SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 26, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

CORRECTED ORDER (Appeal No. 14568) - May 26, 2016

Mazzarelli, J.P., Saxe, Richter, Feinman, JJ.

14568 In re Gaetano Vaccaro, Index 104435/12
Petitioner-Respondent,

-against-

Board of Education of the City School District of the City of New York, et al.,
Respondents-Appellants.

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Zachary W. Carter, Corporation Counsel, New York (Tahirih M. Sadrieh of counsel), for appellants.

Richard E. Casagrande, New York (Michael J. Del Piano of counsel), for respondents.

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Order and judgment (one paper), Supreme Court, New York County (Manuel J. Mendez, J.), entered July 23, 2013, which, among other things, granted the petition to annul respondents' determination, dated September 6, 2012, to discontinue petitioner's probationary employment, declared that petitioner was a tenured teacher at the time of the discontinuance, and denied respondents' cross motion to dismiss the petition, unanimously reversed, on the law, without costs, the petition

denied, the cross motion granted, and the proceeding brought pursuant to CPLR article 78 dismissed.

Petitioner failed to comply with the New York City Department of Education's Chancellor's Regulation Nos. C-205(28) and (29), which govern the withdrawal of a resignation and the restoration to tenure. **Case law from this Court and the Court of Appeals decided after the motion court ruled makes it clear that, contrary to petitioner's argument, the procedures set forth in the regulations must be strictly complied with; accordingly, petitioner did not regain his tenured status after he was rehired by respondents (*see Matter of Springer v Board of Educ. of the City Sch. Dist. of the City of N.Y.*, 121 AD3d 473 [1st Dept 2014], *affd* __ NY3d __, 2016 NY Slip Op 02553; *Matter of Brennan v City of New York,* 123 AD3d 607 [1st Dept 2014]).**

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

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

ENTERED: MAY 26, 2016

CLERK

Sweeny, J.P., Renwick, Saxe, Gische, Kahn, JJ.

880 The People of the State of New York, Ind. 117/12
Respondent,

-against-

Dwight Littlejohn,
Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Rosemary Herbert 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 (Edward J. McLaughlin, J.), rendered November 13, 2012, as amended December 6, 2012, convicting defendant, upon his plea of guilty, of two counts of robbery in the second degree, and sentencing him, as a persistent violent felony offender, to concurrent terms of 16 years to life, unanimously affirmed.

Defendant made a valid waiver of his right to appeal (*People v Lopez*, 6 NY3d 248, 256-257 [2006]), which forecloses review of his suppression claims. The court's colloquy "was sufficient because the right to appeal was adequately described without lumping it into the panoply of rights normally forfeited upon a guilty plea" (*People v Sanders*, 25 NY3d 337, 341 [2015]). Moreover, defendant signed a written waiver.

Regardless of whether defendant made a valid waiver of his

right to appeal, we find that the court properly denied his suppression motion. The record supports the findings that defendant was lawfully stopped, that his statements to police were admissible and that a lineup was not unduly suggestive.

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

ENTERED: MAY 26, 2016

CLERK

Sweeny, J.P., Saxe, Moskowitz, Gische, Webber, JJ.

922 Douglas H. Wigdor, Index 161572/14
Plaintiff-Appellant-Respondent,

-against-

SoulCycle, LLC,
Defendant-Respondent-Appellant,

Julie Rice, et al.,
Defendants-Respondents.

_____

Vladeck, Raskin & Clark, P.C., New York (Valdi Licul of counsel), for appellant-respondent.

Jackson Lewis P.C., New York (William J. Anthony and Sarah K. Hook of counsel), for respondent-appellant and respondents.

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Order, Supreme Court, New York County (Donna M. Mills, J.), entered April 14, 2015, which, to the extent appealed from, granted defendants' motion to dismiss plaintiff's claims for retaliation under Labor Law § 215 and the California Labor Code and for prima facie tort, and denied the motion as to plaintiff's claim for breach of the obligation of good faith and fair dealing as against defendant SoulCycle, LLC, unanimously modified, on the law, to grant dismissal of the claim for breach of the obligation of good faith and fair dealing as against defendant SoulCycle, LLC, and otherwise affirmed, without costs. The Clerk is directed to enter judgment dismissing the complaint.

Labor Law § 215(1)(a), which prohibits an "employer" from retaliating against an "employee" for engaging in protected activities, was clearly intended to provide employees with a cause of action against their current and former employers (*see* McKinney's Statutes § 76*; Adler v 20/20 Cos.*, 82 AD3d 914, 915 [2d Dept 2011]; *Bojaj v Moro Food Corp.*, 2014 WL 6055771, *4, 2014 US Dist LEXIS 159974, *10 [SD NY 2014]). Accordingly, plaintiff, an attorney who filed an action against SoulCycle, LLC and other entities, on behalf of a client, alleging, inter alia, wage violations of New York and California labor laws, lacks standing to bring a Labor Law § 215 against defendants, who never employed him. Plaintiff's retaliation claim under the California Labor Code (CLC) fails for the same reason (*see* CLC §§ 98.6 and 1102.5).

Plaintiff's cause of action for prima facie tort was properly dismissed, as he failed to plead that "disinterested malevolence" was defendants' sole motive in banning him from SoulCycle facilities (*see Burns Jackson Miller Summit & Spitzer v Linder*, 59 NY2d 314, 332-333 [1983]; *Curiano v Suozzi*, 63 NY2d 113, 117 [1984]). Plaintiff's allegations that defendants also implemented the ban to discourage other attorneys from representing clients with claims against SoulCycle and deter

SoulCycle's employees and former employees from objecting to unlawful activity, are fatal to this cause of action (*see Princes Point, LLC v AKRF Eng'g, P.C.*, 94 AD3d 588, 589 [1st Dept 2012]; *Bainton v Baran*, 287 AD2d 317, 318 [1st Dept 2001]). This claim also fails because plaintiff has not pleaded "special damages" (*see Burns Jackson*, 59 NY2d at 332; *Freihofer v Hearst Corp.*, 65 NY2d 135, 142-143 [1985]; *Broadway & 67th St. Corp. v City of New York*, 100 AD2d 478, 486 [1st Dept 1984]). While defects in pleadings can be remedied via an affidavit of one with personal knowledge (*see Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 [1976]; *Ashwood Capital, Inc. v OTG Mgt., Inc.*, 99 AD3d 1, 10 [1st Dept 2012]), plaintiff did not submit an affidavit in opposition to the motion. In any event, plaintiff's proposed amendment to the complaint, which would include claims for a $4 refund and $60 for SoulCycle clothing that he purchased, would not cure the claim's deficiencies. SoulCycle established, via admissible evidence, that plaintiff received a full refund for the unused classes from his SoulCycle class package, and plaintiff has not identified any bar to his wearing of SoulCycle clothing outside of SoulCycle's premises.

Finally, we find that plaintiff's claim for breach of the obligation of good faith and fair dealing should have been

dismissed as against SoulCycle. Even if there is a contractual relationship, plaintiff has failed to plead facts and circumstances constituting a breach.

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

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

ENTERED: MAY 26, 2016

CLERK

Sweeny, J.P., Acosta, Manzanet-Daniels, Gische, Gesmer, JJ.

1065-
1065A The People of the State of New York, Respondent,

Ind. 770/08

-against-

Sean Baker,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Katherine H. Marshall of counsel), and Davis Polk & Wardwell LLP, New York (Jacob Gardener of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Emily Anne Aldridge of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Michael A. Gross, J.), rendered May 12, 2010, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 20 years to life, and order, same court and Justice, entered on or about September 3, 2014, which denied his CPL 440.10 motion to vacate the judgment, unanimously affirmed.

The court did not violate defendant's right to be present at a material stage of trial when it excluded him, but not his attorney, from a hearing regarding protective orders delaying certain discovery. Defendant has not shown that his presence would have been useful, and his various arguments about his ability to contribute are unpersuasive. In any event, any potential for input from defendant was outweighed by valid

concerns for the witnesses' safety, underlying the need for defendant's exclusion (*see People v Frost*, 100 NY2d 129, 135 [2003]).

Defendant abandoned his pro se motion for assignment of new counsel, not, as defendant puts it, by failing to make a "second" motion, but by failing to call the court's attention to the fact that the existing motion remained unresolved (*see People v Santos*, 14 AD3d 316 [1st Dept 2005], *lv denied* 4 NY3d 856 [2005]). There is no indication in the record that the court was even aware that this document existed. In any event, this typical standard form motion did not contain the specific factual allegations of serious complaints about counsel necessary to trigger the court's obligation to make a minimal inquiry (*see People v Porto*, 16 NY3d 93, 100-101 [2010]).

