SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 10, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

205-
206 Index 190415/12

In re New York Asbestos Litigation

- - - - -

Phyllis Brown, as Administratrix of the Estate of Harry E. Brown, etc.,
Plaintiff-Appellant,

-against-

Bell & Gossett Company,
Defendant,

Consolidated Edison of New York, Inc.,
Defendant-Respondent.

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Weitz & Luxenberg, P.C., New York (Alani Golanski of counsel), for appellant.

David M. Santoro, New York (Stephen T. Brewi of counsel), for respondent.

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Order, Supreme Court, New York County (Barbara Jaffe, J.), entered August 29, 2014, which granted defendant Consolidated Edison's (Con Edison) posttrial motion to set aside the verdict against it and direct that judgment be entered in its favor dismissing the complaint against it, and order, same court and Justice, entered March 13, 2015, which, to the extent appealed

from as limited by the briefs, upon renewal and reargument of Con Edison's motion, adhered to the original determination, reversed on the law and facts, without costs, the posttrial motion denied, the verdict as against Con Edison reinstated, and a new trial on damages for loss of consortium ordered unless plaintiff stipulates, within 30 days after service of a copy of this order with notice of entry, to reduce the loss of consortium verdict to $360,000, and to entry of a judgment in accordance therewith.

The trial court improperly set aside the verdict in plaintiff's favor on the Labor Law § 200 claim against Con Edison. The evidence at trial demonstrated that Con Edison had the "authority to control the activity bringing about the injury" (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876 [1993] [internal quotation marks omitted]). "[A]n implicit precondition to this duty is that the party to be charged with that obligation have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998] [internal quotation marks and emphasis omitted]).

In the recently decided case of *Matter of New York City Asbestos Litig.* (*North*) (142 AD3d 408, 409 [1st Dept 2016]), we upheld a jury verdict in the plaintiff's favor on a section 200

claim in an asbestos case where a predecessor of one of the defendants had issued detailed specifications directing contractors in the means and methods of mixing and applying asbestos-containing concrete and insulation at a power plant. In so holding, we reasoned that it was of no consequence that the defendant had supervised the superintendents, rather than directly supervising the workers (*id.*).

Similarly, in *Rizzuto*, the Court of Appeals reversed an order granting the defendant general contractor's motion for summary judgment dismissing, inter alia, section 200 and common-law negligence claims where an employee of a plumbing subcontractor was injured by diesel fuel that sprayed on him while he was in the process of removing and replacing a submersible pump in the fuel station area of a Transit Authority bus terminal (91 NY2d at 347-348). Although the general contractor did not have control over the subcontractor's plumbing methods per se, the general contractor had control over the methods of the subcontractors and other site workers "in the sense that [it] had the ability to coordinate the work activity of its subcontractors and the Transit Authority, had the capacity to exclude the Transit Authority from working in the fuel station area of the depot, or had the authority to direct either its

subcontractors or the Transit Authority to not engage in an operation while another potentially hazardous activity, i.e., pressure-testing an underground fuel tank, was taking place within the immediate area" (*id.* at 353; *see also Bush v Gregory/Madison Ave.*, 308 AD2d 360, 361 [1st Dept 2003] [presence of safety coordinator with authority to stop work if a dangerous condition arose raised triable issue of fact]).

Con Edison had the ability to prevent the hazard ultimately causing the plaintiff's injury, namely, the application of asbestos-containing materials. Indeed, Con Edison's specifications *affirmatively required* the use of hazardous asbestos-containing insulation materials, and Con Edison monitored work for compliance with those specifications. This is a far different situation from one in which a defendant has general workplace oversight, but there is no claim that the specifications themselves mandated that the contractor engage in the injury-producing activity.

This case is dissimilar to previous ones we have encountered involving injuries arising from the installation or removal of asbestos materials. *Matter of New York City Asbestos Litig.* (*Tortorella*) (25 AD3d 375 [1st Dept 2006]), *Matter of New York City Asbestos Litig.* (*Philbin*) (25 AD3d 374 [1st Dept 2006]), and

Matter of New York City Asbestos Litig. (*Held*) (41 AD3d 177 [1st Dept 2007]), relied on by the trial court in overturning the jury's verdict, are inapposite.

The order should be reversed to direct a new trial on damages unless plaintiff stipulates to reduce the loss of consortium verdict to $360,000, the amount suggested by the trial court (*see Penn v Amchem Prods.*, 85 AD3d 475, 476 [1st Dept 2011] [loss of consortium award over 13 months reduced from $1,670,000 to $260,000 or $20,000 per month]).

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

SWEENY, J. (dissenting)

I dissent.

The decedent Harry E. Brown worked with asbestos-containing insulation from 1959 to 1974. From the winter of 1964 to the spring of 1965, he was employed by Robert A. Keasbey, Inc. (Keasbey) as an asbestos insulation installer. Keasbey was a subcontractor at defendant Con Edison's Ravenswood power plant, where it held the subcontracts for asbestos insulation from the three major contractors at the site: Combustion Engineering (boiler), General Electric (turbine) and either Couter or Wolf & Manier (pipes). The contracts between Con Edison or its general contractor with these three contractors required that each would provide a foreman in charge of its specific work and that Con Ed would inspect all contractors' work periodically to ensure compliance with contract specifications as well as to enforce general safety at the site. The contracts further provided that whenever work generated harmful dust, the contractor was obligated to install and maintain equipment that protected the plant and workers against such dust.

Decedent testified at his deposition that he was exposed to asbestos-containing dust while working at the Ravenswood site, where ventilation was inadequate and the workers did not wear

masks. He stated that he took his work instructions from Keasbey's foreman. Although he considered every property owner to be "in charge" of any construction work at any project he worked at, he testified that he never spoke with or received any direction from anyone from Con Ed while working at Ravenswood.

Keasby's foreman at the Ravenswood job testified that the general contractor would coordinate the various activities of the trades through a schedule. The job specifications would have been approved by Con Ed.

Con Ed's engineers and construction managers testified that they monitored the work to ensure that the contractors performed their work productively, safely and according to a preset schedule. If a problem arose, it was taken to their supervisors at Con Ed, as they did not have the authority to direct the contractors' work.

The jury returned a verdict, finding that decedent was exposed to asbestos at Ravenswood, that Con Ed exercised supervision and control over the workers at Ravenswood in a negligent manner and that such negligence was a substantial cause of plaintiff's injuries. It further found that Con Ed was 30% liable and awarded plaintiff $2.5 million. The jury also awarded plaintiff $1 million for the loss of consortium of her husband.

Con Ed moved pursuant to CPLR 4404(a) to set aside the verdict, arguing that, as a matter of law, plaintiff had failed to adduce sufficient evidence from which the jury could reasonably infer that Con Ed exercised supervisory control over Brown's work. The court agreed, set aside the jury verdict and dismissed plaintiff's complaint as against Con Edison. The court also found that the loss of consortium award was excessive and reduced it to $360,000.

Plaintiff thereafter moved to renew and reargue, arguing that the court's reliance on several recent asbestos cases (*Matter of New York City Asbestos Litig.* (*Tortorella*) (25 AD3d 375 [1st Dept] 2006), *Matter of New York City Asbestos Litig. (Philbin*) (25 AD3d 374 [1st Dept 2006]) and *Matter of New York City Asbestos Litig.* (*Held*), 41 AD3d 177 [1st Dept 2007]) was misplaced. She also argued that the remittitur on the loss of consortium was improper, since the issue was rendered moot by the dismissal of the complaint. Both motions were denied.

It is well settled that liability under Labor Law § 200 falls into two broad categories, depending on whether the injury arose from allegedly defective or dangerous premises conditions or from the means and methods of the work (*see Purcell v Metlife Inc.*, 108 AD3d 431, 432 [1st Dept 2013]). The parties here agree

that this case falls within the latter "means and methods" category. As a result, "the owner or general contractor may be liable only if it exercised supervision or control of the work that led to the injury" (1B NY PJI3d 2:216 at 339 [2016]; *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]).

As an initial matter, I agree with the majority that the trial court erred in holding that *Philbin*, *Tortorella* and *Held* are squarely on point with the instant case. Simply because the complaints in those cases were dismissed on the basis of insufficient evidence of Con Ed's supervision or control over the activity that led to injury-producing asbestos exposure, they are not dispositive of the issues in this case. The facts of those cases differ from the instant case in important respects, such as contract specifications, the type of work in question, or the issues raised and argued on appeal.

Nevertheless, in my view, the court correctly dismissed the Labor Law § 200 and common-law negligence claims against Con Ed. There is no evidence on this record that Con Ed exercised the necessary degree of supervision or control over the decedent's work as an insulation installer to subject it to liability under the statute (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505 [1993]). The presence of Con Ed personnel at the work

site to monitor the progress of the work under a preset schedule, and to inspect the project to confirm that the work was performed in accordance with the contract specifications, as well as Con Ed's authority to enforce general safety standards is indicative of a general right of inspection, and not of supervisory control (*see Comes*, 82 NY2d at 877). Indeed, as noted, decedent specifically testified that he took his instructions from Keasbey's foreman and did not speak to Con Ed personnel. Con Ed's general supervisory control is thus insufficient to impose liability under Labor Law § 200 or the common law (*see Bisram v Long Is. Jewish Hosp.*, 116 AD3d 475, 476 [1st Dept 2014]; *Reilly v Newireen Assoc.*, 303 AD2d 214, 221 [1st Dept 2003], *lv denied* 100 NY2d 508 [2003]; *Singleton v Citnalta Constr. Corp.*, 291 AD2d 393, 394 [2d Dept 2002]).

The majority's reliance on our recent decision in *Matter of New York City Asbestos Litig.* (*North*) (142 AD3d 408 [1st Dept 2016]) is misplaced. In *North*, we upheld the verdict against the defendant National Grid on the plaintiff's Labor Law § 200 cause of action because LILCO, defendant's predecessor in interest, "issued detailed specifications directing contractors in the means and methods of mixing and applying asbestos-containing concrete and insulation at the power plant" (*id.* at 409).

Additionally, LILCO retained the authority to direct the various trades "as to where and when to do their work, which resulted in plaintiff's working in close contact with the asbestos-dust-producing insulators" that caused the plaintiff's injuries and ultimately his death (*id.*). This type of control over the means and methods of the injury-causing work falls squarely within the precedents set out in *Comes, Ross* and *Bisram* and is notably absent in this case. While it is true that Con Ed required the use of asbestos-containing insulation, it played no role in controlling how that installation was installed. That function was left to plaintiff's employer. Indeed, the record is clear that, while Con Ed had inspectors on site monitoring the work, the inspectors did not have the authority to direct the work performed by Keasbey's employees.

Nor does *Rizzuto v L.A. Wenger Contr. Co.* (91 NY2d 343 [1998]), also relied upon by the majority, compel a different result. There the Court found that there was a triable issue of fact as to whether the defendant general contractor had control over the methods of the subcontractors and other work site employees (*id.* at 353). However, unlike here, there was testimony from the defendant's supervisor that it was his responsibility to coordinate activities between the defendant's

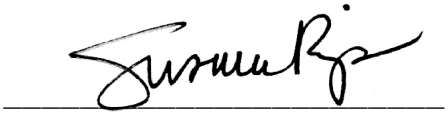
employees and the owner Transit Authority's personnel performing duties unrelated to the ongoing repair work (*id.* at 352-353). The defendant's project supervisor had the authority to control access to areas under construction and to exclude any other persons not employed by the defendant (*id.*). He also knew that there were ongoing Transit Authority operations at the site, unrelated to the repair work undertaken by the defendant (*id.*). The project supervisor testified it was his responsibility to ensure that no Transit Authority activities took place in areas where defendant's employees were working (*id.* at 353). He thus knew, or should have known, that Transit Authority employees had begun pressure testing a fuel tank near where the plaintiff, an employee of a subcontractor was working (*id.*). Diesel fuel erupted during the test, spraying the plaintiff, causing him to fall and sustain injuries (*id.* at 347). This was the result of a failure of coordination of the trades, the very task the defendant general contractor had been performing. That type of control is notably absent here.

Significantly, the injury in the instant case arose from the

manner in which plaintiff installed the insulation. Con Ed was not involved in that activity, the means and methods of that work being left to Keasbey.

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

ENTERED: JANUARY 10, 2017



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Acosta, J.P., Richter, Mazzarelli, Kapnick, Gesmer, JJ.

1965-
1966 The People of the State of New York,
Respondent,

-against-

Deron Boone,
Defendant-Appellant.

Ind. 4740/10

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

Deron Boone, appellant pro se.

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

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Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered July 14, 2011, convicting defendant, after a jury trial, of assault in the third degree, and sentencing him to a term of nine months, and judgment, same court (Richard D. Carruthers, J. at expert witness application; Juan M. Merchan, J. at jury trial and sentencing), rendered November 6, 2013, as amended November 21, 2013, convicting defendant of criminal possession of a weapon in the second degree, and sentencing him, as a second felony offender, to a term of 14 years, unanimously affirmed.

We first address the motion court's denial of defendant's

application to admit expert testimony with respect to false confessions. We agree with the motion court's conclusion, after reargument, that defendant was entitled neither to present the testimony of a false confessions expert at trial nor to test the issue at a *Frye* hearing. However, our agreement with this result is based on a different interpretation of *People v Bedessie* (19 NY3d 147, 161 [2012]).[1] It is important to clarify our interpretation of *Bedessie*'s scope because of the evolving law on false confessions.

In addressing the admissibility of expert testimony on false confessions in *Bedessie*, the Court of Appeals explained that an expert could testify about either dispositional or situational factors (*see Bedessie*, 19 NY3d at 161). Dispositional factors arise where a defendant's personality or psychological makeup could make him or her particularly susceptible to confessing falsely (*id.* at 159). Situational factors may be present when the interrogation is conducted in a way that might induce a defendant to make a false confession (*id.*). Regardless of

[1] When a trial or motion court's decision involves a "single multipronged legal ruling," an appellate court may affirm on an alternate theory of the multipronged analysis (*People v Garrett*, 23 NY3d 878, 885 n 2 [2014]). Here, we analyze defendant's application under *Bedessie*, just as the motion court did, but, we affirm its decision based on a different reading of *Bedessie*.

whether the expert would testify about disposititonal or situational factors, the Court of Appeals emphasized that a proffer must show that the expert's testimony was "relevant to the defendant and interrogation before the court" (*id.* at 161). Since the defendant failed to show that the proposed expert testimony in *Bedessie* was relevant to the "defendant *or* her interrogation," the Court of Appeals affirmed the denial of her application (*id.* at 149 [emphasis added]).

In this case, defendant moved to admit the testimony of an expert on false confessions. The motion court granted the motion to the extent of ordering a *Frye* hearing.

Defense counsel then advised the People that she would only introduce evidence as to situational factors, not dispositional factors. The People moved to reargue the court's order. The motion court granted reargument, and, upon reargument, denied defendant's motion, and refused to either admit the evidence or to hold a *Frye* hearing. It held that this result flowed from *Bedessie*, which it held required that a proposed expert's testimony must address both dispositional and situational factors in order to be admissible.

We do not interpret *Bedessie* this way. In *Bedessie*, the Court of Appeals rejected the defendant's proposed expert

testimony because it was not specific to the case before it; the court did not mandate that the proposed expert must address both dispositional and situational factors.

As this Court has previously held, a motion to admit expert testimony on false confessions is properly denied when "defendant's motion papers, which contained no expert affidavit, did not establish that the proposed expert's testimony would be relevant to the defendant and interrogation before the court" (*People v Roman*, 125 AD3d 515, 515 [1st Dept 2015] [internal quotation marks omitted], *lv denied* 26 NY3d 1091 [2015]). In this case, defendant has not shown that the proposed expert testimony would be addressed to the circumstances of this defendant's interrogation. Therefore, we agree with the denial of defendant's motion.

The trial court properly exercised its discretion in denying defendant's request to impeach the interrogating detective by way of his Facebook posts that assertedly demonstrated his implicit bias against defendant. These posts had no connection or applicability to defendant or any racial or economic group to which he belonged. Defendant's interpretation of the alleged subtexts of these posts was speculative and too remote from the issue of bias to be admissible (*see People v Thomas*, 46 NY2d 100,

105-106 [1978], *appeal dismissed* 444 US 891 [1979]). Accordingly, there was no violation of defendant's right to cross-examine witnesses.

The court, which thoroughly instructed the jury on the issue of the voluntariness of defendant's confession, did not err in refusing to include a charge on attenuation of a confession from a previous one that lacked *Miranda* warnings (*see People v Rabady*, 28 AD3d 794, 795 [2d Dept 2006], *lv denied* 7 NY3d 761 [2006]; *People v Smith*, 209 AD2d 1005, 1006 [4th Dept 1994], *lv denied* 85 NY2d 866 [1995]). Regardless of whether an attenuation instruction might be appropriate in some cases, it was not warranted on the facts of this case, and its absence was harmless in any event.

The court's interested witness charge, which followed the Criminal Jury Instructions, was not constitutionally deficient (*see People v Davis*, 127 AD3d 614, 615 [1st Dept 2015], *lv denied* 26 NY3d 928 [2015]; *People v Blake*, 39 AD3d 402, 403 [1st Dept 2007], *lv denied* 9 NY3d 873 [2007]). With appropriate limitations, as here, a defendant's particular interest in the outcome of a case is "a matter properly to be suggested by the court to the jury" (*Reagan v United States*, 157 US 301, 305 [1895]).

Defendant's retrial on the weapon possession count following a mistrial due to a deadlocked jury did not violate his federal or state constitutional rights against double jeopardy, regardless of the legal sufficiency of the evidence at the first trial (*see Richardson v United States*, 468 US 317, 323-326 [1984]). In any event, the evidence at the first trial was legally sufficient.

We reject defendant's argument that the verdict at his first trial, convicting him of third-degree assault, was against the weight of the evidence (*see People v Chiddick*, 8 NY3d 445, 447 [2007]).

