SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 2, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Mazzarelli, J.P., Andrias, DeGrasse, Richter, Clark, JJ.

9028 Paul M. Ellington, Index 651558/10
Plaintiff-Appellant,

-against-

EMI Music Inc., et al.,
Defendants,

EMI Mills Music, Inc.,
Defendant-Respondent.

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Scarola Malone & Zubatov LLP, New York (Richard J.J. Scarola of counsel), for appellant.

Pryor Cashman LLP, New York (Donald S. Zakarin of counsel), for respondent.

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Appeal from order, Supreme Court, New York County (Bernard J. Fried, J.), entered October 11, 2011, which granted a motion by defendant EMI Mills Music, Inc. to dismiss the amended complaint pursuant to CPLR 3211 (a)(1) and (7), deemed an appeal from judgment, same court and Justice, entered December 7, 2011, dismissing the complaint (CPLR 5501[c]), and, so considered, the judgment unanimously affirmed, without costs.

This breach of contract action was brought to recover royalties allegedly due under a December 17, 1961 songwriter royalty agreement. The agreement designates the legendary Edward Kennedy Ellington, known professionally as Duke Ellington, and named members of his family (collectively Ellington) as the "First Parties." A group of music publishers consisting of Mills Music, Inc., American Academy of Music, Inc., Gotham Music Service, Inc., their predecessors in interest and any other affiliate of Mills Music are collectively designated as the "Second Party" under the agreement. EMI Mills is the successor-in-interest to Mills Music. According to the amended complaint, plaintiff is suing as Duke Ellington's heir and grandson.

This appeal calls for an interpretation of paragraph 3(a) of the agreement which, where relevant, required the Second Party to pay Ellington "a sum equal to fifty (50%) percent of the net revenue actually received by the Second Party from . . . foreign publication" of Ellington's compositions. This is known in the music publishing industry as a "net receipts" arrangement by which a composer, such as Ellington, would collect royalties based on income received by a publisher after the deduction of fees charged by foreign subpublishers (*see e.g. Jobim v Songs of Universal*, 732 F Supp 2d 407, 413 [SD NY 2010]). As stated in

plaintiff's brief, "net receipts" arrangements were standard when the agreement was executed in 1961. Plaintiff also notes that at that time foreign subpublishers were typically unaffiliated with domestic publishers such as Mills Music. Over time, however, EMI Mills, like other publishers, acquired ownership of the foreign subpublishers through which revenues derived from foreign subpublications were generated. Accordingly, in this case, fees that previously had been charged by independent foreign subpublishers under the instant net receipts agreement are now being charged by subpublishers owned by EMI Mills.[1] Plaintiff asserts that EMI Mills has enabled itself to skim his claimed share of royalties from the Duke Ellington compositions by paying commissions to its affiliated foreign subpublishers before remitting the bargained-for royalty payments to Duke Ellington's heirs. In dismissing the complaint, the motion court declined to read into the royalty payment terms any distinction between affiliated and unaffiliated foreign subpublishers inasmuch as the contracting parties themselves chose not to make such a

[1]As also stated in plaintiff's brief, "at source" agreements have replaced "net receipts" agreements as the music publishing industry standard since around 1980. Under an "at source" arrangement, royalty payments to the artist are based on the grand total of earned music publishing revenue with all costs of collection absorbed by the publisher.

distinction. We affirm.

Plaintiff asserts that the agreement is ambiguous as to whether "net revenue actually received by the Second Party" entails revenue received from EMI Mills's foreign subpublisher affiliates. Although it was raised for the first time on appeal, we entertain plaintiff's ambiguity argument as it poses a question of law that could not have been avoided if raised before the motion court (*see Delgado v New York City Bd. of Educ.*, 272 AD2d 207 [1st Dept 2000], *lv denied* 95 NY2d 768 [2000], *cert denied* 532 US 982 [2001]).

An agreement is unambiguous "if the language it uses 'has a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion'" (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002] [citations omitted]). Conversely, an agreement is ambiguous if "on its face [it] is reasonably susceptible of more than one interpretation" (*see Chimart Assoc. v Paul*, 66 NY2d 570, 573 [1986]). Guided by these precedents, we find no ambiguity in the agreement which, by its terms, requires EMI Mills to pay Ellington's heirs 50% of the net revenue actually received from foreign publication of Ellington's compositions. "Foreign

publication" has one unmistakable meaning regardless of whether it is performed by independent or affiliated subpublishers. Given the plain meaning of the agreement's language, plaintiff's argument that foreign subpublishers were generally unaffiliated in 1961, when the agreement was executed, is immaterial.

A court's "role in interpreting a contract is to ascertain the intention of the parties *at the time they entered into the contract"* (*Evans v Famous Music Corp.,* 1 NY3d 452, 458 [2004][emphasis added]). We note that the complaint contains no allegation of any change in the basis for payment of royalties, i.e., 50% of the net revenue derived from foreign publication. Moreover, the complaint sets forth no basis for plaintiff's apparent premise that subpublishers owned by EMI Mills should render their services for free although independent subpublishers were presumably compensated for rendering identical services. Notwithstanding plaintiff's argument, we note that the motion court correctly determined that the agreement's definition of "Second Party" included only the parties named therein and "other affiliates of Mills Music, Inc." that were in existence at the time the agreement was executed. The definition did not include foreign subpublishers that had no existence or affiliation with

Mills Music at the time of contract (*see VKK Corp. v National Football League*, 244 F 3d 114, 130-131 [2d Cir 2001]). We have considered plaintiff's remaining arguments and find them unavailing.

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

ENTERED: MAY 2, 2013

CLERK

Mazzarelli, J.P., Renwick, Richter, Gische, Clark, JJ.

9108 206-208 Main Street Associates, Inc., doing business as 8930 Sutphin Blvd., LLC, Plaintiff-Respondent, Index 107126/10

-against-

Arch Insurance Company, Defendant-Appellant,

H&H Builders, Inc., Defendant-Respondent.

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

Coughlin Duffy LLP, New York (Adam M. Smith of counsel), for 206-208 Main Street Associates, Inc., respondent.

Quinn McCabe LLP, New York (Todd J. DeSimone of counsel), for H&H Builders, Inc., respondent.

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Order, Supreme Court, New York County (Milton A. Tingling, J.), entered April 26, 2012, which, upon plaintiff's and defendant H&H Builders' motions for summary judgment, declared that defendant Arch Insurance Company has a duty to defend and indemnify H&H and plaintiff, unanimously reversed, on the law, with costs, the motions denied, and the declaration vacated.

Plaintiff, 206-208 Main Street Associates, Inc. d/b/a 8930 Sutphin Blvd., LLC (Sutphin), owned the property at 206-208 Main Street in Queens, New York. Sutphin hired defendant H&H

Builders, Inc. (H&H) to act as construction manager on a project to construct a three-story office and retail building on the property, with an underground parking garage. H&H agreed to procure a commercial general insurance policy and to name Sutphin as an additional insured. H&H procured such a policy from defendant Arch Specialty Insurance Company (Arch). The policy contained an "Earth Movement or Subsidence Exclusion Endorsement," which specified that the policy would not apply to property damage or bodily injury claims arising out of subsidence, falling away, caving in, or other movement of earth.

On August 30, 2007, as excavation was ongoing, the foundation of an adjacent building began to crack, and it eventually collapsed. A furniture store and dentist's office were located in the neighboring building. Surrounding buildings also allegedly sustained damage. Through its insurance agent, H&H notified Arch of the incident within several days of its occurrence. H&H informed its agent that the claim was based on the collapse of a neighboring building, which another contractor had undertaken to underpin. In a letter dated September 14, 2007, Arch acknowledged receipt of the claim and advised H&H that it would review the information provided to determine "what rights or coverage, if any, you may be entitled to pursuant to

the terms of the above referenced policy." Arch informed H&H that it reserved its rights to assert "any and all defenses to coverage, including those that may be developed or discovered in the course of our further coverage investigation."

On October 10, 2007, H&H's agent forwarded to Arch a letter from attorneys for an insurance company that insured another contractor on the project. The letter described the incident as involving "the collapse or partial collapse of several structures." On October 30, 2008, Sutphin's insurance carrier wrote to Arch to notify it of the claim, and stated that "[i]t is being alleged that the collapse and damages to the buildings . . were the result of inadequate shoring."

H&H was named in at least four actions that arose out of the incident, one of which was commenced by Sutphin in October 2007. Arch retained a law firm to defend H&H in each of the actions. In the Sutphin lawsuit, the verified bill of particulars alleged that the accident was caused by, inter alia, "excavation work, underpinning [and] soil testing . . . [that was] negligent."

By letter dated January 6, 2010, Arch first informed H&H that the incident might fall within the earth movement exclusion in the policy. Arch reserved its right to disclaim coverage with respect to the lawsuits based on the cited exclusion, but

confirmed that it would continue to provide H&H with a defense. Arch further advised H&H that H&H had the right to reject Arch's defense and retain its own counsel. Arch restated its reservation of rights in a letter dated March 29, 2010.

Sutphin commenced this declaratory judgment action against Arch and H&H seeking a declaration of its entitlement to coverage in the underlying lawsuits as an additional insured under the Arch policy. H&H asserted cross claims against Arch claiming that it too was covered under the policy. Sutphin moved for summary judgment on its claim, on the ground that the earth movement exclusion did not apply to the incident. It further contended that, even if the reservation of rights were otherwise proper, Arch was equitably estopped from refusing to cover the various claims. The equitable estoppel theory was based on the fact that Arch had "controlled the defense" of the underlying action up until it issued its reservation of rights. In support of its motion, Sutphin submitted an affirmation by its counsel in the underlying actions. The affirmation stated:

> "With respect to the prejudicial effect that the delay in disclaiming indemnification coverage for H&H has caused Plaintiff, nothing can be more clearly stated. Defendant H&H was hired as the construction manager for the work performed for Plaintiff and was in charge of supervising the

> underpinning work. As such, the blame for the damages incurred, which is approximately $9,000,000.00, falls squarely on it. Arch's deliberate delay in advising whether it will be indemnifying H&H for this los[s] greatly affects the ability of the parties to resolve this case amicably. For example, all of the parties, including counsel for Defendant H&H, Glenn Fuerth of Wilson Elser Moskowitz Edelman & Dicker LLP, signed and agreed to mediate this case on November 16,2010. (See Mediation Agreement attached hereto as Exhibit 'F') However, just days before the scheduled mediation in late January 2011 Defendant H&H backed out and refused to participate. Since Defendant H&H is the main defendant in the underlying action, the mediation could not proceed and the case remains unresolved to this day. Additionally, this behavior is incongruous with Defendant Arch's assertion that it never disclaimed coverage."

H&H "cross-moved"[1] against Arch for summary judgment. It submitted an attorney affirmation that simply adopted the arguments made by Sutphin. In opposition to both motions, Arch argued, inter alia, that it was not yet obligated to issue a disclaimer at the time the action was commenced and that, in any event, Sutphin and H&H made an insufficient showing of prejudice, since prejudice could not be proven based on the mere fact that Arch controlled the defense. The motion court granted the

[1]Arch contends that this was procedurally improper, since H&H did not cross-move against a party that itself had made a motion.

motions. It did not reach the question whether the exclusion applied. Rather, it held that, "after two years of assuming a defense," Arch was equitably estopped from disclaiming coverage.