In all respects, defendant received effective assistance of counsel under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). With regard to defendant's claim of ineffective assistance in the plea bargaining process, the court properly exercised its discretion in denying defendant's CPL 440.10 motion without holding a hearing (*see People v Samandarov*, 13 NY3d 433, 439-440 [2009]; *People v Satterfield*, 66 NY2d 796, 799-800 [1985]). Defendant's affidavit was inconsistent with the

trial record, self-contradictory, uncorroborated by any other evidence, and otherwise without merit. With regard to defendant's claim of ineffective assistance in connection with sentencing, defendant, who received a less than maximum sentence despite the heinous facts of the crime, has not shown that the additional steps he faults his counsel for omitting could have led to even greater leniency.

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

ENTERED: MAY 26, 2016

CLERK

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

1242 The People of the State of New York, Ind. 2775/13
Respondent,

-against-

Jovan Ortiz,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Lawrence T. Hausman of counsel), and Kirkland & Ellis LLP, New York (Gregory R. Springsted of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Robert M. Stolz, J.), rendered February 13, 2014, convicting defendant, after a jury trial, of grand larceny in the fourth degree and criminal possession of stolen property in the fourth degree, and sentencing him, as a second felony offender, to concurrent terms of two to four years, unanimously affirmed.

The People established the value of the stolen merchandise at issue by introducing a document that was correctly admitted as a properly authenticated business record, and was, in any event, merely a printout displaying electronically stored price information (*see People v Nashal*, 130 AD3d 480 [1st Dept 2015], *lv denied* 26 NY3d 1010 [2015]; *People v King*, 102 AD3d 434, 434-

435 [1st Dept 2013], *lv denied*, 20 NY3d 110 [2013]). The evidence was materially indistinguishable from the evidence presented in *Nashal*, and defendant's arguments to the contrary are unavailing. A security employee was competent to testify, based on his experience, that a "training receipt" simply shows the correct, current prices of any items scanned into the register, without recording an actual sale.

The court properly declined to submit lesser included offenses not requiring value in excess of $1,000, because there was no reasonable view of the evidence, viewed most favorably to defendant, that the total value of the merchandise he stole did not meet that threshold. The security employee provided integrated testimony (*see People v Negron*, 91 NY2d 788 [1998]) establishing the identity of the stolen items he recovered from defendant, and there was no reasonable view to the contrary. Likewise, there was no reasonable view that the information on the training receipt failed to reflect the actual value of these items (*see Nashal*, 130 AD3d at 482; *King*, 102 AD3d at 435-436).

We similarly find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342 [2007]).

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

ENTERED: MAY 26, 2016

CLERK

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

1244 In re Noah Martin Benjamin L.,
and Another,

Dependent Children Under Eighteen
Years of Age, etc.,

Frajon B.,
Respondent-Appellant,

Catholic Guardian Society,
Petitioner-Respondent.

_____

Law Office of Thomas R. Villecco, P.C., Jericho (Thomas R. Villecco of counsel), for appellant.

Joseph T. Gatti, New York, for respondent.

Andrew J. Baer, New York, Attorney for the children.

_____

Order, Family Court, Bronx County (Karen I. Lupuloff, J.), entered on or about June 8, 2015, which denied respondent mother's motion to vacate the default judgment entered against her terminating her parental rights to the subject children upon findings of permanent neglect, unanimously affirmed, without costs.

The court properly exercised its discretion in denying respondent's motion to vacate her default.

Even if this Court were to determine that respondent set forth a reasonable excuse for her default in appearance, we find

that the Family Court properly denied the motion to vacate, because respondent failed to set forth a meritorious defense to the petition by submitting detailed information or documentation to substantiate her claim that she completed the services required to have the children returned to her care (*see Matter of Christopher James A. [Anne Elizabeth Pierre L.]*, 90 AD3d 515 [1st Dept 2011], *lv dismissed* 18 NY3d 918 [2012]).

A preponderance of the evidence supported the determination that termination of appellant's parental rights was in the children's best interests, because the record showed that they are thriving in the foster parents' care, the foster parents want to adopt them, and respondent failed to engage in services even though the children had been in foster care since their respective births (*see Matter of Shane Chayann Orion S. [Dexter F.]*, 79 AD3d 430, 431 [1st Dept 2010]).

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

ENTERED: MAY 26, 2016

CLERK

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

1245 Manda International Corp., doing business as Centrifugal Associates, NYC,
Plaintiff,

-against-

Stephen J. Yager, et al.,
Defendants.

- - - - -

Stephen J. Yager,
Third-Party Plaintiff-Respondent,

-against-

Catherine Guida,
Third Party Defendant-Appellant,

Angelo Corrao, et al.,
Third-Party Defendants.

Index 653012/13
595279/14

_____

Law Offices of David P. Fallon, PLLC, Sayville (David P. Fallon of counsel), for appellant.

Connell Foley, LLP, New York (John P. Lacey of counsel), for respondent.

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered on or about October 15, 2015, which, to the extent appealed from, denied third-party defendant Catherine Guida's motion to dismiss a fraud claim asserted against her, unanimously reversed, on the law, without costs, the motion granted, and the third-party complaint as asserted against Guida dismissed in its

entirety. The Clerk is directed to enter judgment accordingly.

The allegations that Guida plotted with third-party defendants Angelo Corrao and Frank Basile to defraud defendant/third-party plaintiff Stephen Yager, and that she altered the books and records, and diverted funds, of plaintiff-contractor Manda International Corp., are asserted upon information and belief. The only source of this alleged information is found in paragraph 77 of the third-party complaint, which provides that "another former Manda employee" told Yager that he overheard Corrao, Guida and Basile discussing ways to defraud him. However, the allegations do not include the name of the employee, or details of when or where the overheard conversation took place, or when the unnamed former employee conveyed this information to Yager. Thus, the allegations of fraud against Guida are lacking in sufficient detail and do not meet the heightened pleading standard under CPLR 3016(b) (*DDJ Mgt., LLC v Rhone Group L.L.C.*, 78 AD3d 442, 443 [1st Dept 2010]; *accord Nicosia v Board of Mgrs. of the Weber House Condominium*, 77 AD3d 455, 456 [1st Dept 2010]). Moreover, the foregoing is in accordance with the court's dismissal of the fraud claim against Corrao, which it found to be based on general allegations lacking in detail.

Yager has failed to allege a misrepresentation or a material omission of fact which was false and known to be false by Guida (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]). First, Yager alleges, and Guida admits, that her statement that the projects procured by Yager were profitable was in fact true. Second, to the extent Yager cites Guida's failure to provide him with financial records, we note that the third-party complaint contains no allegations suggesting that Guida owed Yager a special duty to disclose the financial information sought.

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

ENTERED: MAY 26, 2016

CLERK

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

1249 The People of the State of New York, Ind. 289/12
Respondent,

-against-

Agustine Garcia,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (William Terrell, III of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Raymond L. Bruce, J.), entered on or about April 29, 2015, which adjudicated defendant a level two sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Defendant was properly assessed 20 points under the risk factor for continuing course of sexual misconduct based on the case summary, which states that defendant engaged in sexual misconduct "on separate occasions" on or about and between August 3, 2010 and September 17, 2010 (*People v Mingo*, 12 NY3d 563, 568, n 2, 573 [2009]; *People v Wagner*, 75 AD3d 674, 675 [3d Dept], *lv denied* 15 NY3d 712 [2010]). Accordingly, defendant was properly

adjudicated a level two sex offender based on clear and convincing evidence.

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

ENTERED: MAY 26, 2016

CLERK

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

1251 In re Ibrahim Donmez, Index 401769/13
Petitioner-Appellant,

-against-

New York City Department of Consumer Affairs, et al.,
Respondents-Respondents.

_____

Ibrahim Donmez, appellant pro se.

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

_____

Appeal from order, Supreme Court, New York County (Cynthia S. Kern, J.), entered March 12, 2014, which denied the petition brought pursuant to CPLR article 78 challenging the determination of respondent Department of Consumer Affairs (DCA), dated September 19, 2013, to suspend petitioner's pedicab driver license for failure to pay fines, if he did not pay the fines by September 29, 2013, without a further hearing, unanimously dismissed, without costs, as moot.

