SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 23, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Tom, Kapnick, Kahn, Gesmer, JJ.

3421 Heriberto Pratts, et al., Index 115578/10
Plaintiffs-Appellants,

-against-

Bruno A. Campolo, et al.,
Defendants,

The City of New York,
Defendant-Respondent.

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Kerner & Kerner, New York (Kenneth T. Kerner of counsel), for appellants.

Zachary W. Carter, Corporation Counsel, New York (Jeremy W. Shweder of counsel), for respondent.

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Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered August 11, 2015, which granted defendant City of New York's motion for summary judgment dismissing the complaint and all cross claims against it, unanimously affirmed, without costs.

Plaintiffs are co-guardians of David Pratts, who suffered serious injuries, including brain damage, when his motorcycle collided with a car driven by defendant Bruno A. Campolo. Plaintiffs contend that the City negligently created visual obstructions, including a green fence and City vehicles parked in

a no-parking zone, that prevented Campolo from seeing Pratts.

The theory of liability premised on illegally parked City vehicles is not properly considered, because it was not asserted in the notice of claim. The notice premised liability solely on the City's non-enforcement of parking restrictions, which did not alert the City of the need to investigate its own employees' parking practices (*see Monmasterio v New York City Hous. Auth.*, 39 AD3d 354, 356 [1st Dept 2007]; *accord Frankel v New York City Tr. Auth.*, 134 AD3d 440, 440-441 [1st Dept 2015]; General Municipal Law § 50-e[6]).

The record contains conflicting testimony as to whether the installation of the green fence enclosing a parking lot and/or storage area on the corner made it more difficult for drivers to see oncoming traffic and thus constituted a breach of the City's nondelegable duty to maintain its roads in reasonably safe condition (*see Stiuso v City of New York*, 87 NY2d 889, 890-891 [1995]; *Parada v City of New York*, 205 AD2d 427 [1st Dept 1994]). However, the record demonstrates conclusively that the alleged obstruction did not proximately cause the accident. Campolo testified that he stopped his car several times before turning, pulling forward far enough to get a clear view of oncoming traffic so that his vision was not obstructed when he made the left-hand turn. Even though the record contains an affidavit

from a witness stating that Campolo only came to a brief stop before turning, and testimony from another witness that Campolo did not stop at all, neither statement serves to rebut Campolo's testimony that his vision was not obstructed when he made the turn. His failure to see Pratts was therefore entirely unrelated to the City's alleged negligence (*compare Parada*, 205 AD2d at 428-429 [finding issues of fact whether "(i)nadequate sight distance caused by obstructing trees" caused car accident; driver testified that moments before impact "all I could see was those trees"]).

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

ENTERED: MAY 23, 2017

CLERK

Acosta, P.J., Tom, Kapnick, Kahn, Gesmer, JJ.

3436N Z.D., by Her Mother and Natural Guardian Zaimah A., et al., Plaintiffs-Appellants, Index 26043/14

-against-

MP Management, LLC, et al., Defendants-Respondents.

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Phillips & Paolicelli LLP, New York (Aryeh L. Taub of counsel), for appellants.

Babchik & Young, LLP, White Plains (William H. Gagas of counsel), for MP Management, LLC, Davidson Apartments, LLC and Moshe Pillar, respondents.

Havkins Rosenfeld Ritzert & Varriale, LLP, White Plains (Carmen A. Nicolaou of counsel), for Parkash 2487, LLC and Ved Parkash, respondents.

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Order, Supreme Court, Bronx County (Laura G. Douglas, J.), entered February 1, 2016, which, to the extent appealed from as limited by the briefs, denied in part plaintiffs' motion to compel discovery, unanimously reversed, on the law and the facts, without costs, and defendants are directed to produce within 45 days all documents in their possession relating to the lead violations on record in all apartments in the subject buildings (2487 Davidson Avenue, Bronx, New York and 2501 Davidson Avenue, Bronx, New York) for three years prior to the date of exposure.

The motion court should not have limited defendants' production of records pertaining to lead-based paint exposure to

the date of exposure and three years prior only in the subject apartments, namely, the apartment in which the infant plaintiff resided and the apartment, in a different building, where she attended day care. "While discovery determinations rest within the sound discretion of the trial court, the Appellate Division is vested with a corresponding power to substitute its own discretion for that of the trial court, even in the absence of abuse" (*Andon v 302-304 Mott St. Assoc.*, 94 NY2d 740, 745 [2000]).

Plaintiffs allege in their complaint that defendants "knew, should have known, and/or had reason to know that there was deteriorated, defective, flaking, chipping and peeling paint in the Subject Premises [apartments] *and the Subject Building*," which "could be harmful to children" (emphasis supplied). Yet, despite this knowledge, the complaint alleges that defendants were negligent in performing repairs within the plaintiffs' residence and the apartment where the infant plaintiff attended day care, and permitted the continued "emission, discharge[], spread and dissemination of lead based paint . . . thus causing the exposure of the infant plaintiff" to the hazardous conditions which were a contributing cause of her lead poisoning. Additionally, since plaintiffs had evidence from the New York City Department of Housing Preservation and Development (HPD),

which showed numerous lead paint violations in the subject buildings, and since evidence of lead paint hazards in one part of a building may be relevant to the issues of defendants' notice of the condition, duties and obligations to the plaintiffs (*see e.g. Espinal v 570 W. 156th Assoc.*, 258 AD2d 309 [1st Dept 1999]; *Rodriguez v Amigo*, 244 AD2d 323, 324-325 [2d Dept. 1997]; *Smith v Fields*, 1997 NY Misc Lexis 731 [Sup Ct, NY Co. 1997]), plaintiffs' demand for production of records for lead-based paint violations in the other apartments in the buildings was appropriate (*see* CPLR 3101[a]). "Knowledge of a dangerous condition in one portion of the structure may have imposed upon the owners an 'obligation to examine' other portions of the structure for defects arising from the same cause, and to ascertain what was ascertainable with the exercise of reasonable care" (*Rodriguez v Amigo*, 244 AD2d at 325). The fact that plaintiffs may have been able to access some evidence of lead paint violations in the building from HPD does not preclude plaintiffs from seeking these records directly from defendants in discovery (*see Matter of Steam Pipe Explosion at 41st St.* & Lexington Ave., 127 AD3d 554, 556 [1st Dept 2015], affd 27 NY3d 985 [2016] [holding that "Con Edison's independent efforts to obtain publicly-available documents, whether through record searches or [FOIA] requests, do not extinguish third-party

defendant's obligations to comply with the CPLR"]; *see also* *Alfaro v Schwartz*, 233 AD2d 281, 282 [2d Dept 1996] [stating that simply because "the documents sought may be available in public records does not, in itself, preclude production of those records from a party"]).

