SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 24, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Friedman, J.P., Renwick, Saxe, Kapnick, JJ.

16305 The People of the State of New York, Respondent, Ind. 5319/12

-against-

Paul Agola,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Beth Fisch Cohen of counsel), for respondent.

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Judgment, Supreme Court, New York County (Laura A. Ward, J. at first request for new counsel; Larry Stephen, J. at second request for new counsel; A. Kirke Bartley, Jr., J. at third request for new counsel, nonjury trial and sentencing), rendered September 27, 2013, convicting defendant of attempted robbery in the first degree, criminal possession of a weapon in the third degree and attempted assault in the second degree, and sentencing him, as a second violent felony offender, to an aggregate term of seven years, unanimously modified, on the law, to vacate the

conviction of attempted robbery in the first degree, and dismiss the first count of the indictment with leave to re-present any appropriate charges to the grand jury, and otherwise affirmed.

Criminal Procedure Law 320.20(5) states, in pertinent part, that, in a nonjury trial, "[b]efore considering a multiple count indictment for the purpose of rendering a verdict thereon, and before the summations if there be any, the court *must* designate and state upon the record the counts upon which it will render a verdict" (emphasis added). Here, there is no dispute that this procedure was not followed. After denying defendant's motion to dismiss the indictment, and prior to summations, the following colloquy took place:

> "THE COURT: . . . Are there any specific charges that you would suggest that I consider with respect to this case before we have our summations? I want to ascertain whether there's anything counsels [sic] wish to direct me to, specifically.
>
> "[ASSISTANT DISTRICT ATTORNEY]: No, Your Honor.
>
> "[DEFENSE COUNSEL]: No, Your Honor.
>
> "THE COURT: All right. We'll move forward, then, to summations."

On May 3, 2013, the trial court rendered its verdict and found defendant not guilty of the first count of the indictment,

robbery in the first degree, but stated that it found him guilty of "the lesser included count[,] which I considered, attempted robbery in the first degree." The matter was adjourned for sentencing, and defense counsel stated his intention to file a motion to set aside the verdict, pursuant to CPL 330.30, with respect to the lesser included count that the court had considered without indicating its intent to do so on the record before summations were delivered.

The record indicates that the motion to set aside the verdict was fully briefed in June 2013, and, on September 26, 2013 the parties appeared before the trial court to "re-open summation." At that time, the court acknowledged that it did in fact fail to specifically state on the record before summations that it would consider the lesser included charge. The trial court explained that it believed it was defendant's wish that the lesser included count be considered based on off-the-record conversations during trial and defense counsel's opening statement, wherein he argued that, at best, the court may have been able to find defendant guilty of attempted robbery in the first degree. However, in light of the oversight, the trial court "offered defense counsel the election of reopening summations with respect to the charge of attempted robbery in the

first degree."

The court went on to state that it was denying defendant's application for a new trial on the lesser included count, but would allow new summations on that charge, disregard the prior summations and render a new verdict with respect to the lesser included offense. Defense counsel objected, arguing that it would not be appropriate for the trial court to render a second verdict because the case law was clear that the remedy of reopening summations to comply with CPL 320.20(5) was only available before a verdict is rendered. The People also objected to reopening summations. When the objection was overruled, defense counsel elected to reopen his summation with respect to the lesser included count. Unlike the original summation, which focused on the lack of proof of a completed robbery, the new summation argued that there was not even an attempted robbery. The People elected not to take part in the procedure. The matter was adjourned to the following day to allow the court to consider the new arguments and review the transcript before it rendered a new verdict.

The trial court's failure to comply with CPL 320.20(5) by not notifying the parties that it intended to consider a lesser included offense until after it rendered the original verdict,

constitutes reversible error. "After formal rendition of a verdict at a bench trial, a trial court lacks authority to reweigh the factual evidence and reconsider the verdict" (*People v Maharaj*, 89 NY2d 997, 999 [1997]). Here, it is undisputed that upon defendant's CPL 330.30 motion, the court reopened summations, and rendered a new verdict. Although this Court has previously held that failure to comply with CPL 320.20(5) constitutes harmless error when the defendant has the opportunity to address the lesser included offenses in a new summation (*see People v Boisseau*, 193 AD2d 517, 517-518 [1st Dept 1993], *lv denied* 81 NY2d 1070 [1993] [court's error in failing to announce before summations its intention to consider lesser included offenses was rendered harmless by opportunity given defense counsel to begin his summation anew after charge conference]), the same cannot be said here where the trial court attempted to rectify its error only after it rendered the verdict. Moreover, the People's assertion that *Maharaj* is inapplicable here because the trial court did not engage in the prohibited action of reweighing the factual evidence is without merit and belied by the record.

We agree that the double jeopardy clause bars a new trial on the original indictment. The People must secure a new indictment

if they wish to pursue further prosecution on the lesser included charge (*People v Mayo*, 48 NY2d 245, 253 [1979]).

We have considered defendant's argument that this matter should be remanded for resentencing on the remaining two counts and reject it on the merits.

Defendant's argument that the motion court (Ward, J.) committed reversible error when it refused to conduct a minimal inquiry before denying his first request for new counsel is unavailing. Although motion courts are "obliged to make some minimal inquiry" when a defendant makes a "serious request[]" for new counsel, a court may summarily deny a motion that is clearly baseless (*People v Sides*, 75 NY2d 822, 824-825 [1990]; *see also People v Porto*, 16 NY3d 93, 100-101 [2010]). Before counsel may be replaced, a defendant must demonstrate that "good cause" exists for the substitution (*Porto*, 16 NY3d at 100), which means that there is a genuine conflict of interest, or the defendant and his attorney have some other irreconcilable conflict (*Sides*, 75 NY2d at 824; *see also People v Nelson*, 63 AD3d 563, 563 [1st Dept 2009] ["Defendant's expression of dissatisfaction with his counsel was insufficient to obligate the court to conduct the inquiry called for in *People v Sides*."], *lv denied* 13 NY3d 747 [2009]). Here, the first colloquy was sufficient because the

court permitted defendant to state his grievances against counsel, but defendant only complained that he and his counsel did not get along, which did not require any further inquiry (*see People v Reed*, 35 AD3d 194, 195 [1st Dept 2006], *lv denied* 8 NY3d 926 [2007]). In any event, the first colloquy should not be viewed in isolation, because defendant was permitted to renew and/or reargue his application before two subsequent Justices, and these subsequent applications resulted in lengthy inquiries that still yielded no valid basis for substitution of counsel.

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

ENTERED: MAY 24, 2016

CLERK

Tom, J.P., Friedman, Sweeny, Acosta, Andrias, JJ.

130-
131 James Grant, Index 112027/09
591030/09
Plaintiff-Respondent-Appellant, 590178/10
590948/10
-against- 590372/11

Solomon R. Guggenheim Museum, et al.,
Defendants-Respondents,

Roehl Transport, Inc.,
Defendant-Appellant-Respondent.

- - - - -

[And Third-Party Actions]

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Lester Schwab Katz & Dwyer, LLP, New York (Daniel S. Kotler of counsel), for appellant-respondent

Sacks and Sacks, LLP, New York (Scott N. Singer of counsel), for respondent-appellant.

D'Amato & Lynch, LLP, New York (Stephen F. Willig of counsel), for respondents.