We find that Arch failed to offer a reasonable excuse for its late disclaimer based on the earth movement exclusion, because sufficient facts were available to it well before it issued the disclaimer. However, we still must determine whether equitable estoppel applies. The Court of Appeals has long recognized that an insurer can be equitably estopped from issuing a disclaimer if at the time it disclaims it has controlled the defense of its insured (*see Gordon, Inc. v Massachusetts Bonding & Ins. Co.*, 229 NY 424 [1920]). Nevertheless, the Court of Appeals has only found estoppel in cases where, by the time the insurer attempted to avoid liability under the policy, the underlying litigation against the insured had reached a point where the course of the litigation had been fully charted. For example, in *Gerka v Fidelity & Cas. Co.* (251 NY 51, 57 [1929]), the Court found that the insured raised an issue of fact as to estoppel where the insurer, having discovered facts supporting a possible disclaimer, "continued with the defense of the action, paid the witness fees, conducted the trial, appealed to the Appellate Division, and offered to pay the plaintiff a sum of

money to settle the action." In *William M. Moore Constr. Co. v United States Fid. & Guar. Co.* (293 NY 119 [1944]), the Court, in finding that the insurer was estopped from disclaiming after the trial had concluded, favorably quoted *Kearns Coal Corp. v United States Fid. & Guar. Co.* (118 F2d 33, 36 [2d Cir 1941]), which stated: "It is true that, where the insurer has retained control of the insured's defense *to final judgment or to a settlement*, many authorities hold that prejudice is presumed or that the assumption of control is a waiver of rights or an election. While there are cases the other way, the New York decisions seem to tend that way without precise statement of the rule" ([internal citations omitted] [emphasis added]).

Both H&H and Sutphin rely on *Albert J. Schiff Assoc. v Flack* (51 NY2d 692 [1980]) in support of their argument that control of an insured's defense for any substantial length of time is inherently prejudicial. However, in that case, equitable estoppel was not at issue, and the Court's discussion of the doctrine was dicta. Further, the *Schiff* Court cited to *Gerka* (251 NY at 51), in which, again, the insurer controlled the defense through trial. Significantly, the *Schiff* Court also relied on *O'Dowd v American Sur. Co. of N.Y.* (3 NY2d 347 [1957]). In *O'Dowd*, the Court held that "[s]ince the insurer's disclaimer

of liability under the policy was first made nearly two years before the trial and again very definitely fully five months before the trial, and since the insured was given a full opportunity to join in the defense of the action, it may not be said as a matter of law that the insurer should be estopped from denying coverage of the policy, in the absence of a showing that the delay in notification prejudiced the rights of the insured" (3 NY2d at 355).

This Court's discussion of equitable estoppel in *Federated Dept. Stores, Inc. v Twin City Fire Ins. Co.* (28 AD3d 32 [1st Dept 2006]) is consistent with the Court of Appeals cases cited above, insofar as this Court stressed that equitable estoppel will not be found unless "the insurer's control of the defense is such that the character and strategy of the lawsuit can no longer be altered" (28 AD3d at 38). There is no indication in *Federated* that when the insurer disclaimed, the underlying litigation was close to trial. By contrast, in *United States Fid. & Guar. Co. v New York, Susquehanna & W. Ry. Corp.* (275 AD2d 977 [4th Dept 2000]), on which this Court relied in *Federated*, the carrier, which had assumed the defense of its insured, never disclaimed until six days before trial and on the eve of a court-ordered settlement conference at which a favorable offer to settle the

case was tendered. The insured agreed to have the carrier pay the amount that was agreed upon at the settlement conference, but first had to agree that it would then litigate the coverage issue and, if it lost, reimburse the settlement amount and all of the defense costs. The court found that under these circumstances the insured was prejudiced.

When Arch issued its reservation of rights based on the earth movement exclusion, the underlying litigation was, by Sutphin's own admission, still in its "early phase." Accordingly, Sutphin's and H&H's submissions do not establish that they were prejudiced as a matter of law (*see O'Dowd*, 3 NY2d at 355). In several cases cited by Sutphin and H&H (*Daimler Chrysler Ins. Co. v Zurich Ins. Co.*, 72 AD3d 730 [2d Dept 2010]; *Brooklyn Hosp. Ctr. v Centennial Ins. Co.*, 258 AD2d 491 [2d Dept 1999], *lv denied* 93 NY2d 814 [1999]; *Hartford Ins. Group v Mello*, 81 AD2d 577 [2d Dept 1981]), equitable estoppel was found to apply because the litigation in which the insurer was defending its insured was already on the trial calendar at the time the disclaimer was issued.

This is not to say that Sutphin and H&H could not establish prejudice by some factor other than the posture of the litigation at the time Arch issued its reservation of rights. For example,

in another case cited by Sutphin and H&H in which a finding of equitable estoppel was made, it is apparent from the briefs that the defendant insurer, to which the plaintiff insurer was trying to tender back the defense of their mutual insured, had argued that the plaintiff insurer had taken advantage of information defense counsel had communicated to it to form the basis for the eventual disclaimer (*Fireman's Fund Ins. Co. v Zurich American Ins. Co.*, 37 Ad3d 521 [2d Dept 2007]). Sutphin and H&H failed to present any such evidence to shift their burden to Arch on their motions for summary judgment. All they attempted to demonstrate was that H&H was perceived in the litigation as the party most to blame for the collapse of the neighboring building. However, they failed to even suggest that Arch somehow manipulated the defense to create that perception.

Because Sutphin's and H&H's submissions were insufficient to demonstrate that they were prejudiced by Arch's late reservation

of rights as a matter of law, they failed to shift their burdens on the motions. Whether Arch should be equitably estopped from disclaiming coverage (if that is what it ultimately decides to do) must therefore be left to the trier of fact.

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

ENTERED: MAY 2, 2013

CLERK

Sweeny, J.P., Acosta, Román, Feinman, Clark, JJ.

9592 John Marrero, Index 301297/10
Plaintiff-Appellant,

-against-

2075 Holding Co. LLC, et al.,
Defendants-Respondents.

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

McGaw, Alventosa & Zajac, Jericho (Ross P. Masler of counsel), for respondents.

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Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered January 11, 2012, which denied plaintiff's motion for summary judgment as to liability on his Labor Law §§ 240(1) and 241(6) claims against defendants 2075 Retail Co., LLC, 2075 Residential Co. LLC, and Gotham Construction Company LLC, unanimously reversed, on the law, without costs, plaintiff's motion granted as to his Labor Law § 240(1) claim and his Labor Law § 241(6) claim predicated on violations of 12 NYCRR 23-2.1(a)(2), and, upon a search of the record, summary judgment granted to defendants 2075 Retail, 2075 Residential and Gotham dismissing the Labor Law § 241(6) claims against them based on alleged violations of 12 NYCRR 23-1.7(e)(2) and 23-2.1(a)(1).

The motion court erred in denying plaintiff's motion for

partial summary judgment on his Labor Law § 240(1) claim. Plaintiff made a prima facie showing that his injuries were caused by a failure to protect against a risk arising from a significant elevation differential. Plaintiff testified that he sustained physical injuries when he was walking across plywood planks covering fresh concrete. The plywood planks buckled and shifted. As a result, an A-frame cart containing Sheetrock and two 500-pound steel beams tipped over toward the plaintiff. The steel beams fell, landing on his left calf and ankle. While the record did not specify the height, the uncontroverted evidence shows that the steel beams fell a short distance from the top of the A-frame cart to plaintiff's leg. Given the beams' total weight of 1,000 pounds and the force they were able to generate during their descent, the height differential was not de minimis (*see McCallister v 200 Park, L.P.*, 92 AD3d 927, 928-929 [2d Dept 2012] [elevation differential was within the scope of the scaffold law when a scaffold on wheels fell on the plaintiff who was at the same level as the scaffold, and it traveled a short distance]; *Kempisty v 246 Spring Street, LLC*, 92 AD3d 474, 474 [1st Dept 2012] [an elevation differential cannot be considered de minimis when the weight of the object being hoisted is capable of generating an extreme amount of force, even though it only

traveled a short distance]; *see also Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 10 [2011] [recovery was permitted under the scaffold law when metal vertical pipes, on the same level as the plaintiff, toppled over on him]; *Runner v New York Stock Exch., Inc.*, 13 NY3d 599 [2009]).

Defendants did not raise a triable issue of fact in opposition to plaintiff's motion. In opposition, defendants submitted the affidavit of plaintiff's foreman who observed the scene shortly after the accident, but did not witness it. His affidavit states that "I believe that the beam may have been stacked on the floor behind or next to the cart," and further, that "I determined that the boards and A-frame cart tipped over and may have knocked down a beam." These speculations and inconsistent statements are insufficient to raise a triable issue of fact, especially in light of the fact that the foreman did not witness plaintiff's accident. Moreover, the foreman's affidavit does not sufficiently challenge the conclusion that the steel beams were not properly secured.

We find that the foreman's affidavit contradicted plaintiff's testimony about what type of work he was doing at the time of the accident. However, this alone does not raise a triable issue of fact. Defendants' liability is unaffected by

whether plaintiff was looking for a plank, or cleaning the site, before the steel beams fell on his leg (*see John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001]). In addition, defendants point to plaintiff's criminal conviction, which is admissible to impeach him as a witness in this case (*see Pope v New York City Tr. Auth.*, 244 AD2d 263 [1st Dept 1997]). However, we do not agree that a criminal conviction by itself can raise an issue of fact of credibility when the plaintiff is the sole witness to an accident. As such, defendants fail to present any evidence raising a triable issue of fact relating to the prima facie case or to plaintiff's credibility. Thus, summary judgment is properly awarded to plaintiff, even though it is based on plaintiff's own testimony as the sole witness to the accident (*Noble v 260-261 Madison Ave., LLC*, 100 AD3d 543, 544-545 [1st Dept 2012]; *see Klein v City of New York*, 89 NY2d 833 [1996]).

As to plaintiff's Labor Law § 241(6) claims, we hold that the motion court improperly denied plaintiff's motion for summary judgment based on violations of 12 NYCRR 23-2.1(a)(2). Section 23-2.1(a)(2) states that "[m]aterial and equipment shall not be stored upon any floor, platform or scaffold in such quantity or of such weight as to exceed the safe carrying capacity of such floor, platform or scaffold." Plaintiff made a prima facie

showing that this provision applies, by testifying that an A-frame cart containing Sheetrock and two 500-pound beams was on plywood flooring and the plywood collapsed as he was walking on the floor. For the reasons stated above, defendants have not presented evidence to raise a triable issue of fact relating to the prima facie case of plaintiff's Labor Law § 241(6) claim.

However, upon our search of the record (*see Merritt Hill Vineyards v Windy Hgts. Vineyard*, 61 NY2d 106, 110-112 [1984]), we grant defendants summary judgment dismissing the Labor Law § 241(6) claims that are predicated on alleged violations of 12 NYCRR 23-1.7(e)(2) and 23-2.1(a)(1). Section 23-1.7(e)(2) is inapplicable because the accident was not caused by materials or tools scattered on the floor (*see Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 383 [1st Dept 2007]). Section 23-2.1(a)(1) is

inapplicable because there is no allegation that the accident occurred in a passageway, walkway, stairway, or other thoroughfare (*see id.* at 382).

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

ENTERED: MAY 2, 2013

CLERK

Tom, J.P., Sweeny, Saxe, Román, Feinman, JJ.

9819- Index 653143/11
9819A Chelsea Piers L.P.,
Plaintiff-Appellant,

-against-

Hudson River Park Trust,
Defendant-Respondent.

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Feinberg Rozen LLP, New York (Kenneth R. Feinberg of counsel), for appellant.

Gibson, Dunn & Crutcher LLP, New York (Randy M. Mastro of counsel), for respondent.