As petitioner has since paid his fines and his pedicab driver license has been restored, and he will suffer no consequences as a result of the dismissal of this appeal, the appeal is moot. Nor is there is a justiciable controversy pending in connection with which this Court may issue declaratory

relief (*see American Ins. Assn. v Chu*, 64 NY2d 379 [1985], *cert denied* 474 US 803 [1985]).

In any event, the article 78 court correctly found that DCA's determination was not arbitrary and capricious or made in violation of any lawful procedure (*see Matter of McClave v Port Auth. of N.Y. & N.J.*, 134 AD3d 435 [1st Dept 2015]), and was not unconstitutional. DCA is "authorized to suspend the license of any person pending payment of [a] fine or civil penalty [imposed by the commissioner]" (*see* Administrative Code § 20-104[e][3]), and the administrative record makes clear that there was a rational basis for the suspension of petitioner's license. Petitioner was given ample notice that the stay of enforcement he obtained terminated upon the denial of his appeal and that payment was then required to avoid the suspension of his license. Further, petitioner received procedural due process in connection with the fines and suspension.

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

ENTERED: MAY 26, 2016

CLERK

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

1252 In re Ibrahim Donmez, Index 401875/13
Petitioner, 401873/13

-against-

New York City Department of Consumer Affairs, et al.,
Respondents.

_____

Ibrahim Donmez, petitioner pro se.

Zachary W. Carter, Corporation Counsel, New York (Damion K. L. Stodola of counsel), for respondents.

_____

Determination of respondent Department of Consumer Affairs, dated June 28, 2013, which upheld the decision of the administration law judge finding, after a hearing, that petitioner committed two violations of the Administrative Code of the City of New York and imposing a fine of $500 per violation, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Peter H. Moulton, J.], entered February 14, 2014), dismissed, without costs.

The determination that petitioner violated two pedicab regulations is supported by substantial evidence and was made in accordance with the law (*see e.g. Matter of Carniol v New York City Taxi & Limousine Commn.*, 126 AD3d 409, 411 [1st Dept 2015]).

The fines imposed for the violations do not shock our sense of fairness (*see Matter of San Miguel Auto Repair Corp. v State of N.Y. Dept. of Motor Vehs.*, 111 AD3d 422 [1st Dept 2013]). We have considered petitioner's remaining arguments and find them unavailing.

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

ENTERED: MAY 26, 2016

CLERK

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

1253 In re Aly T.,
Petitioner-Appellant,

-against-

Francisco B.,
Respondent-Respondent.

_____

Richard L. Herzfeld, P.C., New York (Richard L. Herzfeld of counsel), for appellant.

Bruce K. Bentley, New York, for respondent.

_____

Order, Family Court, Bronx County (Lauren N. Lerner, Referee), entered on or about July 28, 2015, which, after a fact-finding hearing, dismissed the petition for an order of protection against respondent, unanimously affirmed, without costs.

Petitioner failed to establish by a preponderance of the evidence that respondent, the father of two of her children, committed any of the family offenses alleged in the petition, including harassment in the second degree, so as to justify the issuance of an order of protection (*see Matter of Mildred R. v Elizabeth R.*, 131 AD3d 892 [1st Dept 2015], *lv denied* 26 NY3d 913 [2015]). Although petitioner's testimony and evidence as to the photograph posted on respondent's Facebook page meets the

definition in common parlance of harassment, it does not sufficiently demonstrate that respondent committed acts that would constitute harassment in the second degree (*see* Penal Law § 240.26[3]; *see also* Family Ct Act § 812[1]).

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

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

ENTERED: MAY 26, 2016

CLERK

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

1254 The People of the State of New York, Ind. 2168/12
Respondent,

-against-

Jerome Charleau,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (John T. Hughes of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Richard Carruthers, J.), rendered June 23, 2014,

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

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

ENTERED: MAY 26, 2016

CLERK

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

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

1258 Abby Waxman, Index 109389/10
Plaintiff-Appellant,

-against-

The Hallen Construction Co., Inc.,
Defendant-Respondent,

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

_____

Kramer & Dunleavy, LLP, New York (Jonathan R. Ratchik of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Michael D. Stallman, J.), entered July 9, 2015, which, to the extent appealed from as limited by the briefs, granted defendant the Hallen Construction Co., Inc's (Hallen) motion for summary judgment dismissing the complaint as against it, unanimously reversed, on the law, without costs, and the motion denied.

The motion for summary judgment should have been denied as untimely, as it was submitted more than 50 days after the expiration of the deadline imposed by a preliminary conference order, and there was no showing of good cause for the late filing (*see* CPLR 3212[a]; *Quinones v Joan & Sanford I. Weill Med. Coll.*

& Graduate Sch. of Med. Sciences of Cornell Univ., 114 AD3d 472, 473 [1st Dept 2014]). The reassignment of the action to a different Justice's part after entry of the preliminary conference order is not good cause for the late filing, since there was no subsequent order or directive explicitly providing for a different time limit, or stating that the time limits of the new part's rules would supersede the preliminary conference order (*Freire-Crespo v 345 Park Ave. L.P.*, 122 AD3d 501, 502 [1st Dept 2014]).

Even if the motion were timely, Hallen was not entitled to summary judgment on the merits, because plaintiff's evidence raised triable issues of fact as to whether Hallen's negligence was a proximate cause of plaintiff's accident (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1990]).

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

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

ENTERED: MAY 26, 2016

CLERK

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

1259 The People of the State of New York, Ind. 3192/02
Respondent,

-against-

Robert Cumberland,
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 (Alan Gadlin of counsel), for respondent.

_____

Judgment of resentence, Supreme Court, New York County (Michael J. Obus, J.), rendered July 19, 2012, imposing an aggregate term of five years' postrelease supervision as to certain convictions, unanimously affirmed.

The resentencing proceeding imposing terms of postrelease supervision was neither barred by double jeopardy nor otherwise

unlawful (*see People v Lingle*, 16 NY3d 621 [2011]; *see also People v Brinson*, 21 NY3d 490 [2013]).

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

ENTERED: MAY 26, 2016

CLERK

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

1263 In re Loevy & Loevy, Index 100812/12
Petitioner-Respondent,

-against-

New York City Police Department,
Respondent-Appellant.

_____

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

Vladeck, Raskin & Clark, P.C., New York (Rachel Steinback of counsel), for respondent.

_____

Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered January 23, 2015, which granted the petition seeking to compel respondent New York City Police Department (NYPD) to disclose all documents pertaining to an unsolved homicide discovered on November 20, 1987, pursuant to the Freedom of Information Law (FOIL [Public Officers Law § 84 *et seq.*]), to the extent of, among other things, directing NYPD to disclose all documents to a special referee for an in camera review to determine whether any documents or photographs reveal certain information that is exempt under Public Officers Law § 87(2)(a), (b) and (e)(iii), unanimously reversed, on the law, without costs, the petition denied, and the proceeding brought pursuant to CPLR article 78 dismissed. The Clerk is directed to enter

judgment accordingly.

Although no appeal lies as of right from this nonfinal order in an article 78 proceeding (CPLR 5701[b][1]; *Matter of City of Newark v Law Dept. of City of N.Y.*, 8 AD3d 152, 153 [1st Dept 2004]), we grant leave to appeal nostra sponte because the appeal raises important, substantive issues (*see Matter of Exxon Corp. v Board of Stds. & Appeals of City of N.Y.*, 128 AD2d 289, 293 n 3 [1st Dept 1987], *lv denied* 70 NY2d 614 [1988]; *see also* CPLR 5701[c]).

NYPD properly withheld the requested materials pursuant to the exemption to FOIL for documents that "are compiled for law enforcement purposes and which, if disclosed, would . . . interfere with law enforcement investigations" (Public Officers Law § 87[2][e][i]). NYPD met its burden of "identify[ing] the generic kinds of documents for which the exemption is claimed, and the generic risks posed by disclosure of these categories of documents" (*Matter of Lesher v Hynes*, 19 NY3d 57, 67 [2012]). In particular, NYPD submitted an affidavit by a detective averring that he was handling an active, ongoing investigation into the homicide, and had recently pursued potential leads. The detective's affidavit established that disclosure of the records could interfere with the active investigation by, among other

things, leading to witness tampering or enabling the perpetrator to evade detection. Given the foregoing determination, we need not reach the other exemptions cited by NYPD.