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Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered September 25, 2014, which, to the extent appealed from as limited by the briefs, granted defendants Solomon R. Guggenheim Museum and F.J. Sciame Construction Co., Inc.'s motion for summary judgment dismissing the complaint as against them, denied plaintiff's motion for summary judgment as to liability on his Labor Law § 240(1) claim as against Museum and Sciame, and denied defendant Roehl Transport Inc.'s motion for summary

judgment dismissing the common-law negligence claim as against it, unanimously modified, on the law, to deny Museum and Sciame's motion as to the Labor Law § 240(1) claim, and to grant plaintiff's motion, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered January 12, 2015, which denied plaintiff's motion for renewal and reargument of his and Museum and Sciame's summary judgment motions, unanimously dismissed, without costs, with respect to reargument, as taken from a nonappealable order, and, with respect to renewal, as academic in view of the foregoing.

Plaintiff was injured when a crate of glass that he was preparing for offloading from the back of a flatbed truck for window installation at Museum tipped over onto him, knocking him to the ground. Contrary to defendants' contention, preparing a six-foot-tall crate weighing at least 1,500 pounds for hoisting posed an elevation-related risk for plaintiff within the meaning of Labor Law § 240(1) (*see Marrero v 2075 Holding Co. LLC*, 106 AD3d 408 [1st Dept 2013]), and the crate was "an object that required securing for the purposes of the undertaking" (*Outar v City of New York*, 5 NY3d 731, 732 [2005]).

Further, there is unrebutted evidence that various devices, including wooden blocks for bracing, would have stabilized the

crate while it was being maneuvered into a position to have slings placed on it for hoisting by the crane. Since plaintiff was never provided with proper safety devices, his use of the Johnson bar, or J-bar, to move the crate into position was not the sole proximate cause of the accident (*DeRose v Bloomingdale's Inc.*, 120 AD3d 41, 45 [1st Dept 2014]). Moreover, plaintiff testified that, in the past when he used a J-bar under a crate on a flatbed truck, a coworker would stabilize the crate by holding it. At the time of the incident no one stabilized the crate of glass as plaintiff used the J-bar to separate the crates.

Since the positioning of the flatbed truck was a temporary condition necessary for the crane to unload in the limited space available, it was not a dangerous work site condition but part of the means and methods of the work, over which Museum and Sciame exercised no supervision or control and for which they therefore cannot be held liable under Labor Law § 200 (*see O'Sullivan v IDI Constr. Co., Inc.*, 28 AD3d 225, 226 [1st Dept 2006], *affd* 7 NY3d 805 [2006]).

Roehl, which transported the glass to the construction site, is not entitled to summary judgment dismissing the common-law

negligence claim as against it, since the surveillance video capturing the accident raises issues of fact as to whether the truck driver caused or contributed to the toppling of the crate by reaching for the J-bar.

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

ENTERED: MAY 24, 2016

CLERK

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

375 Dzevat Kolenovic, Index 153177/12
Plaintiff-Respondent,

-against-

56th Realty, LLC,
Defendant,

The Manhattan Art & Antiques Center,
et al.,
Defendants-Appellants.

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Baxter Smith & Shapiro, P.C., White Plains (Sim R. Shapiro of counsel), for appellants.

Arze & Mollica, LLP, Brooklyn (Raymond J. Mollica of counsel), for respondent.

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Order, Supreme Court, New York County (Joan M. Kenney, J.), entered March 11, 2015, which, to the extent appealed from as limited by the briefs, denied defendants Manhattan Art & Antiques Center and Glenwood Management Corp.'s cross motion to amend their answer to assert affirmative defenses based on Workers' Compensation Law §§ 11 and 29(6), to dismiss the complaint pursuant to CPLR 3211 based on those defenses, and/or for summary judgment dismissing the Labor Law § 240(1) cause of action, unanimously modified, on the facts, to dismiss the complaint as against The Manhattan Art & Antiques Center, and otherwise

affirmed, without costs. The Clerk is directed to enter judgment accordingly.

Plaintiff Dzevat Kolenovic fell from a ladder after fixing a leaky roof in the course of his employment as a handyman at a building located at 300 East 56th Street and 1050 Second Avenue in Manhattan. Defendant 56th Realty, LLC. is the owner of the building and was plaintiff's employer[1]; defendant Glenwood Management Corp. provided management services to 56th Realty. Defendant Manhattan Art & Antiques Center (MAAC) is the identifying name of the part of the building containing retail space on the Second Avenue entrance of the building, which is rented out for art and antique galleries.

The leak was located in the roof above MAAC's portion of the building. The only way plaintiff could access that location was to climb a 12-foot high metal ladder affixed to a brick wall leading from the first-floor roof to the roof of the MAAC portion of the building. The ladder, which was attached to the brick

[1] By a prior order, the action as against 56th Realty was dismissed pursuant to Workers' Compensation Law §§ 11 and 29(6) (*see* Supreme Court Records On-Line Library, Index No. 153177-2012, Doc No. 43, available at https://iapps.courts.state.ny.us/fbem/DocumentDisplayServlet?documentId=UaFeV2BEUct4CfP07YDw3g==&system=prod [accessed January 26, 2016]).

wall with two bolts at the top and two bolts in the middle, shook as plaintiff climbed up it to the MAAC roof. It was raining lightly at the time.

Plaintiff described the MAAC roof as made of rubber with a three-foot brick parapet topped by a marble-like substance. Plaintiff observed cracking in the marble and holes in the wall, which he filled with silicone caulk. He then went to descend the ladder. It was still raining and the ladder was wet. Plaintiff stepped from the parapet wall onto the top rung of the ladder with both his feet, and was holding the side rails. The ladder shook, plaintiff's feet slipped, and he fell. He testified that his fall was caused by the ladder shaking and being wet, by the wind, and because at the top of the ladder there was not enough room for the safe placement of his feet.

Initially, the complaint must be dismissed against Manhattan Art & Antiques Center. MAAC is not a corporate entity; there is no evidence in the record contradicting the showing that it is simply the name of the portion of the building containing gallery spaces that are rented out to vendors of art and antiques. A Glenwood Management employee's supposition that MAAC may be a lessee is insufficient to create a question of fact in that regard, and plaintiff has failed to present any other evidence

tending to establish that MAAC has a legal status that allows it to be sued.

We agree with the motion court that Glenwood Management Corp. is not entitled to the relief it seeks pursuant to the exclusivity provisions of Workers' Compensation Law §§ 11 and 29(6). Contrary to defendants' contention that Glenwood Management Corp. was the alter ego of plaintiff's employer, 56th Realty, LLC, the record indicates only that Glenwood was the managing agent for 56th Realty, consistent with their management agreement; that the two entities have a principal in common is insufficient to establish that they were alter egos (*see Figueiredo v New Palace Painters Supply Co. Inc.*, 39 AD3d 363, 364 [1st Dept 2007]). Moreover, plaintiff is suing not the principal but the corporation, which is a separate legal entity (*see Joan Hansen & Co. v Everlast World's Boxing Headquarters Corp.*, 296 AD2d 103, 109 [1st Dept 2002]).

Nor is defendant entitled to dismissal of the Labor Law § 240(1) claim. Plaintiff was engaged in repairing the roof, an activity to which Labor Law § 240(1) applies, and not merely in routine maintenance (*see Kun Yong Ke v Oversea Chinese Mission, Inc.*, 49 AD3d 508, 509 [2d Dept 2008]; *Velasco v Green-Wood Cemetery*, 8 AD3d 88 [1st Dept 2004]). Moreover, the permanently

affixed ladder that provided the sole access to plaintiff's elevated work site was a safety device within the meaning of Labor Law § 240(1) (*Priestly v Montefiore Med. Ctr./Einstein Med. Ctr.*, 10 AD3d 493 [1st Dept 2004]). In view of plaintiff's testimony that the ladder shook and was wet and was too close to the wall to allow room for his feet on the rungs, defendant failed to demonstrate as a matter of law that plaintiff was provided with proper protection.

