SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 9, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Tom, Sweeny, Renwick, Richter, JJ.

10007 Start Elevator, Inc., Index 108412/09
Plaintiff-Appellant,

-against-

New York City Housing Authority,
Defendant-Respondent.

_____

Agulnick & Gogel, LLC, Great Neck (William A. Gogel of counsel), for appellant.

Kelly D. MacNeal, New York (Lauren L. Esposito of counsel), for respondent.

_____

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered June 1, 2010, which granted defendant's motion to dismiss the complaint, unanimously affirmed, without costs.

Plaintiff's contention that its April 28 and May 4, 2004 letters constituted a notice of claim pursuant to section 23 of the parties' contract is unavailing (*see e.g. Bat-Jac Contr. v New York City Hous. Auth.*, 1 AD3d 128, 129 [1st Dept 2003]). The April 28 letter merely stated that plaintiff would forward an estimate for the increased cost due to the change from ceramic

tiles to glazed structural brick; however, section 23(a) requires that a notice of claim state the "amount of the extra cost." Although plaintiff's May 4 letter stated the amount of the extra cost, it was "not designated as a notice of claim" (*Bat-Jac*, 1 AD3d at 128; *see also Everest Gen. Contrs. v New York City Hous. Auth.*, 99 AD3d 479, 479-480 [1st Dept 2012]), and instead was a change order form requiring defendant to accept and approve the change by signing it. Defendant's signature does not appear on the May 4 letter.

Even assuming that plaintiff's letters constitute a notice of claim, the release plaintiff signed bars this action (*see e.g. Northgate Elec. Corp. v Barr & Barr, Inc.*, 61 AD3d 467, 468 [1st Dept 2009]).

We decline to consider the argument, raised for the first time in plaintiff's appellate reply brief, that sections 8, 22, and 23 are inconsistent, creating ambiguity and indefiniteness (*see e.g. Shia v McFarlane*, 46 AD3d 320, 321 [1st Dept 2007]). We also decline to consider plaintiff's fact-based waiver and estoppel arguments, raised for the first time on appeal (*see e.g.*

Mount Vernon Fire Ins. Co. v William & Georgia Corp., 194 AD2d 366, 367 [1st Dept 1993]).

We have considered plaintiff's remaining arguments and find them to be without merit.

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

ENTERED: MAY 9, 2013

CLERK

Gonzalez, P.J., Tom, Sweeny, Renwick, Richter, JJ.

10008 Royal Warwick S.A., Index 650531/11
Plaintiff-Appellant,

-against-

Hotel Representative, Inc., et al.,
Defendants-Respondents.

_____

White and Williams, LLP, New York (Andrew I. Hamelsky of counsel), for appellant.

Kravet & Vogel, LLP, New York (Donald J. Kravet of counsel), for respondents.

_____

Order, Supreme Court, New York County (Paul G. Feinman, J.), entered March 2, 2012, which granted defendants' motion to dismiss to the extent of dismissing the second cause of action, only as to any claims for dividends under the parties' Reservation Agreement, and the fourth cause of action, for an accounting, unanimously affirmed, with costs.

The court properly found that plaintiff failed to sufficiently allege "partial performance" to support a claim that the Reservation Agreement was amended to provide for the payment of dividends. Although plaintiff claims that the Reservation Agreement was modified to include the payment of dividends, plaintiff's allegations in the complaint are based almost exclusively on its reliance on statements contained in the

minutes of nonparty Consortium HR's annual meetings. However, the annual meeting minutes merely suggest an attempt to implement a dividends policy at some future date, and are not indicative of any conduct "unequivocally referable" to the oral modification (*Anostario v Vicinanzo*, 59 NY2d 662, 664 [1983] [internal quotation marks omitted]). As the court properly found, the complaint alleges no more than that dividends were promised and were intended to replace the shareholder discounts after 2008. And, even if the dividends were promised, "a mere statement of an intention, even if expressed unconditionally and unequivocally does not, on its own, give rise to a binding contract" (*Smith v Smith*, 66 AD3d 584, 585 [1st Dept 2009]).

Plaintiff's claim for an accounting cannot be maintained in the absence of a fiduciary relationship between plaintiff and defendants (*see Eden v St. Luke's-Roosevelt Hosp. Ctr.*, 96 AD3d 614, 615 [1st Dept 2012]). Plaintiff's claim of breach of fiduciary duty is based entirely on its allegation that defendants breached their duty under the Reservation Agreement by failing to provide shareholder discounts and dividends. Accordingly, plaintiff's claim is based on a contractual, not fiduciary, obligation (*see Superior Officers Council Health & Welfare Fund v Empire HealthChoice Assur., Inc.*, 85 AD3d 680, 682

[1st Dept 2011], *affd* 17 NY3d 930 [2011]). The record belies plaintiff's contention that it is a shareholder of either defendant.

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 9, 2013

CLERK

Gonzalez, P.J., Tom, Sweeny, Renwick, Richter, JJ.

10009-
10010 Felix Garcia,
Plaintiff-Respondent,

-against-

The New York Times Company, et al.,
Defendants-Appellants.

Index 13894/07

_____

Hannum Feretic Prendergast & Merlino, LLC, New York (Matthew J. Zizzamia of counsel), for The New York Times Company, appellant.

Rende, Ryan & Downes, LLP, White Plains (Roland T. Koke of counsel), for TS 229 West 43rd Street, L.L.C., appellant.

Peña & Kahn PLLC, Bronx (Diane Welch Bando of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered on or about January 6, 2012, which, insofar as appealed from as limited by the briefs, in this action alleging violations of the Labor Law, denied defendants' motion for an extension of time to file a summary judgment motion, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered June 6, 2012, which denied defendants' motion to renew and reargue, deemed to be an order denying a motion to reargue only, and so considered, the appeal therefrom unanimously dismissed, without costs, as taken from a nonappealable paper.

Defendants failed to offer a plausible excuse as to why they

failed to secure a sworn statement from plaintiff's foreman although 2½ years had transpired since plaintiff's deposition where defendants learned of the foreman's involvement at the accident site. Accordingly, the court exercised its discretion in a provident manner in denying defendants a further extension of the time in which to file their summary judgment motion so as to permit them to obtain and incorporate such statement in the motion (*see Brill v City of New York*, 2 NY3d 648, 651-652 [2004]; *see also Gibbs v St. Barnabas Hosp.*, 16 NY3d 74, 81 [2010]).

Furthermore, since defendants failed to show any new facts which were not previously considered by the court on the original motion, their motion to renew and reargue was actually one for reargument only, the denial of which is nonappealable (*see D'Andrea v Hutchins*, 69 AD3d 541 [1st Dept 2010]).

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

ENTERED: MAY 9, 2013

CLERK

Gonzalez, P.J., Tom, Sweeny, Renwick, Richter, JJ.

10011 In re Peter Padmore, Index 110473/11
Petitioner-Appellant,

-against-

The New York City Department
of Buildings,
Respondent-Respondent.

_____

Casella & Casella LLP, Staten Island (Ralph P. Casella of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Alexander W. Hunter, Jr., J.), entered April 11, 2012, which denied petitioner's CPLR article 78 petition challenging the New York City Department of Building's (DOB) determination, dated May 24, 2011, denying his application for a master plumber's license and dismissed the proceeding, unanimously affirmed, without costs.

Petitioner mischaracterizes the DOB's determination in contending that the DOB was improperly reading a nonexistent permit-submission requirement into former Administrative Code § 26-146(a)(1) (*cf. Matter of Kreitzer v New York City Dept. of Bldgs.*, 24 AD3d 374 [1st Dept 2005], *lv denied* 6 NY3d 715 [2006]). Rather, the determination indicates that work permits

were but one type of documentary evidence that petitioner could submit to support his claim of qualified experience. The determination that petitioner has not submitted proof adequately showing that he had the requisite qualifying experience was rational and not arbitrary or capricious (*see Matter of Reingold v Koch*, 111 AD2d 688 [1st Dept 1985], *affd* 66 NY2d 994 [1985]).

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

ENTERED: MAY 9, 2013

CLERK

Gonzalez, P.J., Tom, Sweeny, Renwick, Richter, JJ.

10013 Rose Green, Index 104717/08
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent.

_____

Law Offices of William Pager, Brooklyn (William Pager of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Diana Lawless of counsel), for respondent.

_____

Order, Supreme Court, New York County (Arthur F. Engoron, J.), entered March 19, 2012, which granted defendant's motion to dismiss the complaint, unanimously reversed, on the law, without costs, and the motion denied.

In this trip and fall action, plaintiff's notice of claim listed the wrong street address (390 Central Park West rather than 360 Central Park West) in describing the location of her fall on a sidewalk, adjacent to Central Park, and across the street from that address. However, plaintiff also annexed a photograph to the notice of claim which depicted the intersection of Central Park West and 96th Street, which is nearly four blocks south of the incorrect address provided in the notice of claim, and the written description of the location in the notice was

consistent with the area depicted in the photograph. Moreover, at the statutory hearing held six weeks after the notice was served, and three and a half months after the accident, plaintiff explicitly testified that her accident occurred on the sidewalk just a few car lengths south of the 96th Street intersection, and identified the location in the photograph as also shown. We also note that less than five months after the hearing, plaintiff served the summons and complaint, providing the proper street address. Under these circumstances, we find that the mistake in the notice was not made in bad faith, nor was it intended to mislead or confuse the City, and hence, it should have been disregarded or plaintiff should have been allowed to correct the notice pursuant to GML § 50-e(6) (*see e.g. Portillo v New York City Tr. Auth.*, 84 AD3d 535, 536 [1st Dept 2011]; *Phillipps v New York City Tr. Auth.*, 68 AD3d 461, 462 [1st Dept 2009]).