Defendant's pro se ineffective assistance of counsel claims are unreviewable on direct 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]). Defendant's remaining pro se claims are without merit.

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

ENTERED: JANUARY 10, 2017

CLERK

Acosta, J.P., Renwick, Moskowitz, Feinman, Kahn, JJ.

2220 Huseyin Erkan, et al., Index 151961/14
Plaintiffs-Appellants,

-against-

McDonald's Corporation, et al.,
Defendants-Respondents.

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Law Offices of Jeffrey K. Levine, New York (Jeffrey K. Levine of counsel), for appellants.

Stoneberg Moran, LLP, New York (Michael L. Stoneberg of counsel), for McDonald's Corporation and McDonald's USA, LLC, respondents.

Wood Smith Henning & Berman, LLP, New York (Kevin Fitzpatrick of counsel), for Custom Commercial Construction Corp., respondent.

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Order, Supreme Court, New York County (Shlomo Hagler, J.), entered April 28, 2015, which denied plaintiffs' motion for partial summary judgment on their Labor Law § 240(1) claim, without prejudice to renew upon the completion of discovery, unanimously reversed, on the law, without costs, and the motion granted.

Plaintiff Huseyin Erkan (plaintiff) alleges that while installing tiles on the exterior of defendant McDonald's Corporation's new restaurant, he was injured when he fell to the ground after the unsecured ladder on which he was standing shifted and tilted as he attempted to step onto an adjacent,

unsecured Baker's scaffold in order to continue his work.

Plaintiffs commenced their action against McDonald's and the general contractor, Custom Commercial Construction Corp. claiming violations of Labor Law §§ 200, 240(1), and 241(6), and spoliation of the ladder.[1] The parties entered into a preliminary conference order requiring in relevant part that defendants serve their disclosure by January 22, 2015, with depositions to commence in April 2015. Defendants failed to provide their disclosure by the deadline, and on January 23, 2015, plaintiff made the instant motion for partial summary judgment on the Labor Law § 240(1) claim, or to strike defendants' answers on the grounds of spoliation.

Plaintiff made a prima facie showing of entitlement to judgment as a matter of law on the issue of liability under Labor Law § 240(1), through his affidavit stating that he was not provided with any safety equipment that could have protected him while performing his work alone on the ladder and scaffold (*see generally Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP,* 26 NY3d 40, 49 [2015]). Once it is determined that the owner or contractor failed to provide the necessary safety

[1] Plaintiff Emine Erkan's claims are derivative of her husband's Labor Law claims.

devices required to give a worker "proper protection," absolute liability is inescapable under Labor Law § 240(1) *(Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]). Thus, in opposition, defendants were required to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact to preclude summary judgment (CPLR 3212[b]; *see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Here, defendants' primary argument before the motion court was that the motion is premature because plaintiff had not yet been deposed. However, they failed to identify what information is in the exclusive control of plaintiff that would raise a material issue of fact such that CPLR 3212(f) would warrant denial of the motion. Custom Commercial submitted an affidavit by its vice president stating that the company did not own or use ladders or scaffolds on the job. This claim has no import under the absolute liability standard of Labor Law § 240(1) (*see Ross* at 500-501). At oral argument, and in defendant Custom Commercial's brief, it was conceded that this accident was unwitnessed. Defendants argue, however, that the unverified accident report and a few unverified medical records, in inadmissible form, suggest that plaintiff may not have been working alone, that there might not have been a Baker's scaffold

in the area, and that initially after the accident, he could not remember how it happened. Custom Commercial submitted additionally an unsworn statement written by plaintiff's employer, who claimed that one of his employees told him that plaintiff had disregarded his instructions from that morning to tile no higher than five feet from the ground and borrowed a ladder from another subcontractor in order to tile a part of the wall up to the roof line.

Records without proper certification may be considered in opposition to a motion for summary judgment, but only when they are not the sole basis for the court's determination (*see Djeddah v Williams*, 89 AD3d 513, 514 [1st Dept 2011]; *Clemmer v Drah Cab Corp.*, 74 AD3d 660, 661 [1st Dept 2010]). Here, the unverified documents and unsworn statement are the *only* evidence to challenge details of plaintiff's version of the accident and therefore should not be considered. "The mere hope that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny such a motion" (*Guerrero v Milla*, 135 AD3d 635, 636 [1st Dept 2016] [internal quotation marks omitted]).

In sum, defendants have not offered an evidentiary basis "to suggest that discovery may lead to relevant evidence" (*DaSilva v*

Haks Engrs., Architects & Land Surveyors, P.C., 125 AD3d 480, 482 [1st Dept 2015] [internal quotation marks omitted]; *see also Progressive Northeastern Ins. Co. v Penn-Star Ins. Co.*, 89 AD3d 547, 548 [1st Dept 2011]). Even if the unverified evidence were considered, it does not show that there are not-yet-stated facts only known to plaintiff that would call into question the central claim that plaintiff was not provided with proper safety equipment for his work. Further, even if a worker is found to have contributed to the accident, once it is determined that the owner or contractor did not provide proper protection to the employee, it will be found liable under Labor Law § 240(1) *(Zimmer v Chemung County Performing Arts,* 65 NY2d 513, 521 [1985]). Unless the worker's actions were the sole proximate cause of his or her injuries, the owner and contractor remain statutorily liable under Labor Law § 240(1) (*see Hernandez v Bethel United Methodist Church of N.Y.*, 49 AD3d 251, 252-253 [1st Dept 2008]). However, defendants have not adequately raised an

issue of fact as to whether plaintiff was the sole proximate cause of his accident.

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

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

ENTERED: JANUARY 10, 2017

CLERK

Renwick, J.P., Saxe, Gische, Webber, JJ.

2385-
2386 Index 601271/10

Federal-Mogul Corporation, et al.,
Plaintiffs-Appellants-Respondents,

-against-

UTi, United States, Inc.,
Defendant-Respondent-Appellant.

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Winston & Strawn LLP, New York (Kelly Ann Librera of counsel), for appellants-respondents.

Venturini & Associates, New York (August C. Venturini of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered July 1, 2015, which, insofar as appealed from as limited by the briefs, granted defendant's motion for summary judgment dismissing the complaint to the extent of limiting plaintiffs' cover damages to those incurred between May 13 and 18, 2010, and dismissing plaintiffs' request for attorneys' fees, and denied the motion as to dismissing plaintiff WestPoint Homes LLC f/k/a WestPoint Homes, Inc.'s (WP) contract claim in its entirety, and denied plaintiffs' motion for leave to file a second amended complaint, unanimously modified, on the law, to clarify that plaintiffs' claimed cover damages incurred between May 13 and 18 may only be awarded in the event it is

found that plaintiffs did not first materially breach the contracts, so that defendant's May 13 letter constituted a repudiation of the parties' contracts, and otherwise affirmed, without costs. Order, same court and Justice, entered July 17, 2015, which denied plaintiffs' motion to add a contract claim for certain fuel surcharges, unanimously affirmed, without costs.

Defendant contends that its May 13 letter did not repudiate the contracts because its July 22, 2009 letter reserved the right to further negotiate the contracts or rescind them if plaintiffs did not award it all of their business. This argument is unavailing. While the July 22 letter constituted defendant's counteroffer (*see Homayouni v Banque Paribas*, 241 AD2d 375 [1st Dept 1997]), Hunter Gary of Icahn Sourcing (plaintiffs' affiliate) had a conversation with Chris Dale and Gene Ochi of defendant that in essence constituted plaintiffs' counteroffer to defendant's counteroffer. Gary told Dale and Ochi that it was a condition of plaintiffs' countersigning the contracts that defendant's letter "disappear," and Dale and/or Ochi said he/they understood. Since Gary's offer was the last in time, it is the operative one. The conversation was not a prohibited oral modification because it occurred *before* plaintiffs countersigned the contracts.

Next, defendant contends that plaintiffs were the first to breach the contracts, by failing to negotiate fuel costs in good faith, and that therefore it was entitled to send its May 13 letter. However, there is conflicting evidence as to whether plaintiffs and/or Icahn Sourcing failed to negotiate in good faith. Moreover, even if, arguendo, plaintiffs breached first, there is an issue of fact as to whether their breach was material, entitling defendant to breach (i.e., send its May 13 letter) (*see e.g. N450JE LLC v Priority I Aviation, Inc.*, 102 AD3d 631 [1st Dept 2013]).

If the finder of fact concludes either that plaintiffs negotiated in good faith or that they failed to negotiate in good faith but this was not a material breach, then defendant's May 13 letter constitutes a repudiation (*see Created Gemstones v Union Carbide Corp.*, 47 NY2d 250, 255 n 5 [1979]) and an anticipatory breach (*see Rachmani Corp. v 9 E. 96th St. Apt. Corp.*, 211 AD2d 262, 267 [1st Dept 1995]).

The motion court thus erred in finding as a matter of law that defendant's May 13 letter was a repudiation. It also erred in finding that defendant retracted its repudiation on May 18, 2010 (*see e.g. Beinstein v Navani*, 131 AD3d 401, 406 [1st Dept 2015]). However, the court correctly concluded that plaintiffs'

cover damages (if any) must be limited to those incurred between May 13 and 18. If defendant unjustifiably refused to ship their goods, then plaintiffs had to find alternative means of transport, and they are entitled to the difference between the higher price charged by other freight forwarders and the lower price in the contracts between the parties. However, even if the issue of a prior breach by plaintiffs is resolved in their favor, plaintiffs will not be entitled to cover damages arising from their use of alternative means of transport after May 18, 2010. The parties entered into an in-court stipulation on that date whereby defendant agreed to resume shipping immediately if plaintiffs paid the higher fees mentioned in its May 13 letter, with plaintiffs reserving their rights. Thus, after May 18, plaintiffs' decision to use other freight forwarders could no longer be based on defendant's breach, i.e., its refusal to ship their goods (*see Pesa v Yoma Dev. Group, Inc.*, 18 NY3d 527, 532 [2012]).

Assuming, arguendo, that plaintiffs preserved their argument about attorneys' fees, which they make only in a footnote, it is unavailing. Like the indemnification provision in *Hooper Assoc. v AGS Computers* (74 NY2d 487 [1989]), section 30 of the subject contracts contemplates third-party claims, not claims between the

parties.

Defendant contends that the court should have dismissed WP's contract claim entirely because WP did not pay all of defendant's invoices. However, while WP's own performance under the contract is an element of its breach of contract claim (*Dorfman v American Student Assistance*, 104 AD3d 474, 474 [1st Dept 2013]), there are triable issues of fact as to WP's obligation to pay. The contract requires WP to pay within 45 days after receipt of a *correct* invoice; defendant's own emails show that it sent incorrect invoices and at least one duplicate invoice and that some invoices were missing.

The court properly denied plaintiffs' motions to add claims that defendant fraudulently induced them into amending the contracts and breached the amendments by improperly calculating certain fuel surcharges (*see Perrotti v Becker, Glynn, Melamed & Muffly LLP*, 82 AD3d 495, 498 [1st Dept 2011]). To be viable, a fraudulent inducement claim must demonstrate justifiable reliance on the false representation (*id.*). By the time plaintiffs entered into the amendments in the summer of 2010, they had already sued defendant. Moreover, plaintiffs are sophisticated entities (*see e.g. Shea v Hambros PLC*, 244 AD2d 39, 47 [1st Dept 1998]). Unlike the situation in *DDJ Mgt., LLC v Rhone Group*

L.L.C. (15 NY3d 147 [2010]) and *CIFG Assur. N. Am., Inc. v Goldman, Sachs & Co.* (106 AD3d 437 [1st Dept 2013]), plaintiffs did not obtain representations and warranties that defendant's statements (the ones plaintiffs now claim they relied on) were true. Indeed, plaintiffs knew they were not getting all the documents they wanted from defendant, and yet they did not condition the amendments upon an inspection of its books and records (*see e.g. Rodas v Manitaras*, 159 AD2d 341 [1st Dept 1990]).

Contrary to plaintiffs' contention, the amended complaint does not give defendant notice that plaintiffs are seeking fuel overcharges; hence, the court properly required plaintiffs to add a specific claim for such overcharges. It then properly denied the motion to amend. Reading subsections 37.2 and 37.3 of the contracts together, giving them a reasonable commercial construction, and taking into account defendant's conduct regarding documents, we deem plaintiffs' deadline for giving defendant notice to be 90 days from when they discovered that it might have overcharged them for fuel, i.e., 90 days from November 19, 2014. Plaintiffs missed that deadline. While they moved in January 2015 to add a claim for *fraudulent inducement*, they said in their reply brief on that motion that they were "not claiming

that [defendant] failed to perform its obligations under the BAF Amendments." In other words, far from giving notice of a fuel overcharge, plaintiffs specifically disclaimed a contract claim for such overcharges.

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

ENTERED: JANUARY 10, 2017

CLERK

Tom, J.P., Richter, Saxe, Gische, Gesmer, JJ.

2667 Victor Lee, Index 154602/14E
Plaintiff-Respondent-Appellant,

-against-

Alma Realty Corp., et al.,
Defendants-Appellants-Respondents.

_____

Gannon, Rosenfarb & Drossman, New York (Lisa L. Gokhulsingh of counsel), for appellants-respondents.

Segal & Lax, New York (Patrick D. Gatti of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Barbara Jaffe, J.), entered on or about April 6, 2016, which, to the extent appealed from, granted defendants' motion for summary judgment dismissing the complaint insofar as it alleges a claim that defendants negligently failed to install a handrail on the stairs where plaintiff fell, and denied the motion insofar as based on lack of constructive notice of the alleged slippery condition, unanimously reversed, on the law, without costs, the motion denied as to the handrail claim, and the motion granted insofar as based on defendants' lack of constructive notice.

Defendants established their prima facie entitlement to summary judgment by demonstrating that it had rained shortly before or at the time of plaintiff's accident and continued

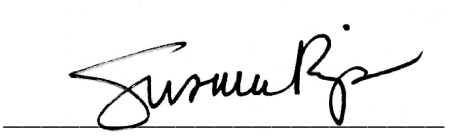
shortly afterward, that they did not have constructive notice of the wet condition, as defendants' porter averred that he had inspected the stairs 15 minutes prior to plaintiff's fall and did not observe any wet condition, and they had no complaints of wetness prior to plaintiff's fall. Moreover, defendants had a doormat in the vestibule to permit people to wipe their feet as they entered (*see Amsel v New York Convention Ctr. Operating Corp.*, 60 AD3d 534, 535 [1st Dept 2009], *lv denied* 13 NY3d 710 [2009]; *Garcia v Delgado Travel Agency*, 4 AD3d 204 [1st Dept 2004]). In opposition, plaintiff did not submit any evidence as to the time elapsed between the cessation of the rain and his accident, and thus failed to raise an issue of fact as to whether defendants had a reasonable amount of time to remedy the wet condition (*see Gleeson v New York City Tr. Auth.*, 74 AD3d 616 [1st Dept 2010]).

The court, however, improperly dismissed plaintiff's claim that defendants failed to install handrails on the subject staircase. The stairs which led to the door providing egress from the building to the outside were interior stairs requiring handrails (Administrative Code §§ 27-232, 27-375; *Cusumano v City of New York*, 15 NY3d 319, 323 [2010]). Plaintiff raised an issue of fact as to whether the absence of handrails was a proximate

cause of his fall by submitting his expert's affidavit stating that the absence of handrails was a dangerous departure from accepted standards and the applicable building code (*see Gold v 35 E. Assoc. LLC*, 136 AD3d 453, 453 [1st Dept 2016]; *Alvia v Mutual Redevelopment Houses, Inc.*, 56 AD3d 311, 312 [1st Dept 2008]).

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

ENTERED: JANUARY 10, 2017



CLERK

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

2668 La Candelaria East Harlem Community Center, Inc., Plaintiff-Appellant, Index 652872/11

Gloria Valdes-Lieske, Plaintiff,

-against-

First American Title Insurance Company of New York, Defendant-Respondent.

_____

Law Office of Jonathan Gould, New York (Jonathan S. Gould of counsel), for appellant.

Herrick, Feinstein LLP, New York (Adam J. Stein of counsel), for respondent.

_____

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered May 16, 2016, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

There is no triable issue of fact as to whether nonparty Triad Abstract Ltd. had actual authority to enter into an escrow agreement with plaintiff-appellant which had nothing to do with the clearance of a title defect (*see generally Standard Funding Corp. v Lewitt*, 89 NY2d 546, 550 [1997] ["Lewitt was expressly authorized only to issue insurance policies and to receive and

collect premiums; nothing in the agency agreement authorized Lewitt to negotiate or enter into premium financing agreements"]; *HSA Residential Mtge. Servs. of Tex., Inc. v Stewart Tit. Ins. Guar. Co.*, 7 AD3d 426, 427 [1st Dept 2004], *lv denied* 3 NY3d 607 [2004]). Contrary to plaintiff's contention, an escrow to comply with a court order regarding a nonprofit's disposition of the proceeds it receives from a sale of property is not title-related (*see generally Voorheesville Rod & Gun Club v Tompkins Co.*, 82 NY2d 564, 571 [1993]).

There is no triable issue of fact as to whether defendant ratified the escrow agreement that purports to be by Triad as authorized agent of defendant. Defendant submitted evidence that the woman to whom plaintiff's employee spoke was not authorized to bind it to a transaction such as an escrow agreement. Plaintiff submitted no proof to the contrary; indeed, it did not even try to contact defendant's former employee.

It is true that "ratification may be implied where the principal retains the benefit of an unauthorized transaction with knowledge of the material facts" (*Standard Funding*, 89 NY2d at 552; *see Matter of New York State Med. Transporters Assn. v Perales*, 77 NY2d 126, 131 [1990]). However, defendant submitted evidence that it received no benefits from the unauthorized

escrow agreement. Plaintiff's contention that defendant benefited because, without the agreement, the transaction would not have closed and defendant would not have received premiums from the buyer of the property, is unavailing. The plain language of the court order authorizing plaintiff to sell the property shows that the escrow was not a precondition to closing.