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

ENTERED: MAY 24, 2016

CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Kapnick, Gesmer, JJ.

960 Angel R., an Infant by His Mother and Natural Guardian Virginia D., et al.,
Plaintiffs-Respondents,

-against-

The New York City Transit Authority, et al.,
Defendants-Appellants,

The City of New York,
Defendant.

Index 350165/10

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

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

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Judgment, Supreme Court, Bronx County (Lizbeth Gonzalez, J.), entered August 22, 2014, after a jury trial, in favor of plaintiff Angel Ramos, unanimously affirmed, without costs.

Plaintiffs brought this suit to recover damages for personal injuries sustained by the infant plaintiff (plaintiff) on December 18, 2009, when, as a pedestrian, he was involved in an accident with a bus owned by defendants. While plaintiffs contended that plaintiff had been struck by the bus, defendants claimed that he had walked into the side of the bus, causing its tire to run over his foot. The case was tried before a jury,

which rendered a verdict in plaintiff's favor. On this appeal, defendants argue that the verdict finding them liable was legally insufficient and against the weight of the evidence. At the very least, defendants argue that the jury's verdict, that plaintiff's negligence was not a proximate cause of the accident, is against the weight of the evidence, mandating a new trial. Alternatively, defendants argue that the damages awarded for future pain and suffering were excessive. We find that none of defendants' arguments have any merit.

A jury verdict should not be set aside as contrary to the weight of the evidence unless the jury could not have reached the verdict by any fair interpretation of the evidence (*see Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [1995]; *Nicastro v Park*, 113 AD2d 129, 134 [2nd Dept 1985]. Whether a jury verdict should be set aside as contrary to the weight of the evidence does not involve a question of law, but rather requires a discretionary balancing of many factors *(see Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]; *Nicastro v Park*, 113 AD2d at 133).

Applying these principles to the facts in this case, we find that the verdict was supported by a fair interpretation of the evidence, and it was not contrary to the weight of the evidence. The jury did find that plaintiff was contributorily negligent

based on his testimony that he emerged mid-block from behind a bus to cross Westchester Avenue in the Bronx. However, the jury could have reasonably inferred that plaintiff's negligence was not a proximate cause of the accident because the bus driver had a clear view of plaintiff and an opportunity to stop the bus to avoid striking plaintiff.

The evidence shows that plaintiff suffered traumatic brain injury to the left side of the brain, which impaired plaintiff's cognitive functions. In addition, plaintiff suffered fractures of the third and fourth metatarsal in his left foot and degloving of that foot, which crushed tendons, bones and muscles, and amputation of the left little toe and partial amputation of the left big toe, which caused limitation of function of plaintiff's foot. Accordingly, we find that the damage award for future pain and suffering does not materially deviate from what is reasonable compensation under the circumstances (CPLR 5501[c]).

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

ENTERED: MAY 24, 2016

CLERK

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

1219 The People of the State of New York, Ind. 8989/98
Respondent,

-against-

Gil Lewis,
Defendant-Appellant.

_____

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

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

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Order, Supreme Court, New York County (Gregory Carro, J.), entered on or about January 15, 2014, which denied defendant's CPL 440.10 motion to vacate a judgment of conviction rendered April 4, 2000, unanimously affirmed.

Initially, we note that defendant's claims generally stem from an alleged inconsistency between a detective's hearing and trial testimony, and that all of this testimony was part of the record of defendant's 2004 appeal. In any event, assuming for the sake of argument that defendant's claims could not have been fully raised on direct appeal (*see* CPL 440.10[2][c]), the court properly exercised its discretion in denying his motion on the ground that on his prior 440.10 motion, he "was in a position adequately to raise the ground[s] . . . underlying the present

motion but did not do so" (CPL 440.10[3][c]).

In addition, the record supports the court's alternative holding, denying the motion on the merits. Summary denial was proper because defendant's allegations did not raise any factual dispute sufficient to warrant a hearing (*see* CPL 440.30[4][b]; *People v Samandarov*, 13 NY3d 433, 439-440 [2009]; *People v Satterfield*, 66 NY2d 796, 799-800 [1985]).

Defendant contended that a detective testified falsely at trial that he personally copied a recording of a certain phone conversation, contradicting his testimony at a pretrial hearing that another detective on his team had done so. On the contrary, the detective's trial testimony clearly indicates that he meant only that someone on his team had made the copy. Accordingly, defendant's claim that the People presented "false" testimony is entirely without merit.

The court correctly rejected defendant's ineffective assistance of counsel claims, since he failed to rebut the "presum[ption] that counsel acted in a competent manner and exercised professional judgment" (*People v Rivera*, 71 NY2d 705, 709 [1988]). Since the purported inconsistency was illusory, trial counsel was not deficient in failing to exploit it on cross-examination. Likewise, counsel was not ineffective in

failing to object to the recording under the best evidence rule, which was inapplicable (*see e.g. People v Dicks*, 100 AD3d 528 [2012]), or in failing to request a missing witness charge as to unidentified detectives who were present during the creation of other copies of recordings, in the absence of any showing that these detectives would have provided noncumulative testimony (*People v Savinon*, 100 NY2d 192, 196 [2003]). Accordingly, defendant has not shown that any of counsel's alleged omissions fell below an objective standard of reasonableness, or that they deprived defendant of a fair trial or affected the outcome of the case (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

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

ENTERED: MAY 24, 2016

CLERK

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

1220 In re Natalie Krodel, Index 152176/14
Petitioner-Appellant,

-against-

Amalgamated Dwellings, Inc.,
et al.,
Respondents,

Abraham Bragin,
Respondent-Respondent.

_____

Gehring & Satriale LLC, New York (Joseph E. Gehring, Jr. of counsel), for appellant.

Rosen Livingston & Cholst LLP, New York (Peter I. Livingston of counsel), for respondent.

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Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered May 6, 2015, which, after a traverse hearing, granted respondent Abraham Bragin's motion to dismiss the proceeding against him for lack of jurisdiction, unanimously reversed, on the law, without costs, and the motion denied.

Although the motion court did not find the process server to be credible, it is uncontested that cameras located on the exterior of the building in which Bragin's apartment was located captured the process server's attempts at service on November 10, 11, and 13, 2014. Although Bragin raises on appeal purported flaws with the attempted service on November 10, he did not do so

at the traverse hearing. Instead, his arguments pertained to November 11. In any event, we reject Bragin's arguments pertaining to November 10.

On November 11, the video demonstrates that the process server approached the building, rang the doorbell multiple times, and left after five minutes. Bragin did not argue at the traverse hearing that the door was unlocked or that the process server failed to check it on that date. While the server's attempt may be characterized as minimal diligence, we find that it was sufficient to warrant substituted service pursuant to CPLR 308(4), especially when considered in conjunction with his attempts on November 10 and 13 (*see Albert Wagner & Son v Schreiber*, 210 AD2d 143 [1st Dept 1994]).

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

ENTERED: MAY 24, 2016

CLERK

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

1221-
1222-
1222A In re Diana N., and Others,

Children Under Eighteen Years of Age, etc.,

Kim N., also known as Kim K.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Carol L. Kahn, New York, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Ellen Ravitch of counsel), for respondent.