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Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered on or about July 30, 2012, which, upon reargument, granted defendant's motion to dismiss the complaint, unanimously modified, on the law, to declare in defendant's favor on the first cause of action, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered April 19, 2012, unanimously dismissed, without costs as superseded by the appeal from the order entered on or about July 30, 2012.

In 1994 plaintiff, as lessee, and defendant's predecessor in interest, as lessor, entered into a lease. Section 10.1(a) requires plaintiff to, among other things, maintain the premises. Section 10.1(b) of the lease states that "in the event a

comprehensive, public maintenance plan for Hudson River waterfront piers in New York City (as opposed to a limited plan for certain designated piers) is adopted and becomes effective during the term of this Lease, then Lessor shall, or if Lessor is not the entity establishing such plan, it shall use its best efforts to (i) include the Premises in such plan, and (ii) assure that Lessee's obligations to maintain the piers within the Premises pursuant to subsection (a) above is not relied upon to exclude the Premises from such plan or to reduce the amount of maintenance activity or funding applied to the Premises under such plan." The lease does not define "comprehensive, public maintenance plan."

The first cause of action of plaintiff's complaint seeks a declaration that defendant has established and undertaken the "comprehensive, public maintenance plan" mentioned in section 10.1(b) of the lease. The second cause of action alleges that defendant has breached the lease by failing to include the premises in the plan.

There are 57 Hudson River waterfront piers in New York City. Twenty-one and a half piers are excluded from the Hudson River Park (the Park) by the Hudson River Park Act (the Act) and by the Park's geographical boundaries. In addition, defendant does not

provide maintenance for at least 11 additional piers, including the 3 leased by plaintiff. In sum, even if one includes the four piers that have been dismantled and turned into "pile fields" (demolished piers), defendant is providing maintenance for only 24.5 out of 57 piers, or 43% of the total. That is hardly "comprehensive," as that term is defined in the dictionary (*see* Merriam-Webster's Collegiate Dictionary 255 [11th ed 2005][defining "comprehensive" as "covering completely or broadly"]; *see also R/S Assoc. v New York Job Dev. Auth.*, 98 NY2d 29, 33 [2002] [consulting dictionary for meaning of a term]).

Plaintiff's reliance on the massive scale and cost of the Park is unavailing. The lease does not merely refer to a "comprehensive" plan; it refers to a comprehensive *maintenance* plan. Similarly, defendant's acknowledgment that the Park meets the objectives of the New York City Comprehensive Waterfront Plan is unavailing because the latter plan is not a *maintenance* plan.

Even if a comprehensive maintenance plan within the meaning of section 10.1(b) has been adopted, plaintiff's claims are time-barred. Defendant's contractual obligation was to include the premises in the plan and assure that the amount of funding for the premises under the plan was not reduced; it was not a

continuing obligation to fund pier maintenance. Therefore, defendant's time for performance was, at the latest, the date when the plan was adopted and became effective.

In its complaint, plaintiff alleged that the comprehensive maintenance plan was a plan that defendant submitted to the Army Corps of Engineers in 1998. However, on appeal, plaintiff contends that the Act is the plan. In any event, since the Act became effective in 1998, plaintiff's claims, brought in 2011, are still time-barred (*see* CPLR 213[2]).

Plaintiff's argument that it could not have sued for breach of contract before 2009 because it had sustained no damages is unavailing. "In New York, a breach of contract cause of action accrues at the time of the breach," even if no damage occurs until later (*Ely-Cruikshank Co. v Bank of Montreal*, 81 NY2d 399, 402 [1993]).

Since defendant's obligation under section 10.1(b) is unambiguous, plaintiff may not resort to extrinsic evidence, such

as the parties' course of performance (*see W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162-163 [1990]).

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

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

ENTERED: MAY 2, 2013

CLERK

Tom, J.P., Friedman, Sweeny, Feinman, JJ.

9944 West 45th Street Venture LLC, Index 108893/10
Plaintiff-Respondent,

-against-

Ladera Partners, LLC,
Defendant-Appellant,

The City of New York Department
of Transportation, etc., et al.,
Defendants.

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Claude Castro & Associates PLLC, New York (Claude Castro of counsel), for appellant.

Greenberg Traurig, LLP, New York (Leslie D. Corwin of counsel), for respondent.

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Order, Supreme Court, New York County (Alice Schlesinger, J.), entered July 11, 2012, which denied defendant-appellant's (defendant) motion to vacate a foreclosure sale of real property, unanimously affirmed, with costs.

Defendant failed to demonstrate any prejudice resulting from plaintiff's mailing of the notice of sale to it instead of to its counsel (*see* CPLR 2003; 2103).

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

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

ENTERED: MAY 2, 2013

CLERK

Tom, J.P., Friedman, Sweeny, Feinman, JJ.

9945-
9945A Index 303349/09

Saundra Curry, as Executrix of the Estate of Doris Beverly Burton,
Plaintiff-Appellant,

-against-

Dr. Elena Vezza Physician, P.C., et al.,
Defendants-Respondents.

_____

RAS Associates, PLLC, White Plains (Luis F. Ras of counsel), for appellant.

Dwyer & Taglia, New York (Peter R. Taglia of counsel), for respondents.

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Judgment, Supreme Court, Bronx County (Howard H. Sherman, J.), entered December 30, 2011, dismissing the complaint, and bringing up for review an order, same court and Justice, entered on or about December 14, 2011, which, after a jury verdict in plaintiff's favor, granted the motion of defendants Dr. Elena Vezza Physician, P.C. and Elena Lorraine Vezza (Dr. Vezza) for judgment notwithstanding the verdict, unanimously affirmed, without costs. Appeal from the above order unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff's decedent, Doris Beverly Burton, while a patient

of defendant Dr. Vezza, underwent an echocardiogram in February 2007, following complaints of dizzy spells, confusion, and visual changes. The echocardiogram was normal, but for the presence of a brightly refractive narrow linear density traversing the region of the right atrium-right ventricle. The reading cardiologist observed that the anomaly "requir[ed] further investigation and clinical correlation; chest CT and/or chest x-ray may be indicated." Dr. Vezza concluded, based upon the location and description of the anomaly, that it was an artifact having to do with the manner in which the test was performed, not the plaintiff's physiology, and not requiring further diagnostic testing. In 2009, plaintiff was diagnosed with Stage IV lung cancer.

Liability is not supported by an expert offering only conclusory assertions and mere speculation that the condition could have been discovered and successfully treated had the doctors not deviated from the accepted standard of medical practice (*see Rodriguez v Montefiore Med. Ctr.*, 28 AD3d 357 [1st Dept 2006]; *Bullard v St. Barnabas Hosp.*, 27 AD3d 206 [1st Dept 2006]). Moreover, failing to investigate an otherwise unindicated disease is not malpractice (*see Rivera v Greenstein*, 79 AD3d 564 [1st Dept 2010]).

Plaintiff did not submit legally sufficient evidence in support of her claim of malpractice. Defendant's expert, a physician board certified in internal medicine, cardiology, cardiac imagining, and nuclear cardiology, testified that the "brightly refractile" line on the echo was an artifact, and since a line of that type did not correspond to any known chest pathology, there was no need to investigate it via X-ray or CT-scan. He further testified that the finding was unrelated to plaintiff's lungs in general, or the primary presumed site of her cancer, which was not even visible within the scan. Plaintiff offered no evidence to rebut this testimony and her expert conceded that he could not say within a reasonable degree of medical certainty that the anomaly had anything to do with plaintiff's subsequent cancer. Instead, the expert essentially opined that Dr. Vezza was guilty of failing to discover the cancer by accident. On cross-examination, plaintiff's expert ultimately conceded that, if the anomaly was, in fact, an artifact, then a failure to perform additional diagnostic testing would be "fine."

And while plaintiff's expert testified that plaintiff's cancer would have been a 1 centimeter localized Stage I lesion at the time of the echocardiogram, detectable by CT-scan, he

testified only that he based his opinion on his experience as an oncologist as to how cancers progress, with insufficient further details. And since the pathologist did not note the cell's specific biology in the biopsy report, plaintiff's expert could not point to any evidence concerning how aggressive plaintiff's particular cancer was. Thus, his opinion concerning when the cancer developed, and what size it would have been in 2007, was pure speculation, insufficient to support the jury's finding of causation (*see Rodriguez*, 28 AD3d at 357).

Plaintiff's remaining contentions are either unavailing or rendered moot by this decision.

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

ENTERED: MAY 2, 2013

CLERK

Tom, J.P., Friedman, Sweeny, Feinman, JJ.

9946 In re Nydia Garcia Colon,
Petitioner-Respondent,

-against-

Luis Alberto Delgado,
Respondent-Appellant.

_____

Leslie S. Lowenstein, Woodmere, for appellant.

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

Karen P. Simmons, The Children's Law Center, Brooklyn (Janet Neustaetter of counsel), attorney for the child.

_____

Order, Family Court, Bronx County (James E. d'Auguste, J.), entered on or about April 11, 2012, which, to the extent appealable, after a hearing, found that extraordinary circumstances existed to permit petitioner, the maternal grandmother, to petition for custody of the subject child and to divest respondent father of custody, unanimously affirmed, without costs.

Family Court properly determined that the grandmother demonstrated the requisite extraordinary circumstances to seek custody (*see* Domestic Relations Law § 72[2][a]). Although the father has stated that he cares about the child's future and wishes to raise her, the record demonstrates that he has not

personally taken care of her since about one year following her birth. The child lived with her mother and grandmother until her mother's death and, thereafter, her grandmother assumed primary responsibility for her care. In 2010, the father moved to North Carolina and he thereafter visited his daughter only sporadically and would speak with her on the phone approximately three times per month. This prolonged separation between the father and his daughter, and his lack of involvement in her life, warranted a finding of extraordinary circumstances (*see Matter of Bennett v Jeffreys*, 40 NY2d 543, 550 [1976]; *Matter of Shemeek D. v Teresa B.*, 89 AD3d 608, 608-609 [1st Dept 2011]).

To the extent the father challenges the Family Court's finding that it is in the best interests of the child to grant custody to the grandmother, it is not appealable since it was

entered upon the father's default (CPLR 5511; *see Matter of Miguel R. v Wilda C.*, 74 AD3d 631 [1st Dept 2010]). In any event, the Family Court's determination is supported by the requisite fair preponderance of the evidence (*see Matter of Joseph S. v Michelle R.F.*, 3 AD3d 446, 447 [1st Dept 2004]).

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

ENTERED: MAY 2, 2013

CLERK

Tom, J.P., Friedman, Sweeny, Feinman, JJ.

9947 The People of the State of New York, ex rel. Kyle B. Watters, Esq., on behalf of Lance Williams, Petitioner-Respondent, Index 3408/12

-against-

Warden, Anna M. Kross Center, etc., Respondent-Appellant.

_____

Robert T. Johnson, District Attorney, Bronx (Orrie A. Levy of counsel), for appellant.

Watters & Svetkey, LLP, New York (Jonathan Svetkey of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered on or about January 11, 2013, which granted the petition for a writ of habeas corpus and fixed bail in the underlying criminal proceeding, unanimously reversed, on the law, without costs, the writ denied, the habeas corpus proceeding dismissed, and petitioner's remand status reinstated without prejudice to any future bail applications before Criminal Term.

The proper scope of inquiry for a habeas court reviewing another court's bail determination is whether "the bail court abused its discretion by denying bail without reason or for reasons insufficient in law" (*People ex rel. Kuby v Merritt*, 96 AD3d 607, 608 [1st Dept 2012], *lv denied* 19 NY3d 813 [2012]).

