SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

**JUNE 16, 2016**

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Sweeny, J.P., Renwick, Andrias, Kapnick, Kahn, JJ.

1185 Salvino Cataudella, et al., Index 158173/12
Plaintiffs-Appellants,

-against-

17 John Street Associates, LLC,
et al.,
Defendants-Respondents.

_____

Law Offices of Peter A. Frankel, New York (Peter A. Frankel of counsel), for appellants.

Lewis Brisbois Bisgaard & Smith LLP, New York (Meredith D. Nolen of counsel), for respondents.

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Order, Supreme Court, New York County (Carol R. Edmead, J.), entered February 17, 2015, which, to the extent appealed from as limited by the briefs, granted defendant Big Tom Inc./The Irish American's (defendant) motion for summary judgment dismissing the complaint as against it, and denied plaintiffs' cross motion for spoliation sanctions, unanimously affirmed, without costs.

Supreme Court properly dismissed the complaint, as defendant satisfied its initial burden on summary judgment by establishing, prima facie, that any alleged defect in the stairway at issue

and/or in its premises lighting was not a proximate cause of plaintiff's accident, and plaintiff failed to raise a triable issue of fact relating his accident and injuries to either.

The court properly declined to consider the errata sheet even though it was timely served, because plaintiff made changes to his testimony without explaining why he was making them, as required by CPLR 3116(a) (*see Garcia v Stickel*, 37 AD3d 368 [1st Dept 2007]).

The court also properly denied the cross motion for spoliation sanctions. Plaintiff failed to specify a particular defect that caused him to fall, and even if defendant should have maintained its video footage of the subject staircase, plaintiff cannot establish that the failure to preserve it left him "prejudicially bereft of appropriate means to [present] a claim with incisive evidence," as required for the imposition of sanctions (*Masciotta v Morse Diesel Intl.*, 303 AD2d 309, 313 [1st

Dept 2003][internal quotation marks omitted]; *see Gunzburg v Quality Bldg. Servs. Corp.*, 137 AD3d 424, 424-425 [1st Dept 2016]).

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

ENTERED: JUNE 16, 2016

CLERK

Tom, J.P., Sweeny, Andrias, Manzanet-Daniels, Webber, JJ.

1142 Steve Soltes, Index 154706/12
Plaintiff-Appellant,

-against-

Turner Construction Company,
et al.,
Defendants-Respondents.

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Cynthia S. Kern, J.), entered on or about February 9, 2015,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated May 18, 2016,

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

ENTERED: JUNE 16, 2016

CLERK

Sweeny, J.P., Renwick, Moskowitz, Kapnick, Gesmer, JJ.

1241N Eleanor Johnson-Roberts, Index 158523/14
Plaintiff-Appellant,

-against-

Ira Judelson Bail Bonds, et al.,
Defendants-Respondents.

_____

Law Offices of Elizabeth A. Douglas, PLLC, White Plains (Elizabeth A. Douglas of counsel), for appellant.

Johnnie Woluewich, New York, for respondents.

_____

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered on or about May 1, 2015, which granted defendants' motion to vacate the default judgment that had been entered against them, unanimously reversed, on the law, with costs, and the motion denied.

As we have held often, there exists a strong public policy in favor of disposing of cases on their merits (*see e.g. Goncalves v Stuyvesant Dev. Assoc.*, 232 AD2d 275, 276 [1st Dept 1996]). However, this policy does not relieve a party moving to vacate a default from satisfying the two-pronged test of showing both (1) a reasonable excuse for the default; and (2) a meritorious defense to the action (*id.*; *see DTG Operations, Inc. v Excel Imaging, P.C.*, 119 AD3d 410 [1st Dept 2014]).

Here, the motion court should not have granted defendants' motion to vacate the default judgment. As to the first prong, defendants failed to demonstrate a reasonable excuse for their default (*see John Wiley & Sons, Inc. v Grossman*, 132 AD3d 559, 559 [1st Dept 2015]). Defendants' counsel never substantiated or explained the nature of the "serious family matter" that purportedly caused the default. At most, counsel had an ex parte communication with the motion court about the facts of this action, and, during that communication, may or may not have revealed the facts surrounding the family matter. This ex parte communication is an insufficient basis upon which to vacate a default judgment, especially where, as here, the details of the communication are not even known (*see Fuller v Tae Kwon*, 259 AD2d 662, 662 [2d Dept 1999]).

Defendants also fail to explain why their counsel's family matter was so serious that it kept him from either interposing an answer or responding to plaintiff's motion for a default judgment. Certainly, the record contains no adequate explanation for why the law firm representing defendants failed to communicate with plaintiff's counsel for nearly five months, even to inform counsel that a family emergency prevented defendants from timely responding to the litigation (*see Whittemore v Yeo*,

99 AD3d 496, 496 [1st Dept 2012]; *Gayle v Parker*, 300 AD2d 145; 145 [1st Dept 2002]). What is more, two attorneys, only one of whom was affected by a family emergency, were representing defendants in this matter; nowhere do defendants explain why the other attorney representing them could not have taken the necessary steps to advance the litigation.

As to the second prong, although defendants asserted that they were entitled to a premium payment because they executed and posted a bail bond, this assertion does not present a meritorious defense to plaintiff's action. Although execution of the bond is a condition precedent for retaining a premium payment, defendants failed to present any documentary evidence that they had actually executed and posted any bond (*see John Harris P.C. v Krauss*, 87 AD3d 469, 469 [1st Dept 2011]). Likewise, defendants presented no evidence that the motion court ever conducted an examination of surety.

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

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

ENTERED: JUNE 16, 2016

CLERK

Mazzarelli, J.P., Andrias, Richter, Manzanet-Daniels, Kahn, JJ.

1255 Heather James, LLC, et al., Index 651226/14
Plaintiffs-Respondents,

-against-

Day & Meyer, Murray & Young Corp.,
Defendant-Appellant.

_____

George W. Wright & Associates, LLC, New York (George W. Wright of counsel), for appellant.

William M. Pinzler, New York, for respondents.

_____

Order, Supreme Court, New York County (Robert R. Reed, J.), entered September 21, 2015, which, to the extent appealed from, denied defendant's motion for summary judgment limiting its liability to the damages specified in the parties' contracts, unanimously affirmed, without costs.

Plaintiff Heather James Jackson, LLC, the owner of an art gallery in Wyoming, facilitated for a client the purchase of 10 original framed Marilyn Monroe silk-screen prints created by Andy Warhol. Included in the collection, and making it unique, was the box that Warhol himself had selected and labeled to sell the prints in. Defendant, which specializes in storing and shipping rare fine art, was to receive the collection from Sotheby's and ship it to the Wyoming gallery. In an email notifying defendant

that the collection would be arriving the next day, an employee of plaintiff advised that the prints were to be shipped to Wyoming, "along with the original box the prints came in." However, the prints arrived in Wyoming without the original box.

Contrary to the motion court's conclusion that gross negligence on defendant's part would deprive defendant of the benefit of the contractual limitation on its liability, the only circumstance that would render the contractual limitation inapplicable in this case is defendant's conversion of the original box (*see* former UCC 7-204[2], now 7-204[b]; *I.C.C. Metals v Municipal Warehouse Co.*, 50 NY2d 657 [1980]). Although defendant proffered a non-conversion explanation for its failure to return the box to plaintiff, the evidence it submitted fails to demonstrate the truth of that explanation as a matter of law (*see I.C.C. Metals*, 50 NY2d 657).

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

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

ENTERED: JUNE 16, 2016

CLERK

Mazzarelli, J.P., Acosta, Saxe, Kapnick, Kahn, JJ.

1424 Jenise Jett, Index 117091/09
Plaintiff-Appellant,

-against-

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

_____

Kelner & Kelner, New York (Ronald C. Burke of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Nancy M. Bannon, J.), entered September 1, 2015, after a jury trial, upon a verdict in favor of defendants, unanimously reversed, on the law, without costs, and the matter remanded for a new trial.

The trial court did not improvidently exercise its discretion in refusing to discharge a juror who expressed concern about continuing deliberations, in the absence of evidence that he was "unable to perform the duties of a juror" (CPLR 4106). After plaintiff's counsel suggested "that we tell the jury to come back on Monday," the juror agreed to return to continue deliberations.

However, we find that the trial court's failure to charge defendant 120-22 West 139th Street Tenant Association's former

superintendent as an interested witness constitutes reversible error (*see Kalam v K-Metal Fabrications*, 286 AD2d 603, 604 [1st Dept 2001]). As a former employee of a party and participant in the accident, who was charged with creating an icy condition by hosing down the sidewalk on a freezing day, the former superintendent was an interested witness (*see Coleman v New York City Tr. Auth.*, 37 NY2d 137, 141-142 [1975]; *Lowenstein v Normandy Group, LLC*, 51 AD3d 517, 518-519 [1st Dept 2008]; *cf. Norton v Port Auth. of N.Y. & N.J.*, 94 AD3d 677 [1st Dept 2012]). The court's general charge on the assessment of credibility and determination as to whether a witness is an interested one is not a substitute for an interested witness charge. Given the pivotal role that the witness's testimony played in defendants' case, which pitted his reliability against that of an alleged eyewitness, the error was not harmless.