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

ENTERED: MAY 23, 2017

CLERK

Acosta, P.J., Renwick, Mazzarelli, Andrias, Manzanet-Daniels, JJ.

4089 The People of the State of New York, Ind. 880/14
Respondent,

-against-

Anthony Newsome,
Defendant-Appellant.

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Rosemary Herbert, Office of the Appellate Defender, New York (Matthew A. Wasserman of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Alexander Michaels 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 (Jill Konviser, J.), rendered November 3, 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 23, 2017

CLERK

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

Acosta, P.J., Renwick, Mazzarelli, Andrias, Manzanet-Daniels, JJ.

4090 In re Marat Fronshtein, Index 102074/15
Petitioner-Appellant,

-against-

Rick D. Chandler, etc., et al.,
Respondents-Respondents.

_____

Zane and Rudofsky, New York (Edward S. Rudofsky of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (John Moore of counsel), for respondents.

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Order and judgment (one paper), Supreme Court, New York County (Kathryn E. Freed, J.), entered on or about August 5, 2016, which denied the petition seeking to invalidate respondents' August 11, 2015, denial of petitioner's application for a master electrician's license and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Contrary to petitioner's argument, this article 78 proceeding did not involve a question of substantial evidence. The investigatory hearings before the Master Electrician Licensing Board are not "hearings pursuant to law" within the meaning of CPLR 7804(g)(*see Matter of Solomon v Department of Bldgs. of City of N.Y.*, 46 AD3d 370, 371 [1st Dept 2007], *lv denied* 10 NY3d 712 [2008]; *Nassau Roofing & Sheet Metal Co. v*

Facilities Dev. Corp., 131 AD2d 171, 174 [3d Dept 1987]).

Respondents' denial of petitioner's application, on the ground that he lacked good moral character, was not arbitrary and capricious, had a rational basis, and was not an abuse of discretion (*see Matter of Peckham v Calogero*, 12 NY3d 424, 431 [2009]). Based on his testimony that he performed "low voltage work" while he was self-employed, respondents rationally concluded that petitioner engaged in unlicensed electrical work, in violation of the New York City Electrical Code (Administrative Code of City of NY § 27-3004). Although the statute recognizes an exception for "low voltage work" performed under a certification issued to a "low voltage installer" (Administrative Code § 27-3017[a][2]), petitioner did not possess a low voltage certification. Respondents' finding that petitioner performed unlicensed electrical work constitutes a rational basis for its determination that petitioner therefore lacked good moral character (*see Matter of Cambridge v Commissioner of N.Y. City Dept. of Bldgs.*, 14 AD3d 373, 375-377 [1st Dept 2005]).

Petitioner's reliance on Administrative Code § 27-3018(b) is misplaced. The fact that certain low voltage work does not require a permit to be filed with the Department of Buildings does not mean that unlicensed individuals may perform low voltage work.

Petitioner's due process arguments are unavailing. Petitioner did not have a due process right to a hearing regarding his initial application for a license (*see Matter of Rasole v Department of Citywide Admin. Servs.*, 83 AD3d 509 [1st Dept 2011]). Because the July 16, 2015 meeting was not a hearing, respondents were not required to notify petitioner and afford him an opportunity to be heard.

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 23, 2017

CLERK

Acosta, P.J., Renwick, Mazzarelli, Andrias, Manzanet-Daniels, JJ.

4093 Diana Worthman, Index 109419/06
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent.

_____

Marder, Eskesen & Nass, New York (Clifford D. Gabel of counsel), for appellant.

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

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Order, Supreme Court, New York County (Margaret A. Chan, J.), entered August 4, 2015, which granted defendant City of New York's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The City made a prima facie showing that it did not have prior written notice of the defective roadway condition that allegedly caused plaintiff to trip and fall (*see* Administrative Code of City of NY § 7-201[c][2]; *Yarborough v City of New York*, 10 NY3d 726, 728 [2008]). Although some of the documents submitted by the City in support of its motion showed the existence of potholes and defects at the accident site during the two years leading up to the accident, there was no proof that any of these defects — all of which were repaired — were the cause of the accident. In any event, "[t]he awareness of one defect in

the area is insufficient to constitute notice of a different particular defect which caused the accident" (*Roldan v City of New York*, 36 AD3d 484, 484 [1st Dept 2007]). Moreover, "the City's records of citizen reports of. . .potholes in the area and FITS reports of repairs made to potholes. . .did not provide the City with prior written notice of the particular defect in the crosswalk where plaintiff fell" (*Stoller v City of New York*, 126 AD3d 452, 452 [1st Dept 2015]; *see Haulsey v City of New York*, 123 AD3d 606 [1st Dept 2014]).

In opposition, plaintiff failed to raise an issue of fact. There was no proof that the defect reported in a prior notice of claim was the same defect that ultimately caused plaintiff's injury. Furthermore, plaintiff's claim that the City's negligent repair of the accident site created the defect did not raise an issue of fact because there was no evidence that the allegedly negligent repair immediately caused the defect, and plaintiff's

claim to the contrary was entirely speculative (*see Ragolia v City of New York*, 143 AD3d 596, 597 [1st Dept 2016]; *Ghin v City of New York*, 76 AD3d 409, 410 [1st Dept 2010]).