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

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Order of disposition, Family Court, New York County (Stewart H. Weinstein, J.), entered on or about October 6, 2014, to the extent it brings up for review an order of fact-finding, same court and Judge, entered on or about September 9, 2014, which determined that respondent mother had abused and neglected the subject children, unanimously affirmed, and the appeal therefrom otherwise dismissed, without costs, as moot. Appeal from the fact-finding order, unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition. Appeal

from permanency order, same court (Susan M. Doherty, Ref.), entered on or about May 4, 2015, which, among other things, continued the children's placement with the Commissioner of Social Services pending the next permanency hearing scheduled for September 10, 2015, unanimously dismissed, without costs, as moot.

Although New York was not the "home state" of the subject children so as to establish jurisdiction pursuant to Domestic Relations Law § 76(1) (Domestic Relations Law § 75-a[7]), Family Court had temporary emergency jurisdiction pursuant to Domestic Relations Law § 76-c(1) (*Matter of Christianti G. [Diana S.]*, 125 AD3d 859, 860 [2d Dept 2015]).

The findings that the mother had abused and neglected her children were supported by a preponderance of the evidence (*see* Family Ct Act § 1046[b][i]). The record shows that the mother's husband sexually abused the oldest child for seven years, that one of the other children observed an incident of sexual abuse, and that the mother failed to protect the child from the abuse (Family Ct Act § 1012[e][iii]; *Matter of Ivette R.*, 282 AD2d 751, 751 [2d Dept 2001]; *Matter of Ashley M.V. [Victor V.]*, 106 AD3d 659 [1st Dept 2013]). The oldest child's out-of-court statements were sufficiently corroborated by, among other things, the

criminal convictions of the mother's husband and by his own admissions (*see* Family Ct Act § 1046[a][vi]; *Matter of Nicole V.*, 71 NY2d 112, 119 [1987]). The mother also failed to protect the children from the husband's excessive drinking and physical abuse (*Matter of Christopher B.*, 26 AD3d 431 [2d Dept 2006]). Further, the mother failed to provide one of the children with adequate medical care (*see Matter of Shawndel M.*, 33 AD3d 1006 [2d Dept 2006]), and she failed to provide the children with adequate food, shelter, clothing, and education. These failures are due to poor planning, and not because of a lack of financial resources (*see* Family Ct Act § 1012[f][i][A]).

The appeals from the disposition and from the subsequent permanency order are moot (*see Matter of Skye C. [Monica S.]*, 127 AD3d 603, 604 [1st Dept 2015]).

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

ENTERED: MAY 24, 2016

CLERK

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

1224 Kenneth Linn, et al., Index 800017/11
Plaintiffs-Respondents,

-against-

New York Downtown Hospital,
Defendant-Respondent,

New York City Health and Hospitals Corporation, et al.,
Defendants,

Viorel Nicolescu, M.D.,
Defendant-Appellant.

_____

James W. Tuffin, Islandia, for appellant.

Ronemus & Vilensky, LLP, New York (Lawrence H. Singer of counsel), for Kenneth Linn and Hadassah Diaz Linn, respondents.

Ivone, Devine & Jensen, LLP, Lake Success (Robert Devine of counsel), for New York Downtown Hospital, respondent.

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Order, Supreme Court, New York County (Martin Schoenfeld, J.), entered October 31, 2014, which denied defendant Viorel Nicolescu, M.D.'s motion for summary judgment dismissing the complaint as against him on the grounds that a general release executed by plaintiffs bars plaintiffs' action against him, unanimously affirmed, without costs.

The release at issue provides that, in exchange for defendant Cabrini Center for Nursing and Rehabilitation's

(Cabrini) payment to plaintiffs of $25,000, plaintiffs released Cabrini, its insurer, and their "agents, servants, employees, [and] staff," from "all . . . actions, causes and causes of action . . . which against the said [Cabrini] the plaintiffs ever had, . . ." "The meaning and extent of coverage of a release 'necessarily depend, as in the case of contracts generally, upon the controversy being settled and upon the purpose for which the release was actually given'" (*Rotondi v Drewes*, 31 AD3d 734, 735-736 [2d Dept 2006], quoting *Cahill v Regan*, 5 NY2d 292, 299 [1959]). "[A] release may not be read to cover matters which the parties did not desire or intend to dispose of" (*id.*; *Morales v Solomon Mgt. Co., LLC*, 38 AD3d 381, 382 [1st Dept 2007]).

Assuming arguendo that defendant Nicolescu, a private attending physician at Cabrini, could be considered a "staff" member of Cabrini, the release is unambiguously limited only to "causes of action" that plaintiffs had against Cabrini, and does not release any other tortfeasors not expressly named therein from liability for causes of action asserted against them (General Obligations Law § 15-108[a]; *Morales* at 382; *compare Bernard v Sayegh*, 104 AD3d 600 [1st Dept 2013]). Interpreting the release as urged by defendant Nicolescu to release him from liability for causes of action asserted against him individually

would return to the common law rule in effect before enactment of General Obligations Law § 15-108(a), when general releases were "a trap for the average man who quite reasonably assumes that settling his claim with one person does not have any effect on his rights against others with whom he did not deal" (*Wells v Shearson Lehman/American Express*, 72 NY2d 11, 22 [1988]).

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

ENTERED: MAY 24, 2016

CLERK

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

1227-
1228 Index 650613/13

Canon Financial Services, Inc.,
Plaintiff,

-against-

Meyers Associates, LP, etc.,
Defendant-Appellant-Respondent,

Canon USA, Inc.,
Defendant-Respondent-Appellant.

_____

Schrader & Schoenberg, LLP, New York (Benjamin Suess of counsel), for appellant-respondent.

Dorsey & Whitney LLP, New York (Elizabeth R. Baksh of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Debra James, J.), entered September 30, 2014, which, to the extent appealed from as limited by the briefs, granted defendant Canon USA, Inc.'s motion to dismiss defendant Meyers Associates LP's first, second, third, and fourth counterclaims as against it, and order, same court and Justice, entered January 30, 2015, which, upon reargument, vacated so much of the prior order as granted Canon's motion to dismiss the fifth and sixth counterclaims as against it, and reinstated those counterclaims, unanimously modified, on the law, to reinstate the first counterclaim, and to dismiss the fifth and sixth counterclaims, and otherwise affirmed, without costs.

Meyers' pleading fails to show that nonparty independent contractor EZ Docs, Inc., a Canon products dealer from which Meyers leased Canon equipment, had either actual or apparent authority to act as Canon's agent (*see Standard Funding Corp. v Lewitt*, 89 NY2d 546, 551 [1997]). Nor was Meyers in privity with Canon, which was not a signatory to any agreement with Meyers. The existence of an express warranty by Canon did not create privity between Meyers and Canon, a party with which Meyers never dealt (*see Randy Knitwear v American Cyanamid Co.*, 11 NY2d 5, 14 [1962]). For these reasons, the first and fourth counterclaims, alleging negligent misrepresentation and breach of contract, respectively, were correctly dismissed, and the fifth and sixth counterclaims, alleging breach of implied warranty, were incorrectly reinstated upon reargument.

The third counterclaim, alleging tortious interference with contract, was correctly dismissed because Canon had its own economic interest in the agreement with EZ Docs that it terminated, and therefore was privileged to "interfere" in the transaction at issue (*see Foster v Churchill*, 87 NY2d 744, 750 [1996]). Moreover, Meyers' own allegation that EZ Docs' breach occurred almost a year before Canon's alleged interference was

fatal to the counterclaim (*see Pitcock v Kasowitz, Benson, Torres & Friedman, LLP*, 80 AD3d 453 [1st Dept 2011], *lv denied* 16 NY3d 711 [2011]).

