion at examinations conducted months after the accident.

In opposition, plaintiff submitted the report of her neurologist, who reviewed the MRI himself, and opined that plaintiff sustained a disc herniation as a result of the accident. However, his report is insufficient to raise a triable issue of fact because, on his initial examination, he found normal to near-normal range of motion, which did not qualify as a serious injury (see *Eisenberg v Guzman*, 101 AD3d 505 [1st Dept 2012]). Furthermore, on a more recent examination, that neurologist found a deficit in one plane and normal to near-normal range of motion in all other planes, and failed to explain the inconsistencies between his earlier findings of almost full range of motion and his present findings of additional deficits, rendering his opinion speculative (see *Santos v Perez*, 107 AD3d 572, 574 [1st Dept 2013]; *Colon v Torres*, 106 AD3d 458 [1st Dept 2013]). Plaintiff's showing of relatively minor limitations was insufficient to sustain a serious injury claim (see *Gaddy v Eyler*, 79 NY2d 955 [1992]; *Cattouse v Smith*, 146 AD3d 670, 672 [1st Dept 2017]).

Defendants also demonstrated that plaintiff did not suffer a 90/180-day claim by relying on her deposition testimony that she was confined to home and bed for just two days after the accident (see *Frias v Son Tien Liu*, 107 AD3d 589, 590 [1st Dept 2013]).

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

ENTERED: APRIL 18, 2017

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[2003]).

Defendant's argument that his plea to a class A misdemeanor to satisfy an indictment also charging a class A misdemeanor was invalid under CPL 220.10(3), which provides that a defendant "may...enter a plea of guilty of a lesser included offense," is unpreserved (see *People v Manuel*, 143 AD3d 473 [1st Dept 2016], *lv denied* 28 NY3d 1147 [2017]), and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. Defendant concedes he wanted to avoid the significant stigma of a conviction on the initial class A misdemeanor charge, an animal cruelty charge, and therefore pleaded guilty to second-degree trespass, also a class A misdemeanor, even though there was no common factual or legal predicate for that charge. Hence, "to the extent there was any statutory error [under CPL 220.10(3)], it was in defendant's favor" (*People v Manuel*, 143 AD3d at 474).

Furthermore, even if we were to conclude that defendant is

entitled to vacatur of his plea, he expressly declines that remedy, requesting instead an outright dismissal, which we find unwarranted, given defendant's conduct in the underlying incident.

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

ENTERED: APRIL 18, 2017

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Friedman, J.P., Renwick, Moskowitz, Feinman, Kapnick, JJ.

3766 Estate of Lorette Jolles Shefner Index 112525/11
by and through its Executors,
etc., et al.,
Plaintiffs-Respondents,

-against-

Galerie Jacques de la Beraudiere, et al.,
Defendants-Appellants.

- - - - -

Yves Bouvier,
Intervenor Defendant-Appellant.

- - - - -

[And a Third-Party Action]

Dunnington, Bartholow & Miller LLP, New York (David J. Hoffman of
counsel), for appellants.

Alston & Bird LLP, New York (Karl Geercken of counsel), for
respondents.

Order, Supreme Court, New York County (Kathryn E. Freed,
J.), entered October 24, 2016, which, to the extent appealed from
as limited by the briefs, denied defendants' and intervenor
defendant's motions for summary judgment dismissing the
complaint, unanimously affirmed, with costs.

Defendants failed to demonstrate that there were no triable
issues of fact concerning ownership of the de Kooning painting
and concerning successor liability. Defendants failed to provide
a consignment agreement listing the painting at issue, and the

documents produced do not show which entity purchased the painting. Moreover, plaintiffs provided evidence sufficient to raise a triable issue of fact concerning whether the painting was properly subject to attachment in connection with a default judgment they obtained in a federal action, based on statements allegedly made by an employee with authority to speak and contradictory statements by defendants (*see DeSimone v City of New York*, 121 AD3d 420, 421-422 [1st Dept 2014]).