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

ENTERED: JUNE 16, 2016

CLERK

Tom, J.P., Mazzarelli, Manzanet-Daniels, Kapnick, Kahn, JJ.

1457 The People of the State of New York, Ind. 3679/94
Respondent,

-against-

Seref Karanisoglu,
Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Eduardo Padro, J.), entered or about March 11, 2011, which denied defendant's motion for resentencing under the Drug Law Reform Act of 2004 (L 2004, ch 738), unanimously affirmed.

The court properly exercised its discretion in determining that substantial justice dictated denial of the application. The seriousness of the underlying crime, which involved international drug trafficking at a very high level, outweighed all of the factors cited by defendant, viewed in totality (*see e.g. People v Rizo*, 51 AD3d 436 [1st Dept 2008]). Moreover, while incarcerated on the underlying conviction, defendant again became involved in an international drug transaction, and even accepting defendant's claim of mitigating factors regarding that crime, the fact

remains that he was convicted of a federal drug felony, and his conduct reveals that he remained able to arrange such a transaction. We have considered and rejected defendant's remaining arguments.

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

ENTERED: JUNE 16, 2016

CLERK

Tom, J.P., Mazzarelli, Manzanet-Daniels, Kapnick, Kahn, JJ.

1458 Annette Brothers, et al., Index 152462/13E
Plaintiffs-Respondents,

-against-

574 9th Ave. Rest. Corp., doing business as Dave's Tavern, et al.,
Defendants-Appellants.

_____

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

Michael Fuller Sirignano, Cross River, for respondents.

_____

Order, Supreme Court, New York County (Joan A. Madden, J.), entered October 22, 2015, which, insofar as appealed from, denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The testimony of defendant bar proprietor that he personally inspected the bathrooms and areas outside the bathrooms, just 20 to 30 minutes prior to plaintiff Annette Brothers' slip and fall outside the women's bathroom, and that he found the floor to be clean, dry and free of debris, established prima facie that defendants lacked actual or constructive notice of the alleged watery, debris-strewn condition on which Brothers fell (*see e.g. Green v Gracie Muse Rest. Corp.*, 105 AD3d 578 [1st Dept 2013]).

In opposition, plaintiffs submitted deposition testimony of themselves and several other witnesses, to the effect that there was an appreciable amount of dirty water from the women's room, together with a significant amount of debris from such bathroom, tracked over a large area just outside the women's bathroom. Such evidence raised triable issues as to whether the alleged hazardous condition existed for a sufficient length of time for the bar's multiple employees to have a reasonable opportunity to discover it and remedy it (*see Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]), as well as credibility issues among all of the witnesses (*see e.g. Best v 1482 Montgomery Estates, LLC*, 114 AD3d 555 [1st Dept 2014]). It is further noted that the video footage from the bar's surveillance camera does not afford definitive resolution of the condition of the floor.

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

ENTERED: JUNE 16, 2016

CLERK

Tom, J.P., Mazzarelli, Manzanet-Daniels, Kapnick, Kahn, JJ.

1459-
1460 In re Joelle T.,

A Child Under Eighteen
Years of Age, etc.,

Laconia W.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Law Office of Cabelly & Calderon, Jamaica (Lewis S. Calderon of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Dona B. Morris of counsel), for respondent.

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

_____

Order of disposition, Family Court, Bronx County (Joan L. Piccirillo, J.), entered on or about January 6, 2015, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about March 13, 2014, which found that respondent mother had neglected the subject child, unanimously affirmed, without costs. Appeal from fact-finding order, unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

A preponderance of the evidence supports Family Court's finding that respondent neglected the child by leaving her on July 1, 2013 at petitioner agency with only the clothing she wore, and without making provisions for her medication, psychiatric care, food, clothing, or shelter (*see Matter of Jalil McC. [Denise C.]*, 84 AD3d 1089, 1090 [2d Dept 2011]; *Matter of Nyia L. [Egipcia E.C.]*, 88 AD3d 882, 883 [2d Dept 2011]). Respondent's actions and statements to a caseworker that she was unwilling to take care of the child reflected her clear intention to abdicate her parental obligations, which placed the child at imminent risk of impairment (*see Matter of Shawntay S. [Stephanie R.]*, 114 AD3d 502 [1st Dept 2014]). The child's disciplinary issues do not foreclose a finding of neglect, since the evidence shows that respondent refused to cooperate with the agency's efforts to address the child's problems (*see Matter of Clayton OO. [Nikki PP.]*, 101 AD3d 1411, 1412 [3d Dept 2012]).

A preponderance of the evidence also supports Family Court's finding that respondent neglected the child by failing to provide her with her prescribed medications. The caseworker's unrefuted testimony establishes that between June 11, 2013 and July 1, 2013, the child did not receive her prescribed medication. Respondent's failure to provide the prescribed medication placed

the child at imminent risk of impairment (*see Matter of John H.M.*, 54 AD3d 763, 764 [2d Dept 2008], *lv denied* 11 NY3d 714 [2009]).

Family Court was entitled to draw the strongest inference against respondent that the opposing evidence permitted, given her failure to testify at the fact-finding hearing (*see Matter of Rosemary V. [Jorge V.]*, 103 AD3d 484 [1st Dept 2013]).

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

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

ENTERED: JUNE 16, 2016

CLERK

Tom, J.P., Mazzarelli, Manzanet-Daniels, Kapnick, Kahn, JJ.

1461 Michael Derin, Index 100763/14
Plaintiff-Appellant,

-against-

Division of Housing and Community Renewal,
Defendant-Respondent,

Courtney Associates,
Defendant.

_____

Michael Derin, appellant pro se.

Eric T. Schneiderman, Attorney General, New York (David Lawrence III of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Carol E. Huff, J.), entered March 25, 2015, in this action challenging the deregulation of plaintiff's former apartment and for damages, granting the motion of defendant Division of Housing and Community Renewal to dismiss the complaint, unanimously affirmed, without costs.

It is undisputed that in 2005 plaintiff challenged the luxury deregulation of his apartment in a prior article 78 proceeding, alleging that the rents for the two adjoining units that he combined into one integrated unit were improper because there was no single lease for the entire living space. The

record reflects that this claim was rejected by the court in the prior proceeding and petitioner's appeal was dismissed for failure to perfect.

Here, the court properly found that plaintiff was barred from re-litigating claims that were necessarily decided in the prior action between the same parties (*see Matter of People v Applied Card Sys., Inc.*, 11 NY3d 105, 122 [2008], *cert denied* 555 US 1136 [2009]; *see also Noto v Bedford Apts. Co.*, 21 AD3d 762, 765 [1st Dept 2005]). Although plaintiff now asserts a fraud claim based on the same transaction, this claim is barred because it could have been raised in the prior proceeding *(see Landau, P.C. v LaRossa, Mitchell & Ross*, 11 NY3d 8, 12-13 [2008]).

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: JUNE 16, 2016

CLERK

Tom, J.P., Mazzarelli, Manzanet-Daniels, Kapnick, Kahn, JJ.

1462 Gear Up, Inc., etc., Index 158312/13
Plaintiffs-Respondents,

-against-

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

Village Voice, LLC, etc.,
Defendant-Appellant.

_____

Miller Korzenik Sommers Rayman LLP, New York (David S. Korzenik and Terrence P. Keegan of counsel), for appellant.

Brenner Law Office, New York (Scott D. Brenner of counsel), for respondents.

_____

Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered September 3, 2015, which denied defendant Village Voice, LLC a/k/a the Village Voice's motion to dismiss the action as against it for failure to serve a complaint, and granted plaintiffs' cross motion for an extension of time under CPLR 3012(b), deeming the proposed complaint timely served nunc pro tunc, unanimously reversed, on the law and the facts, without costs, plaintiffs' motion denied, and defendant's motion granted. The Clerk is directed to enter judgment dismissing the action as against the Village Voice.

Plaintiffs failed to demonstrate either a reasonable excuse for not serving the complaint or a meritorious claim in support of their motion for an extension of time to serve it (CPLR 3012[d]; *see Talley v Montefiore Hosp.*, 167 AD2d 231 [1st Dept 1990]).

The complaint that plaintiffs annexed to their cross motion fails to suffice as an affidavit of merit since it does not contain "evidentiary facts sufficient to establish a prima facie case" (*Kel Mgt. Corp. v Rogers & Wells*, 64 NY2d 904, 905 [1985]). It alleges that defendant printed "malicious defamatory remarks" but does not set forth the particular words complained of (CPLR 3016[a]; *see Khan v Duane Reade*, 7 AD3d 311 [1st Dept 2004]). Nor does it allege facts showing that defendant acted with actual malice (*see Gertz v Robert Welch, Inc.*, 418 US 323, 342 [1974]).

In any event, plaintiff, as a public figure, would have had

to allege facts that the defendant acted with actual malice, knowledge that the statements were false or a high degree of awareness of falsity (*see id.*). There is no such showing here.

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

ENTERED: JUNE 16, 2016

CLERK

Tom, J.P., Mazzarelli, Manzanet-Daniels, Kapnick, Kahn, JJ.

1463 Julie Pancila, Index 800208/11
Plaintiff-Appellant,

-against-

Lauri J. Romanzi, M.D.,
Defendant-Respondent,

Sharon E. Abramovitz, M.D., et al.,
Defendants.