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

ENTERED: MAY 23, 2017

CLERK

Acosta, P.J., Renwick, Mazzarelli, Andrias, Manzanet-Daniels, JJ.

4094 Sustainable PTE Ltd., et al., Index 650340/15
Plaintiffs-Respondents-Appellants,

-against-

Peak Venture Partners LLC, et al.,
Defendants,

Nader Tavakoli, et al.,
Defendants-Appellants-Respondents.

_____

Kasowitz Benson Torres LLP, New York (Emilie B. Cooper of counsel), for appellants-respondents.

Sher Tremonte LLP, New York (Erica A. Wolff of counsel), for respondents-appellants.

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Order, Supreme Court, New York County (Anil C. Singh, J.), entered on or about December 11, 2015, which to the extent appealed and cross-appealed from as limited by the briefs, denied dismissal of the claim for tortious interference with contractual relations as asserted against defendants Nader Tavakoli and Vladislav Doronin, granted dismissal of the claim for tortious interference with prospective contractual relations, and granted dismissal of the part of plaintiffs' unjust enrichment claim that is based on certain fees and expenses set forth in a SURF Agreement, unanimously modified, on the law, to deny dismissal of the unjust enrichment claim, and otherwise affirmed, with costs against defendants-appellants.

Plaintiffs have stated a claim for tortious interference with contractual relations against Doronin and Tavakoli by alleging the existence of the SURF Agreement between them and defendants Omar Amanat and Peak Venture Partners LLC; Doronin's and Tavakoli's knowledge of the SURF Agreement; that Doronin and Tavakolo, through a series complex business machinations, intentionally procured Amanat and Peak's breach of the SURF Agreement by depriving them of the ability to perform under the agreement; actual breach of the SURF Agreement; and plaintiffs' damages (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]). Plaintiffs have further alleged that the breach of contract would not have occurred but for the activities of Doronin and Tavakoli (*Cantor Fitzgerald Assoc. v Tradition N. Am.*, 299 AD2d 204 [1st Dept 2002], *lv denied* 99 NY2d 508 [2003]).

The asset management provision of the SURF Agreement sets forth sufficient material terms to be enforceable in its own right, and is not merely an agreement to agree. Specifically, the provision identifies the services to be provided by plaintiff Sustainable PTE Ltd., the specific compensation that Sustainable is to receive in exchange for those services, and the duration of the agreement (*cf. Signature Brokerage v Group Health*, 5 AD3d 196, 197 [1st Dept 2004] [agreement was unenforceable due to lack of material terms]). The provision is not rendered unenforceable

simply because certain nonmaterial terms were left for future negotiation, or because the SURF Agreement provides that the parties would execute a future asset management services agreement (*see Trolman v Trolman, Glaser & Lichtman, P.C.*, 114 AD3d 617, 618 [1st Dept 2014], *lv denied* 23 NY3d 905 [2014]). Doronin and Tavakoli's arguments remaining concerning the claim for tortious interference with contractual relations either raise issues of fact inappropriate for resolution on a motion to dismiss, or are unavailing.

The motion court correctly dismissed the claim for tortious interference with prospective contractual relations, due to insufficient allegations of wrongful conduct motivated solely by a desire to harm plaintiffs (*Carvel Corp. v Noonan*, 3 NY3d 182, 190 [2004]; *see Arnon Ltd [IOM] v Beierwaltes*, 125 AD3d 453 [1st Dept 2015]).

Plaintiffs are permitted to assert their unjust enrichment claim in the alternative (*Beach v Touradji Capital Mgt. L.P.*, 85 AD3d 674, 675 [1st Dept 2011]), particularly since Doronin and Tavakoli are not parties to the SURF Agreement, yet are alleged to have received the value of plaintiffs' services.

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

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

ENTERED: MAY 23, 2017

CLERK

Acosta, P.J., Renwick, Mazzarelli, Andrias, Manzanet-Daniels, JJ.

4095 The People of the State of New York, Ind. 1300/14
Respondent,

-against-

Daniel Lynn,
Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (Allen Fallek of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Andrew E. Seewald 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 (Edward J. McLaughlin, J.), rendered November 26, 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 23, 2017

CLERK

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

Acosta, P.J., Renwick, Mazzarelli, Andrias, Manzanet-Daniels, JJ.

4097 The People of the State of New York, Respondent, Ind. 1435/15

-against-

Frank Spallone, Defendant-Appellant.

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Mahler & Harris, P.C., Kew Gardens (Stephen R. Mahler of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered July 19, 2016, convicting defendant, after a jury trial, of identity theft in the first degree, criminal possession of a forged instrument in the second degree and criminal possession of forgery devices, and sentencing him to concurrent terms of two to six years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence to concurrent terms of six months, concurrent with five years' probation, and otherwise affirmed. The matter is remitted to Supreme Court for further proceedings pursuant to CPL 460.50(5).

We find that the court's reference to the prospect of a retrial in the event that the jury did not reach a verdict was not coercive under the circumstances (*see e.g. People v Strother*,

30 AD3d 346, 346 [1st Dept 2006], *lv denied* 7 NY3d 818 [2006]). While the court's brief comment that it would be "upsetting" if such a diverse jury could not reach a verdict was improvident, the court nevertheless reminded the jury several times to decide the case based on the evidence, and that it was not asking any juror to violate his or her conscience, or abandon his or her best judgment.

Since the jury acquitted defendant of the only charge about which an uncalled witness had material knowledge, defendant's argument that the court should have granted his request for a missing witness charge regarding this witness is moot, and his arguments to the contrary are unavailing.