The first counterclaim, alleging negligent retention, should be reinstated. Whether and when Canon knew that certain individuals were secretly affiliated with EZ Docs is an issue of fact not appropriate for resolution on this motion pursuant to CPLR 3211(a)(7).

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

ENTERED: MAY 24, 2016

CLERK

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

1229 The People of the State of New York, Ind. 4641/08
Respondent,

-against-

Jaime Cortes,
Defendant-Appellant.

_____

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

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

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Order, Supreme Court, New York County (Thomas Farber, J.), entered on or about September 11, 2013, which adjudicated defendant a level two 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 granting an upward departure based on egregious conduct that was not adequately accounted for in the risk assessment instrument, and that outweighed the mitigating factors cited by defendant (*see*

People v Gillotti, 23 NY3d 841 [2014]). To the extent defendant is challenging the factual predicate for the departure, that claim is unpreserved and without merit (*see e.g. People v Irizarry*, 124 AD3d 429 [1st Dept 2015], *lv denied* 25 NY3d 907 [2015]).

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

ENTERED: MAY 24, 2016

CLERK

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

1230 Tracy Bagan, Index 100958/12
Plaintiff-Respondent,

-against-

Onkar S. Tomer,
Defendant-Appellant,

Mostafa A. Elsrogy, et al.,
Defendants-Respondents.

_____

Downing & Peck, P.C., New York (Matthew G. Merson of counsel), for appellant.

Taubman Kimelman & Soroka, LLP, New York (Antonette M. Milcetic of counsel), for Tracy Bagan, respondent.

Law Offices of Marjorie E. Bornes, Brooklyn (Marjorie E. Bornes of counsel), for Mostafa A. Elsrogy and Lucky Barb Cab Corp., respondents.

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Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered September 5, 2014, which, insofar as appealed from, denied, without prejudice, defendant Onkar S. Tomer's motion for summary judgment dismissing the complaint on the grounds that plaintiff did not sustain a serious injury under Insurance Law § 5102(d), and granted plaintiff's cross motion for leave to amend the bill of particulars to add an allegation of a nasal fracture, unanimously affirmed, without costs.

The motion court providently exercised its discretion in

granting plaintiff's cross motion for leave to amend the bill of particulars. Although plaintiff failed to offer a reasonable excuse for her delay in seeking leave to amend, she demonstrated that the proposed amendment has potential merit by pointing to the medical records submitted by defendant Tomer, which show that two doctors who examined plaintiff after the accident noted the existence of a nasal fracture. Tomer cannot claim surprise or prejudice given such proof, and given that his own expert raised the issue of the fracture (*see Cherebin v Empress Ambulance Serv., Inc.*, 43 AD3d 364, 365 [1st Dept 2007]). To the extent Tomer asserts that he has not been given an opportunity to prepare a defense against the amendment, the motion court struck the note of issue to afford him an opportunity to conduct further discovery and to make a new motion for summary judgment on the issue of serious injury (*see Zeeck v Melina Taxi Co.*, 177 AD2d 692, 694 [2d Dept 1991]).

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

ENTERED: MAY 24, 2016

CLERK

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

1231-
1232 Index 650228/13

Stone Column Trading House Limited,
Claimant-Appellant,

-against-

Beogradska Banka A.D. in Bankruptcy,
Claimant-Respondent.

_____

Medenica Law PLLC, New York (Olivera Medenica of counsel) and Law Offices of Martin Novar, New York (Martin Novar of counsel), for appellant.

Marion & Allen, P.C., New York (Roger K. Marion of counsel), for respondent.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered November 10, 2015, which, upon reargument of claimant Stone Column Trading House Limited's motion for summary judgment, adhered to the original order, entered December 22, 2014, denying the motion, unanimously affirmed, with costs. Appeal from order entered December 22, 2014, unanimously dismissed, without costs, as academic.

The motion court correctly determined that Stone Column's motion for summary judgment was premature because it served the motion prior to joinder of issue (CPLR 3212[a]; *City of Rochester v Chiarella*, 65 NY2d 92, 101 [1985]). Pursuant to a stipulation, the parties agreed to proceed against each other in a

consolidated interpleader action involving the parties' competing claims to an amount on deposit at a bank in liquidation proceedings (*see* CPLR 1006). The stipulation shows that the parties contemplated answering interrogatories in lieu of filing answers to each other's complaints. As interrogatories have yet to be completely answered, and objections thereto resolved, issue has not been joined. Moreover, the motion court correctly noted that discovery is still outstanding on numerous material issues of fact (CPLR 3212[f]; *First Bank of Ams. v Motor Car Funding*, 257 AD2d 287, 293-294 [1st Dept 1999]).

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

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

ENTERED: MAY 24, 2016

CLERK

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

1233 Tracy Mendoza, Index 301024/13
Plaintiff-Appellant,

-against-

Fordham-Bedford Housing Corp.,
et al.,
Defendants-Respondents.

_____

Monier Law Firm, PLLC, New York (Philip Monier, III of counsel), for appellant.

French & Casey, LLP, New York (Douglas R. Rosenzweig of counsel), for respondents.

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Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered August 3, 2015, which granted defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Defendants failed to satisfy their prima facie burden of showing that they did not have constructive notice of the puddle of urine upon which plaintiff allegedly fell (*see generally Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). Defendants' employees both testified that the building's janitorial schedule required that the stairs where plaintiff's fall occurred be cleaned before the time of the accident, and that they personally inspected the stairs several

times on the morning of the accident, finding no such puddle at any time. In contrast, however, plaintiff's testimony, which was submitted by defendants, was that at nearly the same time that defendants' employees claim to have found the stairs urine-free, she observed a puddle of urine in the same spot where she would later fall. Furthermore, plaintiff's daughter stated that she observed a puddle of urine in the same spot two hours before the accident, which was several hours after plaintiff claimed to have seen the puddle (*see Hill v Lambert Houses Redevelopment Co.*, 105 AD3d 642 [1st Dept 2013]; *compare Pfeuffer v New York City Hous. Auth.*, 93 AD3d 470 [1st Dept 2012]). Accordingly, summary judgment was not appropriate because there remain issues of fact as to the credibility of defendants' employees and whether the urine puddle was extant on the stairs for six hours prior to plaintiff's accident without remediation by defendants.

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

ENTERED: MAY 24, 2016

CLERK

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

1234 Tyrae White, etc., Index 350279/10
Plaintiff-Respondent,

-against-

New York City Housing Authority,
Defendant-Appellant.

_____

Herzfeld & Rubin, P.C., New York (Linda M. Brown of counsel), for appellant.

Segal & Lax, New York (Patrick Daniel Gatti of counsel), for respondent.

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Order, Supreme Court, Bronx County (Robert E. Torres, J.), entered August 12, 2015, which, upon renewal, denied defendant's (NYCHA) motion for summary judgment dismissing the complaint, unanimously modified, on the law, to grant the motion as to the common-law negligence claim, and otherwise affirmed, without costs.

Plaintiff seeks damages for injuries allegedly sustained by her disabled son in their NYCHA apartment as a result of coming into contact with an exposed heating pipe in his bedroom while he was suffering a seizure.