_____

Sanders, Sanders, Block, Woycik, Viener & Grossman, P.C., Mineola (Theodore F. Goralski of counsel), for appellant.

McAloon & Friedman, P.C., New York (Gina B. Di Folco of counsel), for respondent.

_____

Order, Supreme Court, New York County (Douglas E. McKeon, J.), entered March 19, 2015, which granted defendant Romanzi's motion for summary judgment dismissing the complaint as against her, unanimously affirmed, without costs.

Defendant established prima facie, through her deposition testimony, the medical records, and her medical expert, that she properly positioned plaintiff during the pelvic reconstruction surgery and took proper precautions to avoid nerve compression in plaintiff's legs (*see DiMitri v Monsouri*, 302 AD2d 420 [2nd Dept 2003]). The expert further opined that the type of neurological injury experienced by plaintiff is a known and accepted

complication of pelvic surgery that can occur even in the absence of malpractice (*see Matos v Schwartz*, 104 AD3d 650 [2d Dept 2013]).

In opposition, plaintiff failed to raise a triable issue of fact. Her expert's affidavit, which asserted that she was improperly positioned during the surgery, failed to explain how defendant's positioning of plaintiff departed from accepted medical practices (*see Callistro v Bebbington*, 94 AD3d 408, 410 [1st Dept 2012], *affd* 20 NY3d 945 [2012]; *DiMitri v Monsouri*, 302 AD2d at 421). As to causation, the expert asserted that the equipment defendant used caused plaintiff's injury but failed to explain how (*see Dallas-Stephenson v Waisman*, 39 AD3d 303, 307 [1st Dept 2007]). In any event, the fact that plaintiff sustained an injury is not evidence of a departure from accepted medical practices (*see Johnson v St. Barnabas Hosp.*, 52 AD3d 286 [1st Dept 2008], *lv denied* 11 NY3d 705 [2008]).

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

ENTERED: JUNE 16, 2016

CLERK

Tom, J.P., Mazzarelli, Manzanet-Daniels, Kapnick, Kahn, JJ.

1464 The People of the State of New York, Ind. 3005/10
Respondent,

-against-

Olushegun Onikosi,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Thomas Farber, J. at speedy trial motion; Arlene D. Goldberg, J. at jury trial and sentencing), rendered February 21, 2013, convicting defendant of identity theft in the first degree (three counts), identity theft in the second degree, criminal possession of stolen property in the fourth degree, grand larceny in the third degree and criminal possession of a forged instrument in the third degree, and sentencing him, as a second felony offender, to an aggregate term of three to six years, unanimously affirmed.

The court properly denied defendant's speedy trial motion. During the period of delay at issue, a necessary police witness who was a member of the Army Reserve was serving on active duty, initially overseas and then while being treated for an injury

received in Iraq. The court correctly found that the officer's unavailability constituted an exceptional circumstance (*see* CPL 30.30[4][g]). The People exercised due diligence by checking on the officer's status, initially with the officer and the NYPD, and keeping the court and defense counsel apprised that the officer had been deployed, had been returned to the United States after an injury, had undergone surgery, and then was recovering on medication. The People then contacted the Army, and served a subpoena to procure the officer's testimony while he was still on active duty. Accordingly, the People made a sufficient showing of due diligence. Even if they had been in direct contact with the Army, rather than the NYPD, at an earlier date, there is no reason to believe the officer could have been made available any earlier (*see People v Lopez*, 2 AD3d 234 [1st Dept 2003], *lv denied* 2 NY3d 742 [2004]; *People v Womack*, 229 AD2d 304 [1st Dept 1996], *affd*, 90 NY2d 974 [1997]). The People's submissions support the conclusion that the officer was unable to testify for the entire period at issue, because he was either deployed to a combat zone or was medically unavailable.

The verdict was supported by legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for

disturbing the jury's credibility determinations. A chain of evidence, viewed as a whole, amply established defendant's accessorial liability.

The trial court providently exercised its discretion in refusing to declare a mistrial after an officer referred to defendant's "probation officer," because the court immediately delivered a curative instruction that the jury should completely disregard that testimony, thus alleviating any prejudice from the brief and inadvertent suggestion that defendant had a criminal record (*see People v Santiago*, 52 NY2d 865 [1981]). The jury is presumed to have followed that instruction (*see People v Davis*, 58 NY2d 1102, 1104 [1983]).

The court also providently exercised its discretion in refusing to adjourn the sentencing to allow defense counsel to submit a motion to set aside the verdict. Counsel made this request over a month after learning that a juror had sent the court a letter stating that the jury "may have rushed to judgment," that defendant would have been found guilty on "some counts," but that the verdict was "overkill," and that "justice was not served." The letter did not suggest any misconduct that might warrant setting aside the verdict (*see* CPL 330.30[2]; *People v Horney*, 112 AD2d 841, 842 [1st Dept 1985], *lv denied* 66

NY2d 615 [1985]). Moreover, as the court noted, the jurors, including the juror who sent the letter, were polled after the verdict and each unequivocally confirmed his or her verdict on each of the counts.

We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 16, 2016

CLERK

Tom, J.P., Mazzarelli, Manzanet-Daniels, Kapnick, Kahn, JJ.

1465-
1466 Index 651174/13
654157/12

U.S. Bank National Association,
solely in its capacity as Trustee
of the Home Equity Asset Trust
2007-2 (HEAT 2007-2),
Plaintiff-Appellant,

-against-

DLJ Mortgage Capital, Inc.,
Defendant-Respondent.

- - - - -

U.S. Bank National Association,
solely in its capacity as Trustee
of the Home Equity Asset Trust
2006-8 (HEAT 2006-8),
Plaintiff-Appellant,

-against-

DLJ Mortgage Capital, Inc.,
Defendant-Respondent.

_____

Kasowitz, Benson, Torres & Friedman LLP, New York (Hector Torres of counsel), for appellant.

Orrick, Herrington & Sutcliffe LLP, New York (John Ansbro of counsel), for respondent.

_____

Orders, Supreme Court, New York County (Marcy S. Friedman, J.), entered October 6, 2014, which, to the extent appealed from as limited by the briefs, granted defendant's motions to dismiss the portion of the indemnification claims seeking reimbursement of attorneys' fees, unanimously reversed, on the law, with costs,

and the motions denied.

These actions arise from alleged breaches of Pooling and Servicing Agreements (PSAs), dated November 1, 2006 (HEAT 2006-8) and March 1, 2007 (HEAT 2007-2), governing trusts containing securitized residential backed mortgage loans transferred to them by defendant. The PSAs contain various representations and warranties by defendant regarding the quality and characteristics of the loans, and provide that, upon discovery of a material breach of the representations and warranties, defendant must cure the breach or, if the breach is not cured, either substitute a qualified loan for the affected loan or repurchase the affected loan from the trustee. Plaintiff, as trustee, seeks, inter alia, to enforce defendant's repurchase obligations with respect to certain of the loans held by the trusts. Section 2.03(d) of the PSAs requires defendant, as Seller, to "promptly reimburse ... the Trustee for any actual out-of-pocket expenses reasonably incurred by ... the Trustee *in respect of enforcing the remedies for such breach*" (emphasis added).

The unmistakable intent of the parties to the PSAs is that enforcement expenses to be reimbursed include attorneys' fees incurred in bringing these actions. As the Second Department recognized in *Scheer v Kahn* (221 AD2d 515 [2d Dept 1995]),

language requiring one party "'to indemnify the other for all expenses incurred in leaving [sic] this agreement judicably enforced' ... must include the expenses incurred in hiring an attorney" (*id.* at 517-518; *see also Breed, Abbott & Morgan v Hulko*, 139 AD2d 71 [1st Dept 1988], affd 74 NY2d 686 [1989]; *LaSalle Bank v Capco Am. Securitization Corp.*, No. 02 CV 9916 [RLC], 2005 WL 3046292, *6, 2005 US Dist LEXIS 27781, *19-20 [SD NY 2005]).

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

ENTERED: JUNE 16, 2016

CLERK

Tom, J.P., Mazzarelli, Manzanet-Daniels, Kapnick, Kahn, JJ.

1467 L&L Painting Co., Inc., Index 105126/08
Plaintiff-Appellant-Respondent,

-against-

Odyssey Contracting Corp.,
Defendant-Respondent-Appellant,

Federal Insurance Company,
Additional Defendant on Counterclaim-
Appellant-Respondent.

_____

Duane Morris LLP, New York (Charles Fastenberg of counsel), for appellants-respondents.

Georgoulis PLLC, New York (Monica Barron of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered on or about September 30, 2014, which, to the extent appealed from, denied plaintiff (L&L) and additional defendant on the counterclaim Federal Insurance Company's (FIC) motion for summary judgment dismissing the first, third, and seventh counterclaims asserted by defendant Odyssey, and granted L&L and FIC's motion for summary judgment dismissing the fifth counterclaim, unanimously affirmed, without costs.

This action arises from a $167 million public improvement project known as the Queensboro Bridge Repainting Project for the New York City Department of Transportation (the City), for which

L&L was the prime contractor, Odyssey was L&L's subcontractor, and FIC was L&L's payment bond surety.