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

ENTERED: MAY 26, 2016

CLERK

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

1264N-
1265N Index 381099/12

SRMOF II 2012-I Trust, etc.,
Plaintiff-Respondent-Appellant,

-against-

Mercy I. Tella, etc.,
Defendant-Appellant-Respondent,

City of New York Environmental
Control Board, et al.,
Defendants.

_____

Biolsi Law Group P.C., New York (Steven A. Biolsi of counsel), for appellant-respondent.

The Law Offices of Charles Wallshein, Melville (Charles W. Marino of counsel), and Stiene & Associates, P.C., Huntington (Charles W. Marino of counsel), for respondent-appellant.

_____

Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered September 9, 2014, which, inter alia, granted plaintiff's motion for a default judgment, and order, same court and Justice, entered September 22, 2015, which denied plaintiff's motion to remove defendant Mercy Tella as a necessary party to this action, and proceed without her, unanimously affirmed, without costs.

Plaintiff's excuse for its delay in moving for a default judgment indicates that there was activity well within the one-year period specified in CPLR 3215(c) (*see Pappoe v Custodio*, 156 AD2d 211 [1st Dept 1989]). Defendant Tella offers no excuse

for her default in answering the complaint, and her attempt to challenge the sufficiency of the documents underlying plaintiff's motion for a default judgment is unpreserved and in any event unavailing. Plaintiff's proof of service, the summons and complaint, and Tella's default in answering when served with process, in conjunction with "[the] affidavit of merit by the current loan servicer/assignee of the note and mortgage, who averred facts which constitute cognizable claims for foreclosure and sale against the obligor/mortgagor defendant[]," are sufficient to support plaintiff's motion (*BAC Home Loan Servicing, LP v Betram*, ___ Misc 3d ___, 2016 NY Slip Op 26053, *6 [Sup Ct, Suffolk County Jan. 7, 2016]; *see also HSBC Bank USA, N.A. v Spitzer*, 131 AD3d 1206 [2d Dept 2015]).

Plaintiff failed to demonstrate that it waived its right to assert a deficiency judgment against Tella, and, thus, failed to establish that Tella is not a necessary or indispensable party

who can be severed from these proceedings (*see Federal Natl. Mtge. Assn. v Connelly*, 84 AD2d 805, 805 [2d Dept 1981]).

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

ENTERED: MAY 26, 2016

CLERK

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

1266N In re Application of Mary Lou Manus, etc., Index 3626C/95

Mary Lou Manus,
Petitioner-Appellant,

-against-

Mark J. Manus,
Respondent-Respondent.

_____

Seth Rubenstein, P.C., Brooklyn (Seth Rubenstein of counsel), for appellant.

Greenfield Stein & Senior, LLP, New York (Harvey E. Corn of counsel), for respondent.

_____

Order, Surrogate's Court, New York County (Rita Mella, S.), entered on or about October 26, 2015, which, to the extent appealed from as limited by the briefs, denied petitioner's cross motion to hold respondent in contempt, unanimously affirmed, without costs.

Considering all of the facts and circumstances of this case, the court providently exercised its discretion by refusing to hold respondent in contempt (*see Matter of Storm*, 28 AD2d 290, 292-293 [1st Dept 1967]). "To sustain a civil contempt, a lawful judicial order expressing an unequivocal mandate must have been in effect and disobeyed" (*McCain v Dinkins*, 84 NY2d 216, 226

[1994]). While the October 2011 decree ordered respondent to account, it contained no deadline by which he had to comply. Thus, petitioner's remedy was to seek to clarify rather than to move for contempt (*see Matter of Storman v New York City Dept. of Educ.*, 95 AD3d 776, 777 [1st Dept 2012], *appeal dismissed* 19 NY3d 1023 [2012]). Moreover, petitioner waited three years to try to hold respondent in contempt, and we have found a shorter delay to be excessive (*see Levin v Halvin Co.*, 63 AD2d 924, 925 [1st Dept 1978]).

It is true that the May 2015 order contained a deadline for respondent to account and that he did not request an extension until four days after the deadline. However, this violation is de minimis (*see Levin*, 63 AD2d at 924). Furthermore, respondent proffered an excuse – albeit one that petitioner disputes – for failing to meet the deadline.

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

ENTERED: MAY 26, 2016

CLERK

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

1267 In re Calvin Brooks, Ind. 1184/14
[M-1380] Petitioner,

-against-

Hon. Charles Solomon, etc., et al.,
Respondents.

_____

Calvin Brooks, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Michael J. Siudzinski of counsel), for Hon. Charles H. Solomon, respondent.

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

_____

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

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

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

ENTERED: MAY 26, 2016

CLERK

Friedman, J.P., Acosta, Saxe, Gische, Webber, JJ.

1268 The People of the State of New York, SCID 30195/14
Respondent,

-against-

Luis Cruz,
Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Robert Mandelbaum, J.), entered or about January 5, 2015, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court correctly assessed 15 points under the risk factor for history of drug or alcohol abuse. Defendant's three drug convictions were not unduly remote in time. Defendant's alleged prolonged abstinence from drugs is an unreliable predictor of his risk of reoffense, or his potential threat to public safety, because defendant was incarcerated for most of the intervening time (*see People v Watson*, 112 AD3d 501, 502-503 [1st Dept 2013], *lv denied* 22 NY3d 863 [2014]). Moreover, defendant's most recent

drug conviction was for possession of drugs in prison while incarcerated in California for the underlying sex offense.

The court also correctly assessed 15 points under the risk factor for lack of supervised release, based upon the unsatisfactory termination of defendant's supervision in California following his release on the underlying sex crime conviction, and the court's assessment of points for both unsatisfactory conduct while supervised and release without supervision did not constitute double counting (*see People v Corn*, 128 AD3d 436, 436-437 [1st Dept 2015]).

The court properly exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). Defendant did not demonstrate any mitigating factors not already taken into account in the risk assessment instrument that would warrant a downward departure, given the egregiousness of the underlying offense.

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

ENTERED: MAY 26, 2016

CLERK

Friedman, J.P., Acosta, Saxe, Gische, Webber, JJ.

1270 In re Adoption of Nevaeh R.,

Veronica B.,
Petitioner-Respondent,

-against-

Rueben M.,
Respondent-Appellant.

_____

Thomas J. Caruso, Bronx, for appellant.

David Bliven, White Plains, for respondent.

_____

Order, Family Court, Bronx County (Ruben A. Martino, J.), entered on or about February 12, 2015, which, after a hearing, denied the motion of respondent, the putative father of the subject child, and declared that he is not entitled to notice and that his consent is not required for the adoption of the child, unanimously affirmed, without costs.

Family Court correctly determined that Domestic Relations Law § 111(1)(e) is applicable, because the subject child was under the age of six months at the time she was placed for adoption (§ 111[1][e]). Respondent did not even attempt to meet the statutory criteria of the subdivision, and could not, because, among other reasons, it is undisputed that he did not "openly live[] with the child or the child's mother for a

continuous period of six months immediately preceding the placement of the child for adoption" (§ 111[1][e][i]).

Respondent failed to establish a constitutionally protected right to fully develop a relationship with the child, because he did not "manifest[] his willingness to be a custodial parent" (*Matter of Robert O. v Russell K.*, 80 NY2d 254, 265 [1992]). He did not file his paternity petition until after the child was one year old and had been living with petitioner, the adoptive mother, for nearly eight months. Moreover, he has not seen the child since 2013. Family Court properly determined that respondent made no meaningful effort to parent, support, or see the child until after he learned that she was to be adopted without his consent.

Family Court correctly determined that respondent failed to show that he is entitled to notice pursuant to Domestic Relations Law § 111-a(2).

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

ENTERED: MAY 26, 2016

CLERK

Friedman, J.P., Acosta, Saxe, Gische, Webber, JJ.

1271 Humberto Gonzalez, Index 161056/13E
Plaintiff-Respondent,

-against-

Mazile S. Marescot,
Defendant-Appellant.

_____

Law Office of Marjorie E. Bornes, Brooklyn (Marjorie E. Bornes of counsel), for appellant.

David S. Kritzer & Associates, P.C., Smithtown (David S. Kritzer of counsel), for respondent.