The record also reflected triable issues of fact concerning whether Galerie Jacques de la Beraudiere was the successor to Galerie Cazeau-Beraudiere (*see Schumacher v Richards Shear Co.*, 59 NY2d 239, 244-245 [1983]; *Ring v Elizabeth Found. for the Arts*, 136 AD3d 525, 527 [1st Dept 2016]).

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

ENTERED: APRIL 18, 2017

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Friedman, J.P., Renwick, Moskowitz, Feinman, Kapnick, JJ.

3767- Ind. 3756/13
3767A The People of the State of New York, 4241/14
Respondent,

-against-

Salvatore Cappuccio,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Diane N. Prince of counsel), for respondent.

Appeals having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Laura Ward, J.), rendered March 30, 2015 and March 31, 2015,

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

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

ENTERED: APRIL 18, 2017



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

Jaeger. The crack was next to a metal plate, or marker, owned by the City. The City is entitled to summary judgment, because it established that it did not have prior written notice of the alleged defective sidewalk and that none of the exceptions to the statutory rule requiring such notice applied (see Administrative Code of City of NY § 7-201[c][2]; *Amabile v City of Buffalo*, 93 NY2d 471, 474 [1999]). The marker on the sidewalk did not confer a special use or benefit upon the City, and therefore the "special use" exception does not apply (see *Amabile*, 93 NY2d at 474; see also *Oboler v City of New York*, 8 NY3d 888, 890 [2007]; *Chambers v City of New York*, 147 AD3d 471 [1st Dept 2017]).

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

ENTERED: APRIL 18, 2017

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CLERK

Friedman, J.P., Renwick, Moskowitz, Feinman, Kapnick, JJ.

3769-

Index 163136/15

3770 In re 620 West 182nd St. Heights
Associates, LLC,
Petitioner-Appellant,

-against-

Department of Housing Preservation
and Development of the City of
New York,
Respondent-Respondent.

Sperber Denenberg & Kahan, PC, New York (Eric Kahan of counsel),
for appellant.

Zachary W. Carter, Corporation Counsel, New York (Max O. McCann
of counsel), for respondent.

Judgment (denominated an order), Supreme Court, New York
County (Cynthia S. Kern, J.), entered July 20, 2016, which
denied, in part, the petition to vacate respondent's Alternative
Enforcement Order (AEP Order) dated September 1, 2015,
unanimously modified, on the law, to the extent of vacating so
much of the AEP Order that directed replacement of the floor
joists in apartments 1C, 3C, and 5C, and otherwise affirmed,
without costs. Order, same court and Justice, entered November
15, 2016, which, insofar as appealed from, denied petitioner's
motion to renew, unanimously affirmed, without costs.

Respondent's AEP Order, as clarified by its February 2016

letter specifying the scope of the work required to remove violations of the Housing Maintenance Code, was not arbitrary and capricious, and had a rational basis (see *Matter of Peckham v Calogero*, 12 NY3d 424, 431 [2009]). Respondent's construction project manager rationally concluded that the floor joists in certain apartments in the building, the entire water supply lines, and the branches and all lead bends of waste supply lines in the building were "related underlying conditions" that caused recurring violations, and therefore needed replacement (Administrative Code of City of NY § 27-2153[k][I]). There was ample evidence in the record of floor violations in apartments 1A, 2A and 2C, and violations for leaks in half of the apartments in the building, prior to the issuance of the AEP Order. However, there were no prior floor violations in apartments 1C, 3C, and 5C, and therefore the AEP Order is modified to vacate the repair of the floor joists in those apartments.