NYCHA failed to establish that Administrative Code of City of NY § 27-809, which requires certain heating pipes to be insulated, did not apply to the subject building, whose

construction pre-dates the enactment of that provision, and that no exception to the grandfathering provisions of the Code was applicable (Administrative Code §§ 27-111; *see Isaacs v West 34th Apts. Corp.*, 36 AD3d 414, 416 [1st Dept 2007], *lv denied* 8 NY3d 810 [2007]; *Sanchez v Biordi*, 259 AD2d 434 [1st Dept 1999], *lv denied* 94 NY2d 754 [1999]). The affidavits submitted by NYCHA attesting to the cost of capital improvements to the building did not conclusively show that alterations in excess of 30% of the value of the property were made to the building during any given 12-month period (Administrative Code §§ 27-115; 27-116; *see Powers v 31 E 31 LLC*, 24 NY3d 84, 92 [2014]; *see also Johnson v Wythe Place, LLC*, 134 AD3d 569, 570 [1st Dept 2015]).

NYCHA established prima facie that it was not negligent in its operation and maintenance of the heating pipes in plaintiff's son's bedroom via affidavits by its engineer, who determined, based on boiler room records, deposition testimony, and an inspection of the heating elements at the building and the apartment, that NYCHA's maintenance and operation of the heating pipes in the bedroom conformed to common and accepted practice, that the heating elements were functioning properly at the time of the accident, and that the steam pressure in the system was at an acceptable level at that time.

In opposition, plaintiff failed to controvert NYCHA's evidence as to the proper functioning of the heating system. The mere fact that the heating pipe, a heat source for the bedroom, was hot and lacked insulation, which would have interfered with its function, is not actionable (*see Rivera v Nelson Realty, LLC*, 7 NY3d 530, 537 [2006]; *Bruno v New York City Hous. Auth.*, 21 AD3d 760 [1st Dept 2005]; *Rodriguez v City of New York*, 20 AD3d 327, 328 [1st Dept 2005]; *Palacios v City of New York*, 80 AD3d 588 [2d Dept 2011]). Moreover, there is no indication that NYCHA assumed a duty to plaintiff through a course of conduct (*cf. Nina W. v NDI King Ltd. Partnership*, 112 AD3d 460 [1st Dept 2013] [building superintendent had removed the rusty, bent and sharp cover on a heating element and promised repeatedly to repair and reinstall it, but failed to do so]). Plaintiff's contradictory statements about making a complaint to a NYCHA employee are insufficient to raise an issue of fact.

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

ENTERED: MAY 24, 2016

CLERK

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

1235-
1235A Index 42032/14E

Christopher Birch,
Plaintiff-Appellant,

-against-

31 Northern Blvd., Inc.,
Defendant-Respondent,

Adokpe Komi,
Defendant.

_____

Law Offices of Peter P. Traub, New York (Peter P. Traub Jr. of counsel), for appellant.

Law Offices of Marjorie E. Bornes, Brooklyn (Marjorie E. Bornes of counsel), for respondent.

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Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered September 10, 2015, which granted defendant 31 Northern Blvd., Inc.'s motion for summary judgment dismissing the complaint on the threshold issue of serious injury within the meaning of Insurance Law § 5102(d), unanimously modified, on the law, to deny the motion as to the claims of "permanent consequential" and "significant" limitations in use of the cervical and lumbar spine, and otherwise affirmed, without costs. Order, same court and Justice, entered August 4, 2015, which denied plaintiff's motion for summary judgment on the issue of liability, unanimously reversed, on the law, and the motion

granted, without costs.

Defendant made a prima facie showing that plaintiff did not sustain a serious injury to his cervical or lumbar spine or other body parts by submitting expert reports by an orthopedist and neurologist, who found full range of motion in those parts and opined that the alleged injuries had resolved. In addition, defendant submitted an affirmed report by a radiologist, who found preexisting degenerative conditions in plaintiff's cervical and lumbar spine (*see Lee v Lippman*, 136 AD3d 411 [1st Dept 2016]; *Matos v Urena*, 128 AD3d 435 [1st Dept 2015]).

In opposition, plaintiff raised a triable issue of fact as to serious injury to his cervical and lumbar spine. His treating physician, who reviewed the MRI films, testified that they showed disc herniations and bulges at multiple levels in the cervical and lumbar spine, with no evidence of desiccation or other degenerative condition. The physician also reviewed results of electrodiagnostic testing showing radiculopathy and neuropathy, and detected spasms at several examinations. He opined that, given plaintiff's lack of symptoms before the accident and the history of the accident, the conditions were caused by the accident, thus presenting an opinion different from that of defendant's experts but equally plausible, which is sufficient to

raise an issue of fact as to causation (*see Venegas v Signh*, 103 AD3d 562, 563 [1st Dept 2013]). The physician, who was not aware that plaintiff was bringing a lawsuit, did not record quantified limitations in range of motion after his examinations of plaintiff, and plaintiff was not required to present such evidence to raise an issue of fact (*see Perl v Meher*, 18 NY3d 208, 217 [2011]). In any event, at the most recent examination, the physician designated a percentage of plaintiff's loss of range of motion in certain planes, which is sufficient to raise an issue of fact (*see id.*).

Plaintiff did not present sufficient evidence to raise an issue of fact as to his other claimed injuries, but, if he demonstrates serious injury to his cervical or lumbar spine at trial, he may recover for all injuries causally related to the accident (*Rubin v SMS Taxi Corp.*, 71 AD3d 548, 550 [1st Dept 2010]).

Plaintiff established that defendant's driver, who drove onto the Harlem River Drive in the wrong direction, was negligent and that, as a back-seat passenger, plaintiff is entitled to summary judgment on the issue of liability.

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

ENTERED: MAY 24, 2016

CLERK

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

1236 The People of the State of New York, Ind. 3077/14
Respondent,

-against-

Gene Baker,
Defendant-Appellant.

_____

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Bonnie Wittner, J.), rendered February 11, 2015,

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

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

ENTERED: MAY 24, 2016

CLERK

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

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

1237 Kevin Yon, Index 114252/09
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent,

The New York Public Library,
Defendant.

_____

Edelstein & Grossman, New York (Jonathan I. Edelstein of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Michael Pastor of counsel), for respondent.

_____

Order, Supreme Court, New York County (Margaret A. Chan, J.), entered August 26, 2014, which granted the cross motion of defendant City of New York for summary judgment dismissing the complaint as against it, and denied plaintiff's motion to preclude, unanimously affirmed, without costs.

Dismissal of the complaint was proper in this action where plaintiff alleges that he was injured when he tripped and fell at a branch of the New York Public Library. It is well settled that the City is not responsible for injuries resulting from allegedly negligent maintenance of a library building (*see Paz v City of New York*, 157 AD2d 562 [1st Dept 1990]). In light of the

dismissal of the complaint as against the City, plaintiff's discovery motion became moot.

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 24, 2016

CLERK

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

1238-
1239-
1240N Index 110046/11

Ithilien Realty Corp.,
Plaintiff-Respondent,

-against-

176 Ludlow, LLC,
Defendant-Appellant.

_____

Rex Whitethorn & Associates, P.C., Great Neck (Rex Whitethorn of counsel), for appellant.

Solomon & Bernstein, New York (Joel Bernstein of counsel), for respondent.

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Judgment, Supreme Court, New York County (Joan M. Kenney, J.), entered August 28, 2015, awarding plaintiff the total sum of $1,164,161.03, including statutory interest from July 25, 2011 through August 28, 2015 in the amount of $313,126.03, unanimously modified, on the law, to vacate the award of prejudgment interest and remand the matter to Supreme Court for entry of an amended judgment, and as so modified, affirmed, without costs. Appeal from orders, same court and Justice, entered January 8, 2015, which, inter alia, granted plaintiff's motion to strike defendant's answer for failure to comply with discovery demands and directed an assessment of damages against defendant, unanimously dismissed, without costs, as subsumed in the appeal

from the judgment.