_____

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered June 3, 2015, which granted plaintiff's motion for partial summary judgment on the issue of liability, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff testified that he stopped his vehicle in the right lane of the highway at night after one of its tires went flat, then activated his hazard lights, exited the vehicle, and stood behind the vehicle while signaling other drivers to go around him. Approximately 10 minutes later, defendant's vehicle rear-ended plaintiff's vehicle, allegedly causing injury. At his deposition, defendant testified, inter alia, that he did not see plaintiff's vehicle in time to avoid a collision because he was driving in the right lane behind another car, which blocked his

vision of plaintiff's stopped vehicle, and when the other car suddenly merged into the left lane, defendant saw plaintiff's vehicle for the first time, and collided with it. Defendant claimed that plaintiff's hazard lights were not activated, and that his ability to avoid a collision was hampered because plaintiff's black vehicle could not be seen at night on the dark area of roadway.

Although there is a presumption of liability based upon the rear-end collision (*see Francisco v Schoepfer*, 30 AD3d 275 [1st Dept 2006]), questions of fact exist as to whether the emergency doctrine applies so as to provide defendant with a reasonable excuse for the collision. Such issues include whether plaintiff's hazard lights were flashing, whether defendant maintained a safe distance behind the car driving in front of him, and whether under the circumstances defendant acted

reasonably to avoid the collision (*see Markowitz v Lewis*, 40 AD3d 371 [1st Dept 2007]; *see also Pillasagua v Losco*, 135 AD3d 843 [2d Dept 2016]).

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

ENTERED: MAY 26, 2016

CLERK

Friedman, J.P., Acosta, Saxe, Gische, Webber, JJ.

1273 Axis Surplus Ins. Co., Index 102277/10
Plaintiff-Appellant-Respondent,

-against-

GTJ Co., Inc., et al.,
Defendants,

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

_____

Hurwitz & Fine, P.C., Buffalo (Dan D. Kohane of counsel), for appellant-respondent.

Zachary W. Carter, Corporation Counsel, New York (Aaron M. Bloom of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Frank P. Nervo, J.), entered June 5, 2014, which, inter alia, denied plaintiff's motion for summary judgment declaring that it had no obligation to further defend or indemnify defendant City of New York in the underlying negligence action, and denied the City's cross motion for summary judgment declaring that plaintiff is obligated to continue its defense of the City and to indemnify it in the underlying action, unanimously modified, on the law, to grant the City's cross motion to the extent of declaring that plaintiff has a duty to defend the City in the underlying action and, otherwise affirmed. The Clerk is directed to enter judgment accordingly.

In this action, plaintiff seeks a declaration that it has no obligation to defend the City in the underlying personal injury action brought by defendant Bronislava Bari. Plaintiff seeks to be relieved of its duty to defend and indemnify the City, arguing that the location where Bari fell was not in an area that plaintiff's insured, defendant GTJ Co., Inc d/b/a Shelter Express was responsible for maintaining. The City seeks, at the very least, to maintain the status quo, and to have plaintiff continue defending it.

Under the circumstances presented, the City's cross motion is granted to the extent of declaring that plaintiff is obligated to defend it in the underlying litigation. The duty of an insurer to provide a defense for its insured is "exceedingly broad," arising "whenever the allegations of the complaint suggest. . . a reasonable possibility of coverage" (*Regal Constr. Corp. v National Union Fire Ins. Co. of Pittsburgh, PA,* 15 NY3d 34, 37 [2010] [internal quotation marks omitted]). Accordingly, "a liability insurer has a duty to defend its insured in a pending lawsuit if the pleadings allege a covered occurrence," even if "facts outside the four corners of those pleadings indicate that the claim may be meritless or not covered" (*Fitzpatrick v American Honda Motor Co.*, 78 NY2d 61, 63 [1991]).

Thus, an insurer may be contractually bound to defend "even though it may not ultimately be bound to pay, either because its insured is not factually or legally liable or because the occurrence is later proven to be outside the policy's coverage" (*id.* at 65).

Here, the four corners of the complaint in the underlying action place the allegations squarely within the responsibilities of plaintiff's insured, triggering the duty to defend. Plaintiff's primary argument, that the accident was not within its insured's area of responsibility, is properly made to Supreme Court in a motion for summary judgment dismissing Bari's complaint or at trial and cannot be resolved by this Court on a motion seeking declaratory relief (*see Allstate Ins. Co. v Santiago*, 98 AD2d 608 [1st Dept 1983]). It is after the resolution of that action where the extent of plaintiff's indemnification obligations can be fully determined (*see Sturges Mfg. Co. v Utica Mut. Ins*. Co., 37 NY2d 69, 74 [1975]).

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

ENTERED: MAY 26, 2016

CLERK

Friedman, J.P., Acosta, Gische, Webber, JJ.

1274 David Moyal, derivatively on behalf of Group IX, Inc., Plaintiff-Respondent-Appellant, Index 601973/07

-against-

Stu Sleppin, et al., Defendants-Appellants-Respondents.

_____

Sadis & Goldberg, LLP, New York (Jennifer Rossan of counsel), for appellants-respondents.

Morrison Cohen LLP, New York (David A. Piedra of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered November 5, 2015, which denied defendants' motion to strike plaintiff's demand for a jury trial and for their equitable defenses to be tried by the court, and denied plaintiff's cross motion seeking recusal of Justice Bransten, unanimously modified, on the law, defendants' motion granted in its entirety, and otherwise affirmed, without costs.

Supreme Court erred in finding that plaintiff in this shareholders' derivative action was entitled to a jury trial, since the claims brought in his capacity as a shareholder were "derivative and therefore equitable in nature" (*Sakow v 633 Seafood Rest., Inc.* 25 AD3d 418, 419 [1st Dept 2006], *lv denied* 7

NY3d 701 [2006]; *Horizon Asset Mgt., LLC v Duffy*, 106 AD3d 594, 595 [1st Dept 2013]). Contrary to plaintiff's contention, the motion was not untimely, since a motion to strike a demand for a jury trial may be made at anytime up to the opening of trial (*A.J Fritschy v Chase Manhattan Bank*, 36 AD2d 600, 600 [1st Dept 1971]), and we find no prejudice in defendants' delay of a few months, following the restoration of the case to the calendar, in making their motion.

Although we need not reach the issue in light of our conclusion, we note, in any event, that pursuant to CPLR 4101, defendants' equitable defenses of estoppel, laches and unclean hands should be tried by the court (*see Cadwalader Wickersham & Taft v Spinale*, 177 AD2d 315 [1st Dept 1991]).

None of the Justice's comments cited by plaintiff warrant recusal (*see Hass & Gottlieb v Sook Hi Lee*, 55 AD3d 433, 434 [1st Dept 2008]).

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 26, 2016

CLERK

Friedman, J.P., Acosta, Saxe, Gische, Webber, JJ.

1278 Rafael Concepcion, Deceased, by Administrator, Neil Concepcion, Plaintiff-Respondent,

-against-

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

Michael Weitzen, D.O., Defendant-Appellant.

- - - - -

The City of New York, et al., Third-Party Plaintiffs-Respondents,

-against-

St. Barnabas Hospital, et al., Third-Party Defendants,

Michael Weitzen, D.O., Third Party Defendant-Appellant.

Index 16298/07
42091/08

_____

Feldman, Kleidman, Coffey, Sappe & Regenbaum, L.L.P., Fishkill (Wayne M. Rubin of counsel), for appellant.

Dansker & Aspromonte Associates, New York (Jason C. Molesso of counsel), for Neil Concepcion, respondent.

Zachary W. Carter, Corporation Counsel, New York (Michael Pastor of counsel), for the City of New York and James F. Williams, respondents.

_____

Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered October 20, 2015, which, insofar as appealed from as limited by the briefs, denied the motion of defendant/third-party

defendant Michael Weitzen, D.O., for summary judgment dismissing the complaint, third-party complaint and all cross claims as against him, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiff's decedent's leg was run over by a truck while he was working as a sanitation worker. The decedent was taken to the emergency room at defendant St. Barnabas Hospital, and was treated by Dr. Weitzen, the on-call trauma surgeon. After consulting with the on-call vascular surgeon, Weitzen ordered an angiogram to determine the site of the internal bleeding. Following a five-hour surgery by the vascular surgeon to bypass the damaged artery, decedent developed abdominal compartment syndrome, and despite an emergency laparotomy to relieve the pressure on the decedent's internal organs, he went into cardiac arrest and died.

The record demonstrates that in opposition to Weitzen's prima facie showing that his treatment of the decedent was within the accepted standard of medical care, both plaintiff and the City impermissibly opposed Weitzen's motion based on theories of liability not previously set forth in their pleadings or bills of particulars (*see Abalola v Flower Hosp.*, 44 AD3d 522 [1st Dept

2007]). The parties' reliance on generalized boilerplate allegations, and bills of particulars that were generally directed at all defendants, is misplaced (*see Suits v Wyckoff Heights Med. Ctr.*, 84 AD3d 487, 489 [1st Dept 2011]; *see also Miccarelli v Fleiss*, 219 AD2d 469,470 [1st Dept 1995]).