We have repeatedly held that municipalities must put forth at least "a modicum of effort" to investigate a notice of claim and to obtain missing information (*Phillipps*, 68 AD3d at 462, quoting *Goodwin v New York City Hous. Auth.*, 42 AD3d 63, 69 [1st Dept 2007]; *Cruz v New York City Hous. Auth.*, 261 AD2d 296, 297 [1st Dept 1999]). Yet, defendant never sent anyone to investigate the scene depicted in the photograph, and did not

perform a computerized record search of the incorrect address until more than two years after being apprised of the correct location at the hearing. Although plaintiff served a bill of particulars six months before the computer search with the same typographical error in the address, defendant still made no effort to ascertain which of the two locations was correct. In any event, plaintiff's discovery responses, served less than one week after this computer search, provided additional photographs showing the sidewalk defect at issue, and a building awning with the street number "360" is clearly visible directly across the street in the background. Moreover, defendant engaged in settlement discussions just a few months later, during which the actual accident location was discussed, and did not file the instant motion alleging confusion as to the accident location until nearly a year and a half later - one week after entering into a so-ordered stipulation to provide discovery for the proper location that was explicitly set forth in the order. Under these

circumstances, we find that defendant has not demonstrated that it was prejudiced in this case (*see e.g. Goodwin*, 42 AD3d at 66; and *Lord v New York City Hous. Auth.*, 184 AD2d 406, 407-408 [1st Dept 1992]).

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

ENTERED: MAY 9, 2013

CLERK

Gonzalez, P.J., Tom, Sweeny, Renwick, Richter, JJ.

10014 2010-1 SFG Venture LLC, Index 810048/10
Plaintiff-Appellant,

-against-

34-10 Development, LLC, et al.,
Defendants-Respondents,

NCC Funding SP, LLC, et al.
Defendants.

_____

Greenberg Traurig, LLP, New York (Steven Sinatra of counsel), for appellant.

Richard L. Yellen & Associates, LLP, New York (Richard L. Yellen of counsel), for respondents.

_____

Order, Supreme Court, New York County (Charles Edward Ramos, J.), entered on or about August 5, 2011, which, insofar as appealed from as limited by the briefs, denied plaintiff's motion for summary judgment seeking judgment of foreclosure and sale as against defendants-respondents, unanimously reversed, on the law, with costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

In this mortgage foreclosure action, plaintiff bank established a prima facie case of its entitlement to summary judgment by producing the mortgage, note, and guaranty executed by defendants-respondents, and evidence of defendants' default on

their obligations thereunder (*see Waterfall Victoria Master Fund, Ltd v Dingilian*, 92 AD3d 593 [1st Dept 2012]; *Chemical Bank v Broadway 55-56th St. Assoc.*, 220 AD2d 308 [1st Dept 1995]). Defendants failed to rebut that evidence and the record shows that they waived the affirmative defenses. Pursuant to choice-of-law provisions in some of the mortgage documents, both New York law and Georgia law govern the affirmative defenses on which defendants rely in seeking to raise an issue of fact. Under either state's law, defendants expressly waived such defenses through various provisions in the mortgage documents (*see Citibank v Plapinger*, 66 NY2d 90, 93 [1985]; *Red Tulip, LLC v Neiva*, 44 AD3d 204, 209 [1st Dept 2007], *lv dismissed* 10 NY3d 741 [2008], *lv denied* 13 NY3d 709 [2009]; *Casgar v Citizens S. Natl. Bank*, 188 Ga App 234, 236 [1988]).

We have reviewed defendants' remaining contentions and find them unavailing.

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

ENTERED: MAY 9, 2013

CLERK

Gonzalez, P.J., Tom, Sweeny, Renwick, Richter, JJ.

10015 The People of the State of New York, Ind. 3472/10
Respondent,

-against-

Michael Feliciano,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered on or about February 2, 2011, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: MAY 9, 2013

CLERK

Gonzalez, P.J., Tom, Sweeny, Renwick, Richter, JJ.

10016 In re Joy T.,

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

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Tamara A. Steckler, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Victoria Scalzo of counsel), for presentment agency.

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Order of disposition, Family Court, Bronx County (Allen G. Alpert, J.), entered on or about April 4, 2012, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that she committed acts that, if committed by an adult, would constitute the crimes of assault in the second degree and criminal possession of a weapon in the fourth degree, and placed her on probation for a period of 12 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis to disturb the court's determinations concerning credibility. The evidence established that appellant threw an unopened can of soda at the victim's face from a distance of five feet away, and then

punched the victim twice even as a school official was intervening. This evidence supports the inference that appellant intended to cause physical injury. There was ample evidence that appellant actually caused physical injury, in that the victim testified that the attack resulted in, among other things, pain, swelling and bruising that lasted a week, for which he sought medical treatment (*see generally People v Chiddick*, 8 NY3d 445, 447 [2007]). The soda can qualified as a dangerous instrument because, under the circumstances of its use, it was readily capable of causing serious physical injury (*see Matter of Nehial W.*, 227 AD2d 101 [1st Dept 1996]).

Probation was the least restrictive dispositional alternative consistent with appellant's needs and the community's need for protection (*see Matter of Katherine W.*, 62 NY2d 947 [1984]), in light of, among other things, the violent nature of this offense, and appellant's poor academic performance and school attendance record.

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

ENTERED: MAY 9, 2013

CLERK

Gonzalez, P.J., Tom, Sweeny, Renwick, Richter, JJ.

10018 AXA Mediterranean Holding, S.P., Index 652110/10
Plaintiff-Appellant,

-against-

ING Insurance International, B.V.,
Defendant-Respondent.

_____

Schlam Stone & Dolan LLP, New York (Jeffrey M. Eilender of counsel), for appellant.

Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (Daniel J. Toal of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered on or about February 22, 2012, which, to the extent appealed from, granted defendant's motion to dismiss the cause of action for breach of contract related to labor organizing activity and the request for punitive damages, unanimously affirmed, with costs.

Pursuant to § 13.1 of the parties' stock purchase agreement, all claims for breach of representation and warranty expire after one year of closing on the sale, unless plaintiff provides defendant with a notice of claim "satisfying the content of Section 11.2(a)," which requires that a notice of claim set forth the existence of a claim and, if possible, the facts underlying the claim. Plaintiff's July 17, 2009 notice of claim was timely

but did not allege a breach of the labor organizing representation and warranty contained in § 2.14(b) of the agreement; it alleged only a breach of certain employment-related representations contained in § 2.14(d). Plaintiff having failed to provide defendant with a timely notice of its claim under § 2.14(b), the claim expired.

Section 11.1(a)(5) of the stock purchase agreement prohibits claims for punitive damages (other than any such damages payable pursuant to a third-party claim). Contrary to plaintiff's contention, while § 11.1(a) exempts claims involving allegations of fraud or intentional or willful misconduct from the limitations therein, it does not override this prohibition. Nothing in § 11.1(a) suggests that the parties agreed to permit a punitive damages request in connection with a breach of contract claim – even if such an agreement were valid (*see Garrity v Lyle Stuart, Inc.*, 40 NY2d 354, 360 [1976] ["The freedom of contract does not embrace the freedom to punish, even by contract"]). In any event, punitive damages are not recoverable because defendant's alleged conduct is not actionable as a tort independent of its alleged failure to perform its contractual obligations (*see New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 315-316 [1995]). The mere allegation that the alleged

breach of contract was "maliciously intended" or constituted "willful misconduct" does not render the breach of contract claim a separate and independent tort claim (*see OFSI Fund II, LLC v Canadian Imperial Bank of Commerce*, 82 AD3d 537, 539 [1st Dept 2011], *lv denied* 17 NY3d 702 [2011]).

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 9, 2013

CLERK

Gonzalez, P.J., Tom, Sweeny, Renwick, Richter, JJ.

10019 Christina Colon, et al., Index 310450/09
Plaintiffs-Appellants,

-against-

Christina Torres,
Defendant-Respondent,

"John Doe," etc.,
Defendant.

_____

Sim & Record, LLP, Bayside (Sang J. Sim of counsel), for appellants.

Law Offices of Michael A. Barnett, Garden City (Jay M. Weinstein of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered June 29, 2012, which, upon the parties' motions for summary judgment, dismissed the complaint in its entirety based upon the failure to establish a serious injury within the meaning of Insurance Law § 5102(d), unanimously affirmed, without costs.

The motion court properly considered defendant Torres' supplemental submission of medical reports relative to plaintiff Christina Colon, since Torres' counsel demonstrated that the failure to annex such medical affirmations was the result of a clerical error. Moreover, the affirmations had been provided to plaintiffs, who were not prejudiced by their delayed submission

to the court (*see Tierney v Girardi*, 86 AD3d 447, 448 [1st Dept 2011]; *compare Ostrov v Rozbruch*, 91 AD3d 147 [1st Dept 2012]).

The record establishes that neither plaintiff suffered a "permanent consequential" or "significant limitation of use" of their cervical and lumbar spine (Insurance Law § 5102[d]). The submitted expert medical reports showed normal ranges of motion in the claimed injured body parts, and noted that plaintiffs had not sought any medical treatment after receiving three months of chiropractic treatment following the accident. Any discrepancies in the experts' stated normal values for certain ranges of motion were not so significant as to defeat summary judgment, since the experts found "a full range of motion ... in every plane" (*Gibbs v Reid*, 94 AD3d 636, 636 [1st Dept 2012]). In the absence of any other evidence of serious injury, the experts were not required to discuss diagnostic tests indicating bulging or herniated discs (*see Onishi v N & B Taxi, Inc.*, 51 AD3d 594, 595 [1st Dept 2008]).

Plaintiffs' opposition failed to raise a triable issue of fact. Although their treating chiropractor found recent range-of-motion deficits, he failed to reconcile these findings of deficits with earlier full range-of-motion findings made by a physician to whom he had referred both plaintiffs shortly after

the accident (*see Dorrian v Cantalicio*, 101 AD3d 578 [1st Dept 2012]; *Jno-Baptiste v Buckley*, 82 AD3d 578 [1st Dept 2011]). Moreover, plaintiffs did not provide an explanation for their gap in treatment of over three years (*see generally Pommells v Perez*, 4 NY3d 566, 574 [2005]; *see Merrick v Lopez-Garcia*, 100 AD3d 456 [1st Dept 2012]).

The record further shows that there is no viable 90/180-day claim since plaintiffs' bill of particulars and deposition testimony demonstrate that they were confined to bed for, at most, two weeks following the accident, and at home for one month (*see Williams v Baldor Specialty Foods, Inc.*, 70 AD3d 522 [1st Dept 2010]).

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

ENTERED: MAY 9, 2013

CLERK

Gonzalez, P.J., Tom, Sweeny, Renwick, Richter, JJ.

10020 Denise Morales, Index 23764/04
Plaintiff-Appellant,

-against-

Manhattan and Bronx Surface
Transit Operating Authority, et al.,
Defendants-Respondents,

"John Doe," etc.,
Defendant.