In this case involving defendant's effort to vacate a default judgment by means of a falsely notarized affidavit, the testimony of the justice who presided over the civil lawsuit was admissible as proof that the allegedly false statements in defendant's affidavit were material, and were submitted to a "public servant in the performance of [her] official functions" (Penal Law § 210.40). Under the circumstances of the case, the fact that this relevant testimony came from a sitting judge was not prejudicial (*see People v Castillo*, 94 AD3d 678, 678 [1st Dept 2012], *lv denied* 19 NY3d 971 [2012]). The justice's testimony that she referred the matter to the "proper parties,"

while noting it was not her position to decide whether anyone had done anything wrong, was limited and brief, and was admissible to complete the narrative of events leading to defendant's arrest (*People v Morgan*, 193 AD2d 467, 467 [1st Dept], *lv denied*, 81 NY2d 1077 [1993]). The court instructed the jury that no witness, including a judge, is presumed to be more or less truthful than someone with a different occupation, further ensuring against any risk that the jury would give her testimony undue weight. Finally, to the extent that defendant challenges portions of the testimony that defense counsel elicited, those challenges are waived.

The prosecutor's comments in summation attacking the veracity of statements in defendant's affidavit and the credibility of his trial testimony were not improper in this case, where defendant was charged with various crimes requiring proof that he made false statements and acted with intent to deceive, and the prosecutor's arguments were not inflammatory (*see People v Korsen*, 167 AD2d 180, 181 [1st Dept 1990], *lv denied* 77 NY2d 962 [1991]; *see also People v Overlee*, 236 AD2d 133, 136 [1st Dept 1997], *lv denied* 91 NY2d 976 [1998]). Defendant did not preserve his remaining challenges to the prosecutor's summation, or to certain comments by the court (most of which were made outside the jury's presence), and we decline

to review them in the interest of justice. As an alternative holding, we find no basis for reversal.

We find the sentence excessive to the extent indicated.

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

ENTERED: MAY 23, 2017

CLERK

Acosta, P.J., Renwick, Mazzarelli, Andrias, Manzanet-Daniels, JJ.

4099 Susan Stulz, et al., Index 102681/12
Plaintiffs-Appellants,

-against-

305 Riverside Corp.,
Defendant-Respondent.

_____

Sokolski & Zekaria, P.C., New York (Daphna Zekaria of counsel), for appellants.

Horing Welikson & Rosen, P.C., Williston Park (Niles C. Welikson of counsel), for respondent.

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Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered February 26, 2016, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

As a result of the Court of Appeals decision in *Roberts v Fishman Speyer Props., L.P.* (13 NY3d 270 [2009]), a tenant is entitled to rent-stabilized status for the duration of the tenancy and to collect any rent overcharges, where an apartment was improperly deregulated at a time when the landlord was receiving J-51 benefits (*see 72A Realty Assoc. v Lucas*, 101 AD3d 401, 401-402 [1st Dept 2012]).

It was undisputed that defendant received J-51 benefits and deregulated plaintiff's apartment in 2001, based on individual apartment improvements (IAIs). Defendant's answer conceded the

improper decontrol, which was based on the Division of Housing and Community Renewal's then policy, and it reimbursed plaintiffs for the overcharges, utilizing the rent on the base date of four years prior to the filing of the complaint to compute the overcharges (CPLR 213-a).

Plaintiffs argue that substantial indicia of fraud by defendant post-*Roberts* and in connection with the IAIs permitted them to utilize the last legal rent paid by a rent-stabilized tenant in the apartment for the calculation of the current legal rent and overcharges (*see Altschuler v Jobman 478/480, LLC*, 135 AD3d 439, 440 [1st Dept 2016], *lv dismissed* 28 NY3d 945 [2016]).

The court properly disregarded the claimed evidence of fraud by defendant post-*Roberts* as irrelevant, and the record does not reflect evidence sufficient to raise a question of fact as to defendant's stated reliance on DHCR's policy in decontrolling the apartment (*see Todres v W7879, LLC,* 137 AD3d 597, 598 [1st Dept 2016], *lv denied* 28 NY3d 910 [2016]). Defendant provided a construction contract, cancelled checks, and the testimony of the contractor to substantiate the IAIs.

Dismissal of the declaratory judgment and injunctive relief causes of action was appropriate as these claims were moot (*see Amherst & Clarence Ins. Co. v Cazenovia Tavern,* 59 NY2d 983, 984 [1983]). The court did not improvidently exercise its discretion

in denying plaintiffs' claim for attorneys' fees, based on a finding that defendant's conduct was not willful.

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

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

ENTERED: MAY 23, 2017

CLERK

Acosta, P.J., Renwick, Mazzarelli, Andrias, Manzanet-Daniels, JJ.

4100 Loren Ridinger, etc., Index 160465/15
Plaintiff-Appellant,

-against-

West Chelsea Development
Partners LLC, et al.,
Defendants-Respondents.

_____

Schwartz Sladkus Reich Greenberg Atlas LLP, New York (Ethan A. Kobre of counsel), for appellant.

Drinker Biddle & Reath LLP, New York (Richard J.L. Lomuscio of counsel), for respondents.

_____

Order, Supreme Court, New York County (Barry R. Ostrager, J.), entered March 21, 2016, which granted defendants' motion to dismiss the complaint and denied plaintiff's cross motion for leave to amend the complaint to add additional plaintiffs, unanimously modified, on the law, to reinstate the derivative claims, except the derivative breach of contract claims against all defendants other than West Chelsea Development Partners, LLC, and to grant leave to amend the complaint, and otherwise affirmed, without costs.

Plaintiff's individual claims were barred by a prior release. However, plaintiff could not and did not release the derivative claims on behalf of the unit owners (*see Caprer v Nussbaum*, 36 AD3d 176 [2d Dept 2006]). Plaintiff was

nevertheless bound by a covenant not to sue, in which she promised not to bring any claim regarding the unit, the building or the condominium, including in a derivative capacity. This did not bar the instant suit on derivative claims, but it does expose plaintiff to a possible claim for damages for breach of the covenant (*see Colton v New York Hosp.*, 53 AD2d 588, 589 [1st Dept 1976]).