The court properly granted the motion to strike defendant's answer inasmuch as the record demonstrates that defendant engaged in willful and contumacious conduct by its failure to comply with the discovery orders and directives of the court and special referee (*see* CPLR 3126; *see e.g. Suffolk P.E.T. Mgt., LLC v Anand*, 105 AD3d 462 [1st Dept 2013]).

There exists no basis to disturb the determinations made by the special referee, including its discovery determinations and its assessment of damages in the amount of the down payment under the parties' contract, and the court's orders confirming the special referee's findings and awarding summary judgment to plaintiff were proper.

However, the court improvidently exercised its discretion in awarding statutory prejudgment interest to plaintiff. The contract's terms, requiring that the down payment be placed in an interest-bearing account, so that the party entitled to the down payment would receive compensation for the deprivation of its use of the money in the form of accrued interest, were sufficiently clear to establish that interest paid at the statutory rate was

not contemplated by the parties at the time the contract was formed and that the amount escrowed, including interest earned, should be the exclusive remedy to the wronged party (*see J. D'Addario & Co. v Embassy Indus., Inc.*, 20 NY3d 113, 117 [2012]).

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

ENTERED: MAY 24, 2016

CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Kapnick, Gesmer, JJ.

965 In re Tiemann Place Realty, LLC, et al., Index 159958/14
Petitioners,

-against-

55 Tiemann Owners Corp., et al.,
Respondents.

- - - - -

In re 55 Tiemann Owners Corp.,
Counterclaim Petitioner-Appellant,

-against-

Tiemann Place Realty, LLC, et al.,
Counterclaim Respondents-Respondents,

Joseph Pistilli, et al.,
Additional Counterclaim Respondents.

_____

Gallet Dreyer & Berkey, LLP, New York (Pamela Gallagher of counsel), for appellant.

Pavia Harcourt LLP, New York (Brandon C. Sherman of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Donna M. Mills, J.), entered December 11, 2014, reversed, on the law, to the extent appealed from, with costs, and the counterclaim petition granted.

Opinion by Acosta, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rolando T. Acosta, J.P.
Dianne T. Renwick
Sallie Manzanet-Daniels
Barbara R. Kapnick
Ellen Gesmer, JJ.

965
Index 159958/14

_____x

In re Tiemann Place Realty, LLC, et al.,
Petitioners,

-against-

55 Tiemann Owners Corp., et al.,
Respondents.

- - - - -

In re 55 Tiemann Owners Corp.,
Counterclaim Petitioner-Appellant,

-against-

Tiemann Place Realty, LLC, et al.,
Counterclaim Respondents-Respondents,

Joseph Pistilli, et al.,
Additional Counterclaim Respondents.

_____x

Counterclaim petitioner appeals from the judgment of the Supreme Court, New York County (Donna M. Mills, J.), entered December 11, 2014, to the extent appealed from, denying the counterclaim petition to set aside the results of the June 17, 2014, election of its board of directors, and dismissing the proceeding brought pursuant to CPLR article 78.

Gallet Dreyer & Berkey, LLP, New York (Pamela Gallagher of counsel), for appellant.

Pavia Harcourt LLP, New York (Brandon C. Sherman, Ivan Serchuk, Adam D. Mitzner of counsel), for respondents.

ACOSTA, J.

We are called upon to decide the status of holders of unsold shares in the context of control of a coop's board of directors. Specifically, four days before the 55 Tiemann Owners Corp.'s (the Coop) scheduled June 17, 2014 annual meeting, the sponsor, Tiemann Place Realty, assigned an apartment, with its 600 allocated shares, to George Johnson. Pursuant to the Coop's proprietary lease and a stipulation signed by the sponsor in federal court, the 600 allocated shares retained the status of "unsold shares," because neither Johnson nor any member of his immediate family ever lived in the apartment. The stipulation also restricted the number of directors elected by holders of unsold shares to one less than the majority (that is, to no more than two of the five directors). In the June 2014 election, three out of the five directors were voted in by holders of unsold shares. We hold that Johnson, as an assignee of the sponsor, was a holder of unsold shares and was therefore bound by the stipulation even though he was not a signatory to the stipulation. Accordingly, the results of the June 17, 2014 election must be set aside.

Background

Counterclaim petitioner 55 Tiemann Owners Corp. is a New York cooperative corporation located at 55 Tiemann Place

in Manhattan. In 1992, the Coop was in financial trouble. As a result of nonpayment of the mortgage, the mortgagee, the Federal Home Loan Mortgage Corporation (FHLMC), commenced a foreclosure action in the U.S. District Court for the Southern District of New York.

In late 1996, additional counterclaim respondents Anthony and Joseph Pistilli formed Tiemann Place Realty LLC (TPR). On November 12, 1996, FHLMC assigned the Coop's mortgage to TPR, which thereby became the successor sponsor and real party in interest in the federal foreclosure action. On March 25, 1997, the parties to the federal foreclosure action entered into a stipulation of settlement. The stipulation provided, among other things, that TPR was to be deemed a holder of unsold shares (HUS) and that all shares transferred to it would be treated as unsold shares. For the duration of time that the mortgage remained outstanding, TPR would be entitled to elect two of the Coop board's five members, and, thereafter, "holders of unsold shares shall be entitled to elect one less than a majority of the members of the board of directors."

The stipulation provided that TPR had the right to sell or sublease the apartments that had been transferred to it "until any such apartment is sold to a purchaser who is not an investor and who intends that the apartment be occupied by himself or

family member as a residence." This provision echoed the Coop proprietary lease's provision that each block of unsold shares retains the status of unsold shares "irrespective of the number of transfers thereof but only until (1) it becomes the property of a purchaser for bona fide occupancy (by himself or a person related to him or her by blood or marriage) of the apartment to which such shares are allocated" or (2) the holder of such block of shares (or a person related to him or her by blood or marriage) becomes a bona fide occupant of the apartment to which they are allocated." The proprietary lease further provided, "The term 'holder of Unsold Shares' wherever used herein shall include a 'purchaser of Unsold Shares', such terms being used interchangeably in this lease."

The stipulation was incorporated into the offering plan by amendment dated March 7, 2013, as of which date TPR remained the holder of all unsold shares. The proprietary lease, in turn, incorporated all of the terms of the offering plan.

On June 13, 2014, TPR assigned apartment 22, with its 600 allocated shares, to petitioner George Johnson. By virtue of this transfer, TPR's ownership dropped from 16,372 to 15,772 of the Coop's 25,808 outstanding shares. The assignment was made "subject to the covenants, conditions and limitations" contained in the proprietary lease, and, in accepting the assignment,

Johnson agreed to "assume each and every obligation under the Lease." Neither Johnson nor any member of his immediate family ever lived in apartment 22.

At the annual shareholder meeting and election of directors on June 17, 2014, TPR's proxy, Gus Sifneos, cast ballots on behalf of TPR for its principals (Anthony Pistilli and Joseph Pistilli). Sifneos did not vote for anyone else. Johnson voted all 600 of his shares for himself. As a result, Anthony Pistilli, Joseph Pistilli, Johnson, Eric Maurer, and Leslie Wagner were elected to the Board; thus, HUSs controlled three of the five directors, in violation of the stipulation and the Coop proprietary lease.