Petitioner's argument that respondent's construction project manager lacked the necessary qualifications to conclude that the floor joists, water supply lines, and the waste supply lines needed replacement, is unavailing. Respondent, as the administrative agency charged with enforcing the Alternative Enforcement Program, "has broad discretion in evaluating

pertinent factual data and inferences to be drawn therefrom” (*Matter of 333 E. 49th Assoc., L.P. v New York State Div. of Hous. & Community Renewal, Off. of Rent Admin.*, 40 AD3d 516, 516 [1st Dept 2007], *affd* 9 NY3d 982 [2007]). The differing conclusions reached by petitioner’s expert are insufficient to annul the agency’s determination (see *Roosevelt Islanders for Responsible Southtown Dev. v Roosevelt Is. Operating Corp.*, 291 AD2d 40, 55 [1st Dept 2001], *lv denied* 97 NY2d 613 [2002]). Moreover, “even if different conclusions could be reached as a result of conflicting evidence, a court may not substitute its judgment for that of the agency where the agency’s determination is supported by the record” (*Matter of Cohen v State of New York*, 2 AD3d 522, 525 [2d Dept 2003]).

Contrary to petitioner’s argument, respondent was not required to make specific findings in the AEP Order (see *Matter of Mid-Island Hosp. v Wyman*, 25 AD2d 765, 767 [2d Dept 1966]; *Matter of McPartland v McCoy*, 35 AD2d 641, 642 [3d Dept 1970]). Supreme Court did not substitute its own judgment for that of the agency when it declined to vacate the AEP Order in its entirety; rather, it permissibly vacated portions of the AEP Order (CPLR 7806).

Renewal was properly denied. Consideration of evidentiary

submissions as to a change in circumstances after the agency's determination is not permissible (see *Matter of Featherstone v Franco*, 95 NY2d 550, 554 [2000]; *Matter of West Vil. Houses Tenants' Assn. v New York City Bd. of Stds. & Appeals*, 302 AD2d 230, 231 [1st Dept 2003], *lv dismissed* 100 NY2d 533 [2003]).

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: APRIL 18, 2017

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the Department of Probation about the underlying facts of the crime to which he pleaded guilty, thus violating the explicit condition of the plea agreement requiring him to truthfully discuss the facts of his crime during the presentence interview (*see id.*).

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

ENTERED: APRIL 18, 2017

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Friedman, J.P., Renwick, Moskowitz, Feinman, Kapnick, JJ.

3773 Bonnie Buchwald, Index 155828/13
Plaintiff-Appellant,

-against-

Silverman Shin & Byrne PLLC,
et al.,
Defendants-Respondents.

David Abrams, Attorney at Law, New York (David Abrams of
counsel), for appellant.

Silverman Shin & Byrne PLLC, New York (Elana Ben-Dov of counsel),
for respondents.

Order, Supreme Court, New York County (Nancy M. Bannon, J.),
entered or about July 11, 2016, which granted defendants' motion
for summary judgment dismissing the complaint, unanimously
affirmed, without costs.

Viewing the record in the light most favorable to plaintiff,
no triable issues of fact exist as to whether defendant
discriminated against plaintiff based on a perceived disability.
Defendant's alleged conduct consists of "petty slights or trivial

inconveniences" that do not suffice to support a hostile work environment claim under the New York City Human Rights Law (see *Williams v New York City Hous. Auth.*, 61 AD3d 62, 79-80 [1st Dept 2009]).

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

ENTERED: APRIL 18, 2017

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CLERK

This case presents a highly unusual and particular set of facts. The parties, who were married on August 24, 1973, lived together as husband and wife for only 52 months, before husband vacated the marital residence in 1978. The parties' minor son remained with wife. For the next 37 years, the parties lived separate and apart, with neither seeking a formal separation. In 2011, wife retired from her job at Lincoln Hospital, where she began working in 1973, the same year as the marriage. She collects \$4,241.95 per month in pension benefits, and, apart from her social security benefits, she has no other source of income. In 2013, wife commenced an action for divorce. Wife's pension is the parties' primary marital asset.

The trial court erred in awarding husband 50% of wife's pension accumulated during the time they lived together. Domestic Relations Law § 236(B)(1)(c) defines marital property as all property acquired "during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action" (*Mesholam v Mesholam*, 11 NY3d 24, 28 [2008]). "Thus, in the absence of a separation agreement, the commencement date of a matrimonial action demarcates 'the termination point for the further accrual of marital property'" (*id.*; see also *Anglin v Anglin*, 80 NY2d 553, 556 [1992]). The valuation of

marital or separate property must be between "the date of commencement of the action [and] the date of trial" (Domestic Relations Law § 236[B][4][b]). Accordingly, wife's pension benefits from the date of marriage to commencement of the divorce action constituted marital property, subject to equitable distribution (see *Majauskas v Majauskas*, 61 NY2d 481, 488-492 [1984]).