Defendants' other arguments as to the complaint are largely unavailing. The demand on the board was excused, where the majority of board members are not simply appointees of the sponsor, but principals of the sponsor and the corporate defendants (*see Bansbach v Zinn*, 1 NY3d 1, 11 [2003]). The breach of contract action should be limited to just the contracting parties, which means it should be dismissed as to all defendants except the sponsor. However, the contractual limitation on damages cannot be said to apply as a matter of law, where, as here, the allegation is that there were unreasonable delays in making repairs (*see 430 W. 23rd St. Tenants Corp. v 23rd Assoc.*, 155 AD2d 237, 238 [1st Dept 1989]). Plaintiff's claims for fraud and breach of fiduciary duty plead various misstatements, but fail to attribute them with particularity; therefore leave to replead those claims should be given (*see* CPLR 3016). Plaintiff's claims for fraudulent conveyance under Debtor

and Creditor Law §§ 273 and 274 are not subject to the particularity requirement of CPLR 3016, because they are based on constructive fraud (*see Gateway I Group, Inc. v Park Ave. Physicians*, P.C., 62 AD3d 141, 149-150 [2d Dept 2009]). Whether any defendant can rely on the contractual limitations period is a question of fact, given that some are not signatories to it, and given the alleged disloyalty of the board members who were the parties required to give notice to the sponsor of defects (*see A.H.A. Gen. Constr. v New York City Hous. Auth.*, 92 NY2d 20, 31 [1998]).

Because the derivative claims were not barred by a release, but were merely brought in breach of a covenant not to sue, plaintiff did not lack standing at the time of the original action and thus an amendment would relate back (*cf. Nomura Asset Acceptance Corp. Alternative Loan Trust v Nomura Credit & Capital, Inc.*, 139 AD3d 519, 520 [1st Dept 2016]).

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

ENTERED: MAY 23, 2017

CLERK

Acosta, P.J., Renwick, Mazzarelli, Andrias, Manzanet-Daniels, JJ.

4101 In re Country-Wide Ins. Co., Index 652751/15
Petitioner-Appellant,

-against-

Valdan Acupuncture, P.C., as assignee of Latonya Frazier,
Respondent-Respondent.

_____

Jaffe & Koumourdas, LLP, New York (Jean H. Kang of counsel), for appellant.

Gary Tsirelman, P.C., Brooklyn (Stefan Belinfanti of counsel), for respondent.

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Judgment, Supreme Court, New York County (Geoffrey D. Wright, J.), entered on or about April 7, 2016, in respondent's favor, unanimously affirmed, with costs.

Petitioner failed to establish any of the grounds for vacating an arbitration award (CPLR 7511[b], [c]; *see generally Azrielant v Azrielant*, 301 AD2d 269, 275 [1st Dept 2002], *lv denied* 99 NY2d 509 [2003]).

Pursuant to Insurance Department Regulations (11 NYCRR) § 65-3.16(a)(12), "insurance carriers may withhold payment for medical services provided by fraudulently incorporated enterprises to which patients have assigned their claims" (*State Farm Mut. Auto. Ins. Co. v Mallela*, 4 NY3d 313 [2005]). Assuming without deciding that an insurer's defense of fraudulent

incorporation cannot be precluded (*see AVA Acupuncture, P.C. v AutoOne Ins. Co.*, 28 Misc 3d 134[A], 2010 NY Slip Op 51350[U] [App Term 2d Dept 2010]; *Bath Med. Supply, Inc. v Allstate Indem. Co.*, 27 Misc 3d 92, 95 [App Term 2d Dept 2010]), we conclude that the master arbitrator properly confirmed the award of the arbitrator, who reviewed petitioner's submissions relating to the plea of guilty to no-fault insurance fraud by a man married to the owner of respondent, found that respondent was not mentioned once in the "hundreds of pages" submitted, and rejected petitioner's attempt to hold the owner "responsible by association." Petitioner's reliance on a subsequent arbitration (in 2014) is also misplaced; among other things, the later arbitration appears to have relied on documentation that was not submitted to the arbitrator in this case.

Contrary to petitioner's contention, there was no default in this case. In any event, any delay in opposing the petition to vacate the arbitration award was short and quickly corrected, and the explanation given for it – law office failure – was detailed and specific, and, in view of the strong public policy favoring resolution of litigation on the merits, constituted "good cause" for the delay (*see Lamar v City of New York*, 68 AD3d 449 [1st Dept 2009]).

Respondent is entitled to attorneys' fees for this appeal

(11 NYCRR 65-4.10(j)(4)), calculated, in accordance with 11 NYCRR 65-4.6(b), as 20% of the no-fault benefits awarded.

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

ENTERED: MAY 23, 2017

CLERK

Acosta, P.J., Renwick, Mazzarelli, Andrias, Manzanet-Daniels, JJ.

4103N Francis McHugh, Index 155796/12
Plaintiff-Appellant,

-against-

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

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

Fabiani Cohen & Hall, LLP, New York (John V. Fabiani, Jr. of counsel), for respondents.

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Order, Supreme Court, New York County (Ellen M. Coin, J.), entered May 4, 2016, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion to strike defendants' answers for discovery violations, unanimously modified, on the law, the facts, and in the exercise of discretion, to strike the answer of defendants the City of New York and the Metropolitan Transportation Authority (MTA), and otherwise affirmed, without costs.

Plaintiff allegedly was injured while working in a tunnel during construction of the Second Avenue Subway. He commenced an action against the City and the MTA in 2012, and those defendants failed to produce a witness for deposition, even after the issuance of three so-ordered discovery stipulations. In 2014, plaintiff commenced an action against defendant Parsons

Brinckerhoff, Inc., which was consolidated with his action against the City and the MTA. After defendants failed to comply with two additional so-ordered discovery stipulations requiring them to produce witnesses for deposition, plaintiff moved to, among other things, strike their answers. That motion was resolved in July 2015 by a so-ordered stipulation providing for production of "[a] [d]efendant" witness "with knowledge," with plaintiff reserving the right to depose additional defendants. Defendants eventually produced an employee of Parsons for deposition. The witness, however, was admittedly unprepared, could not answer a great number of questions posed to him, and could not answer any questions respecting the City and the MTA, or ownership of the tunnel and the ground on which it was built.