"It is not the function of the habeas court to examine the bail question afresh or to make a de novo determination of bail" (*id.* [internal quotation marks omitted]). Here, the habeas court made no express or implied finding that the bail court abused its discretion, and instead engaged in an improper de novo determination of bail conditions. Applying the proper "abuse of discretion" standard, the habeas court should have denied the writ, and dismissed the proceeding, because the record contains support for the bail court's (Ann M. Donnelly, J.) determination to remand defendant after considering the factors enumerated in CPL 510.30(2)(a).

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

ENTERED: MAY 2, 2013

CLERK

Tom, J.P., Friedman, Sweeny, Feinman, JJ.

9948 Noel M. Wiederhorn, MD, etc., Index 601265/10
Petitioner-Respondent,

-against-

J. Ezra Merkin, et al.,
Respondents-Appellants.

_____

Dechert LLP, New York (Neil A. Steiner of counsel), for appellants.

Brickman Leonard & Bamberger, P.C., New York (David E. Bamberger of counsel), for respondent.

_____

Order, Supreme Court, New York County (Richard B. Lowe, III, J.), entered October 4, 2012, which ordered respondents to supplement their undertaking by $255,957.40, unanimously affirmed, without costs, and respondents are directed to pay petitioner an additional $44,570.99, representing interest that accrued on the judgment between October 2, 2012 and January 4, 2013.

On February 9, 2011, a judgment of $1,758,744.01 was entered in petitioner's favor as against respondent Merkin. On February 18, 2011, respondents paid $1,763,080.64 (representing the amount of the judgment, plus interest through February 18) into court to stay the judgment pending appeal pursuant to CPLR 5519(a)(2).

In 2012, petitioner moved to have Merkin increase his

undertaking to account for the additional interest that had accrued on the judgment since February 18, 2011. On October 4, 2012, the court ordered respondents to supplement their undertaking in the amount of $255,957.40, which represented the interest that had accrued from February 19, 2011 through October 1, 2012. Petitioner was finally paid his judgment (essentially, the $1,763,080.64 that respondents had paid into court on February 18, 2011) on January 4, 2013.

Contrary to respondents' claim, their payment of $1,763,080.64 into court on February 18, 2011 to stay the judgment pending appeal did not stop interest from accruing (*see Purpura v Purpura*, 261 AD2d 595, 597 [2d Dept 1999], *lv dismissed in part, denied in part* 94 NY2d 850 [1999]; *see also Matter of Matra Bldg. Corp. v Kucker*, 19 AD3d 496 [2d Dept 2005]). This is so even though respondents no longer had the use of the money after paying it into court (*see J. D'Addario & Co., Inc. v Embassy Indus., Inc.*, 20 NY3d 113, 117-118 [2012]; *Steinback v Diepenbrock*, 5 App Div 208, 211 [1st Dept 1896]).

Petitioner is entitled to simple interest until the date he was paid (*see e.g. Colgate v Broadwall Mgt. Corp.*, 51 AD3d 437, 438 [1st Dept 2008]; *Purpura*, 261 AD2d at 598). That date is January 4, 2013. Petitioner contends, and respondents do not

dispute, that the amount of simple interest on the judgment from February 19, 2011 through January 4, 2013 is $300,528.39. The $255,957.40 supplemental undertaking that respondents paid into court on October 18, 2012 covers part of that amount. The balance is $44,570.99.

Petitioner is not entitled to interest on $300,528.39 (i.e. interest on interest) from January 5, 2013; he has pointed to neither an express agreement nor statutory authority for such compound interest (*see Rourke v Thomas Assoc.*, 216 AD2d 717, 718 [3d Dept 1995], *appeal dismissed* 86 NY2d 837 [1995]).

In the exercise of our discretion, we decline petitioner's request to order respondents to pay him $5,000 in attorneys' fees for bringing a frivolous appeal.

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

ENTERED: MAY 2, 2013

CLERK

Tom, J.P., Friedman, Sweeny, Feinman, JJ.

9949 The People of the State of New York, Ind. 6090/09
Respondent,

-against-

Jameg Blake,
Defendant-Appellant.

_____

Steven Banks, 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.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Renee A. White, J.), rendered on or about September 21, 2011,

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

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

ENTERED: MAY 2, 2013

CLERK

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

Tom, J.P., Friedman, Sweeny, Feinman, JJ.

9950 The People of the State of New York, Ind. 2096/01
Respondent,

-against-

Carlos Franco,
Defendant-Appellant.

_____

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

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

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Order Supreme Court, New York County (Renee A. White, J.), entered on or about February 1, 2011, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6—C), unanimously affirmed, without costs.

The court properly assessed 30 points for defendant's prior violent felony conviction even though he had not yet been sentenced on that conviction at the time he committed the underlying sex offense. We find no basis for applying the sequentiality requirement of the predicate felony offender sentencing statutes to the risk factor for prior violent felonies.

Although the Risk Assessment Guidelines and Commentary for

factor 9 indicates that the term "violent felony" will have the same meaning as in Penal Law § 70.02(1), this does not require the wholesale adoption of the recidivist sentencing statutes contained in Penal Law article 70, including § 70.04(1)(b)(ii), which requires that a defendant have been sentenced on the prior violent felony before it may be used as a predicate violent felony for sentencing purposes. The Sex Offender Registration Act is "not a penal statute and the registration requirement is not a criminal sentence" (*Matter of North v Board of Examiners of State of N.Y.*, 8 NY3d 745, 752 [2007]); registration under the statute is not designed to punish, "but rather to protect the public" (*People v Windham*, 10 NY3d 801, 802 [2008]). CPL § 1.20(13) defines "conviction" as the entry of a plea or verdict of guilty, which occurred here before defendant committed the

underlying sex crime (*see People v Wood* 60 AD3d 1350 [4th Dept 2009]; *Matter of Smith v Devane*, 73 AD3d 179, 182 [3d Dept 2010], *lv denied* 15 NY3d 708; *see also People v Montilla*, 10 NY3d 663 [2008]).

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

ENTERED: MAY 2, 2013

CLERK

Tom, J.P., Friedman, Sweeny, Feinman, JJ.

9953	In re The City of New York, Petitioner-Respondent, -against- Zahav LLC, et al., Claimants-Appellants. _____	Index 401258/10 401259/10 401260/10 401261/10 401262/10 401263/10 401264/10 406534/07

Goldstein, Rikon & Rikon & Houghton, P.C., New York (Jonathan Houghton of counsel), for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Rochelle Cohen of counsel), and Carter Ledyard & Milburn LLP, New York (John R. Casolaro of counsel), for respondent.

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Amended order, Supreme Court, New York County (Jane Solomon, J.), entered October 4, 2011, after a nonjury trial, which determined that properties formerly owned by claimants and taken by the City of New York by eminent domain should be valued for condemnation purposes as if zoned for district M1-5, with the exception of claimant Mercedes-Benz Manhattan, Inc.'s property, which should be valued as if zoned for district C6-3, unanimously modified, on the law, to determine that Block 706, Lot 10 shall be valued, for purposes of compensation in eminent domain, as if zoned C6-4, and otherwise affirmed, without costs.

The trial court correctly found that the retention of an M1-5 zoning designation as part of the rezoning of the Hudson Yards

area for properties condemned for development of a park and boulevard was part of a comprehensive redevelopment plan consisting of the Hudson Yards rezoning, the development of a park and boulevard, the extension of the number 7 subway line, and the property acquisitions, and not for the purpose of artificially depressing their value to make them cheaper to condemn (*see Matter of C/S 12th Ave. LLC v City of New York*, 32 AD3d 1, 10 [1st Dept 2006]).

The City properly valued these properties based on the M1-5 designation rather than at the higher designation given to the surrounding properties upon rezoning, because the rezoning was a necessary and integrated element of a comprehensive plan to redevelop the area as a high-density, transit-oriented, mixed-use expansion of the Midtown Central Business District, and the rezoning of properties in the area to a higher zoning designation would not have occurred but for the project (*see United States v Miller*, 317 US 369, 377 [1943]; *Latham Holding Co. v State of New York*, 16 NY2d 41 [1965]; *Matter of Village of Port Chester [Bologna]*, 95 AD3d 895, 897 [2d Dept 2012], *lv denied* 20 NY3d 852 [2012]).

The record supports the court's finding that, in the absence of the project, the property owned by claimant Mercedes-Benz

Manhattan, Inc. would have been rezoned to a zoning designation of C6-3, and not the C6-4 designation that was granted as part of the comprehensive plan.

As the City concedes, under zoning regulations that govern split-zoned properties, Block 706, Lot 10 must be valued by applying the C6-4 zoning designation that was applicable before the rezoning.

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

ENTERED: MAY 2, 2013

CLERK

Tom, J.P., Sweeny, Román, Feinman, JJ.

9954-
9954A The People of the State of New York,
Respondent,

-against-

Ian Ellison,
Defendant-Appellant.

Dkt. 26104/09

Epstein & Weil, New York (Lloyd Epstein of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Orrie A. Levy of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Diane Kiesel, J.), rendered July 7, 2010, convicting defendant, after a nonjury trial, of attempted criminal contempt in the second degree, and sentencing him to a term of 45 days, unanimously affirmed. The matter is remitted to Supreme Court, Bronx County, for further proceedings pursuant to CPL 460.50(5). Order, same court and Justice, entered on or about June 20, 2011, which denied defendant's CPL 440.10 motion to vacate the judgment, unanimously affirmed.

The accusatory instrument was facially sufficient. In pertinent part, it alleged that defendant entered his ex-wife's place of employment, and that he thereby intentionally disobeyed

a valid order of protection that directed him to stay away from his ex-wife's place of employment. The underlying complaint stated the precise location of the offense, and also established that, only nine days earlier, defendant was present at the issuance of the order of protection and signed it. These allegations gave defendant sufficient notice to prepare a defense and had detail adequate to prevent him from being tried twice for the same offense (*see People v Kalin*, 12 NY3d 225 [2009]; *see also People v Inserra*, 4 NY3d 30, 33 [2004]).

Defendant's principal argument is that the underlying order of protection was defective because it did not identify or state the address of defendant's ex-wife's place of employment. Unlike a challenge to the sufficiency of an accusatory instrument, a challenge to the validity of an underlying order of protection does not assert a nonwaivable jurisdictional defect (*see People v Konieczny*, 2 NY3d 569, 574-576 [2004]; *People v Casey*, 95 NY2d 354, 360 [2000]). We decline to review this unpreserved claim in the interest of justice. As an alternative holding, we find no basis for reversal, since it is clear that defendant knew where his wife worked, both at the time the order was issued and at the time he deliberately violated the order by going to that location.

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 court's credibility determinations. The evidence warranted the conclusion that defendant wilfully violated the order of protection.

Defendant's challenge to the prosecutor's summation is also unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. In context, the challenged remarks were responsive to defense arguments, and the prosecutor did not urge the court to convict defendant on a different theory from the one specified in the accusatory instrument.

The record supports the court's denial of defendant's motion to vacate the judgment. Defendant received effective assistance of counsel under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). Counsel's alleged deficiencies

did not deprive defendant of a fair trial or affect the outcome, particularly in the context of a nonjury trial (*see generally People v Moreno*, 70 NY2d 403, 405-406 [1987]).

We perceive no basis for reducing the sentence.

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

ENTERED: MAY 2, 2013

CLERK

Tom, J.P., Friedman, Sweeny, Feinman, JJ.

9955- Index 22610/99
9956 David Iverson,
Plaintiff-Respondent,

-against-

Ghassan Sayaegh,
Defendant-Appellant,

Adnan Al Faiyad, doing business
as Van Cortlandt Deli,
Defendant-Respondent.