On August 27, 2014, Wagner, the Coop's treasurer, served a notice on all of the Coop's shareholders stating that a special shareholders meeting would be held on September 10, 2014, for the purpose of electing new directors. The purpose of the new election was to "correct" the results of the June 2014 election, in which HUSs — including Johnson — had elected three of the five directors in alleged violation of the stipulation's provision that HUSs could elect only one director less than a majority, i.e., two directors. At the September 2014 meeting, Joseph Pistilli, Rosa Alvarado, Eric Maurer, Leslie Wagner, and Ian Watson were elected to the Coop board.

TPR and Johnson (hereinafter, respondents) commenced a proceeding in Supreme Court, New York County, pursuant to CPLR 7803(3) and 6301, against the Coop and newly elected directors Alvarado and Watson, seeking to enjoin the Coop from recognizing Alvarado and Watson as directors. Respondents contended that the September election violated the Coop bylaws and was void, because the notice provided only for the election of a new board, and said nothing about the removal of existing directors.

The Coop, Alvarado and Watson served an answer denying the petition's material allegations and asserting affirmative defenses. Included with the answer was a counterclaim petition on behalf of the Coop to set aside the June election, which contended that Johnson was an HUS, and, as such, was bound by the stipulation's provision that HUSs could elect only one less than a majority of the directors.

Supreme Court denied both petitions and dismissed the proceeding. As pertinent on this appeal, the court found:

> "[C]ounterclaim petitioner has not shown that either the conduct or the results of the June 17, 2014 election of directors violated that provision of the Stipulation which bars TPR and its assigns and successors from electing more than one less than the majority of the board of directors. Notably, [the Coop] argues that TPR and Johnson, together, violated the Stipulation. Johnson, however, is not a signatory to the Stipulation, and he is not bound by its terms. [The Coop's] argument, that Johnson is bound by the Stipulation, as the assignee of TPR's interest in the unsold shares allocated to his apartment, would make the

> Stipulation binding upon all subsequent purchasers of the unsold shares currently held by TPR and create two classes of shareholders, leaving aside TPR, to wit[,] those who purchased their shares prior to entry of the Settlement and those who, like Johnson, purchased their shares thereafter. Finally, to void the results of the June 17, 2014 election would call into question any contractual commitment made by the board between June 17, 2014 and September 10, 2014. [The Coop] gives no reason for doing so."

Analysis

The appeal from the denial of the counterclaim petition to set aside the results of the June 17, 2014, election was not rendered moot by the September 2014 election (*Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 812 [2003] ["Where . . . a judicial determination carries immediate, practical consequences for the parties, the controversy is not moot"], *cert denied*, 540 US 1017 [2003]; *see also Matter of Hearst Corp. v Clyne,* 50 NY2d 707, 713 [1980]). This Court is being called upon to interpret the language of the Coop's proprietary lease and stipulation, which was incorporated into the Coop's offering plan: this language will apply to every election of directors. There is no question that respondents could continue to violate the plain meaning of the stipulation by claiming that those who purchase shares directly from the sponsor and do not live in their apartments are not holders of unsold shares.

Turning to the merits, Johnson is a holder of unsold shares and is bound by the terms of the stipulation, which precludes

HUSs from electing a majority of the Coop's directors. The election restriction set forth in the stipulation is generally enforceable (*see e.g. Mundiya v Beattie*, 2 AD3d 317, 318 [1st Dept 2003] ["Supreme Court properly interpreted the condominium bylaws to restrict the sponsor to the election of no more than two directors 'by reason of' its vote of unsold shares"]). Moreover, Johnson's status as an HUS is determined by the "controlling documents," including the Coop's "bylaws and the proprietary lease," by applying "the usual rules of contract interpretation" (*Kralik v 239 E. 79th St. Owners Corp.*, 5 NY3d 54, 59 [2005] [internal quotation marks omitted]; *see e.g. Mittman v Netherland Gardens Corp.*, 55 AD3d 512, 513 [1st Dept 2008]).

The stipulation provided that TPR's unsold shares would remain such "until any such apartment is sold to a purchaser who is not an investor and who intends that the apartment be occupied by himself or family member as a residence." The proprietary lease similarly provided that each block of unsold shares retains that status "irrespective of the number of transfers thereof," unless "(1) it becomes the property of a purchaser for bona fide occupancy (by himself or a person related to him or her by blood or marriage) of the apartment to which such shares are allocated, or (2) the holder of such block of shares (or a person related to

him or her by blood or marriage) becomes a bona fide occupant of the apartment to which they are allocated." The proprietary lease added, "The term 'holder of Unsold Shares' wherever used herein shall include a 'purchaser of Unsold Shares', such terms being used interchangeably in this lease."

The stipulation containing the election restriction, was incorporated into the offering plan in March 2013, at which time TPR remained the holder of all unsold shares. The proprietary lease, in turn, incorporated all of the terms of the offering plan. In June 2014, days before the election, TPR assigned Apartment 22 to Johnson. The assignment was made "subject to the covenants, conditions and limitations" contained in the proprietary lease, and, in accepting the assignment, Johnson agreed to "assume each and every obligation under the Lease." It is undisputed that neither Johnson nor any member of his immediate family ever lived in apartment 22.

The foregoing documents, including Johnson's express agreement to take subject to the provisions of the proprietary lease, which incorporated the stipulation, make clear that he was an HUS and was bound by the stipulation's provisions, including the election restriction (*see Davies, Hardy, Ives & Lawther v Abbott*, 38 NY2d 216, 218-19 [1975]).

TPR should not be permitted to frustrate its obligations

under the offering plan or stipulation by transferring its shares to puppet entities to syphon votes away from resident shareholder candidates in order to control the board well beyond the period contemplated by the Attorney General (*420 W 206th St. Owners Corp. v Lorick*, 2014 NY Slip Op 30348[U] *9 [Sup Ct, NY County 2014] ["The AG regulations, among other things, prohibit sponsors and holders of unsold shares from indefinitely controlling a cooperative's board of directors"]). Indeed, there is no question that the sole purpose of TPR's assigning 600 shares to Johnson just four days before the June 17, 2014, board election was to avoid the provision that prohibited holders of unsold shares from electing more than two directors.

To the extent that *Matter of Madison v Striggles* (228 AD2d 170 [1st Dept 1996]), is inconsistent, we have chosen not to follow it (*see Mundiya v Beattie*, 2 AD3d at 318; *Matter of Visutton Assoc. v Anita Terrace Owners*, 254 AD2d 295, 296 [2d Dept 1998], *lv denied* 93 NY2d 803 [1999]; *Matter of Flagg Ct. Realty Co. v Flagg Ct. Owners Corp.*, 230 AD2d 740 [2d Dept 1996]).

Respondents claim that construing the stipulation as binding upon all of TPR's assignees who are HUSs would violate Business Corporation Law (BCL) § 501(c) by treating HUSs differently from other coop shareholders (*see* BCL § 501[c] ["each share shall be

equal to every other share of the same class"]). This argument is without merit. HUSs effectively constitute a separate class of shareholders, and coop plans that treat them differently from other shareholders "have been held not to impair the equality of voting rights of shares" (*Rego Park Gardens Assoc. v Rego Park Garden Owners*, 174 AD2d 337, 340 [1st Dept 1991], *lv denied*, 78 NY2d 859 [1991]).

Accordingly, the judgment of the Supreme Court, New York County (Donna M. Mills, J.), entered December 11, 2014, to the extent appealed from, denying the counterclaim petition to set aside the results of the June 17, 2014, election of the board of directors of counterclaim petitioner 55 Tiemann Owners Corp., and dismissing the proceeding brought pursuant to CPLR article 78, should be reversed, on the law, with costs, and the counterclaim petition granted.

All concur.

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

ENTERED: MAY 24, 2016

CLERK