However, equitable distribution does not mean equal (see *Arvantides v Arvantides*, 64 NY2d 1033, 1034 [1985]), and "an unequal distribution is appropriate when a party has not contributed to the marital asset in question" (*Del Villar v Del Villar*, 73 AD3d 651, 652 [1st Dept 2010]). Here, the court found that the wife testified credibly at trial that after the husband moved out of the marital residence on or about January 1, 1978, she and their son received no further economic or non-economic support from him, to which she would have surely been entitled. Given that the value of wife's pension was due almost entirely to her sole efforts, we award husband as his distributive share 1% of the wife's monthly pension benefits. Accordingly, the matter

is remitted to the IAS court to issue a Qualified Domestic Relations Order consistent with this decision.

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: APRIL 18, 2017

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Friedman, J.P., Renwick, Feinman, Gische JJ.

2950 Tynia Smith,
Plaintiff-Respondent,

Index 302983/09

-against-

Francis V. Rudolph, et al.,
Defendants-Appellants.

Lawrence Heisler, Brooklyn (Timothy J. O'Shaughnessy of counsel),
for appellants.

Spiegel & Barbato, LLP, Bronx (Brian C. Mardon of counsel), for
respondent.

Order, Supreme Court, Bronx County (Edgar G. Walker, J.),
entered on or about May 13, 2015, affirmed, without costs.

Opinion by Renwick, J. All concur except Friedman, J.P. who
concur in a separate Opinion.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
Dianne T. Renwick
Paul G. Feinman
Judith J. Gische, JJ.

2950
Index 302983/09

_____x

Tynia Smith,
Plaintiff-Respondent,

-against-

Francis V. Rudolph, et al.,
Defendants-Appellants.

_____x

Defendants appeal from the order of Supreme Court, Bronx County (Edgar G. Walker, J.), entered on or about May 13, 2015, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion to set aside the jury verdict and order a new trial on the ground of defense counsel's misconduct.

Lawrence Heisler, Brooklyn (Timothy J. O'Shaughnessy of counsel), for appellants.

Spiegel & Barbato, LLP, Bronx (Brian C. Mardon of counsel), for respondent.

RENWICK, J.

We all admire the work of an advocate who performs his or her duties with competence and diligence on behalf of a client. Competent and diligent representation, however, does not mean a lawyer should strive to "win" a case at all costs, if that means harming adversaries and their clients unreasonably and unnecessarily in the process and undermining the authority and integrity of the court. In this case, as fully explained below, defense counsel extended himself far beyond the permissible bounds of advocacy, on many occasions throughout the trial. Given defense counsel's woefully improper conduct, the trial court providently exercised its discretion in granting a new trial in the interest of justice.

Plaintiff Tynia Smith commenced this action to recover damages for personal injuries sustained during a pedestrian knock down accident. Plaintiff alleges that on the night of December 3, 2008, she was walking home with her coworker, after they had finished their evening shift at the Duane Reade Pharmacy located on Southern Boulevard, in the Bronx. The two women left the pharmacy and walked down Hunts Point Avenue until they reached the corner intersection of Bruckner Boulevard. They waited for the crosswalk light to be in their favor before beginning to cross.

The two young women were approximately half way across the street when a long articulated, New York City Transit Authority bus, operated by defendant Rudolph, made a left turn from Hunts Point Avenue onto Bruckner Boulevard and struck Smith in her back and right shoulder area. Plaintiff claims that the bus came from behind and to her right, out of her line of sight. Plaintiff also claims that the bus driver did not honk or do anything else to warn her that the bus was coming into the intersection. The impact knocked plaintiff to the ground, and the bus continued to move forward.