- - - - -

David Iverson,
Plaintiff-Respondent,

-against-

Ghassan Sayaegh,
Defendant,

Adnan Al Faiyad, doing business
as Van Cortlandt Deli,
Defendant-Appellant.

_____

Law Office of Domenick L. D'Angelica, New York (Lauren Felicione of counsel), for Ghassan Sayaegh, appellant.

Gannon, Rosenfarb, Balletti & Drossman, New York (Lisa L. Gokhulsingh of counsel), for Adnan Al Faiyad, respondent/appellant.

Lynn Law Firm, LLP, Syracuse (Patricia A. Lynn-Ford of counsel), for David Iverson, respondent.

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Order, Supreme Court, Bronx County (Julia Rodriguez, J.),

entered March 7, 2012, which denied defendant Sayaegh's motion

for summary judgment dismissing the complaint and the cross claim against him, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint and cross claim against defendant Sayaegh. Order, Supreme Court, Bronx County (Julia Rodriguez, J.), entered March 7, 2012, which denied defendant Faiyad's motion for summary judgment dismissing the complaint and the cross claim against him, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint and cross claim against defendant Faiyad.

The record demonstrates that the allegedly defective condition was trivial and therefore not actionable as a matter of

law (*see e.g. Koznesoff v First Hous. Co., Inc.*, 74 AD3d 1027 [2d Dept 2010]; *Morales v Riverbay Corp.*, 226 AD2d 271 [1st Dept 1996]). Photographs show that the hole did not create a tripping hazard.

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

ENTERED: MAY 2, 2013

CLERK

Tom, J.P., Friedman, Sweeny, Feinman, JJ.

9957 In re Diana Angela Bedolla F.,

A Dependent Child Under
the Age of Eighteen, etc.,

Teresa F., etc.,
Respondent-Appellant,

Catholic Home Bureau for
Dependent Children,
Petitioner-Respondent.

_____

Geoffrey P. Berman, Larchmont, for appellant.

Magovern & Sclafani, New York (Joanna M. Roberson of counsel), for respondent.

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

_____

Order of disposition, Family Court, New York County (Jody Adams, J.), entered on or about June 21, 2011, which, upon granting petitioner's application to be excused from making diligent efforts to reunite the family and upon a finding of permanent neglect, terminated the mother's parental rights to the child, and committed custody and guardianship of the child to petitioner agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

The petitioning agency demonstrated, by clear and convincing

evidence, that diligent efforts to encourage the parent-child relationship would be detrimental to the child, and not in her best interests, in light of the mother's role in the death of the child's infant brother (*see Matter of Sharlese Danielle S.*, 304 AD2d 469 [1st Dept 2003]).

The finding of permanent neglect is supported by the clear and convincing evidence that the mother had no plan for Diana's future and failed to accept responsibility for causing the death of her son and maltreating the subject child (*see Matter of Emily Rosio G. [Milagros G.]*, 90 AD3d 511 [1st Dept 2011]). Although the mother was incarcerated, her incarceration did not relieve her of the responsibility to plan for her child (*see Matter of Tiffany A.*, 295 AD2d 288 [1st Dept 2002]; *Matter of Derrick A.*, 197 AD2d 487, 488 [1st Dept 1993]).

The evidence further supported the court's finding that

termination of the mother's parental rights was in the best interests of Diana (*see Matter of Aisha C.*, 58 AD3d 471 [1st Dept 2009], *lv denied* 12 NY3d 706 [2009]).

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

ENTERED: MAY 2, 2013

CLERK

Tom, J.P., Friedman, Sweeny, Feinman, JJ.

9958 Carrera Casting Corp., Index 650663/12
Plaintiff-Respondent,

-against-

Barry Cord,
Defendant-Appellant.

_____

Russ & Russ, P.C., Massapequa (Jay Edmond Russ of counsel), for appellant.

Dickstein Shapiro LLP, New York (Jeffrey A. Mitchell and Don Abraham of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Barbara R. Kapnick, J.), entered October 19, 2012, awarding plaintiff the principal sum of $192,584.93 plus interest and costs, and bringing up for review an order, same court and Justice, entered October 11, 2012, which granted plaintiff's motion for summary judgment in lieu of a complaint, unanimously affirmed, with costs.

Plaintiff met its prima facie burden of showing that it was entitled to recover the sums due to it under the unconditional personal guaranty, which defendant admits he executed, by proffering the instrument, invoices reflecting that defendant's company owed $192,584.93 to plaintiff, and the affidavit of

plaintiff's vice president attesting to the default (*see Weissman v Sinorm Deli*, 88 NY2d 437, 443-444 [1996]; *Bank of Am., N.A. v Solow*, 59 AD3d 304 [1st Dept 2009], *lv dismissed* 12 NY3d 877 [2009]).

In opposition, defendant failed to raise a triable issue of fact. The guaranty is supported by past consideration that is clearly and unambiguously expressed in the writing (*see* General Obligations Law § 5-1105; *Nachem v Property Mkts. Group, Inc.*, 82 AD3d 573, 574 [1st Dept 2011]). Moreover, the invoices submitted by plaintiff clearly demonstrate that they relate to the subject guaranty, and they are not contradicted by defendant's submission of irrelevant documents relating to separate transactions, unrelated to the guaranty.

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

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

ENTERED: MAY 2, 2013

CLERK

Tom, J.P., Friedman, Sweeny, Feinman, JJ.

9959 Raul Marquez, Index 106220/11
Plaintiff-Appellant, 590969/11

-against-

171 Tenants Corp.,
Defendant-Respondent.

- - - - -

171 Tenants Corp.,
Third-Party Plaintiff-Respondent,

-against-

David Kleinberg-Levin, et al.,
Third-Party Defendants-Respondents.

_____

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

Thomas D. Hughes, New York (Richard C. Rubinstein of counsel), for 171 Tenants Corp., respondent.

Law Office of James J. Toomey, New York (Eric P. Tosca of counsel), for David Kleinberg Levin, respondent.

Leahey & Johnson, P.C., New York (Joanne Filiberti of counsel), for Kenneth Cook, respondent.

_____

Order, Supreme Court, New York County (Lucy Billings, J.), entered October 12, 2012, which denied plaintiff's motion for summary judgment on the issue of defendant's liability under Labor Law § 240(1), unanimously affirmed, without costs.

Plaintiff alleged that he fell and sustained injuries when the ladder on which he was standing while painting a foyer

outside third-party defendant David Kleinberg-Levin's apartment twisted and then slipped out from underneath him. However, the affidavit of Kleinberg-Levin, who hired plaintiff's employer and was in his apartment at the time of the accident, states that no ladders were being used on the project on the date of the alleged accident. Accordingly, the affidavit raises an issue of fact concerning whether plaintiff's accident occurred as alleged. In addition, defendant submitted medical reports wherein plaintiff was quoted as providing a different description of the accident from that alleged. Assuming, without deciding, that the reports are hearsay, they may be submitted in opposition to plaintiff's motion, and may bar summary judgment when considered in conjunction with other evidence (*Guzman v L.M.P. Realty Corp.*, 262 AD2d 99, 100 [1st Dept 1999]).

Under these circumstances, it was appropriate to deny plaintiff's motion and permit discovery to commence (*Wilson v Yemen Realty Corp.*, 74 AD3d 544 [1st Dept 2010]).

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

ENTERED: MAY 2, 2013

CLERK

Tom, J.P., Friedman, Sweeny, Feinman, JJ.

9960- Index 106047/07
9961 Joseph Lipari,
Plaintiff-Appellant,

-against-

AT Spring, LLC., et al.,
Defendants-Respondents.

- - - - -

Shawmut Woodworking & Supply, Inc.,
doing business as Shawmut Design &
Construction,
Third-Party Plaintiff-Respondent,

-against-

Imperial Woodworking Company,
Third-Party Defendant-Respondent.

_____

Appeals having been taken to this Court by the above-named appellant from orders of the Supreme Court, New York County (Cynthia S. Kern, J.), entered on or about June 13, 2012 and October 9, 2012,

And said appeals having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated April 9, 2013,

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

ENTERED: MAY 2, 2013

CLERK

Tom, J.P., Friedman, Sweeny, Feinman, JJ.

9962 The People of the State of New York, Ind. 3828/10
Respondent,

-against-

Jeremy Santiago,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Allen J. Vickey of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Gregory Carro, J.), rendered on or about November 24, 2011,

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

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

ENTERED: MAY 2, 2013

CLERK

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

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

9963N In re Pauline Gilson, Index 106084/11
Petitioner-Appellant,

-against-

Davin Coburn,
Respondent-Respondent.

_____

Kreindler & Kreindler LLP, New York (Steven R. Pounian of counsel), for appellant.

Jonathan R. Donnellan, New York (Eva M. Saketkoo of counsel), for respondent.

_____

Order, Supreme Court, New York County (Shlomo Hagler, J.), entered June 6, 2012, which granted respondent's motion to quash a subpoena duces tecum in connection with an Arizona action to which he is not a party, unanimously affirmed, without costs.

Petitioner's claims in the underlying Arizona action arise from her husband's death in an "aerotrekking" accident on November 1, 2006. Petitioner alleges, inter alia, that defendant John McAfee owned the ultralight aircraft in which petitioner's husband was the passenger and funded the Arizona flight school from which the fatal flight originated. Respondent Davin Coburn is a reporter who published a magazine article recounting his four-day experience aerotrekking with McAfee and others in June 2006. The subject subpoena commands Coburn to appear for a

deposition and to produce any documents relating, in sum, to the subject matter of the Arizona lawsuit.

Contrary to petitioner's contention, all the information she seeks constitutes "unpublished news obtained or prepared by" Coburn, undisputedly a professional journalist, "in the course of gathering or obtaining [the] news" that was ultimately published in the article, and is therefore subject to qualified protection under the New York Shield Law (*see* Civil Rights Law § 79-h[c]; *Baker v Goldman Sachs & Co.*, 669 F3d 105, 110-11 [2d Cir 2012]).

Petitioner failed to make the "clear and specific showing" required to overcome the protection (*see* Civil Service Law § 79-h[c]). Even assuming that the information she seeks is "highly material and relevant" and "critical or necessary" to the maintenance of her claims, she has not shown that it is unobtainable "from any alternative source" (*see id.*). It does not appear that she has even attempted to engage in forensic accounting or otherwise obtain the financial information she

seeks or that she has made any effort to obtain aircraft registration information from sources such as the manufacturer or dealer (*see Flynn v NYP Holdings*, 235 AD2d 907, 909 [3d Dept 1997]; *Matter of CBS Inc. [Vacco]*, 232 AD2d 291 [1st Dept 1996]).

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

ENTERED: MAY 2, 2013

CLERK

Mazzarelli, J.P., Andrias, Saxe, Manzanet-Daniels, Gische, JJ.

9964 The People of the State of New York, Respondent,

Ind. 20137C/08

-against-

Walter Perez,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Bari L. Kamlet of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Edward M. Davidowitz, J.), rendered May 26, 2010, convicting defendant, after a nonjury trial, of attempted aggravated harassment in the second degree and attempted endangering the welfare of a child, and sentencing him to a term of one year's probation, unanimously affirmed.

The verdict was supported by legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The victim, who had known defendant for approximately two years, testified that she

recognized defendant's voice on the inappropriate voicemail messages left for her. There is no basis for disturbing the court's credibility determinations regarding the identity of the caller.

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

ENTERED: MAY 2, 2013

CLERK

Mazzarelli, J.P., Andrias, Saxe, Manzanet-Daniels, Gische, JJ.