Since plaintiff failed to brief apparent authority, that issue is not before us (*see e.g. Edelman v Starwood Capital Group, LLC*, 70 AD3d 246, 249 [1st Dept 2009], *lv denied* 14 NY3d 706 [2010]).

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

ENTERED: JANUARY 10, 2017

CLERK

Tom, J.P., Richter, Saxe, Gische, Gesmer, JJ.

2669 Jeffrey Price, Index 653194/13
Plaintiff-Appellant,

-against-

Tunecore, Inc.,
Defendant-Respondent.

_____

Law Office of John Carlson, Merrick (John Carlson of counsel), for appellant.

O'Melveny & Myers LLP, New York (Daniel J. Franklin of counsel), for respondent.

_____

Order, Supreme Court, New York County (Robert R. Reed, J.), entered January 14, 2016, which granted defendant's motion to dismiss the first cause of action only insofar as it sought to reform the parties' written employment agreement, and dismissed the second through sixth and eighth causes of action, unanimously modified, on the law, to the extent of denying the motion to dismiss the second cause of action insofar as it alleged breach of the employment agreement during the period from December 7, 2006 to December 7, 2009, and otherwise affirmed, without costs.

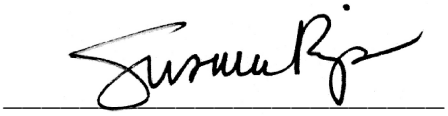
Plaintiff sufficiently alleged breach of the employment agreement based on defendant's failure to pay him the highest salary, but only during the period when the employment agreement, by its terms, was in effect, until December 7, 2009 (*Harris v*

Seward Park Hous. Corp., 79 AD3d 425, 426 [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: JANUARY 10, 2017



CLERK

Tom, J.P., Richter, Saxe, Gische, Gesmer, JJ.

2670-
2671 Index 651809/14

Leon Pokoik, individually, and
in the right and behalf of 234
East 82nd Street, et al.,
Plaintiffs-Appellants,

-against-

Gary Pokoik, individually and
as managing member of 242-44
East 77th Street, LLC, et al.,
Defendants-Respondents.

_____

The Law Firm of Gary N. Weintraub, LLP, Huntington (LeLand S. Solon of counsel), for appellants.

Rosenberg & Estis, P.C., New York (Norman Flitt of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Joan M. Kenney, J.), entered July 14, 2016, dismissing the complaint, and bringing up for review an order, same court and Justice, entered on or about March 14, 2016, which granted defendants' motion to dismiss, and denied plaintiff's application for leave to amend or to correct the summons, unanimously reversed, on the law and the facts, without costs, defendants' motion denied, and plaintiff's application granted. Appeal from the forgoing order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff addressed every ground for dismissal of the complaint set out in the order appealed from, and therefore will not be deemed to have abandoned any claims because he did not speculate in his opening brief about other possible grounds for the dismissal (*see generally McHale v Anthony*, 41 AD3d 265, 266-67 [1st Dept 2007] [purpose of rule limiting appeal is to prevent parties from being surprised by scope of order deciding appeal]).

The court erred in dismissing the complaint on the ground that plaintiff incorrectly named the companies in this derivative action as plaintiffs rather than defendants (CPLR 1003 ["Misjoinder of parties is not a ground for dismissal of an action"]). Moreover, since the request for relief was clearly made in his opposition papers, the court improperly denied plaintiff's request to amend or to correct the summons (*see Marx v Marx*, 258 AD2d 366 [1st Dept 1999]).

On the motion to dismiss, the court should have accepted as true plaintiff's allegations in his affidavit and exhibits as to the demand made on the companies to initiate legal action (*see Ashwood Capital, Inc. v OTG Mgt., Inc.*, 99 AD3d 1, 10 [1st Dept 2012]). These allegations sufficiently set forth the demand (*see Tomczak v Trepel*, 283 AD2d 229, 230 [1st Dept 2001], *lv dismissed*

in part, denied in part 96 NY2d 930 [2001]).

While plaintiff has been engaged before in litigation with defendants (partially prevailing in the most recent case), their relationship was not shown to be so acrimonious or emotional as to demonstrate that plaintiff cannot act as an adequate representative for the companies (*see Gilbert v Kalikow*, 272 AD2d 63 [1st Dept 2000], *lv denied* 95 NY2d 761 [2000]). Nor is there anything inherently improper about bringing claims both derivatively and individually (*see generally Gjuraj v Uplift El. Corp.*, 110 AD3d 540 [1st Dept 2013]).

Because the determination by defendant manager of the amount due to the companies in repayment of legal fees is self-interested, it is not subject to the business judgment rule. The issue of whether the payments that have been made were sufficient is an issue of fact.

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

ENTERED: JANUARY 10, 2017

CLERK

Tom, J.P., Richter, Saxe, Gische, Gesmer, JJ.

2672 The People of the State of New York, Ind. 1600/14
Respondent,

-against-

Demetries Anderson,
Defendant-Appellant.

_____

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

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

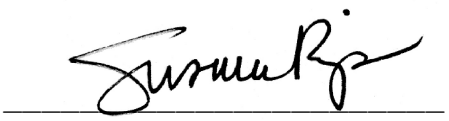
_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Michael Obus, J.), rendered January 8, 2015,

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

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

ENTERED: JANUARY 10, 2017



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

Tom, J.P., Richter, Saxe, Gische, Gesmer, JJ.

2674- Index 156318/12
2675-
2676-
2677-
2678-
2679

G.L., an Infant, by Her Parents and Natural Guardians, etc., et al.,
Plaintiffs-Appellants,

-against-

Alan Harawitz, M.D., et al.,
Defendants-Respondents.

_____

Bruce G. Clark & Associates, P.C., Port Washington (Diane C. Cooper of counsel), for appellants.

Catania, Mahon, Milligram & Rider, PLLC, Newburgh (Ari I. Bauer of counsel), for Alan Harawitz, M.D., Evan Harawitz, M.D. and Monroe Pediatrics Associates, P.C., respondents.

Shaub, Ahmudy, Citrin & Spratt, LLP, Lake Success (Christopher Simone of counsel), for Mirna Chehade, M.D., Keith Breglio, M.D. and Mount Sinai Medical Center, respondents.

_____

Judgments, Supreme Court, New York County (George J. Silver, J.), entered April 28, 2016, dismissing the complaint as against defendant Evan Harawitz, M.D., defendants Alan Harawitz, M.D., and Monroe Pediatric Associates, P.C., and defendants Mirna Chehade, M.D., Keith Breglio, M.D. and Mount Sinai Medical Center, respectively, unanimously affirmed, without costs.

Appeals from orders, same court and Justice, entered January 15,

2016, which granted defendants' respective motions for summary judgment, unanimously dismissed, without costs, as subsumed in the appeals from the judgments.

Defendant pediatricians Alan Harawitz and Evan Harawitz established prima facie that they did not depart from the accepted standard of medical practice in their treatment of the infant plaintiff, who was ultimately diagnosed with a medulloblastoma, a type of brain tumor, by submitting deposition transcripts, medical records, and an expert affirmation that showed that they appropriately evaluated the infant's vomiting and referred her to a specialist when her symptoms persisted, leading to a diagnosis that explained her symptoms.

In opposition, plaintiffs failed to raise a triable issue of fact. Their expert pediatrician's assertions that the infant's condition could have been discovered and treated more successfully earlier had the doctors not deviated from the accepted standard of medical practice were conclusory and speculative (*see Diaz v New York Downtown Hosp.*, 99 NY2d 542 [2002]; *Rodriguez v Montefiore Med. Ctr.*, 28 AD3d 357 [1st Dept 2006]). The pediatric expert recounted the infant's symptomatology inaccurately, which undermined the basis of the opinion, failed to address the defense expert's opinions, and

relied upon facts not contained in the record. The expert's conclusory opinion that "a simple and proper clinical neurological exam would have disclosed signs caused by the tumor growing in her brain and led to the earlier diagnosis ... with ... less damage," was "not supported with scientific data or other medical facts" (*McCarthy v St. Joseph's Med. Ctr.*, 16 AD3d 243, 244 [1st Dept 2005] [internal quotation marks omitted]).

Defendants pediatric gastroenterologists Chehade and Breglio established prima facie that they did not depart from the accepted standard of medical practice, by submitting deposition transcripts, medical records, and an expert affirmation showing that they appropriately evaluated the infant's vomiting, determined that it had a gastroenterological cause, and treated her symptoms accordingly.

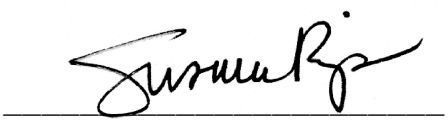
The affidavit of plaintiffs' expert – a pediatrician,

hematologist, and oncologist – was conclusory, speculative, and based upon facts outside the record, and relied on hindsight.

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

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

ENTERED: JANUARY 10, 2017



CLERK

Tom, J.P., Richter, Saxe, Gische, Gesmer, JJ.

2682 The People of the State of New York, Ind. 3626/13
Respondent,

-against-

Edgar Lopez,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Julia L. Chariott of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Margaret L. Clancy, J.), entered August 4, 2015, which adjudicated defendant a level two sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court providently exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). The mitigating factors cited by defendant were adequately taken into account by the risk assessment instrument or were outweighed by the seriousness of the underlying crime, which consisted of repeated sexual abuse of a nine-year-old child over an extended period. In particular, we do not find defendant's age to be a significant mitigating factor, given that

he committed the underlying crime at the age of 41 and is now only three years older.

The court properly designated defendant a sexually violent offender because he was convicted of an enumerated offense, and the court lacked discretion to do otherwise (*see People v Bullock*, 125 AD3d 1 [1st Dept 2014], *lv denied* 24 NY3d 915 [2015]). We have considered and rejected defendant's constitutional arguments.

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

ENTERED: JANUARY 10, 2017

CLERK

Tom, J.P., Richter, Saxe, Gische, Gesmer, JJ.

2683 Lamont Harris, et al., Index 109770/10
Plaintiffs-Respondents,

-against-

Morton's Restaurant Group, Inc., et al.,
Defendants-Appellants.

Goldberg Segalla, LLP, White Plains (William T. O'Connell of counsel), for appellants.

Arnold E. DiJoseph, P.C., New York (Arnold E. DiJoseph of counsel), for respondents.

Order, Supreme Court, New York County (Paul Wooten, J.), entered May 1, 2015, which denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants failed to establish prima facie either that the oysters that plaintiff Lamont Harris (Mr. Harris) ate at their restaurant were not contaminated or that any such contamination did not cause Mr. Harris's illness (*see Williams v White Castle Sys.*, 4 AD3d 161 [1st Dept 2004]; *see also Tardella v RJR Nabisco, Inc.*, 178 AD2d 737 [3d Dept 1991] [consumer's burden of proof is same for negligence, strict products liability and breach of warranty]).

The evidence of noncontamination submitted by defendants is circumstantial, and, while relevant, it is not dispositive, as defendants admit. The evidence of causation shows that Vibrio, a bacteria typically found in undercooked seafood or seawater that may cause illness, was found in Mr. Harris's stool sample. However, contrary to defendants' assertion, it does not show that Vibrio was not pathogenic. The laboratory analysis of the Vibrio found in the stool sample did not conclude that the Vibrio was nonpathogenic; it concluded only that the Vibrio was "[u]nable to [be] speciate[d]," although its closest match was to Grimontia hollisae, a pathogenic species.

Moreover, defendants failed to demonstrate that plaintiffs' evidence did not render the possibility of another explanation for Mr. Harris's illness "sufficiently 'remote' or 'technical' to enable the jury to reach its verdict based not upon speculation, but upon the logical inferences to be drawn from the evidence" (*Gayle v City of New York*, 92 NY2d 936, 937 [1998]). The presence of Vibrio in Mr. Harris's stool is a sufficient factual basis for a finding that it is more likely than not that Mr. Harris's illness was caused by his ingestion of oysters from defendants' restaurant (*see id.*).

To the extent the negligence claim is predicated on breaches

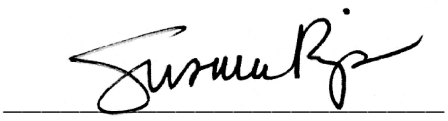
of 10 NYCRR 14-1.40 and 14-1.33, it should be dismissed since those regulations are not relevant to the instant dispute.

We do not reach defendants' argument that there was no sale of goods since it is unpreserved for appellate review (*see Chateau D' If Corp. v City of New York*, 219 AD2d 205, 209 [1st Dept 1996], *lv denied* 88 NY2d 811 [1996]).

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

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

ENTERED: JANUARY 10, 2017



CLERK

Tom, J.P., Richter, Saxe, Gische, Gesmer, JJ.

2685 The People of the State of New York, Respondent, Ind. 4172/10

-against-

Raymond Pilgrim, Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Shera Knight of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Judith Lieb, J.), rendered February 3, 2014, convicting defendant, after a jury trial, of assault in the second degree, and sentencing him, as a second violent felony offender, to a term of 6 1/2 years, unanimously affirmed.

By failing to object, by making generalized objections or an objection on a different ground from those raised on appeal, and by failing to request further relief after objections were sustained, defendant has failed to preserve (*see People v Miller*, 89 NY2d 1077, 1079 [1997]) his challenge to the prosecutor's cross-examination of a defense witness about his failure to come forward to law enforcement authorities (*see People v Dawson*, 50 NY2d 311 [1980]), and we decline to review this claim in the

interest of justice. As an alternative holding, we reject it on the merits. The record as a whole, including matters elicited by defendant on direct examination, shows that the line of questioning was generally permissible under *Dawson*, and was not prejudicial. Moreover, the court precluded a substantial portion of this line of inquiry. In any event, we find any error regarding the prosecutor's cross-examination to be harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

Defendant similarly failed to preserve his challenges to the prosecutor's summation, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal.

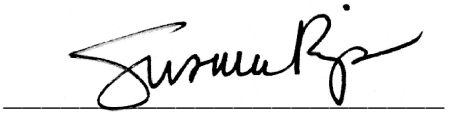
The court providently exercised its discretion, and provided a meaningful response, when it asked the jury to clarify a note (*see generally People v Almodovar*, 62 NY2d 126, 131 [1984]; *People v Malloy*, 55 NY2d 296, 302 [1982], *cert denied* 459 US 847 [1982]). The jury's request, which was subject to conflicting interpretations, warranted clarification, and defendant has not demonstrated that he was prejudiced by the court's inquiry.

Defendant's claim that counsel rendered ineffective assistance by failing to request submission of a lesser included

offense is unreviewable on direct appeal because it involves a matter of strategy 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]). Defendant has not shown that it was objectively unreasonable for counsel to fail to request submission of the lesser offense, or that there is a reasonable possibility that the request would have been led to a more favorable outcome.

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

ENTERED: JANUARY 10, 2017



CLERK

Tom, J.P., Richter, Saxe, Gische, Gesmer, JJ.

2686 In re Sherrene R.,
Petitioner-Respondent,

-against-

Sheena R.,
Respondent-Appellant.

_____

Leslie S. Lowenstein, Woodmere, for appellant.

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

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

_____

Order, Family Court, New York County (Gail A. Adams, Referee), entered on or about December 14, 2015, which, upon a finding of extraordinary circumstances following a hearing, determined that it would be in the best interests of the subject child to award sole physical and legal custody to petitioner grandmother, unanimously affirmed, without costs.

Respondent mother concedes, and the record shows, that the requisite extraordinary circumstances exist for the grandmother to seek custody of the child (*see Matter of Suarez v Williams*, 26 NY3d 440, 448 [2015]; *Matter of Bennett v Jeffreys*, 40 NY2d 543 [1976]; Domestic Relations Law § 72[2][a]). In the presence of such extraordinary circumstances, the court also correctly found

that it is in the child's best interests to remain in the grandmother's custody, as all of the relevant factors to be considered support such a determination (*see e.g. Melissa C.D. v Rene I.D.*, 117 AD3d 407, 407-408 [1st Dept 2014]). The child has been residing with the grandmother for several years and wishes to remain with her, and the grandmother is providing for all of the child's needs (*see Roberta P. v Vanessa J.P.*, 31 AD3d 457 [1st Dept 2016], *lv denied* 28 NY3d 904 [2016]). The court properly exercised its discretion in denying the mother's request for another adjournment, particularly because the need for the postponement was attributable to the mother's own conduct (*see Matter of Jaynices D. [Yesenia Del V.]*, 67 AD3d 518 [1st Dept 2009]).

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: JANUARY 10, 2017

CLERK

Tom, J.P., Richter, Saxe, Gische, Gesmer, JJ.

2687-
2688 Index 24564/05

Rosabel Oquendo,
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent.

_____

Antin, Ehrlich & Epstein, LLP, New York (Arnold E. DiJoseph III of counsel), for appellant.

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

_____

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered on or about October 16, 2014, which denied plaintiff's motion to renew her estoppel arguments based upon new documentary evidence, and order, same court and Justice, entered on or about July 7, 2011, which granted plaintiff leave to renew her opposition to defendant the City of New York's motion to dismiss, and adhered to its prior decision dismissing the complaint for failing to name the Department of Education in the notice of claim and the summons and complaint, unanimously affirmed, without costs.

On January 27, 2005, plaintiff slipped and fell on snow and ice that was in Twin Park Upper School's schoolyard, which is

located at 2055 Mapes Avenue, Bronx County. It is undisputed that when plaintiff served the notice of claim and the summons and compliant, she only named defendant as being responsible for her injuries. It is also undisputed that although defendant in its answer admitted that it owned the accident location, it denied that it controlled, maintained, or managed the schoolyard or had a duty to keep it free of snow and ice.