_____

Kreiger, Wilansky & Hupart, Bronx (Brett R. Hupart of counsel), for appellant.

Steve S. Efron, New York (Renee L. Cyr of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered on or about November 28, 2011, which, after a jury trial, granted defendants-respondents' motion to set aside the jury's award of $400,000 for past pain and suffering and $300,000 for future pain and suffering over 48.6 years to the extent of ordering a new trial on those damages unless plaintiff stipulated to a reduced award to $175,000 for past pain and suffering and $35,000 for future pain and suffering, unanimously modified, on the facts, to direct a new trial on damages unless plaintiff stipulates, within 30 days of service of a copy of this order with notice of entry, to decrease the jury award for past and

future pain and suffering to $300,000 and $250,000, respectively, and to the entry of judgment in accordance therewith, and otherwise affirmed, without costs.

Plaintiff, who was 24 years old at the time of the accident, suffered, among other things, a partial thickness rotator cuff tear, for which she underwent surgery and a course of physical therapy, and an injury to her lower back. Although her medical records reflected that her condition improved postoperatively and she received only limited treatment after the surgery, she continued to complain of pain and limitation at the time of trial. In addition, her expert opined that her shoulder and lower back conditions were permanent and recommended further surgery for the shoulder injury. Under the circumstances, we find that the awards for past and future pain and suffering deviate materially from what is reasonable compensation (*see* CPLR

5501[c]; *compare Konfidan v FF Taxi, Inc.*, 95 AD3d 471 [1st Dept 2012], *Sanchez v Morrisania II Assoc.*, 63 AD3d 605 [1st Dept 2009], *and Elescano v Eight-19th Co., LLC*, 17 AD3d 250 [1st Dept 2005]), and we accordingly modify to the extent indicated.

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

ENTERED: MAY 9, 2013

CLERK

Gonzalez, P.J., Tom, Sweeny, Renwick, Richter, JJ.

10022 The People of the State of New York, Ind. 1377/86
Respondent,

-against-

Tyrone Hunter,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Michael C. Taglieri of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Karinna M. Arroyo of counsel), for respondent.

_____

Order, Supreme Court, New York County (Patricia M. Nunez, J.), entered on or about October 14, 2010, which adjudicated defendant a level three sex offender pursuant to the Sexual Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court providently exercised its discretion in declining to grant a downward departure to level two (*see People v Cintron*, 12 NY3d 60, 70 [2009], *cert denied sub nom. Knox v New York* 558 US 1011 [2009]; *People v Johnson*, 11 NY3d 416, 418, 421 [2008]).

The seriousness of defendant's overall record, including the underlying sex offense, outweighed any reduced risk of reoffense that might result from his age.

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

ENTERED: MAY 9, 2013

CLERK

Gonzalez, P.J., Tom, Sweeny, Renwick, Richter, JJ.

10023N Janice Lee, Index 116603/10
Plaintiff-Appellant,

-against-

215 West 88 Street
Holdings, LLC, et al.,
Defendants-Respondents.

_____

Bierman & Palitz LLP, New York (Lauren M. Reiff of counsel), for appellant.

Cartafalsa, Slattery, Turpin & Lenoff, Tarrytown (Michael J. Lenoff of counsel), for respondents.

_____

Order, Supreme Court, New York County (Donna M. Mills, J.), entered June 28, 2012, which, to the extent appealed from as limited by the briefs, granted defendants' motion to vacate their default in not timely serving their answer, and denied plaintiff's cross motion for a default judgment and for injunctive relief, unanimously affirmed, without costs.

The motion court providently exercised its discretion in granting defendants' motion and denying plaintiff's cross motion as to defendants' default. Defendants' delay in appearing was brief, the default was not willful, there was no evidence that plaintiff was prejudiced, and defendants demonstrated the existence of a potentially meritorious defense (*see D&R Global*

Selections, S.L. v Bodega Olegario Falcón Piñeiro, 90 AD3d 403 [1st Dept 2011]).

The court also properly denied plaintiff's cross motion for injunctive relief requiring defendants to perform certain work in her apartment. Plaintiff failed to demonstrate that she was likely to succeed on the merits of her claims, that she would suffer irreparable injury in the absence of an injunction, and that a balance of the equities tips in her favor (*see generally Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839 [2005]; *see also* CPLR 6301), or that the granting of the requested relief was essential to maintain the status quo (*see Second on Second Café, Inc. v Hing Sing Trading, Inc.*, 66 AD3d 255, 264 [1st Dept 2009]).

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

ENTERED: MAY 9, 2013

CLERK

Tom, J.P., Mazzarelli, Renwick, DeGrasse, JJ.

8229 In re East 51st Street Crane Collapse Litigation
- - - - -
Jean Squeri,
Plaintiff-Respondent,

-against-

East 51st Street Development Company, LLC, et al.,
Defendants-Appellants,

Kennelly Development Company, LLC, et al.,
Defendants.
- - - - -
East 51st Street Development Company, LLC,
Third-Party Plaintiff-Appellant,

-against-

Consolidated Edison Company of New York, Inc., et al.,
Third-Party Defendants,

Liftex Corporation,
Third-Party Defendant-Respondent.
- - - - -
Crave Foods Inc., etc.,
Plaintiff-Respondent,

-against-

Rapetti Rigging Services, Inc., et al.,
Defendants.

Index 769000/08
103802/09
590385/09
117452/08

_____

O'Melveny & Myers LLP, New York (Thomas G. Carruthers of counsel), for East 51st Street Development Company, LLC, appellant.

Gallo, Vitucci & Klar, LLP, New York (Kimberly A. Ricciardi of

counsel), for Reliance Construction, Ltd. and RCG Group, LLC, appellants.

Pollack, Pollack, Isaac & DeCicco, New York (Brian J. Isaac and Robert E. Godosky of counsel), for Jean Squeri, respondent.

Adam Leitman Bailey, P.C., New York (Jeffrey R. Metz of counsel), for Crave Foods Inc., respondent.

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered December 23, 2011, which, to the extent appealed from as limited by the briefs, granted the motion by plaintiff Jean Squeri and cross motions by third-party defendant Liftex Corporation and plaintiff Crave Foods Inc. to unseal settlement documents pertaining to Labor Law wrongful death claims in these consolidated actions, unanimously affirmed, without costs.

This litigation arises out of a tower crane collapse. Upon the settlement of a wrongful death action, the court issued an order dated January 6, 2011 by which it directed the sealing of the terms of that particular settlement "until all wrongful death actions arising from the same incident herein are resolved." The court issued the unsealing order as set forth above although one wrongful death action remains pending. Citing Uniform Rules for Trial Courts (22 NYCRR) § 216.1(a), the court found that there had been no showing of good cause for the continued sealing of the settlement documents. We agree.

22 NYCRR 216.1(a) provides that courts shall not seal court records except upon a written finding of good cause. The rule also requires courts to consider the interests of the public as well as the parties in determining whether good cause has been shown (*id.*). In this regard, "[t]he presumption of the benefit of public access to court proceedings takes precedence, and sealing of court papers is permitted only to serve compelling objectives, such as when the need for secrecy outweighs the public's right to access, e.g., in the case of trade secrets" (*Applehead Pictures LLC v Perelman,* 80 AD3d 181, 191-192 [1st Dept. 2010]).

In light of our holding in *Applehead,* the court properly exercised its discretion in rejecting defendants' argument that the continued sealing of the court records in this case "prevents the risk of parties' attempted use of prior settlement information as an artificial threshold in evaluating the value of their own cases." On the contrary, plaintiffs made a better argument that the unsealing of the settlement documents was necessary to enable them to ascertain the amount of available insurance coverage and thus make informed decisions as to the relative benefits and drawbacks of settling their own claims. Records should not be sealed to enable one party to have an

advantage over another "when such sealing prevents counsel from fully discussing with their clients all of the relevant information in the case" (*Gryphon Dom. VI, LLC v APP Intl. Fin. Co., B.V.* (28 AD3d 322, 326 [1st Dept. 2006]).

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

ENTERED: MAY 9, 2013

CLERK

Mazzarelli, J.P., Moskowitz, DeGrasse, Feinman, Clark, JJ.

9686 Jandy Coleson, etc., Index 26826/04
Plaintiff-Appellant,

-against-

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

_____

Sim & Record, LLP, Bayside (Sang J. Sim of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Susan Paulson of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered on or about March 12, 2012, which granted defendants' motion for summary judgment dismissing the complaint, affirmed, without costs.

Defendants' motion for summary judgment dismissing the complaint was properly granted. In the absence of any evidence that defendants assumed an affirmative duty to protect plaintiff from attacks by her husband, defendants do not owe a duty of care to plaintiff (*see Valdez v City of New York*, 18 NY3d 69 [2011]). The statements allegedly made by police officers and other employees of defendants -- that plaintiff's husband would spend time in jail, and that the police would provide "protection" of an unspecified nature -- were too vague to constitute promises

giving rise to a duty of care (*see Dinardo v City of New York*, 13 NY3d 872, 874 [2009]). The lack of any such duty also warranted the dismissal of the infant plaintiff's claim for negligent infliction of emotional distress (*see Matter of Sheila C. v Povich*, 11 AD3d 120, 130 [1st Dept 2004]).

Given the absence of a duty owed to plaintiff, we need not consider whether defendants established their entitlement to the governmental function immunity defense (*see Valdez*, 18 NY3d at 80).

All concur except Moskowitz and Clark, JJ.
who concur in a separate memorandum by
Moskowitz, J. as follows:

MOSKOWITZ, J. (concurring)

I concur with the majority that *Valdez v City of New York* (18 NY3d 69 [2011]) mandates dismissal of plaintiffs' complaint, and that the IAS court properly granted the City's motion for summary judgment on that basis. However, while *Valdez* constrains me to cast my vote with the majority, I write separately to express concern at the current posture of the law regarding special duties of care by government entities.