The motion court correctly determined that L&L and FIC failed to meet their threshold burden of demonstrating the absence of material issues of fact regarding the first and seventh counterclaims, which alleged that Odyssey had not been paid in full for its work on the project (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). In particular, they failed to submit evidence sufficient to make a prima facie showing that they paid Odyssey the full amounts owing under the subcontracts between Odyssey and L&L. Even if L&L and FIC had met their initial burden, L&L does not contest Odyssey's assertion that L&L conceded in March of 2008 that there were at least some amounts owing to Odyssey. Accordingly, this alone is sufficient to create a factual issue regarding the amounts due and owing (*id.*).

L&L and FIC rely on invoices and a spreadsheet-based invoicing system to show that Odyssey has been paid for all progress payments submitted to it. However, this evidence is not dispositive because, among other reasons, Odyssey seeks other forms of payment, including those for containment work, completion costs, retainage fees, and mobilization costs that were covered by the subcontracts and their amendments but were

not covered by the invoicing system. Nor does the record establish, as a matter of law, that Odyssey repudiated the subcontracts and abandoned its work (*see Norcon Power Partners v Niagara Mohawk Power Corp.*, 92 NY2d 458, 462-463 [1998]; *Children of Am. [Cortlandt Manor], LLC v Pike Plaza Assoc., LLC*, 113 AD3d 583, 584 [2d Dept 2014]).

Odyssey's pleading, especially when considered in conjunction with the deposition testimony of L&L's principal, was sufficient to establish the elements of Odyssey's third counterclaim, for conversion (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 [2006]). The evidence sufficiently identified the property that was allegedly converted (*cf. Art & Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 440 [1st Dept 2014] [conversion claim dismissed on a CPLR 3211 motion to dismiss where the complaint failed to identify the property that was allegedly converted]).

The motion court correctly granted the motion for summary judgment dismissing Odyssey's fifth counterclaim, which seeks damages arising from additional work it performed as a result of a fire at the project site. It is undisputed that, pursuant to the dispute resolution provision found in section 19(a) of the subcontracts, L&L presented the City with a claim seeking

recovery on Odyssey's behalf for the "extra work" Odyssey performed as a result of the fire. Odyssey specifically agreed that it would be bound by the final determination of the claim, including any determination in an appeal. The claim was denied and this Court affirmed that denial (*Matter of L&L Painting Co., Inc. v City of New York*, 69 AD3d 517 [1st Dept 2010]). Accordingly, Odyssey is barred from relitigating the claim.

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

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

ENTERED: JUNE 16, 2016

CLERK

Tom, J.P., Mazzarelli, Manzanet-Daniels, Kapnick, Kahn, JJ.

1469 In re Joseph R. Sahid, Index 158204/14
Petitioner-Appellant,

-against-

1065 Park Ave. Corp., et al.,
Respondents-Respondents.

_____

Law Offices of Joseph R. Sahid, New York (Joseph R. Sahid of counsel), for appellant.

Cantor, Epstein & Mazzola, LLP, New York (Gary Ehrlich of counsel), for respondents.

_____

Appeal from order, Supreme Court, New York County (Nancy M. Bannon, J.), entered March 20, 2015, which denied the motion and dismissed the petition to set aside two elections held on June 4, 2014 by defendant cooperative corporation and direct new elections, unanimously dismissed, without costs.

After the order on appeal was rendered and before the determination on this appeal, the next regularly-scheduled election for the cooperative's board of directors was held, rendering this appeal moot (*see Matter of Paraskevopoulos v Stavropoulos*, 65 AD3d 1153 [2d Dept 2009]; *Matter of Frascati v Irondequoit Nightstick Club, Inc.*, 101 AD3d 1602 [4th Dept 2012]). The exception to the mootness doctrine does not apply here (*id.*; *see Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-

715 [1980]).

In any event, were we to reach the merits, we would find petitioner's arguments unavailing.

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

ENTERED: JUNE 16, 2016

CLERK

Tom, J.P., Mazzarelli, Manzanet-Daniels, Kapnick, Kahn, JJ.

1474 Elsi Burgos, Index 302189/13
Plaintiff,

Alphonso Lythcott,
Plaintiff-Appellant,

-against-

Alou Diop, et al.,
Defendants-Respondents.

_____

Jason Levine, New York, for appellant.

Marjorie E. Bornes, Brooklyn, for respondents.

_____

Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered June 3, 2015, which, insofar as appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing plaintiff Alphonso Lythcott's claims alleging serious injuries to his shoulders under the "permanent consequential" and "significant" limitation of use categories and the 90/180-day injury category of Insurance Law § 5102(d), unanimously modified, on the law, the motion denied to the extent plaintiff alleges serious injuries to his shoulders under the "significant limitation of use" category, and otherwise affirmed, without costs.

Defendants established prima facie that plaintiff did not suffer a "permanent consequential" or "significant" limitation of use of his shoulders as a result of the accident by submitting their orthopedist's report finding full range of motion and negative clinical test results, and their radiologist's report finding that the MRI films of the shoulders showed only preexisting degenerative conditions and no acute traumatic changes (*see Lee v Lippman*, 136 AD3d 411, 412 [1st Dept 2016]; *Walker v Whitney*, 132 AD3d 478 [1st Dept 2015]).

In opposition, plaintiff raised an issue of fact as to whether he sustained an injury involving "significant" limitation of use in the shoulders by submitting his orthopedic surgeon's report, which set forth quantified findings of limitations in range of motion, and findings of positive impingement signs in the months preceding the shoulder surgeries, and noted observations of tears during the arthroscopic surgeries (*see Kang v Almanzar*, 116 AD3d 540, 541 [1st Dept 2014]; *Thomas v NYLL Mgt. Ltd.*, 110 AD3d 613, 614 [1st Dept 2013]). His orthopedic surgeon also sufficiently addressed the causation issue, as his opinion that there was a causal relationship was based on his own treatment of plaintiff, review of plaintiff's MRI records, and

observations during the surgeries, as well as the history provided by plaintiff (*see Kang*, 116 AD3d at 541; *Kone v Rodriguez*, 107 AD3d 537, 538 [1st Dept 2013]; *Daniels v S.R.M. Mgt. Corp.*, 100 AD3d 440, 440 [1st Dept 2012]).

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

ENTERED: JUNE 16, 2016

CLERK

Tom, J.P., Mazzarelli, Manzanet-Daniels, Kapnick, Kahn, JJ.

1475-
1475A The People of the State of New York,
Respondent,

Ind. 4337/10
3635/13
SCI 488/15

-against-

Alberto Batista,
Defendant-Appellant.

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

Robert S. Dean, Center for Appellate Litigation, New York (William Terrell, III of counsel), for respondent.

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Appeals having been taken to this Court by the above-named appellant from a judgments of the Supreme Court, Bronx County (Judith Lieb, J.), rendered March 19, 2015,

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

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

ENTERED: JUNE 16, 2016

CLERK

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

Tom, J.P., Mazzarelli, Manzanet-Daniels, Kapnick, Kahn, JJ.

1476 Carol Mendoza-Jimenez, Index 300460/10
Plaintiff-Appellant,

-against-

New York City Transit Authority,
et al.,
Defendants-Respondents.

_____

Fraiden & Fraiden LLP, Bronx (Mark Fraiden of counsel), for appellant.

Lawrence Heisler, Brooklyn (Daniela Rapisardi of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Barry Salman, J.), entered on or about April 27, 2015, which granted defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

In her notice of claim, plaintiff attributed her injury to an improperly operated or defective lift mechanism on a bus she had boarded. Her deposition testimony, however, makes it unequivocally clear that the lift mechanism of the bus was never engaged and played no role in her injury, but that her injury was caused when "the bus driver took off," causing the bus to "jerk[]" abruptly. Although plaintiff could have moved, pursuant to General Municipal Law § 50-e(5), to amend the theory of

liability contained in her notice of claim, the one-year-and-ninety-day time period in which to do so has expired (*see Pierson v City of New York*, 56 NY2d 950, 954 [1982]; *Thomas v New York City Hous. Auth.*, 132 AD3d 432, 433 [1st Dept 2015]; *Barksdale v New York City Tr. Auth.*, 294 AD2d 210, 211 [1st Dept 2002]). While General Municipal Law § 50-e(6) permits amendment of the notice of claim at any time, plaintiff never sought such relief, and, in any event, "this provision merely authorizes the correction of good faith, nonprejudicial, technical defects or omissions, not substantive changes in the theory of liability" (*Scott v City of New York*, 40 AD3d 408, 410 [1st Dept 2007]).

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: JUNE 16, 2016

CLERK

Tom, J.P., Mazzarelli, Manzanet-Daniels, Kapnick, Kahn, JJ.

1478-
1479N Index 603763/06

Juan Carlos Molina,
Plaintiff-Respondent,

Totalbank,
Intervenor,

-against-

James Chladek,
Defendant-Appellant.

- - - - -

Juan Carlos Molina,
Plaintiff-Respondent,

-against-

James Chladek,
Defendant-Appellant.

_____

Scher & Scher, P.C., Great Neck (Daniel J. Scher of counsel), for appellant.

Anes, Friedman, Leventhal & Balistreri, PLLC, New York (Harvey L. Woll of counsel), for respondent.

_____

Order, Supreme Court, New York County (Shirley W. Kornreich, J.), entered on or about November 6, 2014, which denied defendant's motion to vacate the default judgment entered against him, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered May 1, 2015, which granted the appointed receiver's motion for an order approving the sale of a broadcast license owned by defendant judgment debtor to satisfy

the judgment, unanimously dismissed, without costs, as moot.