9965 In re Chaz J.,

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

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Tamara A. Steckler, The Legal Aid Society, New York (Marcia Egger of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Dona B. Morris of counsel), for presentment agency.

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Order of disposition, Family Court, New York County (Ruben A. Martino, J.), entered on or about February 8, 2012, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he had committed an act constituting possession of a box cutter in a public place by a person under 21 in violation of Administrative Code of City of NY § 10-134.1(e), and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court properly denied defendant's suppression motion. The police saw appellant and three associates encircling a food delivery worker in an area where there had been a pattern of robberies of such workers. This provided, at least, an objective credible reason to approach appellant's group and request

information (*see People v De Bour*, 40 NY2d 210, 223 [1976]). The police conduct in requesting that the group "hold up a second" in order to question them did not elevate the encounter to that of a seizure or a common-law inquiry (*see e.g. People v Bora*, 83 NY2d 531, 534-535 [1994]; *People v Reyes*, 83 NY2d 945 [1994]).

One of appellant's associates then threw a knife into nearby bushes. When coupled with the prior "encircling" behavior, this fact gave the police, at least, a founded suspicion that appellant and the others may have been engaged in a joint criminal enterprise. Since the officers had a founded suspicion of criminality, they were justified in conducting a common-law inquiry by asking appellant and his associates whether they were in possession of any weapons (*see People v Garcia*, 20 NY3d 317 [2012]). Appellant's response led to the lawful recovery of a box cutter.

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

ENTERED: MAY 2, 2013

CLERK

Mazzarelli, J.P., Andrias, Saxe, Manzanet-Daniels, Gische, JJ.

9966 Kelly K. Drotar, Index 113841/09
Plaintiff-Respondent,

-against-

60 Sweet Thing, Inc., doing business as Redemption Cocktail Lounge and Café,
Defendant-Respondent-Appellant,

Vic's Hole in One, LLC, et al.,
Defendants-Appellants-Respondents.

_____

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

Nathaniel B. Smith, New York, for respondent-appellant.

Rubenstein & Rynecki, Brooklyn (Jessica B. Blake of counsel), for respondent.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered July 19, 2012, which denied defendants Vic's Hole in One, LLC and Vic's Lucky Number Nine, LLC's (Vic's) motion for summary judgment dismissing the complaint and all cross claims as against them, and on their cross claim for contractual indemnification against 60 Sweet Thing, Inc., denied their motion to strike defendant 60 Sweet Thing, Inc.'s (60 Sweet) pleadings as a sanction for spoliation, and denied 60 Sweet's cross motion for summary judgment dismissing the complaint as against it, unanimously modified, on the law, to grant the Vic's defendants'

motion for summary judgment dismissing the complaint and all cross claims against them, and on their cross claim for contractual indemnification, and otherwise affirmed, without costs. The Clerk is directed to enter judgment accordingly.

Plaintiff seeks damages for injuries sustained on December 16, 2008, when she tripped and fell down a two-step, interior staircase, at premises owned by Vic's and leased to 60 Sweet, which operated the premises under the name of Redemption Cocktail Lounge and Café.

The Vic's defendants established entitlement to dismissal of the complaint. As out-of-possession landlords, with a limited right to reenter, they could only be liable for negligence "based on a significant structural or design defect that is contrary to a specific statutory safety provision" (*Johnson v Urena Serv. Ctr.*, 227 AD2d 325, 326 [1st Dept 1996], *lv denied* 88 NY2d 814 [1996]). The only condition alleged on appeal to serve as a predicate for Vic's potential liability involves the riser heights of the steps. Even if the alleged Building Code provision, which concerns uniformity, were applicable and had been violated, the same would not constitute a significant structural or design defect and could not serve as a basis for

liability against Vic's (*see Kittay v Moskowitz*, 95 AD3d 451 [1st Dept 2012], *lv denied* 20 NY3d 859 [2013]; *Babich v R.G.T. Rest. Corp.*, 75 AD3d 439 [1st Dept 2010]).

In contrast, 60 Sweet did not meet its burden of establishing that the alleged condition of the stairs was an open and obvious one. Plaintiff testified that she fell on the stairs because she did not see them, that the stripes covering the vertical portions of the steps were not visible from the direction she was walking at the time and that it was darker than depicted in photographs of the scene. Plaintiff and her expert further described the steps as appearing to blend into each other. Under these circumstances, it cannot be said, as a matter of law, that the condition was open and obvious and not inherently dangerous (*see Centeno v Regine's Originals*, 5 AD3d 210 [1st Dept 2004]).

Notwithstanding that the Vic's defendants are free from liability, they have not established entitlement to summary judgment on their cross claim for contractual indemnification for

costs and expenses against 60 Sweet. Under the terms of the lease, such recovery is dependant upon 60 Sweet's actions causing and/or contributing to the accident, which has not yet been established.

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

ENTERED: MAY 2, 2013

CLERK

Mazzarelli, J.P., Andrias, Saxe, Manzanet-Daniels, Gische, JJ.

9967 The People of the State of New York, Ind. 250/10
Respondent,

-against-

Albert Martinez,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Nicole Coviello 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 (Lewis Bart Stone, J.), rendered on or about August 5, 2011,

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

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

ENTERED: MAY 2, 2013

CLERK

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

Mazzarelli, J.P., Andrias, Saxe, Gische, JJ.

9968 Schiavone Construction Co., Inc., etc., Plaintiff-Appellant, Index 105519/02

-against-

The City of New York, etc., Defendant-Respondent.

Goldberg & Connolly, Rockville Centre (William J. Tinsley, Jr., of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Dona B. Morris of counsel), for respondent.

Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered January 10, 2012, which denied plaintiffs' motion to amend the statutory notice of claim and the complaint, and granted defendant's motion to dismiss the complaint, unanimously affirmed, without costs.

Plaintiffs' orginal notice of claim failed to comply with the strict notice provisions of the parties' contract; thus, plaintiffs waived their claim under the contract (*see A.H.A. Gen. Constr. v New York City Hous. Auth.*, 92 NY2d 20, 31-32 [1998]). Plaintiffs do not assert that defendant "frustrated or prevented the occurrence of the condition [precedent]" to their suit (*see id.* at 31 [internal quotation marks omitted]). Moreover, no

fewer than three clauses in the contract alert the parties to the importance of compliance with all notice procedures; allowing plaintiffs to ignore those procedures would be to contravene long-standing black-letter law that a contract should not be read to "render any portion meaningless" and should be "so interpreted as to give effect to its general purpose" (*see Beal Sav. Bank v Sommer*, 8 NY3d 318, 324-325 [2007] [internal quotation marks omitted]).

None of the cases cited by plaintiffs support their contention that they should be allowed at this stage, i.e. after the commencement of litigation, to amend their notice of claim to state damages of nearly four times the amount stated in their original notice.

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

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

ENTERED: MAY 2, 2013

CLERK

Mazzarelli, J.P., Andrias, Saxe, Manzanet-Daniels, Gische, JJ.

9971 Raffaela Nigro, Index 301930/09
Plaintiff-Appellant,

-against-

Cervinara, LLC, et al.,
Defendants,

Dardania Properties, LLC,
Defendant-Respondent.

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Klein Calderoni & Santucci, LLP, Bronx (Fred T. Santucci, Jr. of counsel), for appellant.

White & McSpedon, P.C., New York (Joseph W. Sands of counsel), for respondent.

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Order, Supreme Court, Bronx County (Kenneth L. Thompson, J.), entered June 28, 2012, which granted the motion of defendant Dardania Properties, LLC (Dardania) for summary judgment dismissing the complaint as against it, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff alleges that she was injured when she tripped and fell over a raised sidewalk flag outside a building owned by Dardania. "[W]hether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case and is

generally a question of fact for the jury" (*Trincere v County of Suffolk*, 90 NY2d 976, 977 [1997] [internal quotation marks omitted]).

Here, the evidence, including photographs of the subject sidewalk flag and plaintiff's testimony that she tripped over a two-inch height differential while walking and looking straight ahead, presents triable issues as to whether the defect was trivial (*see Narvaez v 2914 Third Ave. Bronx, LLC*, 88 AD3d 500, 501 [1st Dept 2011]; *Tese-Milner v 30 E. 85th St. Co.*, 60 AD3d 458 [1st Dept 2009]). Moreover, Dardania's challenges to plaintiff's interpretation of the measurements of the raised sidewalk flag depicted in the photographs are unavailing.

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

ENTERED: MAY 2, 2013

CLERK

Mazzarelli, J.P., Andrias, Saxe, Manzanet-Daniels, Gische, JJ.

9972-
9973-
9974-
9975-
9975A

Index 651762/12

Getty Properties Corp., et al.,
Plaintiffs-Respondents,

-against-

Getty Petroleum Marketing Inc.,
Defendant,

1314 Sedgwick Ave. LLC, et al.,
Defendants-Appellants.

White & Wolnerman, PLLC, New York (Randolph E. White of counsel), for appellants.

Rosenberg & Estis, P.C., New York (Michael E. Feinstein of counsel), for respondents.

Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered on or about July 18, 2012, which denied defendants-appellants' motion to transfer this action to Nassau County, unanimously affirmed, without costs. Order, same court and Justice, entered July 6, 2012, which, insofar as appealed from as limited by the briefs, ordered 19 defendants to pay certain sums to plaintiffs, unanimously modified, on the facts, to delete defendant One Pleasantville Road LLC from Schedule 1, and otherwise affirmed, without costs. Judgment, same court and

Justice, entered August 2, 2012, awarding plaintiffs certain sums, as well as immediate possession of certain sites, unanimously modified, on the facts, to delete the decretal paragraph awarding plaintiffs recovery from One Pleasantville Road LLC, and otherwise affirmed, without costs. Appeal from judgment, same court and Justice, entered July 26, 2012, dismissed, without costs, as superseded by the appeal from the August 2012 judgment. Appeal from supplemental order and judgment, same court and Justice, entered July 27, 2012, dismissed, without costs, as abandoned.

Those defendants who were parties to subleases with defendant Getty Petroleum Marketing Inc. (GPMI) (the LLC defendants) were bound by the forum selection clause (naming New York County) in the master lease between GPMI and plaintiff Getty Properties Corp. (GPC) (*see Mann Theatres Corp. of Cal. v Mid-Island Shopping Plaza Co.*, 94 AD2d 466, 471 [2d Dept 1983], *affd* 62 NY2d 930 [1984]). The master lease also states that "all Subleases shall be subject and subordinate to the terms and conditions of this Restated Lease."

Defendants Robert G. Del Gadio and Frank Mascolo guaranteed full performance of the lease by the relevant LLC defendant;

thus, they, too, are bound to litigate in New York County (*see Greene's Ready Mixed Concrete Co. v Fillmore Pac. Assoc. Ltd. Partnership*, 808 F Supp 307, 310 [SD NY 1992]; *Ameritrust Co. Natl. Assn. v Chanslor*, 803 F Supp 893, 896 [SD NY 1992]).

The fact that the master lease was terminated as of April 30, 2012 does not prevent enforcement of its forum selection clause (*see AGR Fin., L.L.C. v Ready Staffing, Inc.*, 99 F Supp 2d 399, 401 [SD NY 2000]).

The distance between Nassau County (defendants-appellants' preferred forum) and New York County "poses no more than a minor inconvenience" (*see Matter of Fidelity & Deposit Co. of Md. v Altman*, 209 AD2d 195 [1st Dept 1994]).