The court properly denied plaintiff's second and third motions for renewal, because the answer, which was served approximately five months before the one-year-and-90-day statute of limitation expired, admitted that defendant owned the school, but denied that defendant controlled, maintained, or managed the subject schoolyard or had a duty to keep it free of snow and ice, which was sufficient to place plaintiff on notice that she had sued the wrong party (*see Gonzalez v City of New York*, 94 AD3d 559 [1st Dept 2012], *lv denied* 20 NY3d 859 [2013]; *Lorenzo v City of New York*, 71 AD3d 458 [1st Dept 2010]). Accordingly, there is no basis to equitably estop defendant from asserting plaintiff sued the wrong party, because she could not have reasonably relied on the contents of the answer in choosing to assume, incorrectly, that defendant had a duty to maintain the schoolyard and there is no evidence that defendant induced her to forgo

making a timely application for leave to serve a notice of claim upon the Department of Education (*see Flores v City of New York*, 62 AD3d 506, 506-507 [1st Dept 2009]; *Polsky v Metropolitan Transp. Auth.*, 37 AD3d 243 [1st Dept 2007]).

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

ENTERED: JANUARY 10, 2017

CLERK

Tom, J.P., Richter, Saxe, Gische, Gesmer, JJ.

2689 Donato Realty, LLC, et al., Index 152419/12
Plaintiffs-Respondents,

-against-

Utica First Insurance Company,
Defendant-Appellant.

_____

Farber Brocks & Zane L.L.P., Garden City (Sherri N. Pavloff of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Shlomo Hagler, J.), entered on or about July 15, 2016, which granted plaintiffs' motion for summary judgment declaring that defendant is obligated to defend and indemnify plaintiff Donato Realty, LLC in the underlying personal injury action, and denied defendant's cross motion for summary judgment declaring that it is not so obligated, unanimously affirmed, with costs.

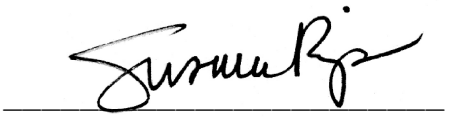
The lease agreement between plaintiff Donato's managing agent and the tenant required the tenant to maintain insurance for itself and Donato against "any liability arising out of the ownership, use, occupancy or maintenance of the demised premises and all areas appurtenant thereto," which includes the sidewalk (*see Tower Ins. Co. of N.Y. v Leading Ins. Group Ins. Co., Ltd.*,

134 AD3d 510 [1st Dept 2015]).

Defendant argues that Donato is not covered for the underlying personal injury, pursuant to the additional insured endorsement in the tenant's policy, which excludes coverage for "any structural alteration" made on Donato's behalf. However, the testimonial evidence indicates an unrepaired structural defect, rather than a structural alteration (*see Leading Ins. Group Ins. Co., Ltd. v Greenwich Ins. Co.*, 44 Misc 3d 435, 444 [Sup Ct, Kings County 2014]). Moreover, the underlying complaint does not allege that the trip and fall was the result of repairs that had been made on Donato's behalf.

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

ENTERED: JANUARY 10, 2017



CLERK

Tom, J.P., Richter, Saxe, Gische, Gesmer, JJ.

2690 The People of the State of New York, Ind. 958/13
Respondent,

-against-

Daniel Washington,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Justin J. Braun of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Steven L. Barrett, J.), rendered June 8, 2015,

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

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

ENTERED: JANUARY 10, 2017

CLERK

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

Tom, J.P., Richter, Saxe, Gische, Gesmer, JJ.

2691-
2692 Index 301863/13

NYCTL 2012-A Trust, et al.,
Plaintiffs-Respondents,

-against-

Jack M. Colbert,
Defendant-Appellant,

New York State Department of
Taxation and Finance, et al.,
Defendants.

_____

Gerard J. White, P.C., Glendale (Gerard J. White of counsel), for appellant.

Windels Marx Lane & Mittendorf, LLP, New York (Stephanie A. LaPerle of counsel), for respondents.

_____

Judgment, Supreme Court, Bronx County (John A. Barone, J.), entered July 7, 2015, granting plaintiffs' motion for a judgment of foreclosure and sale of the subject property in satisfaction of an underlying tax lien, unanimously reversed, on the law, without costs, the judgment vacated, and the matter remanded to Supreme Court for a traverse hearing and further proceedings consistent with the determination rendered after such hearing.

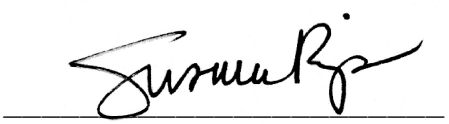
The affidavits of plaintiffs' process server describing defendant as the person who accepted service of the summons, complaint, and notice of pendency, constituted prima facie

evidence of proper service (*see Grinshpun v Borokhovich*, 100 AD3d 551, 552 [1st Dept 2012], *lv denied* 21 NY3d 857 [2013]; *Wells Fargo Bank, NA v Edwards*, 95 AD3d 692 [1st Dept 2012]).

In opposition, however, defendant's affidavit sufficiently rebutted the presumption of service established by the process server because he specifically denied receipt of service insofar as his medical condition rendered him unable to accept service at the times claimed by plaintiffs. Moreover, discrepancies between defendant's stated appearance and the descriptions provided by the process server of the person he served also raised an issue of fact as to whether defendant was personally served (*see NYCTL 1998-1 Trust & Bank of N.Y. v Rabinowitz*, 7 AD3d 459, 460 [1st Dept 2004]; *compare Reem Contr. v Altschul & Altschul*, 117 AD3d 583, 584 [1st Dept 2014]; *Grinshpun*, 100 AD3d at 552). In light of these factual disputes, the court erred in granting the motion for a judgment of foreclosure without first resolving the threshold issue of personal service with a traverse hearing.

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

ENTERED: JANUARY 10, 2017



CLERK

Tom, J.P., Richter, Saxe, Gische, Gesmer, JJ.

2693 The People of the State of New York, Ind. 56/11
Respondent,

-against-

Jimmy Delgado,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Noah J. Chamoy of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Troy K. Webber, J.), rendered September 17, 2013, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 22 years to life, unanimously affirmed.

Defendant claims that defense counsel's failure to object to the admission of evidence in two instances constituted ineffective assistance of counsel. First, he contends that counsel was ineffective in agreeing to the admission of testimony, which defendant asserts was inadmissible hearsay, regarding a fight between defendant and the victim on the day before the homicide. Second, defendant contends that counsel was ineffective for failing to object to the admission of a wanted poster that, in addition to including a photograph that defendant

concedes was admissible in isolation to prove his appearance at the time of the crime, stated that he was "responsible for a homicide," gave two aliases and stated defendant's NYSID number.

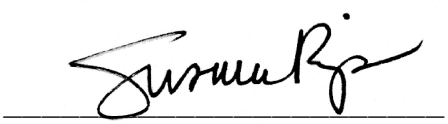
These ineffective assistance claims are unreviewable on direct appeal because they involve matters not reflected in, or fully explained by, the record, including counsel's strategic motivations (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). We are unpersuaded that this is the rare case where the trial record suffices to establish ineffectiveness. Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal.

To the extent that defendant requests us to consider the above-discussed evidentiary issues as unpreserved claims subject to our interest-of-justice jurisdiction, we decline to review them in the interest of justice.

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 10, 2017



CLERK

Tom, J.P., Richter, Saxe, Gische, Gesmer, JJ.

2694-
2695 Index 155421/14

211 West 61st Street Condominium, Inc.,
Plaintiff-Appellant,

-against-

New York City Housing Authority,
Defendants-Respondents.

_____

Klein Slowik PLLC, New York (Christopher M. Slowik of counsel), for appellant.

David I. Ferber, New York (Lauren L. Esposito of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Shlomo S. Hagler, J.), entered August 11, 2016, dismissing the complaint, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered July 14, 2015, which granted defendant's 3211 (a) motion to dismiss, and denied plaintiff's cross motion for, inter alia, summary judgment, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

In 1927, on what was to become plaintiff's lot, located at 211 West 61st Street in Manhattan, stood a tenement. On what was to become defendant's lot, located at 205 West 61st Street, stood another tenement. The two buildings shared a party wall, which

both used for support. In 1927, plaintiff's predecessor tore its tenement down, and erected the current seven story premises. Plaintiff's predecessor incorporated the party wall into the building's facade, but did not use it for support. The tenement remained on defendant's lot until 1934, when defendant's predecessor tore it down. Eventually, the empty lot at 205 West 61st Street was condemned and title passed to the City of New York. In 1947, the City conveyed it to defendant, which eventually used 205 West 61st Street and adjoining lots to construct the Amsterdam Houses, a public housing development. The portion abutting plaintiff's property, however, is used as a parking lot and does not contain a structure.

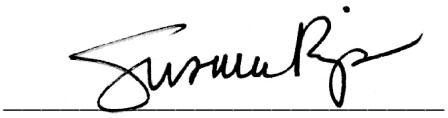
In 2013, plaintiff commenced this action against defendant, alleging that defendant is responsible for maintaining the portions of the former party wall that are now part of the facade of plaintiff's building. Plaintiff contends that the wall, which is now adjacent to the parking lot, is still a party wall. However, once the wall stopped providing support for the structures on the adjacent lots, its status as a party wall and all attendant easements ceased (*see e.g. Heartt v Kruger*, 121 NY 386, 391-392 [1890]; *441 E. 57th St., LLC v 447 E. 57th St. Corp.*, 34 AD3d 378 [1st Dept 2006], *lv denied* 8 NY3d 934 [2007]).

Regardless of whether the wall remained a party wall, defendant took title to the property in 1947, well after the tenement was demolished, and thus bears no responsibility for the supposed negligent demolition of the wall. Even assuming defendant had any responsibility for demolishing the premises, it would have no responsibility for exposing the part of the wall that became part of the facade of plaintiff's building (*Alberti v Emigrant Indus. Sav. Bank*, 179 Misc 1021 [Sup Ct, Bronx County 1942], *affd* 265 AD 1046 [1st Dept 1943]).

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: JANUARY 10, 2017



CLERK

Tom, J.P., Richter, Saxe, Gische, Gesmer, JJ.

2696 The People of the State of New York, Ind. 3149/14
Respondent,

-against-

John Lara,
Defendant-Appellant.

_____

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

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

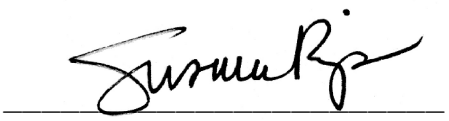
_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Ann M. Donnelly, J.), rendered February 17, 2015,

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

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

ENTERED: JANUARY 10, 2017



CLERK

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

Tom, J.P., Richter, Saxe, Gische, Gesmer, JJ.

2697N Jennifer Fish, Index 159576/15
Plaintiff-Respondent,

-against-

Paula Davis, et al.,
Defendants-Appellants.

_____

Edward P. Kallen, New City, for appellants.

Law Office of Anthony Agrippina, Flushing (Anthony Agrippina of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered on or about May 9, 2016, which denied defendants' motion to change venue of the action from New York County to Rockland County, unanimously affirmed, without costs.

The motion court properly noted that defendants failed to comply with the procedural requirements of CPLR 511 by moving to change venue four months after serving an answer that did not request a change of venue (*see* CPLR 511; *Pittman v Maher*, 202 AD2d 172, 175 [1st Dept 1994]). When a defendant fails to make a demand to change venue, the court may still exercise its discretion to change venue, but "only in certain limited situations," such as when the defendant seeks to enforce a contract provision or when "judicial policy dictates that a case

be heard only in a proper county" (*id.*). While CPLR 507 mandates that venue of an action involving title to or possession, use or enjoyment of real property be the county where the property is located (*see Moschera & Catalano v Advanced Structures Corp.*, 104 AD2d 306 [1st Dept 1984]), here, the action essentially seeks a determination of the individual parties' rights as shareholders of defendant corporation, which owns real property in Rockland County (*see Rubinstein v Bullard*, 285 AD2d 366, 367 [1st Dept 2001]). In opposition to the motion, plaintiff demonstrated that subdivision of the property is not possible, and that the complaint seeks either rescission of the shareholders agreement or specific enforcement of its provision requiring the parties to implement a cooperative ownership plan. Accordingly, the court providently exercised its discretion in denying the motion to transfer venue to Rockland County.

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

ENTERED: JANUARY 10, 2017

CLERK

Tom, J.P., Richter, Saxe, Gische, Gesmer, JJ.

2698 In re Quincy Adams, Index 5431/16
[M-5736] Petitioner,

-against-

Hon. Jeffrey Cohen, et al.,
Respondents.

_____

Quincy Adams, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Margaret A. Cieprisz of counsel), for respondents.

_____

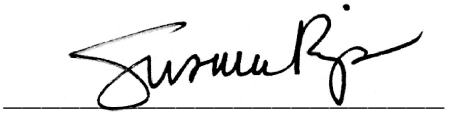
The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

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

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

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

ENTERED: JANUARY 10, 2017



CLERK

Andrias, J.P., Moskowitz, Kapnick, Webber, Kahn, JJ.

2700 Julio Westerband, Index 112964/11
Plaintiff-Respondent,

-against-

Neil E. Buitraso, et al.,
Defendants-Appellants.

_____

Marjorie E. Bornes, Brooklyn, for appellants.

Pollack, Pollack, Isaac & DeCicco, New York (Brian J. Isaac of counsel), for respondent.

_____

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered February 10, 2016, which denied defendants' motion for summary judgment dismissing the complaint on the threshold issue of serious injury within the meaning of Insurance Law § 5102(d), unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Defendants established prima facie that plaintiff did not sustain a serious injury by submitting the affirmed report of a radiologist who reviewed a CT scan of plaintiff's lumbar spine taken after the accident and concluded that it revealed preexisting and degenerative conditions not causally related to the accident (*see Matos v Urena*, 128 AD3d 435 [1st Dept 2015]). Defendants also relied on plaintiff's testimony admitting his

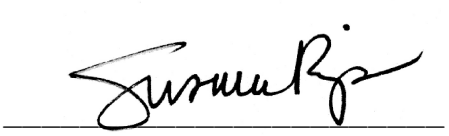
long-term history of degenerative lumbar spine conditions for which he had previously had surgery, and submitted the report of an orthopedic surgeon who, after examining plaintiff and reviewing his extensive medical records, opined that plaintiff's lumbar conditions were degenerative and unrelated to the accident. Contrary to the motion court's reasoning, the radiologist was not required to personally examine plaintiff in order to render an opinion concerning the CT scans (*see Henchy v VAS Express Corp.*, 115 AD3d 478 [1st Dept 2014]), and defendants were able to meet their prima facie burden by showing a lack of causal connection between the injuries and the accident without addressing the issue of limitations in use of the lumbar spine (*see Spencer v Golden Eagle, Inc.*, 82 AD3d 589 [1st Dept 2011]).

In opposition, plaintiff failed to raise an issue of fact. He submitted the operative reports prepared by the surgeons who performed disc replacement surgery after the accident, which identified his diagnosis as chronic degenerative disc disease. His neurologist's conclusory opinion that his preexisting lumbar conditions were aggravated by the subject motor vehicle accident is insufficient to raise an issue of fact, since the neurologist failed to rule out the preexisting conditions demonstrated in plaintiff's own medical records as the cause of the lumbar

conditions, and provided no objective medical basis for determining that those conditions were in any way caused by the accident (*see Alvarez v NYLL Mgt. Ltd.*, 120 AD3d 1043 [1st Dept 2014], *affd* 24 NY3d 1191 [2015]*; Farmer v Ventkate Inc.*, 117 AD3d 562 [1st Dept 2014]; *Brand v Evangelista*, 103 AD3d 539, 540 [1st Dept 2013]).

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

ENTERED: JANUARY 10, 2017



CLERK

Andrias, J.P., Moskowitz, Kapnick, Webber, Kahn, JJ.

2701 In re Nazere McK.,

A Child Under Eighteen
Years of Age, etc.,

Nazaray McK.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Steven N. Feinman, White Plains, for appellant.

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

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

_____

Order of disposition, Family Court, Bronx County (Robert D. Hettleman, J.), entered on or about December 12, 2014, insofar as it brings up for review a fact-finding order, same court and Judge, entered on or about December 11, 2014, which found that respondent mother neglected the subject child, unanimously affirmed, without costs.

A preponderance of the evidence supports the Family Court's finding that on September 19, 2013, respondent neglected the then one-month-old child by causing him to sustain a subconjunctival hemorrhage in his left eye, a scratch on his nostril and a torn frenulum on his upper lip. It is undisputed that the child's

injuries are not of the type that ordinarily occur absent an act or omission and that the child was in respondent's care when his injuries occurred (*see Matter of Ni'Kia C. [Dominique J.]*, 118 AD3d 515, 516 [1st Dept 2014]).

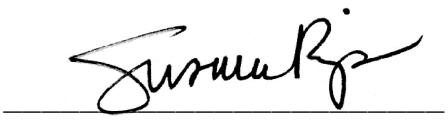
Respondent failed to offer a reasonable and adequate explanation as to how the child sustained his injuries or to otherwise demonstrate why a finding of neglect should not be entered against her (*see Matter of Nasir J.*, 35 AD3d 299, 299-300 [1st Dept 2006]). The testimony of respondent's expert that the child could have sustained the scleral hemorrhage at his birth or from violent screaming, vomiting, and coughing, or from an infection, is not supported by the record because the child had none of those conditions before the September 19, 2013 incident (*see Matter of Radames S. [Maria I.]*, 112 AD3d 433, 434 [1st Dept 2013]). In addition, the Family Court properly rejected the testimony of respondent's expert that it was plausible that the child sustained a torn frenulum after falling face first onto the floor, because she acknowledged that she had only seen such an injury occur in one case out of thousands and that a blow from the hand could affect a child in the same way (*see Matter of Jorela L.*, 222 AD2d 282, 282-283 [1st Dept 1995]).