As a result of this accident, plaintiff suffered injuries to several discs in her lumbar spine and neck as well as torn menisci in her right knee, as reported by her treating physicians. Immediately following the accident, she was taken by ambulance to the emergency room at Lincoln Hospital where she complained of pain in her neck, back and knee. She was examined and prescribed oxycodone. After being discharged home, plaintiff determined that the pain was unbearable, despite the medication. Her leg was buckling and unable to support her, so she went to Westchester Square Hospital a few days later, where she got a shot for pain and was advised to see an orthopedist. Plaintiff then saw Dr. Ehrlich, an orthopedist, who examined her and ordered MRIs of her neck, back, and knee. After the MRIs, Dr.

Ehrlich diagnosed her with a torn meniscus in her right knee, and he performed knee surgery in March 2009. After surgery, plaintiff said she continued to experience knee pain.

With regard to her back injuries, plaintiff began treatment with Dr. Guy in February 2009. Dr. Guy saw plaintiff again in October 2009, and observed persistent pain and limitations in the movement of her knee, neck, and lower back, despite physical therapy and knee surgery. Because trigger point injections and over-the-counter medications did not alleviate her back pain, plaintiff saw several doctors for possible back surgery. The first doctor did not find any need for back surgery, but Dr. Davy did. Based on a diagnostic discogram conducted on the lower back in November 2010, Dr. Davy determined that plaintiff had fissures, or small tears, inside the linings of the discs at the L2 to S1 levels, and that these fissures caused chemical radiculitis, a condition where the body's natural inflammatory response attacks the nerves radiating from the afflicted disc levels.

On January 31, 2011, Dr. Davy performed a percutaneous discectomy to remove some of the nucleus pulposus at the L2 to S1 disc levels, to relieve the pressure in the discs, and to bring down the chemical radiculitis. Based on his treatment and examinations, Dr. Davy concluded that plaintiff sustained

multiple disc herniations from L2 through S1, L5 radiculopathy, traumatic myofascial pain syndrome, and a meniscus tear as a result of the accident; that the injuries were significant and permanent; and that plaintiff would require further treatment.

At trial, the defense contested both liability and damages. The defense presented the testimony of the bus driver who testified that plaintiff and her friend entered the intersection when the pedestrian sign read "don't walk." The bus driver also claimed that plaintiff and her friend bumped into the bus and that the bus stopped at the moment of impact. In addition, the defense presented medical experts who opined that plaintiff's knee and back injuries resulting from the accident had been resolved by the end of 2009 and early 2010.

After trial, the jury found defendants 70% at fault, and plaintiff 30% at fault. With regard to the threshold question of serious injury, the jury found that plaintiff had sustained a "significant limitation" and 90/180-day injuries, but not a "permanent consequential limitation" injury. It awarded plaintiff \$100,000 for past pain and suffering, \$75,000 for past lost earnings, and \$150,000 for past medical expenses, but zero dollars for future pain and suffering, future lost earnings, and future medical expenses. Thereafter, plaintiff moved for judgment notwithstanding the verdict on the issue of comparative

negligence, and an additur on damages. Alternatively, she sought a new trial on the ground that "defense counsel engaged in repeated misconduct in front of the jury, thereby depriving plaintiff of a fair trial and the opportunity to properly present her case," and that the verdict was against the weight of the evidence.

Supreme Court granted plaintiff's motion for a new trial on the ground of improper conduct by defense counsel in the interest of justice. It denied the remaining requests for relief as moot. In ordering a new trial, the trial court concluded that defense counsel's conduct was "so extreme and pervasive as to make it inconceivable that it did not substantially affect the fairness of the trial." Also, such conduct "occurred in front of the jury, created a hostile atmosphere and persisted despite the court threatening to impose sanctions and to hold counsel in contempt."