After the City and the MTA refused plaintiff's request that they produce an additional witness with knowledge, plaintiff moved to, among other things, strike their answer. The motion court improvidently exercised its discretion in failing to strike their answer. The City's and the MTA's unexplained noncompliance with a series of court-ordered disclosure mandates over a period of nearly three years constituted willful and contumacious behavior, warranting the striking of their answer (*see Henderson-Jones v City of New York*, 87 AD3d 498, 504 [1st Dept 2011]; *Elias v City of New York*, 87 AD3d 513, 514 [1st Dept

2011]). Defendants' belated production of "a witness" for deposition on behalf of all three defendants failed to satisfy the requirements of the July 2015 order, since the witness produced was unprepared and had knowledge only on behalf of defendant Parsons. While the court thus providently exercised its discretion in declining to sanction Parsons, the order on appeal directing the City and the MTA yet again to produce a witness with knowledge was insufficient. Given the City's and the MTA's prolonged and willful failure to provide a "timely response and one that evinces a good-faith effort to address the requests meaningfully" (*Kihl v Pfeffer*, 94 NY2d 118, 123 [1999]), the striking of their answer is appropriate.

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

ENTERED: MAY 23, 2017

CLERK

Tom, J.P., Friedman, Richter, Kapnick, Gesmer, JJ.

1564 Trust for the benefit of Shari Lynn Goldstein,
Plaintiff-Appellant-Respondent,

-against-

Linda Lipetz,
Defendant-Respondent-Appellant.

Index 157826/12

Kaufman Friedman Plotnicki & Grun, LLP, New York (Howard Grun of counsel), for appellant-respondent.

Law Offices of Fred L. Seeman, New York (Fred L. Seeman of counsel), for respondent-appellant.

Order, Supreme Court, New York County (Shlomo Hagler, J.), entered July 27, 2015, which denied plaintiff's motion for summary judgment on its first, second and third causes of action and for dismissal of defendant's affirmative defenses and counterclaim, and denied defendant's cross motion for summary judgment dismissing the complaint, modified, on the law, to grant plaintiff's motion, and to declare that plaintiff validly terminated the lease, and otherwise affirmed, without costs.

The law is clear that a rent-stabilized tenant who sublets her apartment at market rates to realize substantial profits not lawfully available to the landlord, and does so systematically, for a substantial length of time, places herself in jeopardy of having her lease terminated on that ground, with no right to cure

(*see Gruber v Anastas*, 100 AD3d 829 [2d Dept 2012]; *220 W. 93rd St., LLC v Stavrolakes*, 33 AD3d 491 [1st Dept 2006], *lv denied* 8 NY3d 813 [2007]; *Matter of 151-155 Atl. Ave. v Pendry*, 308 AD2d 543, 543-544 [2d Dept 2003]; *BLF Realty Holding Corp. v Kasher*, 299 AD2d 87, 91 [1st Dept 2002], *lv dismissed* 100 NY2d 535 [2003]; *Continental Towers Ltd. Partnership v Freuman,* 128 Misc 2d 680 [App Term, 1st Dept 1985]). The record before us establishes, as a matter of law, that this is precisely what defendant did with the rent-stabilized cooperative apartment she leased from plaintiff, the trust that holds the unit's appurtenant cooperative shares and its proprietary lease. Accordingly, plaintiff is entitled to summary judgment on its first cause of action (for a declaration that it validly terminated the lease), on its second cause of action (for ejectment), and as to liability on its third cause of action (for recovery of the fair value of the use and occupancy of the apartment since defendant was served with notice of the termination of the lease). We therefore modify the order appealed from to grant plaintiff's motion for such relief.

Defendant does not dispute that she sublet her apartment to 93 different customers recruited through the Airbnb website, for 338 days spread over a period of 18 months (the first stay began on March 1, 2011, and the last began on August 29, 2012), at

nightly rates ($95 for one person, $120 for two) far in excess of her stabilized rent, which was $1,758.01 per month during the relevant period, equivalent to $57.80 per day.[1] Although a tenant is permitted by Rent Stabilization Code (RSC) (9 NYCRR) § 2525.6(b) to charge a 10% premium for an otherwise lawful sublet of a furnished rent-stabilized apartment, 110% of plaintiff's stabilized rent, on a per-diem basis, was only $63.58. Thus, the $95 per night that she charged single guests was approximately one and a half times the lawful per-diem charge for a sublet, and the $120 she charged couples was nearly twice (approximately 189%) the lawful charge.

The evidence in the record from the Airbnb website reveals that the blatancy of defendant's commercialization of her apartment was comparable to that of tenants who have been evicted for profiteering in prior cases (*see 335-7 LLC v Steele*, 53 Misc 3d 150[A], 2016 NY Slip Op 51689[U] [App Term, 1st Dept 2016]; *42nd & 10th Assoc., LLC v Ikezi*, 46 Misc 3d 1219[A], 2015 NY Slip Op 50124[U] [Civ Ct, NY County 2015], *affd* 50 Misc 3d 130[A], 2015 NY Slip Op 51915[U] [App Term, 1st Dept 2015]; *West 148 LLC v Yonke* (11 Misc 3d 40, 41 [App Term, 1st Dept 2006], *lv denied* 2006 NY Slip Op 73839[U] [1st Dept 2006]; *see also Brookford, LLC*

[1]Most of defendant's "guests" stayed for less than a week. Only one of them stayed for more than 11 days.

v Penraat, 47 Misc 3d 723, 725 [Sup Ct, NY County 2014] [granting interim injunction against tenant's Airbnb subletting]). Defendant advertised her apartment on the Airbnb website as "5th Avenue Perfection," and described the accommodations as follows:

> "Large well appointed private bedroom in great downtown location. (Greenwich Village West) Step out onto New York's 5th Ave from posh doorman building located in the best zip code in NYC. Just steps from Washington Sq Park your comfortable room is surprisingly quiet, but then 5th Ave ends at the park just a stones [sic] throw away so traffic is minimal. Flat screen TV[.] Share fully outfitted kitchen and spotless bathroom with 1 other . . . owner (female)[.] Walk a few short blocks to 2 subway stations (West 4th St or 14th St/Union Sq)[.] Perfect for single or couple. Private Entrance . . . Elegent [sic] Comfy[.]"