Neither party disputes the facts of this case. Plaintiff Jandy Coleson married Samuel Coleson in October 1997; Rolfy, her son from a prior relationship, was Coleson's stepson. Beginning around 2001, Coleson subjected plaintiff to verbal and physical abuse, and in September 2001, during an argument, Coleson forcibly inserted a cordless telephone into plaintiff's vagina. After that incident, Coleson was incarcerated for around a month and plaintiff obtained an order of protection against him. Even with the order of protection in place, however, plaintiff continued to let Coleson live in the apartment after he was released because, plaintiff stated, his name was on the lease and he paid the rent. The order of protection expired after three months. Plaintiff obtained a second order of protection in late 2002; that order lasted only one month. In May 2004, plaintiff

told Coleson that he had to leave the apartment because of his abusive behavior toward her and because of his drug and alcohol use.

On June 23, 2004, plaintiff called police to the apartment when Coleson returned and tried to stab her with an ice pick. Coleson left the building before police could apprehend him, but later that day, police returned to plaintiff's home and told her they had arrested Coleson. When police took plaintiff to the precinct, she spoke with a police officer who told her that Coleson was "going to be in prison for a while." The officer also told plaintiff "not to worry" since "they were going to give [her] protection." Plaintiff testified that she did not ask for specifics, as she was too nervous. Later that evening, an officer called from the precinct and told her that Coleson was in the Bronx County Courthouse "in front of the judge" and that "[t]hey were going to sentence him." The officer said that she was going to "keep in contact" with plaintiff, and that "everything was in its process." Nevertheless, it later transpired that on June 24, 2004 the criminal court released Coleson on his own recognizance after arraignment.

On June 25, 2004, when plaintiff went to pick up Rolfy from school, Coleson accosted her and stabbed her in the back with a

knife. Rolfy, who was then around seven years old, testified that he saw Coleson chasing plaintiff with a knife while she screamed for help. However, as Rolfy hid behind a car, a man who worked at a nearby car wash grabbed Rolfy and locked him inside a broom closet to protect him. While he was in the closet, Rolfy could hear sirens and screaming outside, and recalled "holding [himself] and saying 'Mommy, Mommy.'" He later testified that he saw "a lot of blood" as his mother lay on the ground, but did not see Coleson stab her.

Relying on *Valdez* and on *Dinardo v City of New York* (13 NY3d 872, 874-875 [2009]), this court now finds that these facts create no special duty toward plaintiff or her son. In his dissent in *Valdez*, Chief Judge Lippman noted that the majority's opinion in that case would likely lead to a legal scheme under which no municipal defendant would ever be found to have made promises giving rise to a duty of care toward an injured plaintiff (*id.* at 92). This case strongly suggests that Chief Judge Lippman's prediction has, in fact, come to pass.

It is true, as the City notes, that police did make some vague statements to plaintiff – for example, that police would give plaintiff unspecified "protection" and that she should not worry. I agree with the majority that under *Valdez*, these

statements are, and should be, insufficient to create a special duty of care toward plaintiff.

But police also made concrete statements that, before the line of cases leading to *Valdez*, might well have been found to form a reasonable basis for plaintiff to believe that she would be safe from any further attack (*see e.g. Sorichetti v City of New York*, 65 NY2d 461, 469 [1985] [order of protection, combined with police knowledge of violence, instruction to victim, and reasonable expectation that police would protect her, were sufficient to find special relationship]). Indeed, a police officer not only allegedly told plaintiff that Coleson would be incarcerated "for a while," but also told her that Coleson was "in front of the judge" and "in [the] process" of being sentenced.[1]

These alleged statements purported to inform plaintiff, apparently unequivocally, that her husband was in police custody and would remain there. While it would not have been reasonable for plaintiff to believe that Coleson would be incarcerated indefinitely, it was certainly reasonable for her to believe that

[1] Whether this scenario sounds plausible is beside the point. Plaintiff believed the officer's statements, and whether the officer actually made those statements implicates a matter of credibility not appropriate for resolution on summary judgment.

he would be there at least for a day or two, especially in light of police statements that he would be incarcerated "for a while" (*see e.g. Mastroianni v County of Suffolk*, 91 NY2d 198 [1997] [special duty existed where police remained on scene for an hour after decedent's husband violated an order of protection; police left to take meal break without decedent's knowledge, at which time husband returned to the house and stabbed decedent]).

If the City's statements in this case are not specific enough to find that defendants assumed an affirmative duty to protect plaintiff, it is difficult to imagine any statements that could ever be specific enough. On the contrary, under the majority's ruling – which, to be clear, I concede is mandated under *Valdez* – it seems likely that no court of this State will ever find a municipality to have a special duty toward a plaintiff unless the municipality affirmatively consents to assume such a duty.

Thus, I fear that in the post-*Valdez* system, the police are now permitted to lull a domestic violence complainant into a false sense of security and then, when tragic results befall the complainant, disavow responsibility for having done so. The complainant is therefore left without any remedy, even where she was found to be entitled to protection by way of a restraining

order and even where she has acted in reliance on police assurances. Further, the law after *Valdez* suggests to domestic violence victims that they cannot rely on police statements regarding their safety, should not follow police instructions, and have no reason to place trust in the police. This legal framework will redound to no one's benefit – not the police and certainly not the citizens the police are sworn to protect.

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

ENTERED: MAY 9, 2013

CLERK

Acosta, J.P., Moskowitz, Renwick, Freedman, Clark, JJ.

9933 Marie Eckardt, Index 106449/09
Plaintiff-Respondent,

-against-

Starr Building Realty LLC,
Defendant-Respondent-Appellant.

East Twin Enterprises, Inc.,
doing business as Rhinebeck Grille,
Defendant-Appellant-Respondent.

_____

Thomas M. Bona, P.C., White Plains (James C. Miller of counsel), for appellant-respondent.

Lewis Brisbois Bisgaard & Smith LLP, New York (Nicholas P. Hurzeler of counsel), for respondent-appellant.

Giuliano McDonnell & Perrone, LLP, New York (Matthew M. Gorden of counsel), for respondent.

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Order, Supreme Court, New York County (Joan A. Madden, J.), entered April 26, 2012, which, inter alia, denied defendant Starr Building Realty LLC's (Starr) motion and defendant East Twin Enterprises, Inc. d/b/a/ Rhinebeck Grille's (East Twin) cross motion for summary judgment dismissing the complaint, unanimously modified, on the law, to grant the cross motion, and dismiss the complaint as against East Twin, and otherwise affirmed, without costs. The Clerk is directed to enter judgment accordingly.

Plaintiff was patronizing defendant East Twin's restaurant,

located in a building owned by codefendant Starr, when she tripped and fell on a step leading into the restroom. East Twin had no control over the restroom in question, which was located on the second floor of the property and was not included in the premises leased to it (*see McNally v East Twins Enters., Inc.*, 19 AD3d 152 [1st Dept 2005]). Accordingly, summary judgment should have been granted dismissing the complaint as to East Twin.

However, as to the condition of the step, we find that the circumstances of this case do not differ in a legally significant manner from those in *McNally*. Although in this case, there was a "Watch Your Step" sign on the restroom door, behind which the subject step was located, and the step itself was demarcated with a metal strip, it is not clear that the warnings were adequate in view of plaintiff's testimony that she did not see the step or the sign, and the hallway was dark.

If the lighting in the hallway was insufficient, the step to enter and exit the restroom still may have constituted a "trap for the unwary by reason of . . . [its] placement" (*McNally*, 19 AD3d at 153 [internal quotation marks and citation omitted]; *see also Saretsky v 85 Kenmare Realty Corp.*, 85 AD3d 89 [1st Dept 2011]). Accordingly, summary judgment was correctly denied as to

Starr.

In light of the above, that portion of East Twin's cross motion seeking common-law indemnification is academic.

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

ENTERED: MAY 9, 2013

CLERK

Andrias, J.P., Saxe, Freedman, Román, JJ.

10024 The People of the State of New York, Ind. 5864/07
Respondent,

-against-

David Andrango,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered April 12, 2010, convicting defendant, upon his plea of guilty, of murder in the first degree and robbery in the first degree, and sentencing him to an aggregate term of 25 years to life, unanimously affirmed.

The court properly denied defendant's motion to suppress his statements to the police and to a prosecutor. The record supports the court's finding that when defendant made a statement prior to receiving *Miranda* warnings, a reasonable innocent person in his position would not have thought that he was in custody (*see People v Yukl*, 25 NY2d 585, 589 [1969], *cert denied* 400 US 851 [1970]). Defendant agreed to accompany the police to the precinct, where he remained in an interview room. During the

relatively brief period that preceded *Miranda* warnings, the police did not handcuff or restrain defendant or do anything to convey that he was not free to leave, and the questioning was investigatory rather than accusatory (*see e.g. People v Samuel*, 92 AD3d 466 [1st Dept 2012], *lv denied* 19 NY3d 867 [2012]; *People v Dillhunt*, 41 AD3d 216, 217 [1st Dept 2007], *lv denied* 10 NY3d 764 [2008]).

This conclusion is not undermined by a detective's testimony that defendant would have been placed in custody had he declined to go to, or sought to depart from, the police station. These subjective intentions were never conveyed to defendant. "A policeman's unarticulated plan has no bearing on the question whether a suspect was 'in custody' at a particular time; the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation" (*Berkemer v McCarty*, 468 US 420, 442 [1984]; *see also Stansbury v California*, 511 US 318, 325 [1994]; *United States v Mendenhall*, 446 US 544, 554 n 6 [1980]).

Accordingly, there is no basis for suppression of any of defendant's statements. In any event, regardless of the admissibility of the pre-*Miranda* statement, which was entirely

exculpatory as to the murder, the post-*Miranda* statements were sufficiently attenuated so as to be admissible.

We perceive no basis for a reduction of sentence.

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

ENTERED: MAY 9, 2013

CLERK

Andrias, J.P., Saxe, Moskowitz, Freedman, JJ.

10025 Jason Lawrence, Index 302625/09
Plaintiff-Appellant,

-against-

Correction Officer K. Gonzalez, etc.,
Defendant,

The City of New York,
Defendant-Respondent.

_____

Alan D. Levine, Kew Gardens, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Jacob Gardener of counsel), for respondent.

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Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered February 2, 2012, which, as modified by an order, same court and Justice, entered March 28, 2012, granted the motion of defendant City of New York for summary judgment to the extent of dismissing the first cause of action alleging negligence against it, unanimously affirmed, without costs.