The lack of privity of contract between the LLC defendants (the subtenants) and plaintiffs (the over-landlords) does not prevent the court from ordering the LLC defendants to pay use and occupancy to plaintiffs (*see 1133 Bldg. Corp. v Ketchum Communications*, 224 AD2d 336 [1st Dept 1996], *lv denied* 89 NY2d 816 [1997]). Nor is such an order prevented by the LLC defendants' not being in possession of the subject premises (they had sub-subleased the properties to the operators of the gas stations), because their subleases with GPMI provide that "[i]n the event of . . . [sub-]sub-letting, or other transfer, . . .

Lessee [the relevant LLC defendant] shall continue to remain jointly and severally liable with its transferee to Lessor [GPMI] for the performance of all of Lessee's obligations for the remainder of the Term" (*see Salvatore R. Beltrone Marital Trust II v Lavelle & Finn, LLP*, 13 AD3d 869, 870-871 [3d Dept 2004]). The master lease between GPMI and GPC states, "Tenant [GPMI] hereby assigns, transfers and sets over to Landlord [GPC] all of Tenant's right, title, and interest in and to each Sublease entered into by Tenant . . . together with all subrents or other sums of money due and payable under such Sublease."

Defendants-appellants contend that the amount of use and occupancy in the court's July 2012 preliminary injunction was erroneous. The remedy for any such error is "most appropriately . . . obtained by means of a speedy trial of the action," where plaintiff may be awarded a refund or rent credit (*East 4th St. Garage v Estate of Berkowitz*, 265 AD2d 249, 249 [1st Dept 1999]; *see also Andejo Corp. v South St. Seaport Ltd. Partnership*, 35 AD3d 174 [1st Dept 2006]). The fact that there has not been a speedy trial here is due to defendants-appellants' failure to obey the TRO and preliminary injunction (*see Rose Assoc. v Johnson*, 247 AD2d 222 [1st Dept 1998]; *61 W. 62nd Owners Corp. v Harkness Apt. Owners Corp.*, 202 AD2d 345 [1st Dept 1994]).

Although in support of their motion for a preliminary injunction plaintiffs stated that they were not seeking use and occupancy for One Pleasantville Road because Del Gadio had surrendered that site, the preliminary injunction included it. Thus, we modify the July 6, 2012 order and the August 2012 judgment as indicated. With respect to the other properties, however, no surrender was effected because there was only unilateral action by defendants-appellants (*see Stahl Assoc. Co. v Mapes*, 111 AD2d 626, 628 [1st Dept 1985]).

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

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

ENTERED: MAY 2, 2013

CLERK

Mazzarelli, J.P., Andrias, Saxe, Manzanet-Daniels, Gische, JJ.

9976 Hugo Olea, Index 17459/07
Plaintiff-Appellant, 84106/10

-against-

Overlook Towers Corp, et al.,
Defendants-Respondents,

Perimeter Bridge & Scaffold Co., Inc.,
Defendant.

[And a Third-Party Action]

_____

Sullivan Papain Block McGrath & Cannavo P.C., New York (Brian J. Shoot of counsel), for appellant.

Traub Lieberman Straus & Shrewsberry LLP, Hawthorne (Jeffrey Briem of counsel), for Overlook Towers Corp., Rudd Realty Management Corp. and York Restoration Corp., respondents.

Kral, Clerkin, Redmond, Ryan, Perry & Van Etten, LLP, Melville (Robert D. Martin of counsel), for Lopez Construction Services Corp., respondent.

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Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered April 10, 2012, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for partial summary judgment as to liability on his Labor Law § 240(1) claim, and granted so much of the cross motions of defendants Overlook Towers Corp., Rudd Realty Management Corp., York Restoration Corp., and Lopez Construction Services, Corp. (collectively, defendants) as sought summary judgment dismissing the § 240(1)

claim, unanimously reversed, on the law, without costs, plaintiff's motion granted, defendants' cross motions denied, and the matter remanded to Supreme Court to address so much of the cross motion of defendants Overlook, Rudd, and York as sought summary judgment on their cross claims against Lopez and dismissal of the cross claims against them, and so much of defendant Lopez's cross motion as sought dismissal of the cross claims against it.

Defendants failed to establish that plaintiff's method of attempting to go from the balcony where he had been working onto a motorized scaffold was the sole proximate cause of his accident. The president of York testified that a worker would customarily go from a balcony to a motorized scaffold by jumping onto the scaffold and then climbing over its railing, which was the very method plaintiff was trying to employ when he fell (*see Hernandez v Argo Corp.*, 95 AD3d 782, 783 [1st Dept 2012]). The evidence is also inconclusive about whether safety lines were available at the time of the accident, and whether plaintiff had been instructed to use them (*see Gallagher v New York Post*, 14 NY3d 83, 88-89 [2010]).

Moreover, even if plaintiff was negligent in performing the aforementioned acts, or in failing to dismantle a pipe scaffold

blocking another means of access to the motorized scaffold, his acts were not the sole proximate cause of his accident (*see Hernandez*, 95 AD3d at 783). Indeed, the president of Lopez admitted that it would have been safer to provide ladders to protect a worker in going from a balcony to a motorized scaffold. Accordingly, the evidence shows that defendants violated Labor Law § 240(1) by failing to provide an adequate safety device (*id.*).

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

ENTERED: MAY 2, 2013

CLERK

Mazzarelli, J.P., Andrias, Saxe, Manzanet-Daniels, Gische, JJ.

9977 The People of the State of New York, Ind. 3888/07
Respondent,

-against-

Anthony Walker,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Kerry S. Jamieson of counsel), and Davis Polk & Wardwell LLP, New York (Jason M. Spitalnick of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Karen Swiger of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Robert G. Seewald, J.), rendered June 16, 2010, convicting defendant, after a jury trial, of burglary in the second degree, and sentencing him, as a second violent felony offender, to a term of 14 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 349 [2007]). The People's fingerprint expert testified in detail about the basis for her conclusion that defendant's fingerprint matched a latent print, and there is no basis for disturbing the jury's acceptance of that testimony. The latent print, lifted from the inside of the gate through which the burglar entered the apartment, warranted

the conclusion that defendant committed the burglary. The presence of the print was not susceptible of any innocent explanation, notwithstanding defendant's farfetched theory as to how he might have left his print in that location (*see e.g. People v Texeira*, 32 AD3d 756 [1st Dept 2006], *lv denied* 7 NY3d 904 [2006]).

We find the sentence not to be excessive.

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

ENTERED: MAY 2, 2013

CLERK

Mazzarelli, J.P., Andrias, Saxe, Manzanet-Daniels, Gische, JJ.

9979 Barbara Kulig Hochmuller, Index 400113/12
Plaintiff-Appellant,

-against-

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

_____

Barbara Kulig Hochmuller, appellant pro se.

Michael A. Cardozo, Corporation Counsel, New York (Marta Ross of counsel), for respondent.

_____

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered April 17, 2012, which granted defendant New York City Department of Housing Preservation and Development's (HPD) motion to dismiss the complaint, unanimously affirmed, without costs.

In her complaint, plaintiff, a recipient of an enhanced Section 8 voucher issued by defendant HPD, asserts that HPD has failed to enforce federal regulations applicable to the Section 8 program, by failing to grant her request to be moved from her studio apartment to a renovated one-bedroom apartment in the same building or complex, and by allowing her apartment to become "uninhabitable and not representative of the 'luxury' housing [in

her complex].”

Even when affording the pleading a liberal construction and accepting the facts as alleged in the pleading to be true (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), plaintiff has failed to state a cause of action. Indeed, the owner of the premises, not HPD, is responsible for performing “ordinary and extraordinary maintenance” (24 CFR 982.452[b][2]). Although HPD has the authority to terminate a housing assistance payment contract when the owner fails to maintain the dwelling unit in accordance with housing quality standards (HQS) (*see* 24 CFR 982.404[a][2]), thereby allowing a tenant to move to a new unit with continued assistance (*see* 24 CFR 982.314[b][1][I]), plaintiff has not plead facts showing that the owner failed to maintain her unit in accordance with the HQS (*see* 24 CFR 982.401). Moreover, plaintiff does not have the right to assert

a claim against HPD for an alleged failure to enforce the HQS (*see* 24 CRF 982.406).

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: MAY 2, 2013

CLERK

Mazzarelli, J.P., Andrias, Saxe, Manzanet-Daniels, Gische, JJ.

9980 The People of the State of New York, Ind. 4848/10
Respondent,

-against-

Anthony Lynes,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered May 3, 2011, convicting defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender whose prior felony conviction was a violent felony, to a term of seven years, unanimously modified, on the law, to the extent of vacating the predicate violent felony offender adjudication and remanding for resentencing in accordance with this decision, and otherwise affirmed.

Defendant's adjudication as a second felony drug offender whose prior felony conviction was a violent felony was improper. The People do not dispute that the conviction relied upon in their predicate felony statement, second-degree murder, is not

classified as a violent felony offense under the sections of the Penal Law applicable to this type of adjudication (Penal Law §§ 70.02[1], 70.70[1][c]; *compare* Penal Law § 70.04[1][b][1] [murder is a predicate violent felony in a nondrug second violent felony offender situation]). We decline to effectively rewrite the statute. We have considered and rejected the People's remaining arguments for affirmance, including their preservation claim (*see People v Samms*, 95 NY2d 52, 56-58 [2000]).

On remand, the People may allege a different prior felony or violent felony conviction as the basis for predicate felony adjudication (*see People v Marino*, 81 AD3d 426, 427 [1st Dept 2011], *lv denied* 16 NY3d 897 [2011]).

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

ENTERED: MAY 2, 2013

CLERK

Mazzarelli, J.P., Andrias, Saxe, Manzanet-Daniels, Gische, JJ.

9981 In re Gloria Dougall, Index 401333/11
Petitioner,

-against-

John B. Rhea, etc.,
Respondent.

_____

The Bronx Defenders, Bronx (Rebecca A. Greenberg of counsel), for petitioner.

Kelly D. MacNeal, New York (Andrew M. Lupin of counsel), for respondent.

_____

Determination of respondent, dated January 19, 2011, terminating petitioner's tenancy, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Geoffrey D. Wright, J.], entered March 21, 2012), dismissed, without costs.

Substantial evidence supports respondent's determination that petitioner engaged in drug-related criminal activity from her apartment in respondent's facility (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights,* 45 NY2d 176, 181 [1978]). The police detective testified that a confidential informant bought illegal drugs from petitioner on three occasions, and that he recovered more than 70 ziplock bags of crack cocaine, a bag of

marijuana, and items used in packaging and selling crack cocaine from her apartment. Petitioner did not deny that illegal drugs were recovered from her apartment, but claimed that the drugs belonged to a relative who was assisting her in recovering from surgery. However, petitioner did not dispute that she pleaded guilty to criminal possession of a controlled substance in the seventh degree based on the drugs that were found in her apartment, which was conclusive evidence of the underlying facts (*see S.T. Grand, Inc. v City of New York*, 32 NY2d 300, 304-305 [1973]).

The penalty of termination of petitioner's tenancy does not shock the conscience because her drug-related activity endangered her neighbors and the community (*see Matter of Featherstone v Franco*, 95 NY2d 550, 555 [2000]).

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

ENTERED: MAY 2, 2013

CLERK

Mazzarelli, J.P., Andrias, Saxe, Manzanet-Daniels, Gische, JJ.

9982 The People of the State of New York, Ind. 615/10
Respondent,

-against-

Daquan Mitchell,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Catherine M. Reno 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 (William L. McGuire, J.), rendered on or about May 10, 2011,

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

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

ENTERED: MAY 2, 2013

CLERK

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

Tom, J.P., Acosta, Saxe, Freedman, Feinman, JJ.

9656 In re The Reed Foundation, Inc., Index 653482/12
Petitioner-Respondent,

-against-

Franklin D. Roosevelt Four Freedoms Park, LLC,
Respondent-Appellant.