Defendant's listing on the Airbnb website also provided (1) links for making reservations, (2) "check-in" and "check-out" times, (3) the financial penalty for untimely cancellation, and (4) reviews from numerous past guests.

Turning her rent-stabilized apartment into a single-unit tourist hotel in this fashion enabled defendant to earn substantial profits, far in excess of the legally permissible 10% premium.[2] After Airbnb (to which the subtenants paid the rent)

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[2]Defendant does not dispute plaintiff's figures, derived from the records provided by Airbnb, for the number of paying guests she hosted, the aggregate number of days her guests stayed in the apartment, the daily rates the guests were charged, and her aggregate revenue from the subletting. Contrary to the dissent's assertion, defendant has not submitted a chart of all of her Airbnb income, only a chart listing her revenue during

deducted its fees, the subletting generated total income of $33,592.00 for defendant. The stabilized rent she paid for the same 338 days (based on the aforementioned per-diem figure of $57.80) was only $19,536.40. Thus, defendant realized a 72% profit from her subletting — about seven times the 10% premium permitted for otherwise lawful sublets of furnished rent-stabilized apartments. Had defendant limited herself to the 10% premium permitted by the RSC, her aggregate revenue would have been $21,490.04 — about $12,000 less than her actual revenue of $33,592.00. Taking into account the lawful 10% premium (and ignoring the fact that the apartment was shared), defendant overcharged her 93 subtenants, in aggregate, by approximately 56%.[3]

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eight of the 18 months at issue. Neither defendant nor the dissent identifies any material discrepancies in the record evidence concerning defendant's Airbnb income. While, as noted by the dissent, defendant made an argument before the motion court concerning her alleged expenses and labor in accommodating her subtenants, we have no occasion to address this argument because plaintiff has abandoned it on appeal.

[3]As is evident from the foregoing discussion, we acknowledge that defendant was permitted to charge otherwise lawful subtenants a 10% premium over her own rent. Accordingly, contrary to the dissent's assertion, it is not "misleading" for us to point out that, based on her undisputed aggregate Airbnb income and her undisputed per diem rent, defendant realized a 72% aggregate profit, which, as noted, was about seven times the permissible 10% premium. In fact, it is a considerable understatement to quantify defendant's gross profit at 72%, and the aggregate overcharge of her subtenants at 56%, given that, as

Initially, we are unanimous in rejecting defendant's primary argument on this appeal, in which she contends that the 93 transient, short-term, paying guests she hosted over a year and a half were "roommates" within the purview of Real Property Law § 235-f and RSC 2525.7. Contrary to the view of Supreme Court, the record establishes that defendant's "guests" were, as a matter of law, subtenants, and this matter is therefore governed by RSC 2525.6 (*see Stavrolakes*, 33 AD3d at 491 [occupancy of a rent-controlled apartment "by numerous persons between 2001 and 2005 — especially short-term transient students at illegal rents — was in the nature of subletting rather than taking in roommates"]). Accordingly, defendant's first and fourth affirmative defenses, both based on her claim that her guests were "roommates," are unavailing.

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noted, the subtenants did not have sole possession of the apartment but, rather, shared it with defendant. Indeed, defendant refers to her subtenants as "roommates" throughout her appellate briefs, and states in her affidavit: "I always lived together with my roommates. Everything was shared. We even watched TV together." Based on these sworn admissions, it would appear that the lawful charge to the subtenants would have been based on half of defendant's rent, not the full rent. The dissent offers no rationale for its apparent view that it might be permissible for a rent-stabilized tenant to shift the entire rent to a subtenant who does not have sole possession of the entire apartment. Although, as more fully discussed below, defendant's "guests" were not roommates, we note that a rent-stabilized tenant may not lawfully charge a roommate more than the roommate's "proportionate share of the legal regulated rent" (RSC 2525.7[b]).

As her third affirmative defense, defendant alleges that plaintiff is not entitled to relief because her subletting was "de minimis[,] short term and insubstantial," a contention that she has repeated in her motion papers and on this appeal. In this regard, defendant asserts in her appellate brief that her subletting was "insubstantial when viewed in the context of a forty (40) year tenancy." The dissent takes the position that defendant has raised a triable issue as to whether the subletting was of substantial duration. The implication of this analysis, in which whether the unlawful conduct was of sufficient duration to be considered material is determined by comparison to the total length of the tenancy, has the effect of rendering lawful for a longstanding tenant the exact same conduct that would be unlawful for a tenant who has a shorter history in his or her apartment. The dissent offers no support for its assumption that the relevant legal provisions were enacted with an intent to discriminate in this fashion between tenants based on the lengths of their tenancies. In our view, subletting of an apartment at an excessive rental rate for 338 days over a year and a half, or for 11 out of 18 months, has taken place on a sustained basis, not intermittently, and for a substantial period of time, and thus constitutes unlawful profiteering, regardless of the duration of the tenancy before the unlawful conduct began.