In 2006, plaintiff commenced this action against defendant seeking to recover commissions claimed to be due pursuant to a written agreement which provided that he would receive 40% of certain advertising and programming revenues he brought into defendant's business. In 2008, after entry of a default judgment as to liability and inquest, judgment in the amount of over $2.4 million was entered against defendant. Defendant's previous motion to vacate based on excusable neglect was denied absent any showing of a reasonable excuse for his default.

Five years later, defendant moved to vacate on the grounds of newly discovered evidence showing fraud and misrepresentation (CPLR 5015[a][2] and [3]), based on a purportedly "newly-discovered" commission agreement, which provided for a 10% commission. Aside from the fact that the newly-presented agreement appears on its face to reference a particular transaction, defendant's submission does not warrant relief under CPLR 5015(a)(2) because he failed to explain why the letter agreement, which was addressed to him, "could not have been discovered previously by the exercise of due diligence" (*Olwine, Connelly, Chase, O'Donnell & Weyher v Valsan, Inc.*, 226 AD2d 102, 103 [1st Dept 1996]). Defendant has not offered any reasonable

explanation for why he was not able to retrieve the proffered letter agreement until nearly five years after entry of the default judgment, or why he did not mention its existence in his initial motion to vacate. The evidence presented was also wholly insufficient to demonstrate fraud that would justify relief under CPLR 5015(a)(3) (*see Aames Capital Corp. v Davidsohn*, 24 AD3d 474, 475 [2d Dept 2005]; *Clapp v LeBoeuf, Lamb, Leiby & MacRae*, 286 AD2d 643, 644 [1st Dept 2001]). Moreover, defendant failed to move for such relief within a reasonable time (*see Matter of Angela P. v Floyd S.*, 103 AD3d 439, 440 [1st Dept 2013]; *Aames*, 24 AD3d at 475).

We dismiss as moot defendant's appeal from the order approving the sale of his broadcasting license, since the sale closed and the buyer assumed control of the broadcast station in September 2015. It is not feasible to unwind the purchase.

If we were to reach the merits, we would find that the motion court properly approved the sale, which had already been reduced to writing and executed, even though a better offer was subsequently received *(see Wilber v Wilber*, 119 App Div 740 [3d Dept 1907]; *State Realty & Mtge. Co. v Villaume* (121 App Div 793, 795 [1st Dept 1907]; *see also Chemical Bank v Kupperstock*, 248 AD2d 145, 145 [1st Dept 1998]; *Guardian Loan Co. v Early*, 47 NY2d

515, 521 [1979]). There are also ethical considerations: "[t]he receiver in making this sale represented the court, and the court cannot tolerate the idea that its representative should repudiate a bargain merely for the mercenary consideration of a subsequent opportunity for a better bargain" (*Wilber*, 119 App Div at 742).

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

ENTERED: JUNE 16, 2016

CLERK

Tom, J.P., Mazzarelli, Manzanet-Daniels, Kapnick, Kahn, JJ.

1480N Martin H. Levenglick, Index 350601/03
Plaintiff-Appellant-Respondent,

-against-

JoAnna Levenglick,
Defendant-Respondent-Appellant.

_____

Mintz & Gold LLP, New York (Steven G. Mintz of counsel), for appellant-respondent.

JoAnna Levenglick, respondent-appellant pro se.

_____

Order, Supreme Court, New York County (Lori S. Sattler, J.), entered July 28, 2015, which rejected the portion of a February 19, 2015 report by the Special Referee which found plaintiff husband to be contractually liable for the educational expenses incurred by the parties' emancipated daughter and directed that the issue be resubmitted to a different Special Referee, and confirmed the report insofar as it determined the amount of past amounts expended for education costs, unanimously modified, on the law, to confirm the finding of the Special Referee that plaintiff has an unambiguous obligation to pay for the parties' daughter's post-emancipation education expenses and to vacate so much of the order as directed a second reference, and otherwise affirmed, without costs.

In the absence of an articulated limitation based upon a particular age, number of consecutive years or course of study, the clear meaning of the parties' divorce stipulation, which provides that the husband would pay "the entire cost of the children's private school and higher education," obliges the husband to pay for parties' daughter's current college education (*see Attea v Attea*, 30 AD3d 971, 972 [3d Dept 2006], *affd* 7 NY3d 879 [2006]). Under this view, there is no need to look beyond the four corners of the stipulation. This determination alone suffices to end the inquiry without any need for any further factual inquiry as to the issue of the parties' intent.

As there was no explicit finding of ambiguity prior to the initial reference, the Special Referee's determination was not contrary to the court's reference for a hearing and recommendation as to whether the parties intended to oblige plaintiff to pay for the parties' children's college education only until a child reaches 21 or until the complete of undergraduate education (*compare generally Martin v City of Cohoes*, 37 NY2d 162, 165 [1975]).

Finally, contrary to plaintiff's argument, the record shows that plaintiff had an opportunity to conduct a full inquiry as to whether the submitted documents accurately reflected what was due

and owing to Columbia University. It was also determined that the expenses at issue were part and parcel of the "costs of higher education," which includes tuition and tutoring expenses, as opposed to, for example, costs associated with living off-campus, which would be excluded as not being under the purview of "the costs of higher education." Thus, on this record, the court properly concluded that the determined expenses were supported by the documentary evidence.

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: JUNE 16, 2016

CLERK

Acosta, J.P., Renwick, Saxe, Richter, Gische, JJ.

1481 The People of the State of New York, Ind. 4359/11
Respondent,

-against-

Darryll Jennings,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered January 7, 2014, convicting defendant, after a jury trial, of enterprise corruption, grand larceny in the fourth degree, attempted grand larceny in the second degree (two counts) and attempted grand larceny in the fourth degree, and sentencing him to an aggregate term of two to six years, unanimously affirmed. The matter is remitted to Supreme Court for further proceedings pursuant to CPL 460.50(5).

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence supports the conclusion that in each of the instances at issue, defendant instilled, or, where applicable, attempted to instill in the victims one or more

of the types of harm set forth in the extortion statute (Penal Law § 155.05[2][e]). In particular, the jury could have reasonably concluded that where the victims submitted to defendant's demands for classic "protection" money and other benefits, this acquiescence made no sense unless the victims had been placed in fear by express or implied threats.

Defendant was not deprived of a fair trial by portions of the prosecutor's summation in which he argued that, to the extent certain prosecution witnesses testified that defendant did not instill fear in them, their testimony should not be credited. Regardless of what factual information the prosecutor may have provided in a colloquy outside the jury's presence, the prosecutor did not act as an unsworn witness before the jury, but rather urged the jury to draw fair inferences from the evidence it actually heard (*see People v Lugo*, 81 AD3d 532, 533 [1st Dept 2011], *lv denied* 17 NY3d 807 [2011]; *People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1998]). The limitations on "impeachment" of one's own witness apply to the use of prior contradictory statements (*see* CPL 60.35), not to

record-based summation arguments (*see People v Thomas*, 113 AD3d 447 [1st Dept 2014], *lv denied* 22 NY3d 1159 [2014]).

We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 16, 2016

CLERK

Acosta, J.P., Renwick, Saxe, Richter, Gische, JJ.

1482 Patmos Fifth Real Estate Inc., et al.,
Plaintiffs-Appellants,

-against-

Mazl Building, LLC, et al.,
Defendants-Respondents,

Shimon Wolkowicki,
Defendant.
- - - - -
[And A Third-Party Action]

Index 108421/11

_____

De Lotto & Fajardo LLP, New York (Eduardo A. Fajardo of counsel), for appellants.

Ganfer & Shore, LLP, New York (Ira Brad Matetsky of counsel), for respondents.

_____

Order, Supreme Court, New York County (Barbara Jaffe, J.), entered on or about May 20, 2015, which denied plaintiffs' motion for summary judgment on their second cause of action to vacate the deed recorded by defendant pursuant to Real Property Law § 320, and to dismiss defendants' counterclaims and third-party claims, unanimously modified, on the law, to grant plaintiffs' motion with respect to their second cause of action, to declare that plaintiffs are and have been the sole owners of the subject property since December 23, 2009, and to dismiss defendants' affirmative defenses of laches and estoppel, and otherwise

affirmed, without costs.

In 2006, plaintiffs purchased property from defendant Mazl Building LLC (Mazl). In connection with the purchase, plaintiffs mortgaged and refinanced the property for a total consolidated mortgage with Mazl. Plaintiffs defaulted on the consolidated mortgage, which then included the remaining defendants, but defendants agreed to forbear and extend additional time and credit to plaintiffs.

On February 27, 2009, the parties agreed to an additional loan, a final extension, and a deadline. The agreement required plaintiffs to execute a deed to the property, to be held in escrow and not to be released unless and until plaintiffs defaulted.

Plaintiffs subsequently defaulted under the agreement, and on December 23, 2009, defendants filed and recorded the deed and became the record owner of the property.

Plaintiffs commenced this action on July 21, 2011, alleging, as their second cause of action, that defendants' filing of the deed without first commencing foreclosure proceedings against plaintiffs violated Real Property Law § 320 (*see* 124 AD3d 422 [1st Dept 2015]).