In any event, the opinions of the City's and plaintiff's experts on causation are speculative and unsupported by the record, particularly where the, City's expert anesthesiologist averred that the decedent's syndrome was caused by the negligent and extreme over administration of intravenous liquids during the bypass surgery due to insufficient or incorrect calculations concerning the decedent's rate of fluid loss. Although both plaintiff's and the City's expert surgeons averred that a delay in beginning the surgery caused the compartment syndrome by requiring additional liquids during surgery, neither provided any scientific basis for that assertion (*see Carrera v Mount Sinai Hosp.*, 294 AD2d 154 [1st Dept 2002]). Nor did plaintiff's expert explain how

administering red blood cells earlier would have ultimately led to less fluids being administered.

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

ENTERED: MAY 26, 2016

CLERK

Friedman, J.P., Acosta, Saxe, Gische, Webber, JJ.

1279 Daniel W. Dienst, et al., Index 651450/13
Plaintiffs,

-against-

Paik Construction, Inc.,
Defendant.

- - - - -

Paik Construction, Inc.,
Third-Party Plaintiff-Respondent,

-against-

The Private Bank and Trust Company,
Third-Party Defendant-Appellant.

_____

Bryan A. McKenna, New York, for appellant.

The Marantz Law Firm, Rye (Neil G. Marantz of counsel), for respondent.

_____

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered October 20, 2014, which denied the motion of third-party defendant the Private Bank and Trust Company (Private Bank) to dismiss the third-party complaint, unanimously affirmed, without costs.

In this mechanic's lien foreclosure action brought by defendant/third-party plaintiff Paik Construction, Inc. (Paik), for nonpayment of work performed and materials furnished in constructing the condominium apartment owned by the underlying

plaintiffs, the documentary evidence fails to conclusively establish that Private Bank's loan is not a building loan agreement (*see Fortis Fin. Servs. v Fimat Futures USA*, 290 AD2d 383 [1st Dept 2002]). "A classic building loan mortgage is characterized, inter alia, by (1) a requirement in the loan agreement that the mortgagor construct a building or improvement with the loan and (2) a disbursement of the loan in installments--as the construction progresses--rather than in one lump sum" (*Juszak v Lily & Don Holding Corp.*, 224 AD2d 588, 488-589 [2d Dept 1996]), and is subject to the subordination provisions of Lien Law § 22 (*see Altshuler Shaham Provident Funds, Ltd. v GML Tower, LLC*, 21 NY3d 352, 360 [2013]). Here, the documentary evidence warranted the denial of this pre-answer motion to dismiss.

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

ENTERED: MAY 26, 2016

CLERK

Friedman, J.P., Acosta, Saxe, Gische, Webber, JJ.

1280 Eric Jones, Index 23252/06
Plaintiff-Appellant, 85917/07

-against-

Hiro Cocktail Lounge, et al.,
Defendants-Respondents,

"John Doe,"
Defendant.

- - - - -

B.D. Stanhope LLC doing business as
Hiro Lounge, doing business as
Hiro Cocktail Lounge, et al.
Third-Party Plaintiffs-Respondents,

-against-

N.E.C. Security Consultants, Inc.,
Third-Party Defendant-Respondent.

_____

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

Mischel & Horn, P.C., New York (Scott T. Horn of counsel), for B.D. Stanhope LLC, sued herein as Hiro Cocktail Lounge, and Hudson River Inn, LLC, respondents.

Faust Goetz Schenker & Blee, LLP, New York (Peter Kreymer of counsel), for N.E.C. Security Consultants, Inc., respondent.

_____

Judgment, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered April 1, 2014, upon defendants' (collectively, Hiro) motion for a directed verdict at the close of plaintiff's evidence on liability, dismissing the complaint and the third-

party complaint, unanimously reversed, on the law, without costs, the judgment vacated, the complaint and third-party complaint reinstated, the motion for a directed verdict denied as to the vicarious liability claim, and the matter remanded for a new trial on that claim.

At trial, plaintiff testified that the man who assaulted him at Hiro's nightclub was dressed in the same manner as other security guards at the front of the nightclub, that he was posted in an entrance hallway near a cash register, and that he instructed plaintiff to pay an entrance fee. When plaintiff questioned the man, the man punched him, shattering his jaw. Plaintiff's companion that night, Hernan Santiago, also testified that he believed that the man in the hallway was a security guard because he was dressed in the same manner as other security guards at the front of the nightclub, wearing all black and an earpiece.

Plaintiff read into evidence deposition testimony of Simon Hogue, of third-party defendant N.E.C. Security Consultants, Inc. (NEC), which provided security guards to Hiro, that Hiro's manager supervised the NEC security guards on nights when he was not there and that Hiro's manager was there on the night in question. Plaintiff also read into evidence deposition testimony

of Maurice Rodrigues, Hiro's director of operations, that, on the night in question, two Hiro employees were checking identification in the entrance hallway where plaintiff was punched.

The trial court erred in granting Hiro's motion for a directed verdict, since there is evidence to support a reasonable jury's finding that plaintiff's assailant was a Hiro employee or an NEC employee who was supervised by Hiro, for whose acts Hiro could have been found liable upon the theory of respondeat superior (*N.X. v Cabrini Med. Ctr.*, 97 NY2d 247, 251 [2002]; *Fauntleroy v EMM Group Holdings LLC*, 133 AD3d 452, 453 [1st Dept 2015]). An attack on plaintiff by a security guard could be found to be within the scope of the guard's employment (*see Fauntleroy v EMM Group Holdings LLC*, 133 AD3d at 453; *Jaccarino v Supermarkets Gen. Corp.*, 252 AD2d 572 [2d Dept 1998]). Plaintiff's inability to identify his assailant, who left after the incident, does not preclude him from recovery (*Burgos v Aqueduct Realty Corp.*, 92 NY2d 544, 551 [1998]).

Plaintiff did not submit any evidence to support his claim of negligent supervision. Since the assailant was not identified, plaintiff could not demonstrate that Hiro or NEC knew of the assailant's propensity to commit such attacks (*N.X. v*

Cabrini Med. Ctr., 280 AD2d 34, 42 [1st Dept 2001], *mod on other grounds* 97 NY2d 247 [2002]; *see also Vicuna v Empire Today, LLC*, 128 AD3d 578 [1st Dept 2015]). Nor did plaintiff present any evidence that could reasonably support a finding of premises liability, since he did not demonstrate that the same or similar criminal activity had ever before occurred at the nightclub (*Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 519 [1980]; *Maria T. v New York Holding Co. Assoc.*, 52 AD3d 356 [1st Dept 2008], *lv denied* 11 NY3d 708 [2008]).

The evidence does not support plaintiff's contention that Hiro's security procedures are implicated in the attack on him; in any event, plaintiff did not demonstrate that Hiro failed to comply with its own rules.

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

ENTERED: MAY 26, 2016

CLERK

Friedman, J.P., Acosta, Saxe, Gische, Webber, JJ.

1283 Dr. Steven Rosenfeld, Index 650360/14
Plaintiff-Respondent,

-against-

Joel Schreiber,
Defendant,

Dr. Samuel Waksal, et al.,
Defendants-Appellants.

_____

Kasowitz Benson Torres & Friedman LLP, New York (Christopher P. Johnson of counsel), for appellants.

Meissner Associates, Nyack (Stuart D. Meissner of counsel), for respondent.

_____

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered June 9, 2015, which, to the extent appealed from as limited by the briefs, denied defendants Dr. Samuel Waksal, Kadmon Capital, LLC, and Kadmon Corporation, LLC's motion to dismiss the complaint as against them on statute of frauds grounds, unanimously affirmed, with costs.

Plaintiff alleges that he and defendant Dr. Samuel Waksal, individually and as promoter of defendants Kadmon Capital, LLC, and Kadmon Corporation, LLC, entered into a written agreement pursuant to which he would raise $50 million from investors for a joint venture and would receive a 6% equity interest in the joint

venture as compensation.