Given respondent's conflicting accounts as to how the child

became injured, there is no basis to disturb the court's credibility determinations with respect to those varying accounts (*see Matter of Amire B. [Selika B.]*, 95 AD3d 632 [1st Dept 2012], *lv denied* 20 NY3d 855 [2013]). The fact that respondent acknowledged that she failed to tell the truth about the child's injuries because she was afraid he would be removed from her care provided further evidence of neglect (*see Matter of Tiffany F.*, 205 AD2d 429, 430 [1st Dept 1994]).

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

ENTERED: JANUARY 10, 2017



CLERK

Andrias, J.P., Moskowitz, Kapnick, Webber, Kahn, JJ.

2702 Emilio Nunez, Index 301814/10
Plaintiff-Respondent, 83770/11

-against-

Park Plus, Inc.,
Defendant-Respondent,

DeSoto Parking, LLC,
Defendant-Appellant.

- - - - -

Park Plus, Inc.,
Third-Party Plaintiff-Respondent,

-against-

DeSoto Parking, LLC,
Third-Party Defendant-Appellant,

Little Man Parking, LLC,
Third-Party Defendant.

_____

Chesney & Nicholas, LLP, Syosset (John F. Janowski of counsel), for appellant.

Pollack, Pollack, Isaac & DeCicco, LLP (Brian J. Isaac of counsel), for Emilio Nunez, respondent.

McGivney & Kluger, P.C., New York (Kenneth S. Ross of counsel), for Park Plus, Inc., respondent.

_____

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered July 30, 2015, which to the extent appealed from as limited by the briefs, denied defendant DeSoto Parking, LLC's motion for summary judgment dismissing plaintiff's

complaint on the ground that it was barred by the Workers' Compensation Law, unanimously affirmed, without costs.

Plaintiff was employed by third-party defendant Little Man Parking, LLC at a lot owned by defendant-third party defendant DeSoto Parking, LLC. Plaintiff was injured when a mechanical lift holding a parked car landed on his foot, resulting in the amputation of his toe.

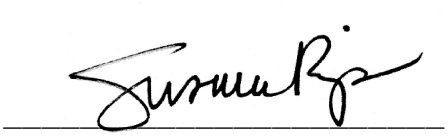
The motion court correctly concluded that plaintiff did not suffer a grave injury within the meaning of Workers' Compensation Law § 11. Consequently, he cannot maintain an action against his employer. However, there are issues of fact concerning whether DeSoto was the alter ego of plaintiff's employer, third-party defendant Little Man Parking, LLC (*see Carty v East 175th St. Hous. Dev. Fund Corp.*, 83 AD3d 529 [1st Dept 2011) sufficient to warrant denial of DeSoto's motion for summary judgment. In addition, there exists, at the very least, a question of fact concerning whether there was a written agreement in place for DeSoto to indemnify third-party plaintiff Park Plus, Inc., the lift owner (*see Baginski v Queen Grand Realty LLC*, 68 AD3d 905 [2d Dept 2009]).

The motion court also properly determined that DeSoto failed

to establish a prima facie case concerning whether plaintiff was its special employee (*Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 557 [1991]).

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

ENTERED: JANUARY 10, 2017



CLERK

Andrias, J.P., Moskowitz, Kapnick, Webber, Kahn, JJ.

2703- Index 150083/14
2704- 150153/11
2705 Rosenbaum, Rosenfeld & Sonnenblick, LLP, et al., 150405/13
Plaintiffs-Respondents,

-against-

Excalibur Group NA, LLC, et al.
Defendants,

A Superior Service and Repair Co., Inc.,
Defendant-Appellant.

- - - - -

The Travelers Indemnity Company of Connecticut, as subrogee of Rosenbaum, Rosenfeld, Sonnenblick, LLP
Plaintiff-Respondent,

-against-

A Superior Service and Repair Co, Inc.,
Defendant-Appellant,

Excalibur Group NA LLC,
Defendant-Respondent,

Home Systems Engineering, Inc.,
Defendant.

- - - - -

Federal Insurance Company as subrogee of Rosenbaum, Rosenfeld & Sonnenblick, LLP,
Plaintiff-Respondent,

-against-

A Superior Service and Repair Co., Inc.,
Defendant-Appellant,

Excalibur Group NA LLC,
Defendant-Respondent,

Home Systems Engineering, Inc.,
Defendant.

_____

Farber Brocks & Zane LLP, Garden City (Tracy L. Frankel of counsel), for appellant.

Lipsius-BenHaim Law LLP, Kew Gardens (David BenHaim of counsel), for Rosenbaum, Rosenfeld & Sonnenblick, LLP, R&R Properties LLC, and Computerized Diagnostic Scanning Associates, P.C., respondents.

Sheps Law Group, P.C., Huntington (Robert Sheps of counsel), for The Travelers Indemnity Company of Connecticut, respondent.

Gambesski & Frum, Elmsford (Malcolm Stewart of counsel), for Excalibur Group NA LLC, respondent.

Mischel & Horn, P.C., New York (Naomi M. Taub of counsel), for Federal Insurance Company, respondent.

_____

Order, Supreme Court, New York County (Ellen M. Coin, J.), entered April 16, 2015 (index nos. 150153/11 and 150405/13) which, to the extent appealed from as limited by the briefs, denied defendant A Superior Service and Repair Co., Inc.'s (Superior) motions for summary judgment dismissing the claims for negligence and cross claims for common law indemnification and contribution, unanimously reversed, on the law, without costs, and the motions granted. The Clerk is directed to enter judgment accordingly. Order, same court (Donna M. Mills, J.), entered May 13, 2015 (index no. 150083/14) which, to the extent appealed from as limited by the briefs, denied defendant Superior's motion

pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint and all cross claims as against it, or pursuant to CPLR 3211(c) to convert the motion to one for summary judgment, unanimously reversed, on the law, without costs, and the motion to dismiss granted. The Clerk is directed to enter judgment accordingly.

Where Superior contracted to do specific, limited plumbing work, its failure to detect and/or correct an improper connection between a sanitary line and the storm water stack outside the scope of its contract and outside the area of its work did not launch a force or instrument of harm for which it may be liable (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]), and the expert affidavits submitted by plaintiffs in the subrogation actions fail to raise an issue of fact as to whether Superior had a duty to detect and/or correct such a connection.

In the absence of a contract for routine maintenance, an independent contractor has no duty to inspect or warn of purported defects (*Daniels v Kromo Lenox Assoc.*, 16 AD3d 111, 112 [1st Dept 2005]). Moreover, it is well-established that a contractor or builder may rely on the plans and specifications that it contracted to follow "unless they are so apparently defective that an ordinary builder of ordinary prudence would be put upon notice that the work was dangerous and likely to cause

injury" (*Ryan v Feeney & Sheehan Bldg. Co.*, 239 NY 43, 46 [1924]).

The experts' assertions, without reference to any authority or industry standard, that Superior should have verified the accuracy of connections in an area away from its work, performed "industry-wide testing" not included in its contract, and conducted an independent survey of the building's plumbing to discover the improper connection or alleged discrepancies in the plumbing drawings is conclusory (*see Solis v 32 Sixth Ave. Co. LLC*, 38 AD3d 389 [1st Dept 2007]). Accordingly, Supreme Court should have granted Superior's motions for summary judgment dismissing the complaint and cross claims for common-law indemnification and contribution against it in the subrogation actions.

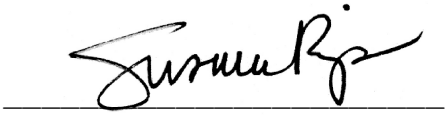
Similarly, Supreme Court should have granted Superior's motion pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint and cross claims against it in the action by the insured and another tenant and landlord of the building for essentially the same reasons, although the analysis is different because of the procedural posture. In support of its motion to dismiss, Superior submitted, inter alia, its contract for the work and the plumbing drawings it contracted to follow, which was

supplemented by the deposition testimony of Superior's president and his affidavit in which he further described the work, which is not in dispute. Such documentary evidence conclusively established that Superior had no duty to detect, modify, or alter the improper connection.

It was thus incumbent on the plaintiffs, in order to preserve their pleading, to submit affidavits or other materials to establish that Superior had a duty to detect and/or correct the improper connection outside the scope of its contract (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976]). In this regard, they relied on the affidavits of the plaintiffs' experts in the subrogation actions. For the reasons discussed above, however, such affidavits fail to raise an issue of fact as to whether some standard exists that imposed a duty on Superior to detect and/or correct the improper connection.

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

ENTERED: JANUARY 10, 2017



CLERK

Andrias, J.P., Moskowitz, Kapnick, Webber, Kahn, JJ.

2706 The People of the State of New York, Ind. 67/13
Respondent,

-against-

Antjuan Prince,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Casey K. Lee of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Roger S. Hayes, J.), rendered May 27, 2014, convicting defendant, after a jury trial, of criminal possession of a forged instrument in the second degree and sentencing him, as a second felony offender, to a term of 2½ to 5 years, unanimously affirmed.

Defendant's legal sufficiency claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The chain of circumstances surrounding defendant's use of a fraudulent gift card, which had been altered so that a third

party would be billed for the transaction, supported the inference that defendant knew it was forged (*see e.g. People v Credel*, 99 AD3d 541 [1st Dept 2012] *lv denied* 20 NY3d 1060 [2013]*; People v Price*, 16 AD3d 323 [1st Dept 2005], *lv denied* 5 NY3d 767 [2005]). In two transactions observed by plainclothes police officers, defendant engaged in a pattern of suspicious behavior evincing scienter and consciousness of guilt.

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

ENTERED: JANUARY 10, 2017

CLERK

Andrias, J.P., Moskowitz, Kapnick, Webber, Kahn, JJ.

2707 Lisa Goldstein, Index 651706/14
Plaintiff-Appellant-Respondent,

-against-

Orensanz Events LLC, et al.,
Defendants-Respondents-Appellants.

_____

Buchanan Ingersoll & Rooney PC, New York (Lauren Isaacoff of counsel), for appellant-respondent.

Law Office of Richard A. Altman, New York (Richard A. Altman of counsel), for respondents-appellants.

_____

Order, Supreme Court, New York County (Robert R. Reed, J.), entered June 30, 2015, which, insofar as appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing the complaint, and denied their motion for summary judgment on the counterclaim for attorney's fees and costs, unanimously modified, on the law, to deny the motion for summary judgment dismissing the complaint, and otherwise affirmed, without costs.

Plaintiff seeks to recover consequential damages allegedly incurred when she was forced to find a new wedding venue on short notice after the venue she initially booked was closed pursuant to a vacate order issued by the New York City Department of Buildings upon a finding that the building was structurally

unstable. Defendants, the manager and the owner of the building, moved for summary judgment citing the force majeure clause in the site rental agreement, which provides that if the event must be canceled because of "an order of the Federal, State, or City government or for any reason beyond Owner's control," the client's sole remedy is either another date for the event or a refund. Plaintiff argues that the issuance of the vacate order and the ensuing cancellation were within defendants' control.

While, as the motion court found, the clause as written applies to any cancellation pursuant to a government order regardless of whether the order was unforeseeable or outside defendants' control, it must be interpreted in light of the purpose of force majeure clauses, "to limit damages ... where the reasonable expectation of the parties and the performance of the contract have been frustrated by circumstances beyond the control of the parties" (*United Equities Co. v First Natl. City Bank*, 52 AD2d 154, 157 [1st Dept 1976], *affd* 41 NY2d 1032 [1977]; *see Macalloy Corp. v Metallurg, Inc.*, 284 AD2d 227 [1st Dept 2001]; *Team Mktg. USA Corp. v Power Pact, LLC*, 41 AD3d 939, 942-943 [3d Dept 2007]; *Phibro Energy, Inc. v Empresa de Polimeros de Sines Sarl*, 720 F Supp 312, 318-320 [SD NY 1989]). Thus, the clause must be interpreted as if it included an express requirement of

unforeseeability or lack of control. The vacate order's citation to defendants' failure to maintain the building and the engineer's letter citing overcrowding as a possible cause for the structural failure present issues of fact whether the failure was foreseeable or within defendants' control and therefore whether the force majeure clause applies in this case.

Accordingly, defendants have not complied with their discovery obligations, and further discovery is necessary to determine the cause of the structural failure (*see* CPLR 3212[f]).

In view of the foregoing, we need not reach the issue of defendants' entitlement to attorneys' fees and costs.

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

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

ENTERED: JANUARY 10, 2017

CLERK

Andrias, J.P., Moskowitz, Kapnick, Webber, Kahn, JJ.

2708 Julie Chernov, Index 151682/13
Plaintiff-Appellant,

-against-

Securities Training Corp.,
Defendant-Respondent.

_____

Bantle & Levy LLP, New York (Robert L. Levy of counsel), for appellant.

Eustace, Marquez, Epstein, Prezioso & Arciold, New York (Rhonda L. Epstein of counsel), for respondent.

_____

Order, Supreme Court, New York County (Paul Wooten, J.), entered September 2, 2015, which granted defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Viewing the evidence in the light most favorable to plaintiff, the record shows that she had suffered from, and had been intermittently treated for, anxiety disorder since as early as 2008. Plaintiff never communicated her ailment to defendant, her employer, but managed it through therapy as needed. In late October 2012, Hurricane Sandy caused plaintiff to suffer from severe stressors, including the destruction of her elderly mother's Long Island home. The continuing stressors caused plaintiff's anxiety disorder to flare up, with sleeplessness and

feelings of being overwhelmed. On November 18, 2012, plaintiff finally told her employer that she was "completely overwhelmed" by anxiety and stress and needed time off to deal with her situation. Plaintiff specifically asked for medical leave. When this was denied, plaintiff asked at a meeting on November 20, 2012, at least to be permitted to take scheduled vacation as well as "a day here and there" to deal with her "overwhelming stress and anxiety." This was denied as well and plaintiff was instead terminated effective November 28, 2012.

Under these circumstances, issues of fact exist as to whether, based on plaintiff's disclosures, defendant reasonably "should have known" that plaintiff was suffering from a disabling anxiety condition (Administrative Code of City of NY § 8-107[15][a]; *Rodas v Estee Lauder Cos., Inc.*, 2010 NY Slip Op 33199[U], *3 [Sup Ct, NY County 2010]). Issues of fact likewise exist as to whether defendant should have entered into a good faith interactive dialogue with plaintiff, inquiring into the nature of her disabling condition and exploring what sorts of accommodations might reasonably be required, and whether reasonable accommodations would have enabled her to perform the "essential requisites of [her] job" (Administrative Code § 8-107[15][b]), without causing defendant "undue hardship in the

conduct of . . . [its] business" (*id.* § 8-102[18]; *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 835 [2014]; *Phillips v City of New York*, 66 AD3d 170, 183 [1st Dept 2009]).

Issues of fact also exist as to whether plaintiff's alleged disabling anxiety condition caused the poor performance (i.e., absenteeism and unresponsiveness) that defendant pointed to as the reason for her termination (*see Jacobsen*, 22 NY3d at 834), and, if so, whether plaintiff could have performed the essential requisites of her job with reasonable accommodation (*see* Administrative Code §§ 8-107[15][b]; 8-102[18]).

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

ENTERED: JANUARY 10, 2017

CLERK

Andrias, J.P., Moskowitz, Kapnick, Webber, Kahn, JJ.

2709 The People of the State of New York, Ind. 5449/12
Respondent,

-against-

Juan Perez, also known as Jose Solano,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered June 4, 2014, convicting defendant, upon his guilty plea, of assault in the second degree, and sentencing him, as a second felony offender, to a term of three years, unanimously reversed, on the law, the plea vacated, and the matter remanded to Supreme Court for further proceedings.

Defendant entered his guilty plea in consideration of a promise that he would receive a sentence to run concurrently with the sentences imposed for his Kings County convictions. As the People concede, since that conviction has been reversed on appeal, defendant is entitled to withdraw his plea (*People v Fuggazzatto*, 62 NY2d 862 [1984]).

This determination renders academic defendant's remaining challenges to his guilty plea.

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

ENTERED: JANUARY 10, 2017

CLERK

Andrias, J.P., Moskowitz, Kapnick, Webber, Kahn, JJ.

2710 In re Dhanmatie G.,
Petitioner-Appellant,

-against-

Zamin B.,
Respondent-Respondent.

_____

Andrew J. Baer, New York, for appellant.

Law Office of Wayne F. Crowe, Jr., P.C., Bronx (Wayne F. Crowe, Jr. of counsel), for respondent.

Karen P. Simmons, The Children's Law Center, Brooklyn (Laura Solecki of counsel), attorney for the children.

_____

Order, Family Court, Bronx County (Tracey A. Bing, J.), entered on or about October 2, 2014, which dismissed without prejudice petitioner's family offense petition, unanimously affirmed, without costs.

Petitioner failed to establish a family offense by a fair preponderance of the evidence (Family Court Act § 832). Petitioner's allegations that respondent paternal uncle inappropriately touched one or more of the children were supported only by the inadmissible hearsay statements of the children (*Matter of Joyesha J. v Oscar S.*, 135 AD3d 557, 558 [1st Dept 2016]; *see* Family Court Act § 834). Family Court Act § 1046(a)(vi), which allows such testimony, is explicitly limited

to child protective proceedings under articles 10 and 10-A, and has no application to family offense proceedings under article 8. The application of that provision in child custody proceedings under article 6 has been confined to situations in which the custody proceeding is founded upon abuse or neglect, rendering the issues "inextricably interwoven" (*Matter of Khan-Soleil v Rashad*, 108 AD3d 544, 546 [2d Dept 2013]). Nor was there additional admissible evidence to sufficiently corroborate the statements (*see Matter of Leighann W. v Thomas X.*, 141 AD3d 876, 878-879 [3d Dept 2016]). The mere repetition of the statements does not constitute corroboration (*id.* at 878; *see also Matter of Nicole V.*, 71 NY2d 112, 124 [1987]).