Real Property Law § 320 codifies the common-law principle

that the giving of a deed to secure a debt, in whatever form and however structured, creates nothing more than a mortgage (*see Leonia Bank v Kouri*, 3 AD3d 213, 216-217 [1st Dept 2004]). "The courts are steadfast in holding that a conveyance, whatever its form, if in fact given to secure a debt, is neither an absolute nor a conditional sale, but a mortgage, and that the grantor and grantee have merely the rights and are subject only to the obligations of mortgagor and mortgagee" (*id.* at 217 [internal quotation marks omitted]). "Significantly, the statute does not require a conclusive showing that the transfer was intended as security; it is sufficient that the conveyance appears to be intended only as a security in the nature of a mortgage" (*id.* [internal quotation marks omitted]; *see Vitvitsky v Heim*, 52 AD3d 1103, 1105 [3d Dept 2008]). "In determining whether a deed was intended as security, examination may be made not only of the deed and a written agreement executed at the same time, but also of oral testimony bearing on the intent of the parties and to a consideration of the surrounding circumstances and acts of the parties" (*Bouffard v Befese, LLC*, 111 AD3d 866, 868 [2d Dept 2013] [internal quotation marks and brackets omitted]).

Here, Raba Haim Abramov, a member of Mazl, conceded in his affidavit and in his deposition testimony that he understood that

the deed was given to secure an extension of the mortgage and an additional loan. This, coupled with the clear language of the agreement, leads to the conclusion that the deed was only a security (*see Leonia Bank* at 217-218; *Bouffard* at 868-869; *Vitvitsky* at 1105*; see also Gioia v Gioia*, 234 AD2d 588 [2d Dept 1996], *lv denied* 89 NY2d 814 [1997]; *Basile v Erhal Holding Corp.*, 148 AD2d 484, 485 [2d Dept 1989], *lv denied* 75 NY2d 701 [1989]). Abramov's contradictory and conclusory statements regarding defendants' intent are insufficient to create a genuine issue of material fact (*see Hypo Holdings v Chalasani*, 280 AD2d 386, 387 [1st Dept 2001], *lv denied* 96 NY2d 717 [2001]). In view of the foregoing, plaintiffs are also entitled to a declaration in their favor on defendants' counterclaim and the third-party claim for a declaratory judgment as to ownership of the property.

Plaintiffs are also entitled to summary judgment dismissing defendants' affirmative defenses of laches and estoppel, as the statute of limitations on plaintiffs' right to redemption had not yet expired (CPLR 212[c]; *Matter of American Druggists' Ins. Co.*, 15 AD3d 268 [1st Dept 2005], *lv denied* 5 NY3d 746 [2005]).

Plaintiffs are not entitled to summary judgment dismissing the foreclosure counterclaim and third-party claim because the filing of the deed was not equivalent to a judgment of

foreclosure; nor are plaintiffs entitled to summary judgment dismissing the remaining counterclaims and third-party claims, including for breach of a 2008 guarantee and unjust enrichment (*see e.g. Riley v South Somers Dev. Corp.*, 222 AD2d 113 [2d Dept 1996]).

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

ENTERED: JUNE 16, 2016

CLERK

Acosta, J.P., Renwick, Saxe, Richter, Gische, JJ.

1483 In re Amanda T.,
Petitioner-Respondent,

-against-

Erick Z.,
Respondent-Appellant.

_____

Erick Z., appellant pro se.

Zachary W. Carter, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for respondent.

_____

Order, Family Court, New York County (Adetokunbo O. Fasanya, J.), entered on or about September 2, 2015, which denied respondent father's objections to orders of a support magistrate, unanimously affirmed, without costs.

Family Court properly denied as untimely and unpreserved respondent's objections to the Support Magistrate's November 25, 2014 support order entered upon his default and the January 21, 2015 order denying his motion to vacate the support order (Family Ct Act § 439[e]; *Matter of DeVries v DeVries*, 87 AD3d 1139, 1140 [2d Dept 2011]; *Matter of Redmond v Easy*, 18 AD3d 283, 283-284 [1st Dept 2005]).

Family Court also properly denied respondent's objections to the Support Magistrate's May 20, 2015 order, which dismissed

respondent's petition for a downward modification of the November 25, 2014 order of support and reinstated that order in the amount of $168 per week. Respondent failed to demonstrate a substantial change in circumstances warranting a downward modification, since he did not submit a financial disclosure affidavit, a job search diary, or any evidence of his income (*see* Family Ct Act §§ 424-a, 451[3]; *see Matter of Baumgardner v Baumgardner*, 126 AD3d 895, 896-897 [2d Dept 2015]; *see also Matter of Sheenagh O'R. v Sean F.*, 50 AD3d 480, 481 [1st Dept 2008]). Further, respondent failed to comply with the Support Magistrate's directive to attend the Support Through Employment Program (STEP), and his attendance at a commercial driving school did not constitute sufficient evidence of a job search (*see Matter of Ceballos v Castillo*, 85 AD3d 1161, 1162-1163 [2d Dept 2011]).

The Support Magistrate properly declined to consider a medical letter submitted by respondent; the letter was not notarized and indicated no diagnosis, prognosis, or any

indication as to whether respondent was able to work or look for work (*see e.g. Matter of Bronstein-Becher v Becher*, 25 AD3d 796, 797 [2d Dept 2006]; *see also Matter of Karagiannis v Karagiannis*, 73 AD3d 1064, 1065, 1066 [2d Dept 2010]).

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

ENTERED: JUNE 16, 2016

CLERK

Acosta, J.P., Renwick, Saxe, Richter, Gische, JJ.

1484 Yolanda Casilia, et al., Index 157076/12
Plaintiffs-Respondents,

-against-

Webster LLC,
Defendant-Appellant.

_____

Law Office of Santo Golino, New York (Santo Golino of counsel), for appellant.

Max D. Leifer, P.C., New York (Max D. Leifer of counsel), for respondents.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered April 28, 2015, which, to the extent appealed from, denied defendant's motion for summary judgment dismissing the complaint insofar as asserted by plaintiff Casilia, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiff Casilia's alleged inability to use the leased premises as a catering hall due to the certificate of occupancy does not relieve her of the obligation to pay rent for the period of time during which she occupied the premises (*Phillips & Huyler Assoc. v Flynn*, 225 AD2d 475 [1st Dept 1996]). The lease did not require defendant landlord to obtain a certificate of occupancy that would permit plaintiff's intended use of the premises (*see*

*Rivera v JRJ Land Prop. Corp.*, 27 AD3d 361 [1st Dept 2006]; *Silver v Moe's Pizza*, 121 AD2d 376, 378 [2d Dept 1986]), and there is no evidence that defendant fraudulently induced plaintiff to execute the lease or made a specific representation that her intended use would comply with the certificate of occupancy (*Phillips & Huyler Assoc.*, 225 AD2d at 475). Plaintiff's admission that she never operated a business at the premises negates her claim for loss of goodwill.

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

ENTERED: JUNE 16, 2016

CLERK

Acosta, J.P., Renwick, Saxe, Richter, Gische, JJ.

1485 Lisa DiGregorio, Index 159638/13
Plaintiff-Appellant,

-against-

MTA Metro-North Railroad, etc., et al.,
Defendants-Respondents.

_____

Borrelli & Associates, P.L.L.C., Great Neck (Samuel Veytsman of counsel), for appellant.

Richard L. Gans, New York (Jonathan P. Meinen of counsel), for respondents.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered July 11, 2014, which granted defendant MTA Metro-North Railroad's motion to dismiss the complaint as against it, unanimously affirmed, without costs.

Plaintiff's sole claim here against defendant Metro-North, her former employer, was made pursuant to § 75-b of the Civil Service Law (CSL)(the whistle-blower statute) and may not be litigated in this forum. Because plaintiff was "subject to a collectively negotiated agreement which contains provisions preventing an employer from taking adverse personnel actions and which contains a final and binding arbitration provision," she was required to bring her claim in arbitration instead of in court (CSL § 75-b[3][b], [c]; *Obot v New York State Dept. of*

*Correctional Servs.*, 256 AD2d 1089, 1090 [4th Dept 1998]; *Munafo v MTA*, 2003 WL 21799913, *31, 2003 US Dist LEXIS 13495, *93-94 [ED NY Jan. 22, 2003]). There is no merit to plaintiff's contention that this argument should not have been considered because the relevant collective bargaining agreement was first submitted in reply. Although defendant did not attach the agreement to its moving papers, it argued from the beginning that plaintiff's claim had to be brought in arbitration, and plaintiff had a full and fair opportunity to respond to this argument. The agreement was appropriately submitted in response to arguments made in plaintiff's opposition (*see Sanford v 27-29 W. 181st St. Assn.*, 300 AD2d 250, 251 [1st Dept 2002]).

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: JUNE 16, 2016

CLERK

Acosta, J.P., Renwick, Saxe, Richter, Gische, JJ.

1487 The People of the State of New York, Ind. 389/12
Respondent,

-against-

Christopher Campbell,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered April 10, 2014, convicting defendant, after a jury trial, of attempted murder in the second degree, assault in the first degree (two counts), criminal possession of a weapon in the second degree (two counts) and reckless endangerment in the first degree, and sentencing him to an aggregate term of 10 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). Defendant's identity as the person who gave a pistol to the codefendant after a fight with a group of other persons was established by evidence including a surveillance videotape, defendant's statements to the police and his recorded phone call. The

evidence also supports the inference that defendant supplied the pistol with the intent that the codefendant use it to kill members of the other group.