Dismissal of the cause of action alleging negligence was appropriate since the City demonstrated the absence of actual or constructive notice of the defective condition of the chair that broke when plaintiff was sitting on it. The City relied upon plaintiff's testimony that he had never seen anything wrong with the plastic chair that the City provided for use by inmates at

its facility, and that he was unaware of any complaints about the chair or any other of the plastic chairs that were used throughout the facility. The defective condition of the chair was not apparent and visible, and there was no evidence as to how the condition was created or how long it existed *(see Quinones v Federated Dept. Stores, Inc.,* 92 AD3d 931, 932 [2d Dept 2012]; *Levinstim v Parker*, 27 AD3d 698, 699-700 [2d Dept 2006]). In opposition, plaintiff failed to raise a triable issue of fact, and his argument that the City was negligent in not inspecting the chairs, which appeared to be in good condition, is unavailing *(see Singh v United Cerebral Palsy of N.Y. City, Inc.,* 72 AD3d 272, 276 [1st Dept 2010]).

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

ENTERED: MAY 9, 2013

CLERK

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

10026 The Board of Managers of Soho Greene Condominium, Plaintiff-Respondent, Index 850025/10

-against-

Clear, Bright & Famous LLC, et al., Defendants-Appellants,

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

[And a Third-Party Action]

_____

Sills Cummis & Gross, P.C., New York (James M. Hirschhorn of counsel), for appellants.

Guzov LLC, New York (Gregory P. Vidler of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan A. Madden, J.), entered November 19, 2012, as amended by order, same court and Justice, entered January 4, 2013, which, inter alia, granted plaintiff's motion for summary judgment on its foreclosure cause of action and dismissed the counterclaim and third-party claim for violation of the condominium's bylaws and the counterclaim and third-party claim for breach of fiduciary duty, unanimously affirmed, with costs.

The condominium unit owners validly ratified the board's

renovation plans, based on knowledge they obtained through formal and informal communications (*see e.g. Skytrack Condominium Bd. of Mgrs. v Windberk Partners*, 167 AD2d 381 [2d Dept 1990]). We reject defendants' argument that the ratification vote was invalid because the unit owners were not disinterested; defendants were at least equally conflicted. Plaintiff showed sufficient cause for its second summary judgment motion (*see Varsity Tr. v Bd. of Educ. of City of N.Y.*, 300 AD2d 38, 39 [1st Dept 2002]). The factual issue whether the unit owners' knowledge of the renovations was sufficient to support their ratification of the board's arguably voidable resolution was raised by defendants in a surreply long after the final submissions on the initial summary judgment motion.

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

ENTERED: MAY 9, 2013

CLERK

Andrias, J.P., Saxe, Freedman, Román, JJ.

10027-
10027A In re Anthony Wayne S. and Another,

Dependent Children Under the
Age of Eighteen Years, etc.,

Anthony Wayne S.,
Respondent-Appellant,

Damaris S.,
Respondent,

Abbott House,
Petitioner-Respondent.

_____

Larry S. Bachner, Jamaica, for appellant.

Quinlan & Fields, Hawthorne (Jeremiah Quinlan of counsel), for Abbott House, respondent.

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

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Order, Family Court, Bronx County (Monica Drinane, J.), entered on or about September 11, 2012, which, to the extent appealed from as limited by the briefs, revoked a suspended judgment entered on a finding of permanent neglect, terminated respondent father's parental rights to the subject children, and committed custody and guardianship of the children to petitioner agency for the purpose of adoption, unanimously affirmed, without costs. Appeal from order, same court and Judge and entered on or

about the same date, which, to the extent appealed from, denied respondent father's application for a stay of the court's order terminating his parental rights and for continued visitation with the subject children pending the stay, unanimously dismissed, without costs, as abandoned.

The finding that the father had violated the terms of the suspended judgment is supported by a preponderance of the evidence (*see Matter of Kendra C.R. [Charles R.]*, 68 AD3d 467, 467-468 [1st Dept 2009], *lv dismissed and denied* 14 NY3d 870 [2010]). The father failed to show that he stopped the cycle of domestic violence with the children's mother, which was one of the reasons the children entered into foster care, and his actions demonstrated his inability to take full responsibility as the children's primary caretaker (*see Matter of Darren V.*, 61 AD3d 986, 987 [2d Dept 2009], *lv denied* 12 NY3d 715 [2009]).

A preponderance of the evidence supports the determination that the children's best interests would be served by terminating the father's parental rights (*Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). The children have been in the same foster homes for most of their lives, and the foster parents have provided for their special needs and wish to adopt them (*see Matter of Aliyah Careema D. [Sophia Seku D.*], 88 AD3d 529,

529-530 [1st Dept 2011]). Moreover, the father has failed to demonstrate that exceptional circumstances exist requiring the court to extend the suspended judgment or that a fourth attempt to reunite the family is in the best interests of the children (*see Matter of Lourdes O.*, 52 AD3d 203, 204 [1st Dept 2008]).

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

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

ENTERED: MAY 9, 2013

CLERK

Andrias, J.P., Saxe, Freedman, Román, JJ.

10030 Bryan Schwartz, et al., Index 109186/09
Plaintiffs-Appellants,

-against-

Empire City Subway Company (Limited),
Defendant-Respondent,

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

_____

Wingate, Russotti, Shapiro & Halperin, LLP, New York (David M. Schwarz of counsel), for appellants.

Conway, Farrell, Curtin & Kelly P.C., New York (Darrell John of counsel), for respondent.

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered May 30, 2012, which granted defendant Empire City Subway Company's motion for summary judgment dismissing the complaint as against it, and denied plaintiffs' motion for summary judgment as to liability, unanimously affirmed, without costs.

In this personal injury action, plaintiff Bryan Schwartz alleges that he slipped and fell on a slippery manhole cover. Defendant made a prima facie showing of its entitlement to judgment as a matter of law by submitting evidence of the lack of prior notice of any defective condition and its engineer's

affidavit attesting to the safe condition of the manhole cover (*see Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969 [1994]).

Although, in opposition to the motion, plaintiffs may have raised an issue of fact as to the existence of a defective condition, they failed to raise a triable issue of fact as to whether defendant had notice of the latent slippery condition of the manhole cover (*see Hayes v Riverbend Hous. Co., Inc.*, 40 AD3d 500, 501 [1st Dept 2007], *lv denied* 9 NY3d 809 [2007]). Indeed, the cover's slip-preventive lettering and pattern appeared visible upon inspection, as evidenced by photographs.

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

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

ENTERED: MAY 9, 2013

CLERK

Andrias, J.P., Saxe, Freedman, Román, JJ.

10031 Ellen Zedeck, et al., Index 103448/11
Plaintiffs-Appellants,

-against-

Derfner Management Inc., et al.,
Defendants-Respondents,

Blair Hall, Inc., et al.,
Defendants.

_____

Stroock & Stroock & Lavan LLP, New York (Ernst H. Rosenberger of counsel), for appellants.

Kaye Scholer, LLP, New York (James D. Herschlein of counsel), for respondents.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered January 14, 2013, which denied plaintiffs' motion for partial summary judgment and granted defendants-respondents' cross motion for partial summary judgment, unanimously modified, on the law, to deny the cross motion, and otherwise affirmed, without costs.

Regardless of whether the motion court erred by invoking law of the case, res judicata and collateral estoppel, we are not bound by those doctrines on this appeal (*see e.g. People v Evans*, 94 NY2d 499, 503 n 3 [2000]; *Matter of Mont Gardens v Suffolk County Dept. of Health*, 24 AD2d 599, 599-600 [2d Dept 1965]).

Accordingly, we reach the merits of whether defendant Derfner Management Inc. (DMI) was required to have a real estate broker's license pursuant to Real Property Law (RPL) § 440-a.

It is undisputed that, in exchange for a 7% commission, DMI negotiated leases and collected rents on behalf of the corporate plaintiffs. Hence, it would appear to fall under the definition of "real estate broker" in RPL 440(1). However, it has been held that RPL article 12-A, which includes sections 440 and 440-a, is "not broad enough 'to cover . . . every transaction in which an interest in real estate may be part of the'" transaction (*Reiter v Greenberg*, 21 NY2d 388, 391-392 [1968], quoting *Weingast v Rialto Pastry Shop*, 243 NY 113, 116 [1926]). More recently, we have held that "[t]he statute is inapplicable where the collection of rent is incidental to responsibilities which fall outside the scope [of] brokerage services" (*Herson v Troon Mgt., Inc.*, 58 AD3d 403, 403 [1st Dept 2009]; *see Garber v Stevens*, 94 AD3d 426, 427 [1st Dept 2012]).

The issue of whether a party's services fall under RPL article 12-A is one of fact (*see Dodge v Richmond*, 5 AD2d 593, 596 [1st Dept 1958]; *see also Garber*, 94 AD3d at 427; *Herson*, 58 AD3d at 403). Thus, the court correctly denied plaintiffs' motion for partial summary judgment. However, it should have

also denied defendants-respondents' cross motion for partial summary judgment, and we disagree with the contention that the evidence currently in the record is sufficient to allow us to decide, as a matter of law, whether DMI's negotiation of leases and collection of rents were incidental to the non-RPL services that it provided.

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

ENTERED: MAY 9, 2013

CLERK

Andrias, J.P., Saxe, Freedman, Román, JJ.

10032 The People of the State of New York, SCI. 30075/11
Respondent,

-against-

Henry Cooper,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Andrew E. Seewald of counsel), for respondent.

_____

Order, Supreme Court, New York County (Cassandra Mullen, J.), entered on or about August 2, 2011, which adjudicated defendant a level three sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly exercised its discretion in denying defendant's request for a downward departure (*see People v Cintron*, 12 NY3d 60, 70 [2009], *cert denied sub nom. Knox v New York* 558 US 1011 [2009]; *People v Mingo*, 12 NY3d 563, 568 n 2 [2009]). The mitigating factors cited by defendant are outweighed by his serious criminal record.

Both the underlying sex crime and a prior sex crime involved eight-year-old victims, and defendant has twice been convicted of

failing to register in connection with a prior sex offender adjudication. We do not consider defendant's sex crimes to be exceedingly remote, particularly since he spent much of the intervening time in prison, and we do not find his age (early 40s) to be a significant mitigating factor under the circumstances.

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

ENTERED: MAY 9, 2013

CLERK

Andrias J.P., Saxe, Freedman, Román, JJ.