The allegations that the parties entered into a written agreement signed by both plaintiff and Waksal and setting forth all the parties' material contractual obligations are sufficient to satisfy the statute of frauds at this stage of the litigation (*see Saivest Empreendimentos Imobiliarios E. Participacoes, Ltda v Elman Invs., Inc.*, 117 AD3d 447 [1st Dept 2014]; *see also Chapman, Spira & Carson, LLC v Helix BioPharma Corp.*, 115 AD3d 526, 528 [1st Dept 2014]). The documentary evidence submitted by defendants does not conclusively establish that no agreement existed (*see Leon v Martinez*, 84 NY2d 83, 88 [1994]).

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

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

ENTERED: MAY 26, 2016

CLERK

Friedman, J.P., Acosta, Saxe, Gische, Webber, JJ.

1286N In re Tila Azeem, Index 653489/15
Petitioner-Appellant,

-against-

David James Murphy,
Respondent-Respondent.

_____

John H. Snyder PLLC, New York (John H. Snyder of counsel), for appellant.

Braverman Greenspun, P.C., New York (Scott S. Greenspun of counsel), for respondent.

_____

Appeal from order, Supreme Court, New York County (Eileen Bransten, J.), entered on or about November 12, 2015, which declined to sign petitioner's order to show cause seeking a stay of an arbitration, unanimously dismissed, without costs, as taken from a nonappealable paper.

The court's order declining to sign petitioner's order to show cause is not appealable (*M&J Trimming v Kew Mgt. Corp.*, 254 AD2d 21 [1st Dept 1998]; *see also McKanic v Amigos del Museo del Barrio*, 74 AD3d 639 [1st Dept 2010], *appeal dismissed* 16 NY3d 849 [2011], *lv denied* 17 NY3d 705 [2011], *rearg denied* 17 NY3d 856 [2011]; CPLR 5701[a][2]).

Even if the matter were properly before us, we would find that petitioner is not entitled to a stay of the pending

arbitration between the parties (*see* CPLR 7503[b], 7502[b]). The amended statement of claim filed in the arbitration is timely, since it simply provides more details to support the timely original claim (*see Robinson v Canniff*, 22 AD3d 219, 220 [1st Dept 2005]).

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

ENTERED: MAY 26, 2016

CLERK

Friedman, J.P., Acosta, Saxe, Gische, Webber, JJ.

1287N Moussa Keita, previously known as Adama Diabate,
Plaintiff-Respondent,

-against-

Zahava Services Corp., et al.,
Defendants-Appellants.

Index 310533/11

Connors & Connors, P.C., Staten Island (Robert J. Pfuhler of counsel), for appellants.

Spiegel & Barbato, LLP, Bronx (Brian C. Mardon of counsel), for respondent.

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered October 8, 2015, which denied defendants' motion to preclude plaintiff from offering expert testimony, or alternatively, to compel him to exchange his expert's reports, notes and records, and submit to a vocational rehabilitation examination, unanimously affirmed, without costs.

The motion court providently exercised its discretion in denying defendants' motion. Plaintiff's CPLR 3101(d) notice provides enough detail regarding the substance of his expert's expected testimony (*see* CPLR 3101[d][1][i]).

Defendants are not entitled to the expert's reports, notes or records (*see Richards v Herrick*, 292 AD2d 874 [4th Dept

2002]). Nor are they entitled to a vocational rehabilitation examination of plaintiff. Defendants' motion was made after the filing of the note of issue, and they have not shown that unusual or unanticipated circumstances developed subsequent to the filing (*see* 22 NYCRR 202.21[d]; *Schroeder v IESI NY Corp.*, 24 AD3d 180, 181 [1st Dept 2005]; *Silverberg v Guzman*, 61 AD3d 955, 956 [2d Dept 2009]; *Schenk v Maloney*, 266 AD2d 199, 200 [2d Dept 1999]).

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

ENTERED: MAY 26, 2016

CLERK

Friedman, J.P., Acosta, Saxe, Gische, Webber, JJ.

1288N Beth A. Travers, Index 107720/11
Plaintiff-Respondent,

-against-

John Kulynych,
Defendant-Appellant.

_____

John Kulynych, appellant pro se.

Baker & Hostetler LLP, New York (Jonathan B. New of counsel), for respondent.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered March 19, 2014, which denied defendant's motion to vacate a default judgment, unanimously affirmed, without costs.

The motion court providently exercised its discretion in denying defendant's motion to vacate the default judgment entered against him on plaintiff's action for conversion, in light of his failure to show a meritorious defense to her well-documented claim (see CPLR 5015[a][1]; *Singh-Mehta v Drylewski*, 107 AD3d 478 [1st Dept 2013]).

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

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

ENTERED: MAY 26, 2016

CLERK

Friedman, J.P., Acosta, Saxe, Gische, Webber, JJ.

1289 In re Danielle Smith, Ind. 37/14
[M-1845] Petitioner,

-against-

Hon. Cyrus R. Vance, Jr., etc., et al.,
Respondents.

_____

Dale L. Smith, New York, for Danielle Smith, petitioner.

Cyrus R. Vance, Jr., District Attorney, New York (Marc F. Scholl of counsel), for Cyrus R. Vance, Jr., respondent.

Eric T. Schneiderman, Attorney General, New York (Angel M. Guardiola II of counsel), for Hon. Gregory Carro, respondent.

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

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

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

ENTERED: MAY 26, 2016

CLERK

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

480 Modesto Costa, Court of Claims
Claimant-Appellant, Motion No. 85009

-against-

The State of New York
Defendant-Respondent.

_____

Queller, Fisher, Washor, Fuchs & Kool, LLP, New York (Christopher L. Sallay of counsel), for appellant.

Eric T. Schneiderman, Attorney General, New York (Matthew W. Grieco of counsel), for respondent.

_____

Order of the Court of Claims of the State of New York (O. Peter Sherwood, J.), entered July 18, 2014, which denied claimant's motion for leave to file a late notice of claim, affirmed, without costs.

Opinion by Saxe, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

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

480
Court of Claims Motion No. 85009

_____x

Modesto Costa,
Claimant-Appellant,

-against-

The State of New York
Defendant-Respondent.

_____x

Claimant appeals from the order of the Court of Claims of the State of New York (O. Peter Sherwood, J.), entered July 18, 2014, which denied his motion for leave to file a late notice of claim.

Queller, Fisher, Washor, Fuchs & Kool, LLP, New York (Christopher L. Sallay, Julie T. Mark and Dallin M. Fuchs of counsel), for appellant.

Eric T. Schneiderman, Attorney General, New York (Matthew W. Grieco and Anisha S. Dasgupta of counsel), for respondent.

SAXE, J.

This appeal raises the issue of whether New York State, despite its status as the owner of Pier 40 in Hudson River Park, can avoid an owner's absolute liability under the Labor Law by reliance on the legislature's turnover of the stewardship -- but technically not ownership -- of the property to a public benefit corporation.

On March 22, 2013, claimant Modesto Costa, a construction worker hired by Padilla Construction Services to perform the stair renovation on a stair renovation project inside a building located at Pier 40, was injured when a metal beam collapsed and struck him. As a result of the accident, claimant alleges, he suffered significant permanent injuries.

Pier 40 is located within the Hudson River Park, which extends along the western edge of Manhattan from the top of Battery Park to 59th Street. At the time of the accident, title ownership of Pier 40 was held by defendant State of New York, although all day-to-day operations of the entire Park, including Pier 40, were under the authority and management of the Hudson River Park Trust (the Trust), a public benefit corporation created by the legislature in 1998 (*see* McKinney's Uncons Laws of NY §§ 1641-1656 [Hudson River Park Act, L 1998, ch 592]).

Claimant initially filed a notice of claim against New York

City. However, on April 3, 2014, the City moved for summary judgment on the ground that it did not own Pier 40, but that the site was actually owned by the State of New York. Attached to this motion was the affidavit of a title examiner who stated that the record title for Pier 40 was held by New York State; also appended was a notice of appropriation of the property by the State of New York. The City's motion was granted.

On April 24, 2014, claimant made the underlying motion for leave to file late notice of claim against the State of New York, pursuant to the Court of Claims Act § 10(6). The Court of Claims denied claimant's motion, on the ground that New York State was not a proper party to the action, because the legislature had transferred all of the state's legal obligations regarding the Hudson River Park to the Trust. Claimant appeals, arguing that New York State remains liable under the Labor Law because it remains the record title owner of Pier 40. He contends that the Hudson River Park Act of 1998 did not carve out an exception to the absolute liability imposed on owners under the Labor Law.