The court then cited the multiple instances of defense counsel's misconduct: "frequent assertions of personal knowledge of facts in issue in violation of Rules of Professional Conduct, Rule 3.4(d)(2)"; his many speaking objections, with one of them flagrantly misstating the law; his motion for a mistrial twice in front of a jury; his unfair and false denigration of Dr. Davy as not being a "real surgeon"; his pattern of interrupting and

speaking over the court despite the court's directions to stop; and his interruption of the trial by demanding that plaintiff's counsel move a chart she was showing to the jury to accommodate his refusal to move from his seat. The court further noted that, although not reflected in the record, defense counsel would use a "sneering, denigrating tone" while cross-examining Dr. Davy and plaintiff's other witnesses. The court also noted as not reflected in the record the "tone of voice" directed at plaintiff's counsel, witnesses, and the court, or the "volume of his voice"; the court noted that it had admonished counsel "not to scream" on several occasions. The court continued that not fully reflected in the record was the extent to which defense counsel would continue talking after being directed to stop.

The trial court clarified that where the transcript showed the court saying "stop" or "overruled" multiple times in succession, it was because defense counsel had continued to speak despite the court's direction. The court concluded that the improper comments about Dr. Davy and Dr. Guy could not be deemed harmless, as the nature and extent of plaintiff's injuries were in significant dispute. It also determined that this case did not present a situation where there was overwhelming evidence in favor of defendants and where an isolated comment could be deemed harmless. In light of the foregoing, the court ordered a new

trial in the interest of justice. This appeal ensued.

We now affirm. We are mindful that a counsel's objection to improper conduct, but failure to timely move for a mistrial before a jury returns a verdict, renders the error unpreserved and "may limit appellate review" (*Rivera v Bronx-Lebanon Hosp. Ctr*, 70 AD2d 794, 796 [1st Dept 1979]). However, pursuant to CPLR 4404(a), the court, upon the motion of any party or on its own initiative, may set aside a verdict "in the interest of justice." This "is predicated on the assumption that the Judge who presides at trial is in the best position to evaluate errors therein" (*Micallef v Miehle Co., Div. of Miehle-Goss Dexter, Inc.*, 39 NY2d 376, 381 [1976]). In this regard, the trial court must decide, based on "'common sense, experience and sense of fairness,'" whether "it is likely that the verdict has been affected" by the alleged misconduct (*id.*; 4 Weinstein-Korn-Miller, NY Civ Prac, par 4404.11). The trial court's determination is "discretionary in nature" and should not therefore be reversed absent an abuse or improper exercise of discretion (*see Micallef*, at 381-382)

In this case, we find that the trial court properly considered plaintiff's posttrial motion and granted a new trial in the interest of justice (see CPLR 4404[a]), as defense counsel's misconduct constituted fundamental error that deprived

plaintiff her of substantial justice and likely affected the verdict (*Micallef*, 39 NY2d at 381; *Selzer v New York City Tr. Auth.*, 100 AD3d 157, 162 [1st Dept 2012]). On these facts, this was not a close question. The record shows a pervasive pattern of misconduct that permeated the month-long trial. As pointed out by the trial court, the more egregious examples include the denigration of Dr. Davy and Dr. Guy; counsel's unsupported assertions that doctors provided unnecessary treatment as part of a money-making conspiracy; and counsel's assertion of his personal view that plaintiff was pursuing the lawsuit only because she wanted to "take the rest of her life off."

Moreover, like the trial court, we are convinced that defense counsel's denigration of plaintiff's witnesses and unsupported inflammatory comments throughout trial "appear[] to have been calculated to influence the jury by considerations which were not legitimately before them, and cannot be dismissed as inadvertent, thoughtless or harmless" (*Kohlmann v City of New York*, 8 AD2d 598, 598 [1st Dept 1959]). Indeed as noted by the trial court, this was not a case of an isolated or inadvertent comment. Rather, the improprieties permeated the entire trial, in a continuing pattern of misconduct. The remarks were persistently made over the recurring and almost constant objection of counsel for plaintiff, and were repeated even though

the trial court sustained the objections. Defense counsel even persisted after the trial court explicitly reprimanded him for his misconduct. Under the circumstances, counsel's persistent speaking objections, interruptions, "screaming," refusals to heed the court's admonishments, and use of a "sneering, denigrating" tone toward opposing counsel, plaintiff's witnesses, and the court, created a climate of hostility that so obscured the issues as to have made the trial unfair (*cf. Duran v Ardee Assoc.*, 290 AD2d 366, 367 [1st Dept 2002]). The cumulative effect of defense counsel's remarks undoubtedly served to leave the intended, indelible impression upon the minds of the jurors.