10033 Bruce Sims, Index 309883/09
Plaintiff-Appellant,

-against-

3349 Hull Avenue Realty Co. LLC,
Defendant-Respondent.

_____

Sim & Record, LLP, Bayside (Sang J. Sim of counsel), for appellant.

Carol R. Finocchio, New York, and The Chartwell Law Offices, LLP, New York (William H. Grae of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered April 10, 2012, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant established its entitlement to judgment as a matter of law in this action where plaintiff was injured when he slipped and fell on a worn marble tread as be descended the stairs in defendant's building. The worn marble tread is not an actionable defective condition (*see Murphy v Conner*, 84 NY2d 969, 971-972 [1994]; *Cintron v New York City Tr. Auth.*, 77 AD3d 410, 411 [1st Dept 2010]; *Pena v Women's Outreach Network, Inc.*, 35 AD3d 104, 111 [1st Dept 2006]), and other than stating that he slipped, plaintiff was unable to explain the cause of his fall,

and expressly said that he did not slip on any dirt or debris that may have been present (*see Reed v Piran Realty Corp.*, 30 AD3d 319 [1st Dept 2006], *lv denied* 8 NY3d 801 [2007]).

In opposition, plaintiff failed to raise a triable issue of fact. That defendant's superintendent was aware that the marble step was worn is irrelevant where the alleged defective condition is not actionable (*see DeMartini v Trump 767 5th Ave., LLC*, 41 AD3d 181 [1st Dept 2007]). Moreover, the opinion of plaintiff's expert that the steps were worn and could cause one to slip is speculative (*see Murphy v New York City Tr. Auth.*, 73 AD3d 1143 [2nd Dept 2010]), and plaintiff cited no applicable Building Code violations connecting plaintiff's injuries to any alleged defective condition (*see Garcia-Rosales v 370 Seventh Ave. Assoc., LLC*, 88 AD3d 464 [1st Dept 2011]; *compare Babich v R.G.T. Rest. Corp.*, 75 AD3d 439 [1st Dept 2010]).

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

ENTERED: MAY 9, 2013

CLERK

Andrias, J.P., Saxe, Freedman, Román, JJ.

10034 Federated Project and Trade Finance Core Fund, et al., Plaintiffs-Respondents, Index 651986/12

-against-

Amerra Agri Fund, LP, Defendant-Appellant,

Amerra Capital Management, LLC, Defendant.

_____

Pollack Solomon Duffy LLP, New York (Barry S. Pollack of counsel), for appellant.

Lowey Dannenberg Cohen & Hart, P.C., White Plains (Stephen Lowey of counsel), for respondents.

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Appeal from order, Supreme Court, New York County (Cynthia S. Kern, J.), entered September 12, 2012, which, to the extent appealed from, denied defendant-appellant's motion to dismiss the first cause of action for breach of contract, unanimously dismissed, without costs, as moot.

After the court denied defendant's motion to dismiss the breach of contract cause of action, plaintiffs filed an amended complaint. We take judicial notice of the amended complaint (*see Assured Guar. [UK] Ltd. v J.P. Morgan Inv. Mgt. Inc.*, 80 AD3d 293, 303 [1st Dept 2010], *affd* 18 NY3d 341 [2011]), and find that

it renders this appeal, based on the original complaint, moot (*see 100 Hudson Tenants Corp. v Laber*, 98 AD2d 692 [1st Dept 1983]).

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

ENTERED: MAY 9, 2013

CLERK

Andrias, J.P., Saxe, Freedman, Román, JJ.

10036 In re Ronni H. Macklowitz, et al., File 1157/12

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Ronni H. Macklowitz, et al.,
Petitioners-Respondents,

-against-

Jeffrey Solomon,
Respondent-Appellant,

Ernest J. Miller, Esq., et al.,
Respondents.

_____

Bee Ready Fishbein Hatter & Donovan, LLP, Mineola (Donald J. Farinacci of counsel), for appellant.

McCoyd, Parkas & Ronan LLP, Garden City (Jonathan Perrelle of counsel), for respondents.

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Order, Surrogate's Court, New York County (Kristin Booth Glen, S.), entered June 27, 2012, which granted the petition to the extent of declaring two of the petitioners to be the lawful trustees of the subject trust and further declaring that appellant Jeffrey Solomon and respondent Russell Williams are not trustees of the trust, unanimously affirmed, with costs.

The documentary evidence establishes that pursuant to the clear and unambiguous language of the trust, appellant was never validly appointed trustee and respondents Daniel Macklowitz and Laurie Selfon were duly appointed *(see Matter of Matthews Trust*

No. 1, 61 AD3d 511, 512 [1st Dept. 2009]). Moreover, as appellant's only alleged act as trustee was to make certain payments that he was not required to make, from his own funds, it cannot be said that he relied upon any representation or assent to his being trustee in making such payments, nor has his position changed prejudicially, as he has a claim for the payments against the trust *(BWA Corp. v Alltrans Express U.S.A., Inc.*, 112 AD2d 850, 853 [1st Dept. 1985). Nor did the Surrogate err in failing to allow discovery or in ruling upon the petition and verified answers. This is a special proceeding and summary disposition is expressly permitted (CPLR 409).

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

ENTERED: MAY 9, 2013

CLERK

Andrias, J.P., Saxe, Freedman, Román, JJ.

10037 The People of the State of New York, Ind. 597/99
Respondent,

-against-

Tim Jones,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Lauren Stephens-Davidowitz of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered on or about October 26, 2010, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: MAY 9, 2013

CLERK

Andrias, J.P., Saxe, Freedman, Román, JJ.

10038 310 East 74 LLC, et al., Index 109924/09
Plaintiffs-Appellants,

-against-

Fireman's Fund Insurance Company
doing business as Interstate
Indemnity Company,
Defendant-Respondent.

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Kornstein Veisz Wexler & Pollard, LLP, New York (Daniel J. Kornstein of counsel), for appellants.

Rivkin Radler LLP, Uniondale (Merril S. Biscone of counsel), for respondent.

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Order, Supreme Court, New York County (Richard F. Braun, J.), entered July 16, 2012, which granted defendant's motion for summary judgment declaring that defendant has no duty to defend or indemnify plaintiffs in an underlying personal injury action or to reimburse them for attorneys' fees in defense of that action, and denied plaintiffs' cross motion for summary judgment declaring that defendant is obligated to defend and indemnify them in the underlying action, unanimously affirmed, without costs.

Plaintiffs' seven-month delay in notifying defendant insurer of the subject accident was unreasonable as a matter of law (*see Tower Ins. Co. of N.Y. v Classon Hgts., LLC*, 82 AD3d 632, 634

[1st Dept 2011]). Furthermore, plaintiffs failed to meet their burden to raise a triable issue of fact as to whether they had a reasonable, good-faith belief in their nonliability (*see id.*; *Paramount Ins. Co. v Rosedale Gardens*, 293 AD2d 235, 239-240 [1st Dept 2002]).

The record shows that after the plaintiff in the underlying action fell off a ladder while removing insulation from the chimney of a building owned and managed by plaintiffs, the building superintendent arrived and found the injured person leaning against a wall in the basement, and he appeared to be in pain. The superintendent then watched as the injured worker was helped into a taxi by two others. Although the superintendent did not recall whether the taxi was taking the worker to obtain medical attention, the circumstances suggested that possibility. Thus, the superintendent, whose knowledge is imputed to plaintiffs (*see Tower Ins. of N.Y. v Amsterdam Apts.*, LLC, 82 AD3d 465 [1st Dept 2011]), could not have had a good-faith belief in nonliability without conducting a more thorough inquiry into the matter (*see Tower Ins. Co. of N.Y. v Red Rose Rest., Inc.*, 77 AD3d 453 [1st Dept 2010]; *Anglero v George Units, LLC*, 61 AD3d 564 [1st Dept 2009]).

Plaintiffs' subsequent communications with the worker's

boss, in which he made statements to the effect that he was going to take care of the worker, did not constitute an adequate inquiry, in the absence of any evidence that plaintiffs diligently sought to learn of the extent of the worker's injuries (*see Board of Mgrs. of the 1235 Park Condominium v Clermont Specialty Mgrs., Ltd.*, 68 AD3d 496 [1st Dept 2009]). The need to investigate the matter was particularly apparent since the accident involved a construction worker falling off a ladder while working on plaintiffs' property, thereby subjecting them to potential liability pursuant to the Labor Law (*see id.; QBE Ins. Corp. v D. Gangi Contr. Corp.*, 66 AD3d 593, 594 [1st Dept 2009]). Moreover, when an investigator showed up to take photographs of the premises, and the superintendent understood that he was there on the worker's behalf, plaintiffs were effectively on notice of the likelihood of the underlying personal injury claims. Plaintiffs' professed ignorance of the scope of landowners' liability for accidents suffered by construction workers pursuant to the Labor Law does not establish a reasonable belief in nonliability (*see e.g. Tower Ins. Co. of N.Y. v Red Rose Rest., Inc.*, 77 AD3d at 454).

Furthermore, contrary to plaintiffs' contention, defendant "was not required to demonstrate any prejudice resulting from the

claimed untimely notice, as its policy predated the effective date of the amendments to Insurance Law § 3420(a)(5) that now requires such a showing" (*25 Ave. C New Realty, LLC v Alea N. Am. Ins. Co.*, 96 AD3d 489, 491 [1st Dept 2012]).

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

ENTERED: MAY 9, 2013

CLERK

Andrias, J.P., Saxe, Freedman, Román, JJ.

10040 Lawrence Kasoff, Index 116954/07
Plaintiff-Respondent,

-against-

KVL Audio Visual
Services, Inc., et al.,
Defendants-Appellants.

Clifton Budd & DeMaria, LLP, New York (George F. Brenlla of counsel), for appellants.

Grabell & Associates, P.A., New York (Matthew R. Grabell of counsel), for respondent.

Judgment, Supreme Court, New York County (Milton A. Tingling, J.), entered April 18, 2012, insofar as appealed from as limited by the briefs, awarding plaintiff a total amount of $215,672.72, inclusive of double damages, court costs and reasonable attorneys' fees, unanimously modified, on the law, to strike that part of the judgment awarding double damages, court costs and reasonable attorneys' fees, and to remand for recalculation of interest and total judgment, and otherwise affirmed, without costs.