Defendant did not preserve his claim that the court should have charged the jury to consider the counts requiring intent to cause death or serious physical injury in the alternative to the count charging depraved indifference assault (*see People v Carter*, 7 NY3d 875, 876 [2006]), and we decline to review it in the interest of justice. Although defendant made a related claim, this was solely in the context of a motion to dismiss certain counts, and the only issue litigated was *whether* the court should submit all the counts, not *how* it should submit them if it declined to dismiss any (*see e.g. People v Lombardo*, 61 NY2d 97, 104 [1984] [preservation limited to relief actually requested]).

As an alternative holding, we reject defendant's claim on the merits. The court properly submitted the attempted murder and intentional assault counts conjunctively with the depraved indifference assault count, and the resulting verdict convicting defendant of all these counts was not inconsistent (*see Matter of Suarez v Byrne*, 10 NY3d 523, 541 [2008]; *People v Trappier*, 87 NY2d 55, 58-59 [1995]; *see also Carter*, 7 NY3d at 876-877).

There is nothing to the contrary in *People v Dubarry* (25 NY3d 161, 169-173 [2015]), because that case involved a single result (the death of the victim) committed both by transferred intent and depraved indifference. Here, although the actual result of both assault charges was serious physical injury to the named victim, defendant acted, as explained in *Suarez* and *Trappier,* with separate mental states regarding separate results. Furthermore, the attempted murder charge did not, and could not, involve transferred intent (*see People v Fernandez*, 88 NY2d 777, 783 [1996]), notwithstanding any surplus language in the court's charge setting forth the definition of murder.

We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 16, 2016

CLERK

Acosta, J.P., Renwick, Saxe, Richter, Gische, JJ.

1489 Anthony Masi, Index 305749/13
Plaintiff-Respondent,

-against-

Cassone Trailer & Container Co., et al.,
Defendants-Appellants,

Simone Development Corporation, et al.,
Defendants.

- - - - -

Cassone Leasing, Inc.,
Third-Party Plaintiff-Appellant-
Respondent,

-against-

LKQ Hunts Point Auto Parts,
Third-Party Defendant-Respondent-
Appellant.

- - - - -

Simone Development Corporation, et al.,
Second Third-Party Plaintiffs,

-against-

LKQ Hunts Point Auto Parts Corp.,
Second Third-Party Defendant-
Respondent-Appellant.

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Morris Duffy Alonso & Faley, New York (Iryna S. Krauchanka and Kevin Faley of counsel), for appellants/appellant-respondent.

Vecchione, Vecchione & Connors, LLP, Mineola (Cherice P. Vanderhall of counsel), for respondent-appellant.

Shafran & Mosley, P.C., White Plains (Howard E. Shafran of counsel), for respondent.

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Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered December 17, 2014, which, to the extent appealed from, denied the motion by defendant Cassone Leasing Inc., also sued herein as Cassone Trailer & Container Co., for summary judgment dismissing the complaint as against it, and the motion by third-party defendant/second third-party defendant LKQ Hunts Point Auto Parts Corp.(L&Q) for summary judgment dismissing the complaint and the third-party complaints, unanimously affirmed, without costs.

The settlement agreement signed by plaintiff pursuant to Workers' Compensation Law § 32 settled plaintiff's Workers' Compensation claims against his employer, LKQ, and LKQ's Workers' Compensation insurance carrier. It did not settle or release plaintiff's personal injury claims against defendants. The release agreement subsequently entered into between plaintiff and LKQ did not release only plaintiff's employment-based claims, but broadly released "all claims ... of whatever kind or nature in law, equity or otherwise, whether now known or unknown," including those arising out of "any injuries [plaintiff]

sustained." However, it released those claims in favor of LKQ only, not defendants.

Whether the release bars the third-party actions against LKQ was not raised in the motion court and is not before us.

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

ENTERED: JUNE 16, 2016

CLERK

Acosta, J.P., Renwick, Saxe, Richter, Gische, JJ.

1490 Bonfilia Morales, Index 304836/08
Plaintiff-Appellant,

-against-

Avalon Bay Communities, Inc., now known as Avalonbay Communities Inc.,
Defendant-Respondent.

_____

Pollack, Pollack, Isaac & De Cicco, LLP, New York (Brian J. Isaac of counsel), for appellant.

Marshall Dennehey Warner Colman & Goggin, New York (Adam C. Calvert of counsel), for respondent.

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Order, Supreme Court, Bronx County (Mary Ann Brigantti, J.), entered August 4, 2015, which, insofar as appealed from as limited by the briefs, denied plaintiff's motion for partial summary judgment on the issue of liability on her Labor Law §§ 240(1) and 241(6) claims, and granted defendant's cross motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The evidence shows that defendant retained plaintiff's employer, nonparty Urban Cleaning Contractors (Urban), to perform a "final cleaning" of the units of a new residential apartment building owned by defendant, before the units were turned over to tenants. At the time of the accident, the construction was in

the process of winding down, with about 90% of the units occupied. Urban employed plaintiff to clean kitchens in the building. On the day of the accident, plaintiff climbed an approximately three-foot stepladder to get onto the kitchen counter in one apartment unit, from which she cleaned the cabinets, starting with their tops, which were about seven feet above the floor. When she put her foot on the top step of the ladder after finishing that task, she lost her balance and fell to the floor.

In applying the factors set forth in *Soto v J. Crew Inc.* (21 NY3d 562 [2013]), the court properly concluded that plaintiff was not engaging in "cleaning" within the meaning of Labor Law § 240(1) at the time of her accident.

Dismissal of the Labor Law § 241(6) claim was warranted, since "plaintiff was not engaged in duties connected to the inherently hazardous work of construction, excavation or demolition" (*Kagan v BFP One Liberty Plaza*, 62 AD3d 531, 532 [1st Dept 2009] [internal quotation marks omitted]).

Furthermore, the court properly dismissed the common-law negligence and Labor Law § 200 claims. The evidence that

defendant exercised general oversight over plaintiff's work was insufficient to establish that defendant exercised supervisory control over the means or methods of the work (*see Singh v Black Diamonds LLC*, 24 AD3d 138, 140 [1st Dept 2005]).

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

ENTERED: JUNE 16, 2016

CLERK

Acosta, J.P., Renwick, Saxe, Richter, Gische, JJ.

1491 The People of the State of New York, SCI 2546/14
Respondent,

-against-

Carlos Torres,
Defendant-Appellant.

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The Legal Aid Society, New York (Seymour W. James, Jr. and Amy Donner of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Richard M. Weinberg, J. at plea; Diana M. Boyar, J. at sentencing), rendered August 27, 2014, convicting defendant of criminal possession of a controlled substance in the third degree, and sentencing him to a term of five years' probation, unanimously affirmed.

Defendant had the practical ability to withdraw his plea before sentencing, and his challenges to the validity of his plea do not come within the narrow exception to the preservation requirement (*see People v Conceicao*, 26 NY3d 375, 381-382 [2015]). We decline to review these unpreserved claims in the interest of justice. As an alternative holding, we find that the

plea was knowing, intelligent, and voluntary, notwithstanding any deficiencies in the plea colloquy (*see People v Sougou*, 26 NY3d 1052 [2015]; *People v Tyrell*, 22 NY3d 359, 365 [2013]).

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

ENTERED: JUNE 16, 2016

CLERK

Acosta, J.P., Renwick, Saxe, Richter, Gische, JJ.

1494 The People of the State of New York, Ind. 994N/14
Respondent,

-against-

Manuel Fana,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered October 14, 2014, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony offender, to an aggregate term of five years, followed by two years of post-release supervision, unanimously affirmed.

Although we do not find that defendant made a valid waiver of the right to appeal, we perceive no basis for reducing the sentence.

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

ENTERED: JUNE 16, 2016

CLERK

Acosta, J.P., Renwick, Saxe, Richter, Gische, JJ.

1495 A&M East Broadway LLC, et al., Index 117746/09
Plaintiffs-Respondents,

-against-

Hong Kong Supermarket, Inc.,
Defendant-Appellant,

PCK Realty Inc.,
Defendant.

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Kinney Lisovicz Reilly & Wolff PC, New York (Adam M. Maurer of counsel), for appellant.

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

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Order, Supreme Court, New York County (Lucy Billings, J.), entered May 27, 2015, which, to the extent appealed from, denied defendant supermarket's motion for summary judgment dismissing plaintiffs' complaint as against it, unanimously affirmed, without costs.

Although the supermarket moved for summary judgment within the extended time limit ordered by the motion court, the court correctly denied the motion on the merits, since the supermarket failed to make a prima facie showing of its entitlement to judgment as a matter of law (*see Alvarez v 21st Century Renovations, Ltd.*, 66 AD3d 524, 525 [1st Dept 2009]). A fire

incident report submitted by the supermarket indicated that the fire at issue originated at the market, that it spread throughout the rest of the building via "open voids," and that it led to the "structural instability" of the building and, according to plaintiffs, to the damage and demolishment of their adjoining building. The evidence submitted by the supermarket, including its expert's affidavit, failed to demonstrate that it maintained a working sprinkler system or any other fire-safety system to control the spread of the fire. Moreover, the market failed to make a prima facie showing that it did not create or have constructive notice of the open voids in the building (*see Graham v YMCA of Greater N.Y.*, 137 AD3d 546, 547 [1st Dept 2016]). The evidence shows that the market made renovations to the building before the fire, and there is no evidence as to when the building was last inspected before the fire or the findings of that

inspection.