"Viewed in totality," the record shows that petitioner received "meaningful representation" from her trial counsel (*Matter of Dylan Mc. [Michelle M. Mc.]*, 105 AD3d 1049, 1050 [2d Dept 2013]). Trial counsel acknowledged that she had no other

evidence other than the inadmissible hearsay statements of the children.

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

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

ENTERED: JANUARY 10, 2017

CLERK

Andrias, J.P., Moskowitz, Kapnick, Webber, Kahn, JJ.

2711 In re Huguette Clark, Index 1375/95I
Deceased. 1375/95E

- - - - -

Public Administrator of New York
County, et al.,
Petitioners-Appellants-Respondents,

-against-

Beth Israel Medical Center, et al.,
Respondents-Respondents,

Mark Rudick, et al.,
Respondents-Respondents-Appellants,

Dr. Henry Singman, et al.,
Respondents.

_____

Farrell Fritz, P.C., Uniondale (John R. Morken of counsel), for appellants-respondents.

Sargent, Sargent & Jacobs, LLC, New York (Hale C. Sargent of counsel), for Mark W. Rudick, Anne L. Rudick-Lowe and Irene Rudick, respondents-appellants.

Duane Morris LLP, New York (Marvin Wexler and Lawrence C. Fox of ccounsel), for Beth Israel Medical Center, Continuum Health Partners, Inc. and Mount Sinai Health System, Inc., respondents.

_____

Order, Surrogate's Court, New York County (Nora S. Anderson, S.), entered August 19, 2015, which, to the extent appealed from as limited by the briefs, dismissed certain claims as against Jack Rudick as time-barred, denied the motion of respondents Mark Rudick and Anne L. Rudick-Lowe, as co-executors of the estate of

Jack Rudick, and Irene Rudick to dismiss the petition in its entirety as against them, and granted the motion of respondents Beth Israel Medical Center, Continuum Health Partners, Inc. and Mount Sinai Health Systems, Inc. (collectively Beth Israel) to dismiss all claims as against them, unanimously modified, on the law, to the extent of dismissing the claims as against Irene Rudick, and otherwise affirmed, without costs. The Clerk is directed to enter judgment dismissing the proceeding as against Irene Rudick.

It is well established that courts "look to the underlying claim and the nature of the relief sought to determine the applicable period of limitation" (*Vigilant Ins. Co. of Am. v Housing Auth. of City of El Paso, Tex.*, 87 NY2d 36, 41 [1995] [internal quotation marks omitted]). Here, the Rudicks contend that the allegations brought pursuant to SCPA 2103 are a claim for conversion, and petitioners have alleged unjust enrichment, undue influence, and constructive trust claims solely to obtain the benefit of a longer six-year statute of limitations. However, when a conversion claim is asserted with respect to money, the funds must be specifically identifiable and be subject to an obligation to be returned or to be otherwise treated in a particular manner *(see Lucker v Bayside Cemetery*, 114 AD3d 162,

174 [1st Dept 2013], *lv denied* 24 NY3d 901 [2014]). Here, a conversion claim was not stated since there are no allegations that the money given to the Rudicks by decedent was specifically identifiable, was obligated to be returned, or otherwise treated in a particular manner.

Dismissal of the petition as against Irene Rudick, however, is warranted. The petition failed to allege any misconduct by Irene, who was not alleged to have had any contact with decedent, and where the transfers to her took place more than six years prior to decedent's death.

The court properly dismissed the breach of fiduciary duty claims against Beth Israel. No facts were stated from which the factfinder could conclude that decedent relied upon the hospital for anything other than medical advice, care, and treatment.

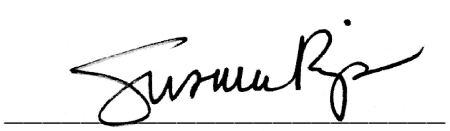
The breach of fiduciary duty claims were not tolled by the open repudiation doctrine, because a fiduciary relationship between decedent and either Jack Rudick or Beth Israel was not stated, and this toll does not apply to claims for money damages *(see Stern v Morgan Stanley Smith Barney,* 129 AD3d 619 [1st Dept 2015]). The toll provided in CPLR 208 is similarly unavailing because the petition did not allege that decedent was insane and the record shows that she had an attorney and an accountant with

whom she regularly communicated to protect her legal rights (*see* *McCarthy v Volkswagen of Am.*, 55 NY2d 543, 548 [1982]).

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: JANUARY 10, 2017



CLERK

Andrias, J.P., Moskowitz, Kapnick, Webber, Kahn, JJ.

2712 In re Randy M. Mastro, Index 101274/14
Petitioner-Appellant,

-against-

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

_____

Gibson, Dunn, & Crutcher LLP, New York (Gabriel K. Gillett of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Daniel Matza-Brown of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Jennifer G. Schecter, J.), entered December 4, 2015, which denied the article 78 petition seeking to annul respondents' determination, dated July 31, 2014, upholding the decision of the Administrative Law Judge, dated April 30, 2014, which imposed a fine pursuant to a notice of violation (NOV), for failure to prevent two unnecessary and/or unwarranted fire alarms, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The NOV citing petitioner for two false fire alarms at his residence required that petitioner submit a Certificate of Correction supported by "proof of compliance" by March 14, 2007. Among other things, petitioner was required to "[s]ubmit

documentation detailing cause of alarm(s) and corrective measures taken." Petitioner was also informed that "[f]irst offenders whose proof of correction is accepted by the Fire Department by such date will avoid a hearing and penalty." A week before the deadline, petitioner submitted a Certificate of Correction, attesting that he had "corrected all said violations as ordered by the Commissioner," and two supporting documents – a work order from petitioner's alarm company, indicating that petitioner "needs tech to check zone 16 basement falsing, smoke det," and a work order summary indicating that the company had "replaced Z16 smoke detector." The documents did not specifically state the cause of the two false alarms.

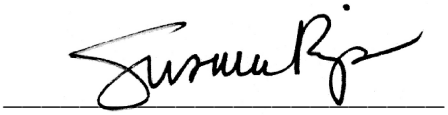
In a letter dated March 14, 2014, respondent Fire Department of the City of New York (FDNY) disapproved petitioner's Certificate of Correction, explaining that he had "failed to submit a letter stating the cause of the two unnecessary alarms and what action was taken to prevent future alarms." Several weeks later, petitioner submitted a letter from the alarm company stating that the company had "replaced the battery on zone 15 smoke detector" and had also "replaced your zone 16 smoke detector," and that "[w]e believe that these steps have addressed the false alarm." Petitioner was ultimately given a reduced fine

based on the conclusion that his post-deadline submissions were satisfactory. He unsuccessfully challenged the imposition of any fine administratively and in the instant article 78 proceeding.

While it was not unreasonable for petitioner to expect that his initial submission would suffice to avoid a fine, we agree with the court below that the more exacting standard applied by the FDNY did not amount to irrationality. The FDNY's action was not "without sound basis in reason" or "taken without regard to the facts" (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]). Further, FDNY's request for a "letter stating the cause of the two unnecessary alarms and what action was taken to prevent future alarms" was not, as petitioner argues, an improper post hoc engrafting of a new requirement, but an explanation of how the standard set forth in the NOV could be fulfilled.

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

ENTERED: JANUARY 10, 2017



CLERK

Andrias, J.P., Moskowitz, Kapnick, Webber, Kahn, JJ.

2713 The People of the State of New York, Ind. 2557/13
Respondent,

-against-

Richard Hovan,
Defendant-Appellant.

_____

Law Offices of Daniel A. Hochheiser, Scarsdale (Daniel Hochheiser of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Charles H. Solomon, J. at first *Gomberg* inquiry; Jill Konviser, J. at second *Gomberg* inquiry, jury trial and sentencing), rendered October 20, 2015, convicting defendant, after a jury trial, of rape in the third degree (five counts), criminal sexual act in the third degree (three counts) and of endangering the welfare of a child, and sentencing him to an aggregate term of 2½ years, unanimously affirmed.

Defendant made a valid waiver of his right to conflict-free representation. Any conflict created by defendant's retained attorney's involvement in defendant's inappropriate contact with a witness in this case did not rise to the level of a nonwaivable conflict, such as where the attorney is accused of crimes

relating to the underlying charges against the client (*see e.g. United States v Perez*, 325 F3d 115, 125-127 [2d Cir 2003]; *People v Cortez,* 85 AD3d 409, 410 [1st Dept 2011], *affd* 22 NY3d 1061 [2014]; *see also People v Konstantinides*, 14 NY3d 1, 13-14 [2009]. At two stages of the proceedings, the respective courts conducted thorough inquiries pursuant to *People v Gomberg* (38 NY2d 307 [1975]), which included the participation of independent counsel appointed for defendant by the court, and warnings about the specific risks involved in continuing with the retained attorney. We find that defendant, who insisted on proceeding with the attorney of his choice, made a valid waiver of the conflict, and we reject his arguments to the contrary.

The court properly denied defendant's application pursuant to *Batson v Kentucky* (476 US 79 [1986]). There is no basis to disturb the court's credibility determinations that the nondiscriminatory explanations for the challenges at issue were not pretextual, a finding that is supported by the record and entitled to great deference (*see People v Hernandez*, 75 NY2d 350 [1990], *affd* 500 US 352 [1991]).

The court providently exercised its discretion in denying defendant's mistrial motion, made after the court determined that a witness's testimony about the victim's report of her sexual

activity with defendant failed to qualify for admission under the prompt outcry exception to the hearsay rule. The court struck the offending testimony and delivered a curative instruction that was sufficient to alleviate any possible prejudice (*see People v Santiago*, 52 NY2d 865 [1981]). In any event, the evidence of guilt was overwhelming and the hearsay testimony was cumulative to the victim's own testimony.

The portion of the prosecutor's summation to which defendant objected on the ground of vouching constituted permissible comment on a credibility issue (*see People v Overlee*, 236 AD2d 133, 144 [1997], *lv denied* 91 NY2d 976 [1992]). Defendant's remaining challenges to the summation, and to an investigator's testimony, are unpreserved and we decline to review them in the interests of justice. As an alternative holding, we find no basis for reversal.

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

ENTERED: JANUARY 10, 2017

CLERK

Andrias, J.P., Moskowitz, Kapnick, Webber, Kahn, JJ.

2714 Ricky Zegelstein, M.D., et al., Index 651198/14
Plaintiffs-Appellants-Respondents,

-against-

Michael J. Faust, M.D., et al.,
Defendants-Respondents,

Alan Raymond, M.D.,
Defendant-Respondent-Appellant,

VCare, LLC, doing business as M.D. Manage, Inc.,
Defendant.

_____

C. Cardillo, P.C., Brooklyn (Chris Cardillo of counsel), for appellants-respondents.

Swidler & Messi LLP, New York (Steven A. Swidler of counsel), for Alan Raymond, M.D., respondent-appellant.

Ann R. Starer, Scarsdale, for Michael J. Faust, M.D., respondent.

Garfunkel Wild, P.C., Great Neck (Kevin Donoghue of counsel), for Michael P. Krumholz M.D., respondent.

Meltzer, Lippe, Goldstein & Breitstone, LLP, Mineola (Loretta M. Gastwirth of counsel), for Jed Kaminetsky, M.D., respondent.

Law Offices of John V. Golaszewski, New York (John V. Golaszewski of counsel), for Haroon Chaudhry, respondent.

_____

Order, Supreme Court, New York County (Anil C. Singh, J.), entered April 30, 2015, which granted defendants' motions to dismiss the complaint for lack of in personam jurisdiction, and, on the ground of lack of jurisdiction, denied plaintiffs' cross

motion for leave to extend the time for service and to amend the complaint, unanimously modified, on the law, to delete the factual findings that defendant Raymond, individually, entered into an agreement with plaintiffs and that he would compensate the plaintiffs for services performed, and to deny defendants' motions, and the matter is remanded for consideration of plaintiffs' cross motion, and otherwise affirmed, without costs.

The court erroneously concluded that it lacked jurisdiction to entertain plaintiffs' cross motion for leave to extend the time for service and to amend the complaint as a result of plaintiffs' failure to serve the summons with notice within 120 days of commencement, in violation of CPLR 306-b. The court was required to exercise its discretion to decide whether an extension of time for service was warranted upon good cause shown or in the interest of justice (CPLR 306-b; *Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95 [2001]).

The court having granted the motions to dismiss on an improper basis and without considering plaintiffs' cross motion, we remand the matter for consideration of the cross motion (*see*

Matter of Jordan v City of New York, 38 AD3d 336, 339 [1st Dept 2007]).

We decline to dismiss plaintiffs' claims with prejudice or to sanction plaintiffs for filing a frivolous action.

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

ENTERED: JANUARY 10, 2017

CLERK

Andrias, J.P., Moskowitz, Kapnick, Webber, Kahn, JJ.

2715 In re Gabriella Kamina M.,

A Child Under Eighteen Years
of Age, etc.,

Naquwan T.,
Respondent-Appellant,

Edwin Gould Services for Children
and Families,
Petitioner-Respondent.

_____

Dora M. Lassinger, East Rockaway, for appellant.

John R. Eyerman, New York, for respondent.

Tennille M. Tatum-Evans, New York, attorney for the child.

_____

Order, Family Court, Bronx County (Linda Tally, J.), entered on or about August 20, 2015, which, inter alia, determined that respondent father's consent to the subject child's adoption was not required, unanimously affirmed, without costs.

Petitioner agency proved by clear and convincing evidence that the father only had minimal and sporadic contact with the child and the agency, and that the father did not provide the child with any financial support (*see Matter of S'Mya Jade R. [Paul Gregory R.]*, 135 AD3d 488 [1st Dept 2016]). The father did not contact the agency to set up visits with the child while he was incarcerated, and did not begin visiting with the child until

well after the filing of the agency's petition, when the child was about two years old. The father's incarceration does not absolve him of the obligation of maintaining regular contact with the child and providing financial support for her, according to his means (*see Matter of Jonathan M.H. [Reginald H.]*, 135 AD3d 493 [1st Dept 2016], *lv denied* 27 NY3d 904 [2016]). Furthermore, the father was not listed on the child's birth certificate or in the putative father registry, and he did not file his paternity petition until after the agency filed its petition, when the child was over a year old (*see Matter of Nevaeh R. [Veronica B.-Ruben M.]*, 139 AD3d 602 [1st Dept 2016]).

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

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

ENTERED: JANUARY 10, 2017

CLERK

Andrias, J.P., Moskowitz, Kapnick, Webber, Kahn, JJ.

2716 The People of the State of New York, Ind. 2415/08
Respondent,

-against-

Quanel Miller,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Andrew J. Zapata of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Patricia DiMango, J.), rendered March 26, 2013, convicting defendant, upon his plea of guilty, of sexual abuse in the first degree and robbery in the third degree, and sentencing him to an aggregate term of seven years, unanimously modified, on the law, to the extent of reducing the amounts of the mandatory surcharge to $250 and the crime victim assistance fee to $20, respectively, and otherwise affirmed.

Defendant's challenges to his plea do not come within the narrow exception to the preservation requirement (*see People v Williams*, 27 NY3d 212 [2016]; *People v Conceicao*, 26 NY3d 375, 382 [2015]), and we decline to review them in the interest of justice. As an alternative holding, we find that the record as a

whole establishes that the plea was knowingly, intelligently and voluntarily made (*see generally People v Fiumefreddo*, 82 NY2d 536, 544 [1993]). Although the court made a remark that defendant characterizes as threatening, this remark, when viewed in context, was merely a reference to the coincidence that defendant had also appeared before the same Justice on a case in Kings County Supreme Court, where the Justice had previously been assigned. There is no reasonable possibility that this remark, or any other remarks challenged by defendant on appeal, could have coerced defendant into taking the plea. Furthermore, when defendant initially denied that he had forcibly stolen the victim's property, the court conducted a suitable further inquiry. After defendant conferred with his attorney, he admitted that he had forcibly stolen property.

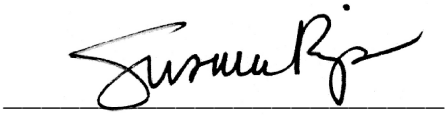
Although we do not find that defendant made a valid waiver of the right to appeal (*see People v Powell*, 140 AD3d 401 [1st Dept 2016], we perceive no basis for reducing the sentence.

As the People concede, since defendant committed the instant

crime prior to the effective dates of statutory amendments increasing the mandatory surcharge and crime victim assistance fees, defendant's sentence is unlawful to the extent indicated.

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

ENTERED: JANUARY 10, 2017



CLERK

Andrias, J.P., Moskowitz, Kapnick, Webber, Kahn, JJ.

2717 A&F Hamilton Heights Cluster, Inc., derivatively on behalf of Hamilton Heights Cluster Associates, L.P., et al., Plaintiffs,

James Fendt, derivatively on behalf of Hamilton Heights Cluster Associates, Inc., Plaintiff-Appellant,

-against-

Urban Green Management, Inc., et al., Defendants-Respondents,

Hamilton Heights Cluster Associates, L.P., et al., Defendants.

- - - - -

[And Other Actions]

Index 653038/14
595555/15

_____

Tendy Law Office LLC, New York (Sheila Tendy of counsel), for appellant.

Andrew W. Hayes, New York (Andrew W. Hayes of counsel), for respondents.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.,), entered November 23, 2015, which, to the extent appealed from as limited by the briefs, amended the court's order, dated November 12, 2015, and ordered plaintiff James Fendt to pay $131,022 to Hamilton Heights Cluster Associates, L.P. (HHCA) to reimburse it for funds used to pay the Tendy Law

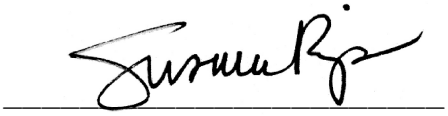
Office, unanimously affirmed, without costs.