_____

Sidley Austin LLP, New York (James D. Zirin of counsel), for appellant.

Simpson Thacher & Bartlett LLP, New York (Michael J. Garvey of counsel), for respondent.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered November 14, 2012, affirmed, without costs.

Opinion by Acosta, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Rolando T. Acosta
David B. Saxe
Helen E. Freedman
Paul G. Feinman, JJ.

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In re The Reed Foundation, Inc.,
Petitioner-Respondent,

-against-

Franklin D. Roosevelt Four Freedoms Park, LLC,
Respondent-Appellant.

_____x

Respondent appeals from the order of the Supreme Court, New York County (Charles E. Ramos, J.), entered November 14, 2012, which declared that they breached its contractual obligations to petitioner to complete an agreed engraving at the Franklin D. Roosevelt Four Freedoms Park, and directed specific performance of the obligation.

Sidley Austin LLP, New York (James D. Zirin, James D. Arden and Michael D. Mann of counsel), for appellant.

Simpson Thacher & Bartlett LLP, New York (Michael J. Garvey and Devin F. Ryan of counsel), for respondent.

ACOSTA, J.

Can aesthetic considerations trump a carefully considered and crafted contractual provision dictating the specific location of an inscription on a work of art? We hold that they cannot.

This case revolves around the Franklin D. Roosevelt Four Freedoms Park (the Park), which commemorates FDR's famous "Four Freedoms" speech.[1] The Park is located on four acres of land at the southern tip of Roosevelt Island. It was designed in the 1970s by the distinguished architect, the late Louis I. Kahn. For over 30 years, efforts to develop the Park had been unsuccessful. Interest in the park was renewed in 2005 when Reed and Jane Gregory Rubin, the current officers of petitioner The Reed Foundation (the Foundation), funded an exhibit about the history of the long dormant project entitled "Coming to Light."

At the Rubins' urging, the Franklin & Eleanor Roosevelt Institute formed the Franklin D. Roosevelt Four Freedoms Park, LLC (the LLC) and undertook to raise the funds necessary to complete the Park. In March 2010, the Foundation contracted to give the LLC a $2.5 million grant. In exchange for the grant,

[1]In a January 6, 1941 address to Congress in which he spoke of the need for the United States to devote itself primarily to meeting the "foreign peril" then assailing "the democratic way of life," FDR looked forward to "a world founded upon four essential Freedoms": freedom of speech and expression, freedom of worship, freedom from want, and freedom from fear.

the LLC contractually agreed to carving Recognition Text (i.e., text recognizing the Rubin's and the Foundation's grant) at a specific location near a bust FDR of which was to be housed in the park. The Foundation was among the very first donors to make a grant in connection with this project, at a time when there remained considerable doubt as to whether the LLC could raise the funds necessary to complete the project. The Foundation's grant enabled the LLC to qualify for essential public funding from New York State and New York City, after which the LLC was able to raise the necessary funds to complete the Park. It was only after the necessary funds were raised and the Park essentially completed that the LLC reneged on its obligation to engrave the recognition text at the specified location, citing aesthetic concerns.

The Foundation's grant is governed by a series of interrelated agreements, including a Grant Agreement, entered into by the Foundation, the LLC and The Franklin & Eleanor Roosevelt Institute, which is the sole member of the LLC, and a Recognition Agreement, executed by the Foundation and the LLC.

The agreements detail the LLC's obligation to engrave specific text recognizing the Foundation and its founders (the Threshold Recognition Text) on a 12-foot by 12-foot granite wall,

which is part of a structure in the Park called the "Threshold" (or the Niche) that houses a bronze bust of FDR. It was to read, "IN HONOR OF VERA D. RUBIN AND SAMUEL RUBIN. THE REED FOUNDATION." As depicted in the photographs, the placement of the Threshold Recognition Text was to be low to the ground, in small font less than two inches high along the bottom of a solid 12 foot by 12 foot granite wall on the west-facing side of the Threshold. On June 21, 2012, the Foundation consented to a request by the LLC that the lettering for the Threshold Recognition Text be changed from black to a muted gray.

The Grant Agreement provides that the Foundation's grant will fund construction of the Park, including "the carving of, and/or other display of, the Threshold Recognition Text." Under the Grant Agreement, the LLC agreed to "construct the Recognition in accordance with the terms, conditions and specifications set forth in the Recognition Agreement." The Grant Agreement, in Section 7, "Termination/Survival," gives the Foundation alone the right in its sole discretion, to terminate the Grant Agreement by written notice of termination to the Institute and the LLC, (1) "if any aspect of the Project materially changes or it becomes impracticable to comply with requirements of Sections 1 and 2 of the Recognition Agreement" or (2) "a Default (as defined in the Recognition Agreement) occurs."

The Recognition Agreement sets forth the "terms, conditions and specifications for the construction, placement and design of the Recognition and the use of [the Foundation's funds] with respect to the [Park]" and specifies the precise location and wording of the "Threshold Recognition Text," as well as requirements for the carving and maintenance of the inscription.

Section 6 of the Recognition Agreement defines "default" to mean, among other things, "if any aspect of construction of the . . . Park materially changes or it becomes impracticable to comply with requirements of Sections 1-4 of this Recognition Agreement." Importantly, under this section, the LLC also agreed that the Foundation would be entitled to specific performance in the event of the LLC's breach.

By July 2012, the LLC had completed the inscription of an excerpt from the Four Freedoms speech on the south-facing side of the Threshold but had not yet commenced the engraving of the Threshold Recognition Text. Instead of completing the Threshold Recognition Text, the LLC began pressuring the Foundation to consent to relocate the Foundation's Recognition Text to an area called the "Grand Staircase" at the opposite end of the Park, where other donors' names were going to be engraved. The Foundation declined, and insisted that the LLC honor the Recognition Agreement.

On October 2, 2012, just over two weeks before the Park's scheduled dedication, the LLC advised the Foundation that it was refusing to perform because "[o]ur architects and consultants have told us" that including the Recognition Text on the Threshold is not the "best aesthetic." The Foundation seeks specific performance. The LLC offered to return the Foundation's money.

The Foundation commenced this proceeding, seeking a declaration that the LLC breached its contractual obligations, and an order directing specific performance of the agreements. In opposition to the petition, and notwithstanding the terms of the agreements, the LLC now argued, in an affidavit by its chairman, that carving the Recognition Text where the Foundation insisted was totally inconsistent with the objective of the Foundation's own gift, and that this was a case that "cries out for equitable relief, not tipping on the side of a selfish private interest, but on the side of the public in a lasting historical monument." The LLC also submitted an affidavit of Jack Reynolds, director of the Yale University Art Gallery, who maintained that to inscribe the Recognition Text "within the heart of Louis Kahn's public architectural masterwork is akin to signing a donor's name within the frame of great painting, something . . . that no donor would ever insist on . . . doing to

a great Picasso or Van Gogh canvas upon donating such to a museum." In addition, the LLC submitted an affidavit of the stone carver who carved the Sculpture Niche who agreed that the proposed inscription would be inappropriate and not in keeping with Kahn's design and his artistic intention, and with an affidavit by Nathaniel Kahn, the architect's son who stated that placing the Recognition Text on the sculpture niche would damage his father's design, the "aesthetic purity of the space, and the purpose of the Park."

Aesthetic considerations extraneous to a contract cannot trump its terms. We thus find that the LLC breached its contractual obligations to the Foundation. We find further that the motion court properly ordered specific performance by directing the engraving of the Recognition Text in accordance with the Recognition Agreement (*see Matter of Lamberti v Angiolillo*, 73 AD3d 463, 464 [1st Dept 2010], *lv denied* 15 NY3d 711 [2010]; *see also Dartmouth College v Woodward*, 17 US 518, 654 [1819] [Washington, J.] [a contract is a "transaction between two or more persons in which each party comes under an obligation to the other and each reciprocally acquires a right to whatever is

promised by the other"]). In the Recognition Agreement, the LLC expressly agreed

> "that the Foundation's remedies at law for a failure to perform, breach or threatened breach of Section 1 ["Threshold Recognition Text"] and 2 ["agreements, Representations and Warranties"] of this Recognition Agreement would be inadequate and the Foundation would suffer irreparable damages as a result of such failure to perform, breach or threatened breach. In recognition of this fact, the LLC agrees that, in the event of the LLC's failure to perform, breach or threatened breach, in addition to any remedies at law, the Foundation, without posting any bond, shall be entitled to seek equitable relief in the form of specific performance."

The LLC's failure to perform would deprive the Foundation of recognition of its substantial contribution to the Park in an inscription placed in a unique location that has special significance to the Foundation. Indeed, this Court has long recognized that specific performance is appropriate in situations involving unique articles of property "having a special and unascertainable quality (*see Chabert v Robert & Co., Inc.*, 273 App Div 237, 238 [1st Dept 1948]).

The LLC raises for the first time on appeal the contractual defense of impracticability. However, the LLC's changed aesthetic vision did not render its performance impracticable or impossible. The defense of impossibility or impracticability of

performance is "applied narrowly" such that performance is excused "only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible" and that "the impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract" (*see Kel Kim Corp. v Central Mkts.*, 70 NY2d 900, 902 [1987]). The LLC does not contend that it is unable to complete the agreed engraving. Rather, it has chosen not to do so because its "advisors" believe, on aesthetic grounds, that there should be no such engraving on the Threshold. Nor do the Termination provisions in the Grant Agreement support the LLC's view, since they address situations in which, for example, the niche is not constructed.

The time for the LLC to have voiced its aesthetic concerns was at the time the Recognition Agreement was negotiated, not after it had "accepted and spent the Foundation's money" (*see Allegheny Coll. v National Chautauqua County Bank of Jamestown*, 246 NY 369, 379 [1927]). As the Court of Appeals explained in *Allegheny*, "the [donor] does not say: I hand you $1,000, and you may make up your mind later . . . whether you will undertake to commemorate my name. What she says is in effect is this: "I hand you $1,000, and if you are unwilling to commemorate me, the time to speak is now" (*id.*).

Furthermore, while the LLC cites a public interest in protecting the aesthetics of the Park, the public interest in enforcing donor recognition agreements outweighs the shifting aesthetic concerns regarding the LLC (*see Smithers v St. Luke's-Roosevelt Hosp. Ctr.*, 281 AD2d 127, 140-141 [1st Dept 2001]). Indeed, the failure "to protect the interest of donors" risks the result that "donors may become more hesitant to contribute at all" (*id.* at 140, *quoting* Lisa Loftin, Note, Protecting the Charitable Investor: A rationale for Donor Enforcement of Restricted Gifts, 8 B.U. Pub. Interest L.J. 361, 380, 385). Moreover, "a donor's desire to perpetuate his name as a benefactor of a particular charitable institution and humankind is not a selfish one. These desires are deeply ingrained in human nature and are effective motivating forces in donations of this character" (*Smithers*, 281 AD2d at 140 [internal quotations marks and citation omitted]).

We reject the LLC's argument that the petition and order to show cause are procedurally deficient(CPLR 103[c]; *see Matter of Carroll v Gammerman*, 193 AD2d 202, 205 [1st Dept 1993]).

Accordingly, the order of the Supreme Court, New York County (Charles E. Ramos, J.), entered November 14, 2012, which declared that respondent breached its contractual obligations to

petitioner to complete an agreed engraving at the Franklin D. Roosevelt Four Freedoms Park, and directed specific performance of the obligation, should be affirmed, without costs.

All concur.

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

ENTERED: MAY 2, 2013

CLERK