This Court's prior order (*see* 87 AD3d 944 [1st Dept 2011]) awarded plaintiff the full amount of his Miscellaneous commission claim ($47,731.47) as a sanction for defendants' intentional

interference with discovery orders and alteration of critical discoverable documents (*see Sony Corp. of Am. v Savemart, Inc.*, 59 AD2d 676 [1st Dept 1977]).

However, plaintiff was not entitled to double damages, court costs and reasonable attorneys' fees as allowed under Labor Law § 191-c. That provision is limited to "sales representative[s]" who work as independent contractors pursuant to contracts with a principal as defined in Labor Law § 191-a, and here, plaintiff was employed by defendants, which made him a "commission salesperson[]," as that term is defined in Labor Law § 190(6) and § 191(1)(c).

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

ENTERED: MAY 9, 2013

CLERK

Andrias, J.P., Saxe, Freedman, Román, JJ.

10041 Christopher Ross, Index 103496/10
Plaintiff-Respondent,

-against-

1510 Associates LLC, et al.,
Defendants-Appellants.

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

Jaroslawicz & Jaros LLC, New York (David Tolchin of counsel), for respondent.

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Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered May 7, 2012, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for summary judgment on the issue of liability under Labor Law § 240(1), unanimously affirmed, without costs.

Plaintiff testified that he was injured when the A-frame ladder he was standing on tipped over after it shifted because of the unevenness of the floor, and he fell. The accident involved an elevation-related risk, and plaintiff's injuries were proximately caused, at least in part, by defendants' failure to provide him with proper protection as required by Labor Law § 240(1) (*see Dwyer v Central Park Studios, Inc.*, 98 AD3d 882, 883 [1st Dept 2012]). Plaintiff was not required to show that the

ladder was defective (*see id.*).

Contrary to defendants' contention, the record presents no triable issue of fact whether plaintiff's negligence was the sole proximate cause of the accident, because there is no evidence that plaintiff fell simply because he lost his balance (*see Carchipulla v 6661 Broadway Partners, LLC*, 95 AD3d 573 [1st Dept 2012]).

Defendants argue that plaintiff was not entitled to summary judgment because the only evidence as to their liability is his testimony, and they should have the opportunity to cross-examine him and have his credibility determined by a factfinder. However, in contrast to *Grant v Steve Mark, Inc.* (96 AD3d 614 [1st Dept 2012]), the case on which defendants rely, plaintiff's testimony was not the only evidence; plaintiff submitted an affidavit by a witness who was present immediately after the

accident and observed the uneven condition of the floor in the area in which plaintiff had been working.

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

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

ENTERED: MAY 9, 2013

CLERK

Andrias, J.P., Saxe, Freedman, Feinman, JJ.

10042& M-1982 Estate of Iris Gordon, Plaintiff-Respondent, Index 109782/10

-against-

City of New York, et al., Defendants,

Francis Syn-Moye, et al., Defendants-Appellants.

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Richard J. Katz, LLP, New York (Brian M. Hussey of counsel), for appellants.

Albert Van-Lare, New York, for respondent.

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Order, Supreme Court, New York County (Milton A. Tingling, J.), entered September 30, 2011, which denied defendants-appellants' motion to dismiss the complaint as asserted against them, unanimously reversed, on the law, without costs, the motion granted, and the complaint dismissed as against defendants-appellants, without prejudice. The Clerk is directed to enter judgment accordingly.

"[W]here a receiver has been discharged from any and all liability, he or she may not be sued unless the appointing court vacates its order and grants leave to sue" (*Gadson v 1340 Hudson Realty Corp.*, 180 AD2d 582, 583 [1st Dept 1992]). Nothing in the record indicates that the Housing Court has vacated the consent

order dated April 7, 2009, to which plaintiff was a party, discharging defendants as court-appointed administrators under article 7A of the Real Property Actions and Proceedings Law.

M-1982 - *Gordon v Sym-Moye*

Motion for sanctions denied.

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

ENTERED: MAY 9, 2013

CLERK

Andrias, J.P., Saxe, Freedman, Román, JJ.

10043 Ari L. Waldman, Index 108191/11
Plaintiff-Appellant,

-against-

Millennium Realty Group LLC,
Defendant-Respondent.

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Robert L. Lewis, New York, for appellant.

Eaton & Van Winkle LLP, New York (Robert A. Rubenfeld of counsel), for respondent.

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Order, Supreme Court, New York County (Paul Wooten, J.), entered October 2, 2012, which granted defendant's motion to dismiss the complaint for failure to timely file it in compliance with an order, same court and justice, entered May 6, 2011, in a prior action between the parties (Index No. 116127/2010), unanimously affirmed, without costs.

The court properly dismissed the complaint in the instant action pursuant to the order in the prior action, which granted

plaintiff leave to file a "new complaint" within 60 days and was marked "final disposition." It is undisputed that plaintiff did not file the complaint in the instant action until after 60 days had expired.

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

ENTERED: MAY 9, 2013

CLERK

Andrias, J.P., Saxe, Freedman, Román, JJ.

10044N OrthoTec, LLC, Index 601377/08
Plaintiff-Respondent,

-against-

HealthpointCapital, LLC, et al.,
Defendants-Appellants,

Scient'x, S.A.,
Defendant.

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DLA Piper LLP (US), New York (Colleen M. Carey of counsel), for appellants.

Browne George Ross LLP, Los Angeles, CA (Peter W. Ross of the bar of the State of California, admitted pro hac vice of counsel), for respondent.

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Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered October 2, 2012, which denied defendants' motion for spoliation sanctions, unanimously affirmed, without costs.

The motion court properly denied defendants' motion to strike the cause of action for intentional interference with economic advantage as a sanction for spoliation since the spoliation did not deprive defendants of their ability to defend against the claim (*see Suazo v Linden Plaza Assoc., L.P.*, 102 AD3d 570 [1st Dept 2013]; *see also Melcher v Apollo Med. Fund Mgt. L.L.C.*, ___ AD3d ___, 959 NYS2d 133 [1st Dept 2013]). With respect to any other spoliation sanction, the court properly

found that the "zone of the preservation duty" encompasses only documents drafted subsequent to 2008, when plaintiff began seriously contemplating initiating this litigation (*see VOOM HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 AD3d 33 [1st Dept 2012]), and that the evidence of plaintiff's preservation and collection of any such documents is inadequate to show the degree of its culpability (*see Melcher*, 2013 NY Slip Op 00443, *6).

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

ENTERED: MAY 9, 2013

CLERK

Mazzarelli, J.P., Moskowitz, DeGrasse, Manzanet-Daniels, Clark, JJ.

8916 In re McIver-Morgan, Inc., Index 653164/11
Petitioner-Respondent,

-against-

Christopher Dal Piaz, et al.,
Respondents-Appellants.

_____

Massoud & Pashkoff, LLP, New York (Ahmed A. Massoud of counsel), for appellants.

Feldman & Associates, PLLC, New York (Edward S. Feldman of counsel), for respondent.

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Order, Supreme Court, New York County (Milton A. Tingling, J.), entered March 26, 2012, affirmed, without costs.

Opinion by Mazzarelli, J.P. All concur.

Order filed.

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SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
Karla Moskowitz
Leland G. DeGrasse
Sallie Manzanet-Daniels
Darcel D. Clark, JJ.

8916
Index 653164/11

_____x

In re McIver-Morgan, Inc.,
Petitioner-Respondent,

-against-

Christopher Dal Piaz, et al.,
Respondents-Appellants.

_____x

Respondents appeal from the order of the Supreme Court, New York County (Milton A. Tingling, J.), entered March 26, 2012, which granted the petition to confirm an arbitration award.

Massoud & Pashkoff, LLP, New York (Ahmed A. Massoud of counsel), for appellants.

Feldman & Associates, PLLC, New York (Edward S. Feldman and Stephanie Feldman of counsel), for respondent.

MAZZARELLI, J.P.

Respondents Christopher Dal Piaz and Elizabeth Schoelkopf (the Owners), engaged petitioner McIver-Morgan, Inc. (McIver) to design a major renovation of their townhouse. Promotional materials created by McIver reflect that it holds itself out as "a full service firm specializing in all facets of high-end residential interior design and architectural services." It is undisputed that McIver is a business, not professional, corporation, and that the entity does not have a license to practice architecture. McIver does, however, employ George Queral, who is a licensed, but not registered, architect. It also periodically uses an outside consultant, Robert Schwartz, a licensed and registered architect. Because Schwartz has many close contacts in the New York City Buildings Department and other related agencies, McIver recommended to the Owners that they use him on their project as an expediter who could sign and seal architectural drawings and then file them with the Buildings Department.

The written agreement between the Owners and McIver set forth the basic services, broken down into four phases, which the latter would provide. These included a "schematic design" phase in which McIver would prepare schematic design documents that illustrate the scale and relationship of the project components,

including a conceptual site plan and preliminary building plans. The second phase was "design development" in which McIver would produce "plans," "drawings," and "outline specifications and other documents," as would evidence "the scope, relationships, forms, size, and appearance of the Project." The third stage was the "construction documents" phase in which McIver would provide, inter alia, "Drawings and Specifications that establish in detail the quality levels of materials and systems required for the Project." The final phase was for "contract administration services," in which McIver would essentially act as the Owners' representative during construction. The agreement expressly provided that "Consultants including but not limited to a Structural Engineer, a Mechanical Engineer, and a Surveyor may be required during Phase one, two, three and four. Services of Consultants will be coordinated by [McIver], paid for by the Owner[s] and included in the cost of Construction." The parties agreed that the Owners would pay McIver 15% of the overall "Construction Cost" for the project, which would be due in estimated 25% increments upon the completion of each of the four phases of the project. They further agreed to submit any disputes arising out of the agreement to an arbitrator.

At some point during the renovation, the Owners terminated the agreement based on McIver's alleged failure to perform in a

timely fashion. McIver filed for arbitration. The Owners counterclaimed for, inter alia, restitution by McIver of $37,500 which the Owners claimed they paid to McIver for architectural services. They argued that public policy precluded McIver from charging for such services because it did not possess an architectural license. Before conducting a hearing, the arbitrator issued, at the parties' request, a preliminary order on the issue of arbitrability. The order stated, among other things, that the agreement for designer services was not invalid on public policy grounds, although McIver is not a licensed, registered architect. The arbitrator observed that the agreement's terms explicitly gave notice that outside "consultants, including ... a structural engineer, mechanical engineer, and a surveyor may be required," and that their "assistance" could be used on the project. The arbitrator also determined that McIver's

> "subsequent proposal that Mr. Schwartz, an RA [Registered Architect], be retained as a consultant to 'prepare and file' drawings with the Department of Buildings and the Landmarks Preservation Commission, assures that such services will be performed by an appropriately licensed professional, and is not inconsistent with the agreement's provision that other 'consultants ... may be required' nor contrary to the provisions of NY State Education Department regulations."