The motion court did not award sanctions pursuant to 22 NYCRR 130-1.1(c)(3), but rather granted that portion of the motion to compel the return of all funds paid from HHCA's bank accounts to Tendy. "The traditional judicial equity power in NY Constitution, article VI, § 7 is implemented by CPLR 3017(a), which prescribes that 'the court may grant any type of relief within its jurisdiction appropriate to the proof whether or not demanded, imposing such terms as may be just'" (*State of New York v Barone*, 74 NY2d 332, 336 [1989]). The order here was not unjust, in that Fendt caused HHCA to make payments to the law firm that commenced this litigation, although he was not authorized to do so. In light of this finding, plaintiff Fendt's invocation of the business judgment rule is unavailing, as are his remaining arguments (*Matter of Seligson v Board of Mgrs. of*

the 25 Charles St. Condominium, 138 AD3d 432, 432-433 [1st Dept 2016]). Insofar as he claims he loaned the funds to HHCA used to pay the law firm, such claim is not substantiated by the record before us.

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

ENTERED: JANUARY 10, 2017



CLERK

Andrias, J.P., Moskowitz, Kapnick, Webber, Kahn, JJ.

2718 The People of the State of New York, Ind. 3857/13
Respondent,

-against-

Modesto Cuesta,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Sabrina Margret Bierer of counsel), for respondent.

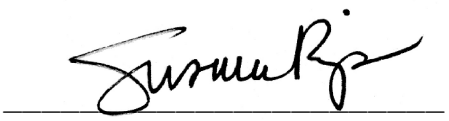
_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Charles Solomon, J.), rendered August 26, 2014,

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

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

ENTERED: JANUARY 10, 2017



CLERK

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

Andrias, J.P., Moskowitz, Kapnick, Webber, Kahn, JJ.

2722 The People of the State of New York, Ind. 580/13
Respondent,

-against-

Eudys Garcia,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Matthew B. White of counsel), for respondent.

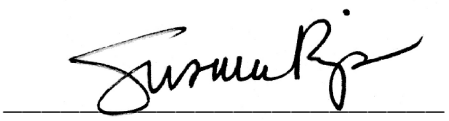
_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (George R. Villegas, J.), rendered February 18, 2014,

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

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

ENTERED: JANUARY 10, 2017



CLERK

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

Andrias, J.P., Moskowitz, Webber, Kahn, JJ.

2723N Frances C. Peters, Index 600456/04
Plaintiff-Appellant,

-against-

George Christy Peters, et al.,
Defendants-Respondents.

_____

Hill Rivkins LLP, New York (Caspar F. Ewig of counsel), for appellant.

Beys Liston Mobargha & Berland LLP, New York (Nader Mobargha of counsel), for respondents.

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered August 7, 2015, which, to the extent appealed from, denied plaintiff's motion to strike defendants' answers pursuant to CPLR 3126 and for spoliation, unanimously affirmed, with costs.

The motion court providently exercised its discretion in denying the motion to strike defendants' answers *(see generally Estate of Mojica v Harlem Riv. Park Houses, Inc.*, 140 AD3d 579 [1st Dept 2016]). Plaintiff failed to show by clear and convincing evidence that defendants' alleged misstatements were particularly egregious and characterized by lies in furtherance of a scheme designed to conceal critical matters from the court (*cf. CDR Creances S.A.S. v Cohen*, 23 NY3d 307, 321 [2014]).

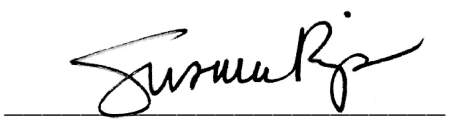
Moreover, while defendants may have, at some point, had various trust-related and company-related documents in their possession, a spoliation finding is not appropriate as they are not the sole source of such information and documents, nor has plaintiff demonstrated that the destruction of any such documents, if that occurred, was grossly negligent or done as a willful attempt to avoid discovery (*see Alleva v United Parcel Serv., Inc.*, 112 AD3d 543, 544 [1st Dept 2013]; *see also Arbor Realty Funding, LLC v Herrick, Feinstein LLP*, 140 AD3d 607, 609-610 [1st Dept 2016]). The documents may be sought from the trustee or other nonparties, including Sea Trade Maritime Corporation.

Plaintiff has also not shown that defendants repeatedly failed to respond to discovery demands and comply with court orders (*see Siegman v Rosen*, 270 AD2d 14, 15 [1st Dept 2000]). Defendants produced over 11,000 pages of documents, and provided affidavits of compliance indicating that, after a thorough search, they did not have any other documents in their possession, subject to their attorney's objections in defendants'

response to plaintiff's demands. Although plaintiff may not be satisfied with this response, it does not evince noncompliance with court orders warranting the striking of defendants' answers.

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

ENTERED: JANUARY 10, 2017



CLERK

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

478 Jeanetta Stega, etc., Index 152716/13
Plaintiff-Respondent,

Wesley Tzall, M.D.,
Plaintiff,

-against-

New York Downtown Hospital, et al.,
Defendants-Appellants,

Jeffrey Menkes, etc., et al.,
Defendants.

_____

Nixon Peabody LLP, Jericho (Christopher J. Porzio of counsel), for appellants.

Beranbaum Menken LLP, New York (John A. Beranbaum of counsel), for respondent.

_____

Order, Supreme Court, New York County (Debra A. James, J.), entered September 17, 2014, reversed, on the law, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint as against said defendants.

Opinion by Saxe, J. All concur except Kapnick, J. who dissents in an Opinion.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Richard T. Andrias
David B. Saxe
Barbara R. Kapnick, JJ.

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_____x

Jeanetta Stega, etc.,
Plaintiff-Respondent,

Wesley Tzall, M.D.,
Plaintiff,

-against-

New York Downtown Hospital, et al.,
Defendants-Appellants,

Jeffrey Menkes, etc., et al.,
Defendants.
_____x

Defendants New York Downtown Hospital and Stephen G. Friedman, M.D. appeal from the order of the Supreme Court, New York County (Debra A. James, J.), entered September 17, 2014, to the extent it denied their motion to dismiss plaintiff Stega's defamation cause of action as against them.

Nixon Peabody LLP, Jericho (Christopher J. Porzio and Christopher G. Gegwich of counsel), for appellants.

Beranbaum Menken LLP, New York (John A. Beranbaum and Jason J. Rozger of counsel), for respondent.

SAXE, J.

The statements that form the basis of the defamation claim at issue here were made to a U.S. Food and Drug Administration (FDA) investigator in the course of an investigation. In fact, that investigation was prompted by a complaint made by plaintiffs after defendant hospital terminated their employment, in which they expressed concern that the patients in research protocols being overseen by the hospital's Institutional Review Board (IRB) might be treated improperly. The particular research protocol at the heart of the underlying events, which led directly to the termination of plaintiffs' employment and the premature termination of the research protocol itself, was testing a compound developed by Luminant Bio-Sciences, LLC, for the treatment of metastatic cancer. Given both the nature of an FDA investigation into the propriety of the hospital's research protocols and the importance of the unimpeded flow of thoughts and information in this investigative context, as a matter of law and public policy, statements to such an investigator must be protected by an absolute privilege, not merely a qualified privilege. Therefore, plaintiff Stega's defamation cause of action must be dismissed.[1]

[1] Coplaintiff Tzall's claims were dismissed, and that dismissal is not at issue on this appeal.

For purposes of this motion, we accept as true the events leading to this action as alleged in the complaint: Plaintiff Dr. Jeanetta Stega was employed by defendant New York Downtown Hospital (NYDH) as a research scientist and, during the relevant period, as the chair of its Institutional Review Board (IRB), a board comprised of a number of individuals designated by the hospital to review, approve and oversee its biomedical research involving human subjects. The work of IRBs is governed by regulations promulgated by the FDA (*see generally* 21 CFR part 56).

According to the complaint, in October 2011, Luminant Bio-Sciences, LLC, the manufacturer of a newly developed drug to be used to treat metastatic (stage four) cancer, retained defendant Leonard A. Farber, M.D., an oncologist in private practice, to create a research protocol and patent application for a clinical trial for the drug. According to Stega, Farber was unable to develop the protocol, even with templates provided by Stega, and requested that Stega develop the protocol.

In October 2011, Stega alleges, she spoke about the Luminant project and her plan to write the study's protocol with several NYDH officers, including Anthony Alfano, the hospital's chief operating officer; Chad Harris, its chief compliance officer, and defendant Jeffrey Menkes, its chief executive officer. She

alleges that no objection was raised to her preparing the protocol for Luminant, and that Alfano, Harris and Menkes did not ask her whether she was to be compensated for this work. Stega then agreed to write the protocol and patent application, allegedly performing this work on weekends and at night, so as not to interfere with her duties at the IRB. In about November 2011, before the proposed study was presented to the IRB, Luminant paid Stega $50,000 for this work.

Farber remained the study's principal investigator, and in November 2011, he applied to the hospital's IRB for approval of the Luminant study. Stega alleges that she recused herself from the IRB's deliberations and voting on the project, since she had written the protocol and patent application, but she remained at the IRB meeting to answer questions about the Luminant study, allegedly in compliance with FDA regulations. The IRB approved the application for the Luminant study.

Farber then commenced the clinical trial with stage four cancer patients, at his private office. Plaintiff alleges that Farber ran into financial problems or other difficulties, and complained to Luminant that he was not receiving enough money to run the study and needed more people. In December 2011, Farber requested that Stega take over the study, but she declined; then Luminant itself asked Stega to take over the study, and she

declined.

On December 16, 2011, after Stega rejected demands from Farber that she turn over to him money she had received from Luminant, Farber advised Stega that he was leaving the study. He texted her the following:

> "The money you arranged for yourself was what I had negotiated to keep my practice going. I cannot do it for nothing. You are going to need to find a new PI and change the IRB. I am done with it."

According to the complaint, Farber failed to make alternative treatment plans for the patients in the Luminant study, so Stega requested that NYDH treat those patients at its facility, and it agreed to do so over the Christmas holiday. Stega oversaw the patients in the study during that period without compensation.

Luminant then requested that NYDH take over the study. However, in the process of giving consideration to Luminant's proposal, in January 2012, Alfano asked Stega if she had been paid by Luminant; she replied that she had, after she had complied with the hospital's conflict of interest policy by informing him, Menkes, and Harris of the work, and by working on her own time. On or about January 25, 2012, Stega was called to Menkes's office, and, in the presence of Alfano and defendant Stephen G. Friedman, M.D., NYDH's acting chief medical officer, Menkes accused Stega of stealing money paid by sponsors that

rightly belonged to the hospital.[2] Stega was placed on administrative leave pending an investigation of her conduct.

After performing the investigation, NYDH's counsel concluded that Stega had a conflict of interest arising from her role as chairperson of the IRB when the IRB considered the Luminant study. Stega's employment was terminated, along with that of plaintiff Wesley Tzall, M.D., NYDH's director of nuclear cardiology, who had been serving as vice chair of the IRB.

On March 6, 2012, Stega and Tzall filed a formal complaint with the FDA, expressing concerns that the patients in research protocols overseen by the IRB would not be properly supervised. In response to Stega and Tzall's complaint, the FDA commenced an investigation, during which an FDA investigator performed an onsite inspection of NYDH and met with Friedman. Friedman explained the reasons for Stega's removal from her positions at NYDH and the IRB and responded to Stega's and Tzall's complaint. He is alleged to have asserted that Stega had "channeled" funds from a research study sponsor to her own research group and that

[2] According to Stega, the actions against her by NYDH and its executive officers were prompted by Leonard Farber, who is a friend of Menkes. She alleges that in early January 2012, after Farber notified her, Luminant, and the IRB that he wanted to resume his role as PI for the study, and Stega informed him that it was no longer his, Farber threatened to "punish Stega and destroy the study."

she had indicated to Farber that she could use her position on the IRB to get a patient into a study. Friedman allegedly said that all IRB approvals made while Stega was chairperson were "tainted."

Stega and Tzall brought this action. While the motion court granted defendants' CPLR 3211 motion to the extent of dismissing plaintiffs' other claims -- which ruling is not challenged on appealed -- it denied the branch of the motion seeking to dismiss the defamation claim as asserted by Stega. It reasoned that the alleged statements at issue here qualified only for a "common interest" qualified privilege, rather than for the protection of an absolute privilege, because the FDA investigation here had none of the indicia of a quasi-judicial proceeding.

My dissenting colleague agrees with the motion court, reasoning that the FDA investigation lacked the indicia of a quasi-judicial proceeding and safeguards such as an adversarial process or a determination reached based upon the application of law to the facts and subject to review.

I disagree, because under current case law, the complained-of statements were made in a quasi-judicial context in which an absolute privilege protects them.

Whether allegedly defamatory statements are protected by an absolute or a qualified privilege "depend[s] on the occasion and

the position or status of the speaker" (*Park Knoll Assoc. v Schmidt*, 59 NY2d 205, 208-209 [1983]).

> "The absolute privilege generally is reserved for communications made by individuals participating in a public function, such as executive, legislative, judicial or quasi-judicial proceedings . . . to ensure that such persons' 'own personal interests -- especially fear of a civil action, whether successful or otherwise -- do not have an adverse impact upon the discharge of their public function'" (*Rosenberg v MetLife, Inc.*, 8 NY3d 359, 365 [2007]).

The Second Department explained the evolution of the applicable case law, which has developed so as to apply an absolute privilege in the quasi-judicial, administrative context: "[T]he complexities of our modern society have substantially broadened the role of administrative law both in its rulemaking and adjudicative aspects. With that expansion has come a concomitant recognition by many courts that certain attributes of the judicial process have equal relevance to those administrative bodies that utilize a quasi-judicial process in the determination of individual rights, privileges or obligations" (*Allan & Allan Arts v Rosenblum*, 201 AD2d 136, 139 [2d Dept 1994], *lv denied* 85 NY2d 921 [1995], *cert denied* 516 US 914 [1995], quoting *Julien J. Studley, Inc. v Lefrak*, 50 AD2d 162, 165 [1975], *affd* 41 NY2d 881 [1977]). "Accordingly, during the past several decades, the courts have extended the absolute privilege to a wide array of hearings held by administrative agencies, finding such hearings

to be in substance judicial" (*Allan & Allan Arts*, 201 AD2d at 139-140 [internal quotation marks omitted]).

Moreover, it is not merely statements made in the administrative hearings themselves that are covered by the absolute privilege. Courts of this State have applied an absolute privilege to statements in complaint letters sent to the grievance committee of a bar association (*see Wiener v Weintraub*, 22 NY2d 330 [1968]), in a complaint letter to a division of the State Department of Labor requesting an investigation of an apprentice program (*see Stilsing Elec. v Joyce*, 113 AD2d 353, 356 [3d Dept 1985]), and in a Form U-5, which is required to be filed with the SEC when an employee at a brokerage is terminated (*see Herzfeld & Stern v Beck*, 175 AD2d 689 [1st Dept 1991], *lv dismissed* 82 NY2d 789 [1993], 89 NY2d 1064 [1997]). Indeed, recent cases clearly establish that the privilege does not only apply to statements made during a hearing before an administrative agency, but also applies to statements made in the very beginning of an administrative agency's investigatory process, even at a preliminary stage (*see id.; Cicconi v McGinn, Smith & Co., Inc.*, 27 AD3d 59 [1st Dept 2005], *lv dismissed* 6 NY3d 807 [2006]).

In *Cicconi v McGinn, Smith*, this Court had occasion to carefully re-consider the application of the absolute privilege

to statements made on the required termination notice form (Form U-5) filed by a National Association of Securities Dealers (NASD) employer about a terminated employee. In the earlier case, *Herzfeld & Stern v Beck* (175 AD2d 689 [1st Dept 1991]), when we applied the absolute privilege, we particularly pointed out that in the administrative context, "the absolute privilege attaches not only to the hearing stage, but to every step of the proceeding in question even if it is preliminary and/or investigatory and irrespective of whether formal charges are ever presented" (*id.* at 691). In *Cicconi* we were asked to overrule or limit that holding. We declined to do so, specifically reaffirming the aspect of *Herzfeld* holding that an allegedly defamatory statement on a Form U-5 could properly be said to have been made in a quasi-judicial proceeding, even where no investigation or adversarial hearing followed the filing of the form (27 AD3d at 62-63).

We had emphasized in *Herzfeld* that the New York Stock Exchange Department of Enforcement

> "is authorized to inquire into whether one of its members or an employee thereof should be disciplined for violating a particular section of the law or pertinent rule or regulation, a process which is adversarial in nature and affords the subject of the investigation due process protections (*see* 15 USC § 78f), including the right to appeal (15 USC § 78s[d])" (175 AD2d at 691).

In *Cicconi*, we added that public policy supports the use of an absolute privilege, since

> "[b]y assuring brokerage firms that they will not be liable in tort for statements in their mandatory U-5 filings, we avoid the possibility that they will hesitate to clearly state the exact grounds for an employee's termination. Only by clear descriptions of questionable conduct by brokers can we best ensure that any future employers and customers have notice of any such conduct in their interactions with those brokers" (27 AD3d at 63).

Thereafter, the Court of Appeals came to the same conclusion in *Rosenberg v MetLife, Inc.* (8 NY3d 359 [2007], *supra*), holding that an absolute privilege must be applied to statements made by an employer about a terminated employee on an NASD employee termination notice. It explained that NASD is a quasi-governmental entity with authority to enforce the requirements of the Securities and Exchange Act, and that Form U-5 plays a significant role in the agency's self-regulatory process (*id.* at 366-367).