Discussion

Labor Law §§ 240(1) and 241(6) impose a nondelegable duty on contractors and owners (*see Gordon v Eastern Ry. Supply*, 82 NY2d 555 [1993]). The Labor Law's imposition of absolute liability on owners includes all "owners in fee, even though the property

might be leased to another" (*Coleman v City of New York*, 91 NY2d 821, 823 [1997] [internal quotation marks omitted]), and "even though the job was performed by an independent contractor over which it exercised no supervision or control" (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991], citing *Haimes v New York Tel. Co.*, 46 NY2d 132, 136-137 [1978]).

The Hudson River Park Act, by its explicit terms, does *not* alter ownership and title to the property (*see* Uncons Laws § 1647[3][a]). Rather, it directs the State and City, as owners of portions of the Park, to "enter into agreements with the trust, whether by lease or otherwise, for a term not to exceed 99 years" and "execute such other instruments as necessary, whereby the trust shall receive a possessory interest in the real property and exercise its rights, powers, responsibilities and duties" (Uncons Laws § 1647[3][b]).

It is well settled that the act of leasing its property to another entity does not in itself allow the owner of the property to avoid absolute liability under the Labor Law. In *Coleman v City of New York* (91 NY2d at 822), the Court declined to relieve the City of New York of the responsibilities of ownership under the Labor Law where it had leased the site of the accident to the Transit Authority, and a Transit Authority employee was injured while performing repair work. The Court rejected the City's

argument that it should not be strictly liable because it lacked any ability to protect Transit Authority workers, holding that the broad reach of owner liability under Labor Law § 240(1) could not be eliminated without an exception carved out by the legislature (*see* 91 NY2d at 823).

Similarly, in *Adimey v Erie County Indus. Dev. Agency* (89 NY2d 836 [1996], *modifying for reasons stated in dissenting opinion* at 226 AD2d 1053 [4th Dept 1996]), title to the construction site was held by the defendant Erie County Industrial Development Agency, which had purchased the property from the plaintiff's employer, Tonawanda Coke Corporation, pursuant to a sale and lease-back transaction. The defendant agency, argued that it had retained title to the property only for tax benefits, and that upon expiration of the lease, title was to be reconveyed to Tonawanda Coke Corporation for nominal consideration. Although the majority at the Appellate Division, Fourth Department, had held that "a sale and lease-back transaction between the fee owner and [the local industrial development agency] was not a 'genuine allocation of ownership' for purposes of Labor Law § 240(1)" (226 AD2d at 1053), the Court of Appeals held otherwise, agreeing with the dissenters at the Appellate Division that the absolute liability of a title owner under Labor Law § 240(1) must be imposed on the defendant agency

as title owner, in the absence of an exception crafted by the legislature (89 NY2d at 838).

As the foregoing cases illustrate, the mere act of leasing the property to another entity does not alone allow the owner to avoid the broad reach of owner liability under Labor Law § 240(1) (*Coleman*, 91 NY2d at 823).

The State argues that a lessee with total control over its property may be an "owner" for purposes of the Labor Law, citing this Court's statement that "[t]he 'owners' who are contemplated by the Legislature under Labor Law § 240(1) are those parties with a property interest who hire the general contractor" (*Frierson v Concourse Plaza Assoc.*, 189 AD2d 609, 611 [1st Dept 1993]). However, the possibility that a lessee may be chargeable as an owner may not necessarily be equated with the lessee replacing the title owner for purposes of Labor Law liability. In fact, *Frierson* did *not* consider a claim that the lessee would step into the owner's shoes, leaving the title owner without liability; rather, there, this Court granted summary judgment on the issue of liability against the owner and general contractor, while denying summary judgment as against the lessee, allowing for the possibility that at trial the lessee might also be found to be strictly liable under the Labor Law. Moreover, the subsequent *Coleman* case establishes that a lessee's total control

is not in itself grounds to excuse the owner from liability.

We therefore reject the State's argument that the lease to the Trust is enough to clear the State of liability under the Labor Law as the owner of the property. We perceive no reason why the rule stated in *Coleman* should be inapplicable simply because the lease is prompted by the legislature rather than by the owner. Rather, as the Court explained in *Coleman*, the State, as owner, may only avoid liability if the legislature created an exception to that liability (*see also Santass v Consolidated Inv. Co., Inc.*, 10 NY3d 333, 340 [2008]).

The only concrete example of such a "carved out" exception to an owner's strict liability under the Labor Law is provided by *Coleman v City*, which points to the legislature's amendment of Labor Law sections 240 and 241(6), adding language to those provisions that explicitly create an exception to owner liability for "owners of one- and two-family dwellings" who contract for but do not direct or control the work (*see* 91 NY2d at 823, citing L 1980, ch 670). Claimant suggests that an explicit amendment to the Labor Law is therefore required for an exception to be made to absolute liability, and that in the absence of such an amendment to the Labor Law, no exception to the States's absolute liability as owner of Pier 40 exists. However, we reject the premise that an amendment to the Labor Law is the only way for

the legislature to create an exception to owners' liability under the Labor Law.

Rather, we conclude that other legislative enactments may establish a legislative intent to exempt the State from owners' liability under the Labor Law. To determine whether the legislature intended such an exemption with the Hudson River Park Act requires a careful consideration of the Act's terms and provisions. We conclude that the Legislature intended the Act to exempt the title owner from any liability that would otherwise flow from its ownership of Hudson River Park property that was turned over to the Trust.

Section 5 of the Hudson River Park Act (Uncons Laws § 1645[1]), gives the Trust total "authority over the planning, design, construction, operation and maintenance of" the park; the Act also gives the Trust the right to receive rents and other revenues generated from the park (*see* §§ 1646[g], 1647[10]), although ownership and title would remain with the State (*see* § 1647[2], [3]). Also, notably, the Act directs that the Trust has the capacity to sue and be sued (§ 1647[1][d][v]), and requires that all tort actions commenced against the Trust comply with the notice of claim requirement of General Municipal Law § 50-e (§ 1651). Most importantly, the Act expressly states that "[u]pon the coming into existence of the trust, the trust shall succeed

to *all* contracts, leases, licenses and *other legal obligations* respecting the park to which its predecessors are a party at or after the effective date of this act" (§ 1645 [1] [emphasis added]). The legislature's use of the term "succeed to" and its reference to all "other legal obligations" of its predecessors clearly reflects an intent to have the Trust take over *all* legal liability arising out of ownership of the Park's premises.

Subsequent events further support the conclusion that the legislature intended the Trust to succeed to all the State's legal obligations arising out of its ownership of park property. By 2013 the Trust found that it was spending over $500,000 annually to insure against claims arising out of the park property (*see* Mem of Vice President & Gen Counsel of Hudson River Park Trust, Bill Jacket, L 2013, ch 517, at 70). To shift that cost, in 2013 the legislature amended the Hudson River Park Act in order to require the State and City to indemnify the Trust for "bodily injury . . . claims alleged to occur on or relate to their respective real property in the park" (*see* L 2013, ch 517 § 5). This amendment, enacted after plaintiff's accident, illustrates that under the original Act, as it existed at the time of the accident, it was intended that the State and City would bear no further legal responsibility for injuries occurring within their portions of the park, and that the Trust would be

the sole entity bearing full legal responsibility for any bodily injury sustained in the Park. It would not have been necessary for the legislature to enact the 2013 amendment if the 1998 Act allowed for continued liability on the part of the City and State for injuries occurring within their portions of the Park.

For all the foregoing reasons, we agree with the motion court that the State, although it continued to hold the registered title to Pier 40, no longer stood in the position of an "owner" for purposes of the Labor Law at the time of the accident, so that it was not a proper party in interest in this action, and the court was without jurisdiction over the claim (*see* Court of Claims Act § 9[2]). Accordingly, we do not address whether, on the merits, claimant was entitled to leave to file a late notice of claim.

We recognize that as a result of this unusual legislative shifting of legal obligations without changing formal title, a Labor Law plaintiff is left in the unusual position of being unable to rely on the recorded title to determine the proper party to sue as the property's owner. This unusual circumstance may, in appropriate circumstances, constitute grounds for a motion to file a late notice of claim against the proper party. However, it does not justify an imposition of liability on the State here.

Accordingly, the order of the Court of Claims of the State of New York (O. Peter Sherwood, J.), entered July 18, 2014, which denied claimant's motion for leave to file a late notice of claim, should be affirmed, without costs.

All concur.

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

ENTERED: MAY 26, 2016

CLERK