At the hearing that followed, Queral testified that he

prepared architectural drawings for the project in question, but that Schwartz always reviewed them. He stated that "I e-mailed [Schwartz] the plans and then we talked on the phone and he would say, we have to change this or that, and so I would do it." It is apparent from Queral's testimony that Schwartz's recommended changes were substantive in nature. Schwartz also appeared at the arbitration hearing. He testified that he did not sign and seal the architectural drawings made by Queral until they were revised "to my satisfaction." Schwartz further stated, with respect to Queral, "When he's working with the drawings with me, he's working under my supervision, so I'm reviewing the plans and he's working under my supervision." Finally, although his testimony was somewhat equivocal on this point, Schwartz testified that he was "the architect" for the project.

The arbitrator found in favor of McIver on its claim for unpaid fees in the amount of $127,622.13, together with interest from the date the arbitration was filed. To the extent the Owners contended that McIver was not entitled to any compensation for any architectural services it rendered, the arbitrator referenced his preliminary order, wherein he denied the Owners' argument to strike the agreement on the basis that McIver provided architectural services without a license. The arbitrator further found that while the Owners had terminated the

agreement for alleged untimely performance by McIver, the terms of the agreement did not specify a time-line for McIver's performance, but rather contained language allowing for time adjustments during the course of the project. The arbitrator noted that the evidence and testimony at the arbitration hearings indicated that "numerous" design changes requested by the Owners, including an increase in the scope of the project, had led to delays for re-design and a "higher than expected" cost for the project. Finally, the arbitrator found that the Owners terminated McIver at or about the completion of Phase 3 of the Project, and so it was only entitled to receive 75% of what it contended it was owed for that phase, since the drawings submitted to the Owners were incomplete and uncoordinated, and were lacking mechanical and structural engineering drawings.

McIver commenced this special proceeding to confirm the arbitrator's award. The Owners denied the material allegations in the petition, and asserted as grounds for denying confirmation of the award, and dismissal of the petition (which they sought by cross motion), that the agreement was "void as against public policy" based on McIver's lack of an architect's license; that McIver's conduct violated statutory law prohibiting and criminalizing such conduct (citing Education Law §§ 6512, 7300, 8300); and that the award was irrational. Supreme Court granted

McIver's petition, adopting the reasoning in the petition.

Because of the great degree of deference afforded to arbitration awards, the available grounds for vacating them are extremely limited. Mere errors of law or fact reflected in an arbitration award are insufficient for a court to overturn it, since "the courts should not assume the role of overseers to mold the award to conform to their sense of justice" (*Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 480 [2006], *cert dismissed* 548 US 940 [2006]). A court may only disturb the award "when it violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on an arbitrator's power" (*Matter of New York State Correctional Officers & Police Benevolent Assn. v State of New York*, 94 NY2d 321, 326 [1999]).

With regard to the public policy ground, the focus is on whether

> "public policy considerations, embodied in statute or decisional law, prohibit, in an absolute sense, particular matters being decided or certain relief being granted by an arbitrator. Stated another way, the courts must be able to examine an arbitration agreement or an award on its face, without engaging in extended factfinding or legal analysis, and conclude that public policy precludes its enforcement" (*Matter of Sprinzen [Nomberg]*, 46 NY2d 623, 631 [1979]).

In *Sprinzen*, the Court, pursuant to these principles, refused to vacate an arbitrator's award enforcing a restrictive

covenant barring future employment, even though there was "some doubt" whether the Court would have enforced it (*id.* at 632). That was because "[w]hile it is true that considerations of public policy militate against the enforcement of restrictive covenants of future employment, these covenants are not per se unenforceable as being null and void. Each case turns upon its own distinct facts" (*id.* at 631-632 [internal citations omitted]).

Here, the face of the award rejected the Owners' bid to recover the amounts they paid McIver for architectural services on the basis that McIver was not licensed. Just like in disputes involving restrictive employment agreements, whether an unlicensed entity offering services regulated by the Education Law may enforce its contract must be decided on a case by case basis. That is because the provisions in the Education Law requiring a license to practice architecture are not to be "slavishly applied" (*Charlebois v Weller Assoc.*, 72 NY2d 587, 595 [1988]).

In *Charlebois*, an agreement between a general contractor and a building owner called for a licensed architect-engineer to provide engineering services. The owners later claimed that this arrangement violated the public policy codified in the Education Law because the general contractor itself was required to hold an

engineering license. The Court of Appeals rejected this position, holding that "the design functions were contracted for and actually performed by a named licensed engineer, as the [owners] agreed and expected under their contract" (72 NY2d at 594) and that

> "[n]either a fair reading of the contractual arrangement nor the regulatory scheme designed to protect an important public policy would support a view that [the general contractor] agreed for itself to engage or actually engaged in the practice of engineering. That is what the Education Law forbids under these circumstances. The design in this case as part of the over-all project was performed lawfully by a licensed professional" (*id.* at 594-595).

Perhaps most importantly, the Court stated:

> "Finally, forfeitures by operation of law are strongly disfavored as a matter of public policy and the [owners'] efforts to use that concept as a sword for personal gain rather than a shield for the public good should not be countenanced in the name of the Education Law public policy, slavishly applied. The legislative objective, after all, is professional performance – a matter of substance – not the vehicle of professional performance – a matter of form" (*id.* at 595).

Several decisions from this Court echo the Court of Appeals' admonition that, above all, a commonsense approach to the operative facts should dictate whether the mere fact that a contractor leading a construction project does not have a professional license should preclude it from recovering its fee. For example, in *SKR Design Group v Yonehama, Inc.* (230 AD2d 533 [1st Dept 1997]), the plaintiff held itself out as "Interior

Designers Planners Architects" which would provide "architectural and interior design services." It entered into a contract with the defendant to provide "construction and design services" for a restaurant that the defendant was building. The plaintiff was not a licensed professional corporation. However, the evidence showed that the contract provided that "[d]esign services shall be performed by qualified architects, engineers and other professionals selected and paid by the Design/Builder (*id*. at 536 [internal quotation marks omitted])." Further, all of the architectural work, including the signing and sealing of the plans, was performed by a licensed and registered architect. This Court held that the arrangement met the standard set forth in *Charlebois* and stated: "That a contractor engages the services of a licensed professional to perform a portion of the services covered by the contract does not convert that contract into one for the performance of those services" (230 AD2d at 537). We further stated:

> "Since the purpose of the licensing requirements is to ensure that the regulated work is performed by those with the necessary skills and training, we see no reason why the contract must designate a specific person. Where a licensed architect performed all of the services despite not being named in the contract, as here, the effectiveness of the regulatory scheme is not weakened. This is true because the licensed professional selected remains 'inescapably subject to the educational, regulatory and punishment mechanisms of the licensing entity'" (*id.* at 537, quoting *Charlebois*, 72 NY2d at 592).

We held similarly in *Cherokee Owners Corp. v DNA Contr., LLC* (96 AD3d 480 [1st Dept 2012]).

On the other hand, in *Alex Greenberg, DDS, PC v SNA Consultants, Inc.* (55 AD3d 418 [1st Dept 2008], *lv denied* 12 NY3d 707 [2009]), this Court held that the evidence established that the defendant contractor's work was more in the nature of architecture, for which it held no professional license, and not interior design, as it claimed, and found that the agreement was unenforceable. Moreover, in *P.C. Chipouras & Assoc. v 212 Realty Corp.* (156 AD2d 549, 549 [2d Dept 1989]), the Second Department found that the Education Law was violated because "[t]he level of review or participation in the construction drawings by a licensed architect allegedly working on the project was not sufficient to render the work product his own."

That the outcomes of these cases vary is a testament to their fact-intensive nature. This case falls somewhere between those cases where an unlicensed entity unquestionably did all of the architectural work itself, and those where all of the architectural work was legitimately performed by a licensed architect. However, that is the very reason why we may not interfere with the arbitration award, since we may not "engag[e] in extended factfinding or legal analysis" before declaring that an arbitration award violates public policy (*Matter of Sprinzen*,

46 NY2d at 631; *Transparent Value, L.L.C. v Johnson*, 93 AD3d 599, 600 [1st Dept 2012]). Given that Schwartz's involvement, at the very least, raises a serious question as to whether McIver satisfied the spirit of the Education Law, we would have to engage in such a review of the factual record to reach that conclusion.

Even if we could examine the facts in this record, we would be constrained to conclude that the arrangement here did not violate public policy. Again, courts are to consider all of the circumstances in determining whether the goals of the Education Law's licensing requirements are met, and are not to elevate form over substance (*see Charlebois* at 595). In supervising Queral's preparation of the architectural plans and insisting that his changes be adopted, in addition to his signing and sealing of the architectural drawings, it is clear to us that Schwartz had a substantive, active role in the provision of architectural services.

Further, the parties' agreement sufficiently notified the Owners that McIver might retain outside contractors to provide professional services. There is no basis for the Owners to argue that the non-exhaustive list of professionals named in that provision excluded architects such as Schwartz. Indeed, the situation was substantially similar to that in *SKR Design Group*,

where we held that a contractor had no obligation to specify who would be providing the architectural services (230 AD2d at 537).

Finally, nothing in the record supports the Owners' argument that the arbitrator's conclusion that McIver did not breach the agreement by failing to perform in a timely fashion was irrational. The arbitrator correctly found that there is no language in the agreement that required McIver to perform by a date certain. There was correspondence between the parties setting target dates for completion of certain phases of the project, but the dates were not inflexible. Moreover, the arbitrator found that the Owners contributed to the delays by changing the scope of the project, and some of the designs, in midstream.

Accordingly, the order of the Supreme Court, New York County (Milton A. Tingling, J.), entered March 26, 2012, which granted the petition to confirm an arbitration award, should be affirmed, without costs.

All concur.

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

ENTERED: MAY 9, 2013

CLERK