The statements at issue here were made to an FDA investigator looking into accusations that IRB protocols at NYDH might not be properly handled. The FDA is an administrative agency of the federal government, charged with many responsibilities, including ensuring that new drug trials are handled properly. The complicated regulatory scheme for oversight by the FDA over the operation of IRBs in conducting new

drug protocols, controlled by 21 CFR part 56, includes provision for procedures where an FDA investigator observes apparent noncompliance with these regulations in the operation of an IRB. Under these regulations, the IRB and parent institution are informed of those observations, and a response describing the corrective actions to be taken is required (*see* 21 CFR 56.120[a]). If it is determined that the IRB or the institution has failed to take adequate steps to correct the noncompliance, and the FDA Commissioner determines that this noncompliance may justify the disqualification of the IRB or of the parent institution, "the Commissioner will institute proceedings in accordance with the requirements for a regulatory hearing set forth in part 16" (21 CFR 56.121). Of course, the regulatory scheme explicitly provides for court review of final administrative actions taken by the Commissioner (*see* 21 CFR 10.45[a]).

It is therefore clear that the procedures created by these regulations of IRBs, which include the possibilities of an adversarial regulatory hearing before the FDA (*see* 27 CFR 156.121[a]) and subsequent judicial review (*see* 21 CFR 10.45), qualify as a quasi-judicial process by an administrative agency, as contemplated by *Rosenberg* and *Herzfeld*. Like the NASD considered by the Court of Appeals in *Rosenberg* (8 NY3d at 366),

the FDA "is a quasi-governmental entity [with] authority to enforce the requirements of [law]," and the agency's initial investigation into a complaint against an IRB is part of its execution of its responsibility for oversight and regulation of new drug testing. Therefore, statements made to an investigator in the course of the initial investigation by the FDA into the hospital's IRB are protected by an absolute privilege.

There is no merit in my colleague's suggestion that because such an FDA hearing would involve the IRB rather than Stega personally, the absolute privilege protecting statements made in the course of that preliminary investigation would not protect the speakers in a defamation claim brought against them by Stega. It is not germane that it is Stega who is asserting the defamation claim; the statements given to the investigator are subject to an absolute privilege, period.

It is also simply irrelevant who initiated the FDA's investigation by making a complaint to the FDA. The FDA had the authority and responsibility to commence an inquiry with regard to the proper functioning of the hospital's IRB, and, depending on what the investigator uncovered, that initial inquiry could have ultimately led to a regulatory hearing before the FDA. Therefore, when that investigator inquired of hospital administrators about the circumstances of Stega's termination and

the drug protocol underlying it, that inquiry was part and parcel of the agency's process, and answers provided by a hospital administrator should be subject to the same absolute privilege as that which attaches to a complaint initiating an SEC investigation.

Furthermore, there is a strong public interest in ensuring that those with information about research protocols for newly developed drugs are encouraged to speak fully and candidly, without any need for self-censorship.

The case of *Toker v Pollak* (44 NY2d 211 [1978]), relied on by my dissenting colleague as controlling in this case, does not require a different result. That case concerned oral and written statements by defendant Henry Stern, then a deputy commissioner in the City Department of Consumer Affairs, to a representative of the Mayor's Committee on the Judiciary, a representative of the Department of Investigation, and an Assistant District Attorney. In each of those statements, Stern in effect said that he had been told by defendant Pollak, the attorney who had represented Stern's mother in a personal injury case against New York City, that Pollak had paid a bribe to plaintiff Toker, the Assistant Corporation Counsel representing the City, in order to settle Stern's mother's case. Toker then sued both Stern and Pollak (although the Court of Appeals' decision discussed only

the defamation claims against Stern). The Court held that Stern's oral and written statements to the Department of Investigation and the District Attorney were afforded only a qualified privilege (*see* 44 NY2d at 221).

In so holding, the Court relied on its previous ruling in *Pecue v West* (223 NY 316 [1922]), which held that absolute immunity does not attach to a complaint or information given to a District Attorney concerning the alleged commission of a crime. The Court in *Toker* also elaborated on the general rule (at the time) that absolute immunity had only been granted to "individuals participating in a public function, such as judicial, legislative, or executive proceedings" (44 NY2d at 219 [citations omitted]), and noted that in *Pecue v West* the Court had said that absolute immunity "applies only to a proceeding in court or one before an officer having attributes similar to a court" (*Toker*, 44 NY2d at 219, quoting *Pecue*, 223 NY at 321). The discussion in *Toker* mentioned some of the "quasi-judicial" administrative contexts in which statements have been afforded an absolute immunity (*see* 44 NY2d at 222), but emphasized that in each of its examples, a hearing was held.

However, the developing law since *Toker* has broadened the application of absolute privilege in the "quasi-judicial" context. The Court of Appeals' more recent decision in *Rosenberg*

(8 NY3d 359) established that a statement made in a preliminary form to a government agency may be entitled to an absolute privilege, even where no further investigation, hearing, or any other processes are conducted by the agency as a result of that statement. This Court's decisions in *Cicconi* (27 AD3d 59) and *Herzfeld* (175 AD2d 689) elaborate on that expansion from earlier, narrower rulings such as *Toker*. The law as it currently stands no longer limits the application of absolute immunity to statements made in the context of administrative hearings.

Therefore, the allegedly defamatory statements here must be protected by an absolute privilege, and, consequently, it is irrelevant whether they were non-actionable opinion or statements of fact reasonably susceptible of a defamatory connotation.

Accordingly, the order of the Supreme Court, New York County (Debra A. James, J.), entered September 17, 2014, to the extent it denied the motion of defendants New York Downtown Hospital and Stephen G. Friedman, M.D. to dismiss plaintiff Stega's defamation cause of action as against them, should be reversed, on the law, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint as against said defendants.

All concur except Kapnick, J. who dissents in an Opinion.

KAPNICK, J. (dissenting)

I respectfully dissent from the majority's opinion, because I believe that the alleged defamatory statements to the FDA were not protected by an absolute privilege, but rather by a qualified privilege, and thus I would affirm the motion court's order.

This action stems from the February 2012 termination of plaintiffs Jeanetta Stega, Ph.D., M.S.N. (Stega or plaintiff), and Wesley Tzall, M.D.,[1] from their positions with defendant New York Downtown Hospital (NYDH), now the New York and Presbyterian Hospital.

On January 27, 2012, Jeffrey Menkes, NYDH's chief executive officer, placed Stega on administrative leave pending an investigation of her conduct. Between January 27 and February 2, 2012, NYDH's outside counsel performed an allegedly flawed investigation. According to plaintiff, NYDH wrongly concluded that she had a conflict of interest arising from her role as chairperson of its Institutional Review Board (IRB) when the IRB considered the Luminant study. On February 2, 2012, Anthony Alfano, NYDH's chief operating officer, terminated her employment in the presence of Stephen G. Friedman, M.D., NYDH's acting chief medical officer, and Chad Harris, NYDH's chief compliance

[1] In the order appealed from, the motion court dismissed all claims asserted by Tzall, and he has not taken an appeal.

officer. On March 6, 2012, Stega and Tzall, who was also terminated from the IRB, filed a formal complaint with the FDA, because they were concerned that the patients in research protocols overseen by the IRB would not be properly supervised.

On May 22, 2012, in response to Stega and Tzall's complaint, and as part of the FDA's investigation, an FDA investigator performed an onsite inspection of NYDH, and met with Dr. Friedman, who explained the reasons for Stega's termination.

In particular, Stega alleges in this action, Dr. Friedman informed the FDA inspector that (1) "Stega had created the Stega Research Group, using her home address, and that funds from the sponsor for the Luminant study were 'channeled to the Stega Research Group'"; (2) "Stega had requested of Farber, the then PI for the Luminant study, to add a patient with prostate cancer to the Luminant study"; (3) when Farber told Stega that the IRB would not approve bringing in that patient, "according to Farber, Stega said: 'I am the IRB and I want the patient entered'"; (4) "[A]ll of the IRB's approvals of studies when [Stega] was Chairperson were 'tainted'"; and (5) "therefore, the Hospital had removed Stega as Chair, Tzall as Vice Chairman of the IRB, and any IRB member who had direct contact with Stega," and, "[b]ecause the IRB officers and members were tainted," Dr. Friedman "wanted to disband the Hospital's IRB."

Stega further alleges that Dr. Friedman's slanderous statements to the FDA inspector were then re-published in the FDA's "Establishment Inspection Report," which was sent to CEO Menkes with a cover letter, and received August 16, 2012.

The complaint, as relevant to this appeal, alleges that Dr. Friedman's statements during the FDA investigation were false, made with malice, and were defamatory per se, because they tended to injure Stega in her profession and as a research scientist who works closely with the FDA.

NYDH's motion to dismiss the defamation claim was premised primarily on the contention that Dr. Friedman's statements to the FDA investigator are protected by an absolute privilege, since they were made in the course of a quasi-judicial proceeding. NYDH alternatively argued that Dr. Friedman's statements were protected by a qualified privilege applicable to communications between people with a common interest or duty in the subject matter. Plaintiff essentially acknowledged that point, and the court denied the motion, holding that a claim of qualified privilege is to be raised as an affirmative defense and that it was premature to consider it on a motion to dismiss.[2] The motion court also found that the complaint's allegations of defamation

[2] It is not disputed on appeal that the defamatory statements are at least protected by a qualified privilege.

were sufficiently specific to satisfy pleading requirements.

On appeal, defendants argue that the absolute privilege afforded to quasi-judicial proceedings applies to the FDA investigation, and immunizes Dr. Friedman's statements. Alternatively, defendants argue that the challenged statements either are true or are protected opinion.

Plaintiff argues that the FDA investigation was not a quasi-judicial proceeding, and thus no absolute privilege applies, and that, moreover, the statements made by Dr. Friedman were defamatory, and thus Dr. Friedman and NYDH are liable for their publication.

"[S]tatements uttered in the course of a judicial or quasi-judicial proceeding are absolutely privileged so long as they are material and pertinent to the questions involved" (*Herzfeld & Stern v Beck*, 175 AD2d 689, 691 [1st Dept 1991], *lv dismissed* 82 NY2d 789 [1993], 89 NY2d 1064 [1997]). "As a matter of policy, the courts confine absolute privilege to a very few situations" (*Park Knoll Assoc. v Schmidt*, 59 NY2d 205, 210 [1983]). The absolute privilege affords a speaker or writer immunity from liability for an otherwise defamatory statement to which the privilege applies, regardless of the motive with which the statement was made (*id.* at 208-209).

"This immunity . . . has been granted only to

> those individuals participating in a public function, such as judicial, legislative, or executive proceedings . . . [and] is designed to ensure that their own personal interests -- especially fear of a civil action, whether successful or otherwise -- do not have an adverse impact upon the discharge of their public function" (*Toker v Pollak*, 44 NY2d 211, 219 [1978] [internal citations omitted]).

When applicable, the absolute privilege attaches not only to the hearing stage, but also to preliminary or investigative stages of the process (*Rosenberg v Metlife, Inc.*, 8 NY3d 359, 365 [2007], citing *Wiener v Weintraub*, 22 NY2d 330, 331 [1968]).

"An administrative function is considered quasi-judicial when it is adversarial, results in a determination that derives from the application of appropriate provisions in the law to the facts and is susceptible to judicial review" (*Herzfeld & Stern v Beck*, 175 AD2d at 691).[3]

In *Herzfeld*, the Court of Appeals found that the New York Stock Exchange "clearly perform[ed] as a quasi-judicial body," because it had established

> "a comprehensive system of oversight and

[3] The majority's opinion appears to be focused on the fact that statements made outside the context of an administrative hearing may still qualify for the application of absolute privilege. I do not dispute this, and therefore find most of the majority's opinion to be superfluous. Certain quasi-judicial elements must be present before the analysis even considers the stage at which the subject statements were made.

> self-regulation . . . [and was] authorized to inquire into whether one of its members or an employee thereof should be disciplined for violating a particular section of the law or pertinent rule or regulation, a process which is adversarial in nature and affords the subject of the investigation due process protections, including the right to appeal" (internal citations omitted) (*id.*).

Similarly, in *Rosenberg*, the Court of Appeals found that the National Association of Securities Dealers (NASD), which is a self-regulatory organization, qualifies as a quasi-judicial body, and, as a result, statements made by an employer on an NASD employee termination (U-5) notice are protected by an absolute privilege (8 NY3d at 366, 368). Importantly, "NASD disciplinary determinations are subject to SEC and judicial review" (*id.* at 367).

On the other hand, "a statement is subject to a qualified privilege when it is fairly made by a person in the discharge of some public or private duty, legal or moral, or in the conduct of his [or her] own affairs, in a matter where his [or her] interest is concerned" (*Rosenberg*, 8 NY3d at 365 [internal quotation marks omitted]). If the privilege is qualified, "it can be lost by plaintiff's proof that defendant acted out of malice" (*Park Knoll Assoc.*, 59 NY2d at 209).

In *Toker*, the Court of Appeals held that an alleged defamatory statement made to the New York City Department of

Investigation (DOI) concerning plaintiff, who was seeking appointment to the Criminal Court, was only afforded a qualified privilege because, while the DOI could subpoena witnesses, it did not conduct a quasi-judicial hearing at which the plaintiff could challenge the defendant's allegations. Nor did it appear that the DOI was "empowered, based upon its findings, to grant any tangible form of relief reviewable on appeal in the courts," and, therefore, the DOI's proceeding "lacked all of the safeguards traditionally associated with a quasi-judicial proceeding" (*Toker*, 44 NY2d at 222).

Here, as in *Toker*, the safeguards attendant to a quasi-judicial proceeding are lacking. The alleged defamatory statements were made to an FDA investigator charged with investigating complaints that the patients in research protocols overseen by the IRB were not being properly supervised. Defendants accurately argue that the FDA's investigation could lead to a hearing on whether the IRB would be disqualified; however, such a hearing would ultimately involve the IRB and NYDH, but not Stega. While the FDA may be an administrative agency of the federal government, it does not perform as a quasi-judicial body like the NYSE, which affords the *subject of the investigation* due process protections, including the right to appeal (*Herzfeld*, 175 AD2d at 691), or the NASD, whose

disciplinary determinations are subject to SEC and judicial review (*Rosenberg*, 8 NY3d at 367). Further, while the FDA regulatory scheme (*see* 21 CFR 10.45) provides for subsequent judicial review, it does not afford Stega, the subject of the investigation, due process protections. Therefore, regardless of the nature of the FDA's proceeding, it would not be adversarial to Stega and would not provide a forum for her to challenge the alleged defamatory statements.

Moreover, as relied upon in applying absolute privilege in NASD U-5 termination cases, it is "significant that there are remedies available to an employee who disputes the employer's statements" (*Cicconi v McGinn, Smith & Co., Inc.*, 27 AD3d 59, 63 [1st Dept 2005] *lv dismissed* 6 NY3d 807 [2006]); specifically, an "arbitration proceeding or court action to expunge any alleged defamatory language" (*Rosenberg*, 8 NY3d at 368). No such remedy is available to Stega if the absolute privilege is applied here. Additionally, a finding of qualified privilege offers ample protection to the speaker, because malice must be proven, and, as with any defamation claim, truth is a complete defense.

While I acknowledge the public importance of FDA investigations into potential misconduct in clinical trials such as the one conducted in this case, I do not find any policy reasons for concluding that this qualifies such an investigation

as one of the "very few situations" (*Park Knoll Assoc.*, 59 NY2d at 210) in which speakers should be afforded unlimited freedom of speech, without inquiry into malice. Here, as in *Toker*, "[a] qualified privilege is sufficient to foster the public purpose of encouraging citizens to come forth with information concerning [potentially] criminal [or otherwise inappropriate] activity . . . [and] [t]he protection afforded by a qualified privilege should not be cavalierly dismissed as inadequate" (44 NY2d at 221).

Notwithstanding defendants' arguments and the majority's statements to the contrary, the Court of Appeals' holding in *Rosenberg*, and our rulings in *Cicconi* and *Herzfeld*, that the absolute privilege attaches to defamatory statements made in U-5 termination notices, have not expanded the application of absolute privilege so far as to encompass the scenario found here, where the requisite attributes of a quasi-judicial proceeding are not present.

Accordingly, I would find that the absolute privilege does not apply under the circumstances of this case.

Because I find that absolute privilege does not attach here, I will also address the defendants' alternative argument that the complaint should be dismissed because the alleged defamatory statements either are true or are protected opinion. The elements of defamation are "a false statement, published without

privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, ... caus[ing] special harm or constitut[ing] defamation per se" (*Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999]. When a qualified privilege applies, the statements are protected unless made with malice, meaning either "spite or ill will," or "reckless disregard of whether [they were] false or not (*Liberman v Gelstein*, 80 NY2d 429, 437-438 [1992] [internal quotation marks omitted]; *Frechtman v Gutterman*, 115 AD3d 102, 107-108 [1st Dept 2014]).

In determining the sufficiency of a defamation pleading, the Court considers "whether the contested statements are reasonably susceptible of a defamatory connotation" (*Davis v Boeheim*, 24 NY3d 262, 268 [2014], quoting *Armstrong v Simon & Schuster*, 85 NY2d 373, 380 [1995]). "If, upon any reasonable view of the stated facts, plaintiff would be entitled to recovery for defamation, the complaint must be deemed to sufficiently state a cause of action" (*Silsdorf v Levine*, 59 NY2d 8, 12 [1983], *cert denied* 464 US 831 [1983]).

In my opinion, the complaint adequately pleads that Dr. Friedman made false statements that are "'reasonably susceptible of a defamatory connotation'" (*Davis*, 24 NY3d at 268) and the motion court correctly found that the alleged defamatory

statements connote that Stega misappropriated funds and improperly attempted to interfere with a clinical study, and that these statements would disparage Stega in her profession. Although the FDA report of the investigation indicated that Dr. Friedman said that he "felt" that the IRB was "tainted," that does not render the statement a protected opinion (*see Mann v Abel*, 10 NY3d 271 [2008], *cert denied* 555 US 1170 [2009]). Since Dr. Friedman was the acting chief medical officer, his words carried authority when speaking about the IRB, and the context suggests to the average reader that his statements were based on facts (*see Davis*, 24 NY3d at 273).

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

ENTERED: JANUARY 10, 2017

CLERK