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

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

ENTERED: JUNE 16, 2016

CLERK

Acosta, J.P., Renwick, Saxe, Richter, Gische, JJ.

1496 Altin Bundo, et al., Index 104843/11
Plaintiffs-Appellants,

-against-

10-12 Cooper Square, Inc., et al.,
Defendants-Respondents,

Alpha Stone Corp.,
Defendant.

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Rimland & Associates, New York (Michael H. Zhu of counsel), for appellants.

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Marcia K. Raicus of counsel), for 10-12 Cooper Square, Inc. and Atlantic Development Group, LLC, respondents.

Faust Goetz Schenker & Blee LLP, New York (Peter Kreymer of counsel), for Cooper Square Contractors, LLC and To Better Days, LLC, respondents.

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Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered April 24, 2015, which denied plaintiffs' motion for partial summary judgment on the common-law negligence and Labor Law § 241(6) claims, unanimously modified, on the law, to grant the motion as to the Labor Law § 241(6) claim, and otherwise affirmed, without costs.

The injured plaintiff's testimony that debris flew into his eye while he was grinding stone without wearing protective goggles established prima facie defendants' liability under Labor

Law § 241(6), predicated on a violation of Industrial Code (12 NYCRR) § 23-1.8(a) ("Eye protection") (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993]). Contrary to defendants' contention, there is no evidence of culpable conduct on plaintiff's part (*see Kutza v Bovis Lend Lease LMB, Inc.*, 131 AD3d 838, 839 [1st Dept 2015]; *Once v Service Ctr. of N.Y.*, 96 AD3d 483, 483 [1st Dept 2012], *lv dismissed* 20 NY3d 1075 [2013]). Plaintiff was aware of the need for safety goggles when operating the grinder, and he asked his employer for goggles. However, he was told to begin work without them and that he would be provided with a pair as soon as possible.

Plaintiffs made a prima facie showing that defendants 10-12 Cooper Square, Inc. and Atlantic Development Group, L.L.C. are subject to the Labor Law by submitting leases and contracts listing these defendants as owners and lessees, and defendants did not rebut the showing (*see Kane v Coundorous*, 293 AD2d 309, 311 [1st Dept 2002]). Independent contractor status would not exclude the injured plaintiff from the Labor Law's protective ambit (*see Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]).

Having granted plaintiffs summary judgment as to defendants' liability under Labor Law § 241(6), we need not reach their arguments regarding the common-law negligence claim (*see Fanning v Rockefeller Univ.*, 106 AD3d 484 [1st Dept 2013]).

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

ENTERED: JUNE 16, 2016

CLERK

Acosta, J.P., Renwick, Saxe, Richter, Gische, JJ.

1497 Residential Board of Managers of 310 West 52nd Street Condominium, Plaintiff, -against- El-Ad 52 LLC, Defendant. - - - - - El-Ad 52 LLC, Third-Party Plaintiff-Appellant, -against- Tishman Construction Corporation of New York, et al., Third-Party Defendants, Apogee Wausau Group, Inc., doing business as Wausau Window & Wall Systems, Third-Party Defendant-Respondent. - - - - - [And A Second Third-Party Action] Index 600174/10

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Marks, O'Neill, O'Brien, Doherty & Kelly, PC, New York (Joel M. Maxwell of counsel), for appellant.

LeClair Ryan PC, New York (Michael J. Case of counsel), for respondent.

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Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered September 15, 2014, which granted third-party defendant-respondent's (Wausau) motion to dismiss the third-party complaint as against it, unanimously affirmed, with costs.

Third-party plaintiff (El-Ad), a sponsor and owner of a

condominium building that was allegedly constructed in a defective manner, asserted claims against Wausau for breach of contract, breach of warranty, negligence, common-law indemnification, common-law contribution, contractual indemnification, and contractual contribution. Wausau allegedly supplied defective windows, window frames, and terrace doors to second third-party defendant Ecker Window Corp., the installation subcontractor.

The motion court correctly dismissed the breach of contract and breach of warranty claims as barred by the four-year statute of limitations set forth in UCC 2-725. Wausau delivered the supplies no later than December 1, 2008 and El-Ad did not file the third-party complaint until December 18, 2012, more than four years later.

El-Ad was not a third-party beneficiary of the contract between Ecker and Wausau (*see Port Chester Elec. Constr. Corp. v Atlas*, 40 NY2d 652, 656 [1976]; *Amin Realty v K&R Constr. Corp.*, 306 AD2d 230, 231-232 [2d Dept 2003], *lv denied* 100 NY2d 515 [2003]). In addition, there is no evidence that Wausau agreed to be bound by the terms of the contracts between El-Ad and third-party defendant Tishman, the construction manager, or between Tishman and Ecker. Accordingly, the motion court correctly

dismissed the contractual indemnification and contractual contribution claims.

The negligence claim was correctly dismissed, since El-Ad failed to plead that Wausau owed a duty of care toward El-Ad or that any of the *Espinal* exceptions applied (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138-139, 140 [2002]). Since there is no allegation or evidence that Wausau owed a duty of care to El-Ad or to plaintiff, the motion court also correctly dismissed the common-law contribution claim (*see Aiello v Burns Intl. Sec. Servs. Corp.*, 110 AD3d 234, 247-248 [1st Dept 2013]; *Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp.*, 125 AD2d 754, 756 [3d Dept 1986], *affd* 71 NY2d 599 [1988]). The common-law indemnification claim fails as a matter of law, since the responsibility for the windows was shared by El-Ad, Wausau, Tishman, and Ecker (*see Arlington Cent. School Dist. v Horizon Roofing & Sheet, Inc.*, 27 AD3d 676, 677 [2d Dept 2006]).

We have considered El-Ad's remaining arguments, including its contention that Wausau's motion was premature, and find them unavailing.

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

ENTERED: JUNE 16, 2016

CLERK

Acosta, J.P., Renwick, Saxe, Richter, Gische, JJ.

1501N A. Bernard Frechtman, Index 653353/14
Plaintiff-Appellant,

-against-

Allen Gutterman, et al.,
Defendants-Respondents.

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A. Bernard Frechtman, New York, appellant pro se.

Brian H. Bluver, New York, for respondents.

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Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered on or about October 30, 2015, which denied plaintiff's motion for summary judgment awarding him legal fees and expenses in the amount of $57,664.07, unanimously affirmed, without costs.

Defendant's claim that plaintiff is not entitled to legal fees because he no longer has an office in New York is unpreserved, as it was not raised before the motion court, and, in any event, is unavailing (*see Matter of Garrasi*, 29 Misc 3d 822, 830 [Sur Ct, Schenectady County 2010]). Moreover, plaintiff has conceded that there was no retainer agreement, and thus, his breach of contract claim fails as a matter of law (*see Seth Rubenstein, P.C. v Ganea*, 41 AD3d 54, 59 [2d Dept 2007]).

However, plaintiff's failure to comply with the rules on retainer agreements (22 NYCRR 1215.1) does not preclude him from

seeking to recover legal fees for the services he provided, such as on a quantum meruit and account stated basis (*see Miller v Nadler*, 60 AD3d 499 [1st Dept 2009]; *Seth Rubenstein, P.C. v Ganea*, 41 AD3d at 59-60). Faced with conflicting affidavits, the billing statements, and email correspondence between the parties, the motion court properly denied summary judgment on plaintiff's remaining claims, as there are triable issues, including whether defendants received a statement from plaintiff without objecting to it (*see Dreyer & Traub v Rubinstein*, 191 AD2d 236 [1st Dept 1993]).

Plaintiff's request for a hearing is academic, since the motion court directed that a hearing be held to determine if plaintiff was discharged for cause, and, if he was not, to determine the reasonable value of his services (*see Teichner v W & J Holsteins*, 64 NY2d 977, 979 [1st Dept 1985]). The trial court acted well within its discretion in not ordering an immediate trial under CPLR 3212(c).

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

ENTERED: JUNE 16, 2016

CLERK

Acosta, J.P., Renwick, Saxe, Richter, Gische, JJ.

1502N James M. Rae, Index 101491/12
Plaintiff-Appellant,

-against-

Stanton Chase of NY, et al.,
Defendants,

Goodrich Capital, LLC, et al.,
Defendants-Respondents.

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James M. Rae, appellant pro se.

Gary G. Staab LLC, White Plains (Gary G. Staab of counsel), for respondents.

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Appeal from order, Supreme Court, New York County (Joan M. Kenney, J.), entered July 29, 2015, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for leave to amend the complaint to add causes of action for constructive fraud, aiding and abetting fraud, fraud, and negligent misrepresentation, unanimously dismissed as moot, without costs.

Given The dismissal of the action, by order of the motion court entered on April 26, 2016, for failure to prosecute, this appeal is moot.

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

ENTERED: JUNE 16, 2016

CLERK