Significantly, as plaintiff correctly points out, defense counsel's conduct here is remarkably similar to the conduct of defense counsel in several cases which the Second Department found deprived the respective plaintiffs of a fair trial. For example, most recently, in *Maraviglia v Lokshina* (92 AD3d 924 [2d Dept 2012]), the Second Department reversed and ordered a new trial "in light of the inappropriate cross-examination of the plaintiffs' witnesses, as well as the inflammatory and improper summation comments of counsel for the defendants." Specifically, the defendants' counsel "repeatedly denigrated the medical background of the [] plaintiff's treating physician"; "made inflammatory remarks, including commenting during summation that

the plaintiff's treating physician and the plaintiff were 'working the system'; and improperly remarked that the plaintiff's treating physician "was the 'go-to' doctor in Suffolk County for patients who wished to stop working" (*id.* at 924-925). "[D]uring cross-examination of the plaintiffs' expert anesthesiologist, counsel for the defendants twice referred to the medical center where this doctor performed procedures as a 'parking lot,' even though the trial court had sustained the plaintiffs' objection to the first use of this reference. In addition, counsel persistently questioned the plaintiffs' expert about an investigation by the Department of Health[] in the anesthesiology department at Long Island Jewish Medical Center, despite the expert's testimony that the investigation did not involve his practice, and the defendants' lack of any evidence to the contrary" (*id.* at 925).

Again, in *Rodriguez v City of New York* (67 AD3d 884 [2d Dept 2009]), the Second Department found that conduct remarkably similar to the instant case deprived the plaintiff of a fair trial. In that case, defense counsel argued during his opening statement that the plaintiff, who alleged that he was unable to work as a result of back injuries sustained from a fall, "was disabled due to 'lung problems,' sepsis, and his treatment with interferon for hepatitis C," despite absence of evidence on these

health conditions (*id.* at 885). In his summation, defense counsel referred to the plaintiff's vocational economic analyst as "'totally incredible' and a 'kind of tweaker'"; called another economist "a liar"; and asserted that the plaintiff's chiropractor was "'not being honest, is not being truthful'" (*id.*). Further, defense counsel stated, "'It's not a lottery. It's not a game. It's not 'here's the American dream, come over here, fall off a scaffold, get a million dollars'" (*id.*). Although *Rodriguez* also involved improper comments by the trial judge, the Second Department held that the defense counsel's pattern of improper comments, alone, was sufficiently prejudicial and inflammatory to justify a new trial (*id.* at 886-887).

Likewise, in *Mercurio v Dunlop, Ltd.* (77 AD2d 647 [2d Dept 1980]), the Second Department found similar conduct to have deprived the plaintiffs of a fair trial. There, the defense counsel, among other things, made comments disparaging the plaintiff's attorney and accusing the attorney of misconduct, stated not simply that the plaintiff was an "interested witness" but that he was "asking for a large sum of money," and made two baseless motions for a mistrial. There were other instances of interruptions and argumentative objections. After the jury returned a verdict in favor of the defendants, the Second Department set aside the verdict and ordered a new trial, noting,

"The record quite palpably reveals that the behavior of defense counsel during the trial created an atmosphere which deprived plaintiffs of a fair trial. What was involved was not an isolated remark during questioning or summation, but a seemingly continual and deliberate effort to divert the jurors' and the court's attention from the issues to be determined" (*id.* at 647).

Hence, as the foregoing discussion illustrates, it cannot be disputed that the defense counsel's obdurate and unrestrained conduct here is as equally egregious as the objectionable conduct that took place respectively in *Maraviglia*, *Rodriguez* and *Mercurio* and which the Second Department found deprived the respective plaintiffs of a fair trial. While a litigant has a right to expect his or her attorney to argue forcefully based upon the evidence, counsel went far beyond the facts and proffered his sentiment about plaintiff's motive for suing for her personal injuries. Counsel's personal beliefs regarding plaintiff's motive for suing had no place in his argument to the jury. In addition, his denigration of the treating physicians was a transgression that cannot be condoned. Such opinions were uncalled for and should not have been placed before the jury. Moreover, defense counsel's expression of indignation and outrage could only serve to lead the jury away from a decision based upon a fair and impartial review of the evidence. Like the trial

court, we are persuaded that, under the circumstances here, "the odoriferous taint spread by counsel's frequent and grave improprieties" tainted the jury and thus deprived plaintiff of a fair trial (*Commercial Credit Bus. Loans, Inc. v Martin*, 590 F Supp 328, 335 (ED Pa 1984]).

Finally, we reject defendants' argument that the fact that the jury found them 70% liable and plaintiff 30% liable indicated that the jury was capable of fairly evaluating the evidence and arguments, and therefore, plaintiff was not deprived of a fair trial. Although an apportionment of liability may support a finding of careful deliberation by the jury, we find that it is more likely that the jury reached a compromised verdict due to defense counsel's pervasive misconduct. Indeed, the evidence presented at trial did not overwhelmingly favor one side or another, but rather, presented a close case on the issues of liability and future damages. Based on the foregoing, we conclude that the trial court properly exercised its discretion under CPLR 4404(a) in setting aside the jury verdict and granting a new trial.

Accordingly, the order of Supreme Court, Bronx County (Edgar G. Walker, J.), entered on or about May 13, 2015, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion to set aside the jury verdict and order a new

trial on the ground of defense counsel's misconduct, should be affirmed, without costs.

All concur except Friedman, J.P. who concurs in a separate Opinion.

FRIEDMAN, J.P. (concurring)

In view of the unusually egregious and pervasive misconduct of defense counsel at trial, as described in the majority opinion, I concur in the affirmance of the order granting plaintiff a new trial, notwithstanding her counsel's failure to move for an order declaring a mistrial before the verdict was rendered. I write separately, however, to note that our disposition of this appeal should not be construed as a retreat from the general principle that a party who fails to move for a mistrial before the case is submitted to the factfinder, in spite of being aware of grounds for doing so, will not be granted relief on a motion to set aside a disappointing verdict on those grounds (see *Virgo v Bonavilla*, 49 NY2d 982, 984 [1980]; *Bertram v Columbia Presbyt./N.Y. Presbyt. Hosp.*, 126 AD3d 473 [1st Dept 2015], *lv denied* 26 NY3d 905 [2015]; *Boyd v Manhattan & Bronx Surface Tr. Operating Auth.*, 79 AD3d 412, 413 [1st Dept 2010]; *Selzer v New York City Tr. Auth.*, 100 AD3d 157, 162 [1st Dept 2012]; *Califano v City of New York*, 212 AD2d 146, 153 [1st Dept 1995]; *Schein v Chest Serv. Co.*, 38 AD2d 929 [1st Dept 1972]). As the Court of Appeals has explained, "A party is not permitted to speculate upon a favorable verdict before asserting a claim that could properly be made during trial" (*Virgo*, 49 NY2d at 984).

It is only in the rare case where the misconduct of opposing counsel was so wrongful and persistent as to constitute a fundamental error and a gross injustice that a trial court may providently exercise its discretion under CPLR 4404(a) to set aside the verdict on the grounds of such misconduct, in spite of the aggrieved party's failure to make a timely mistrial motion (see *Boyd*, 79 AD3d at 413; *Heller v Louis Provenzano, Inc.*, 257 AD2d 378, 379 [1st Dept 1999]). Although the instant appeal presents a close question, my ultimate conclusion is that this one of those rare cases. I therefore concur in the affirmance of the order under review.

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

ENTERED: APRIL 18, 2017


CLERK