Indeed, the Appellate Term recently affirmed the eviction of a tenant who had sublet her rent-stabilized apartment through Airbnb for "at least 120 nights in a 14 month period" (*Steele*, 53 Misc 3d 150[A], 2016 NY Slip Op 51689[U], *1) — less than half the number of nights defendant sublet her apartment, over a roughly comparable period of time (*see also Continental Towers*, 128 Misc 2d at 681 [the tenant was evicted for having entered into an arrangement to sublet his apartment at an excessive rate for six months, although the subtenant apparently vacated the premises before the term of the sublease had expired]).[4]

Defendant also argues that her profiteering was "insubstantial" because her Airbnb income did not exceed her legal regulated rent plus 10% during several months of the subletting. We find the point unavailing. Defendant sublet her apartment on a daily basis and, perforce, she had less Airbnb

[4]In cases in which tenants found to have engaged in unlawful for-profit subletting have avoided eviction, the unlawful conduct has generally been of objectively brief duration. In *Cambridge Dev., LLC v Staysna* (68 AD3d 614 [1st Dept 2009]), the overcharging of the sole subtenant ceased "before the first month of the sublease had ended" (*id.* at 615). In *Ariel Assoc., LLC v Brown* (271 AD2d 369 [1st Dept 2000], *lv dismissed* 95 NY2d 844 [2000]), as revealed by the record and appellate briefs, the apartment was sublet for only approximately one month during each of three summers, spread over four years. Similarly inapposite is the Appellate Term case of *Central Park W. Realty v Stocker* (1 Misc 3d 137[A], 2004 NY Slip Op 50058[U] [App Term, 1st Dept 2004]), in which the unlawful sublet lasted only one month.

revenue in months during which her apartment was sublet for fewer days. To determine defendant's profit from the subletting, her income from the subletting should be compared to the share of her rent attributable to the days she was actually hosting a subtenant in the apartment, not to her rent for the entire month during which the subletting occurred.

Although she has not pleaded this as an affirmative defense, and barely touches on the point in her appellate briefs, defendant also appears to contend that plaintiff had knowledge of, and gave consent to, her subletting. Here again, the dissent is persuaded that there are issues to be determined at trial, including (1) "whether defendant acted with the knowledge of Samson [Management LLC], her landlord's agent," (2) "whether defendant obtained the consent of the building's managing agent," and (3) "whether the managing agent [of the building] had apparent authority to act for plaintiff." However, as more fully explained below, the record contains no admissible evidence that Samson, plaintiff's agent, ever knew of defendant's subletting before it was advised of the practice in the summer of 2012 — more than a year after the subletting began — by the cooperative corporation's managing agent (which threatened to terminate plaintiff's proprietary lease if the subletting continued). Nor does any admissible evidence give rise to a triable issue as to

whether defendant's alleged notice of her subletting to the cooperative corporation's managing agent was "binding" upon plaintiff.

Defendant's claim that plaintiff had notice of the subletting is based entirely on her contention that, before she listed the apartment with Airbnb, she told an unidentified employee of the cooperative's building manager about the plan, who told her that it would not be a problem as long as she provided the building staff with a completed visitor notification form for each guest.[5] However, any notice defendant provided to

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[5]Defendant states in her affidavit:

> "Because I was concerned that the building might not allow my roommates entry to my apartment, I actually spoke to the property manager of the building and explained the situation *before* starting the whole AIRBNB roommate process. I was told specifically by building management that it would *not* be a problem and that so long as I completed the building's Visitor Notification Form each time I had a new roommate or guest, there would be *no* issue. My building has a doorman, and, as requested by management, I notified management of my roommates/guests, as evidenced by Plaintiff's exhibit 'F' [copies of several visitor notification forms that defendant filled out]."

Notably, defendant does not claim to have told the building's management that she would be charging her "roommates" unlawfully excessive rent (or, indeed, that she would be charging them anything at all), or that the anticipated "roommates" would be people unknown to her who had responded to an online advertisement. If defendant actually disclosed these facts to the managing agent, it is strange that she did not forthrightly say so in her affidavit or in her deposition testimony.

the building manager, an agent of the cooperative corporation, is a complete red herring, because her landlord — plaintiff in this action — was not the cooperative corporation but the holder of the proprietary lease for her apartment and the owner of the shares in the cooperative corporation appurtenant to that unit. Neither defendant nor the dissent identifies any admissible evidence that could support an inference that the cooperative corporation's building manager had actual or apparent authority to act for plaintiff or that the building manager (assuming that, as defendant claims, she gave the building manager advance notice of her plan to receive guests through Airbnb) notified plaintiff of the subletting at any time before an attorney for the cooperative corporation sent plaintiff a letter, in June 2012, demanding that the subletting be brought to a halt.

In assessing defendant's claims that plaintiff somehow had notice of her subletting, it is critical to bear in mind that the record establishes that plaintiff and the cooperative corporation were represented by different property management companies. As previously noted, plaintiff's agent was Samson, the company that signed defendant's renewal lease and sent her correspondence concerning the apartment, and to which defendant made her rent

checks payable.[6] The agent for the cooperative corporation, on the other hand, apparently was a company known as Lawrence Properties, as evidenced on a Department of Housing Preservation and Development building registration summary report for 39 Fifth Avenue, dated January 22, 2015, which is part of the record. In addition, Barbara Schmidt, the person listed as the building's managing agent on the visitor advice notification forms that defendant completed for her guests, is identified as an affiliate of Lawrence Properties in the June 2012 letter from the cooperative's counsel to plaintiff demanding the cessation of defendant's subletting.[7] Again, the record is utterly bereft of

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[6]Plaintiff, as a trust, rather than a natural person, necessarily acts through agents. At all times during the period of defendant's subletting, plaintiff's trustee was Arnold Goldstein, an executive of Samson, who died during the pendency of this action. It is not clear what the dissent means by its assertion that "[t]here is no evidence that defendant ever had any direct communication with an individual representing plaintiff during the four decades of her tenancy." In addition to numerous rent checks defendant made payable to Samson, the record contains several renewal leases and other documents relating to the tenancy signed by defendant and, on behalf of Samson, by a person apparently named Estelle Magidson. The record also contains a letter handwritten by defendant and addressed to "Deslin Neal" at Samson, in which defendant refers to her 2009 lease as "my most current lease."

[7]Defendant testified at her deposition that Barbara Schmidt "banged" on her door in July or August of 2012 and told defendant that she was going to be "throw[n] . . . out" of her apartment. Defendant's account of Schmidt's anger over the subletting is inconsistent with defendant's position that she had gotten the approval of the building's managing agent for the subletting

any basis for treating notice to the cooperative's managing agent as notice to plaintiff, or for deeming the acts of the cooperative's managing agent to have been authorized by, or binding upon, plaintiff.

While defendant testified at her deposition that "Sampson [sic] Management [plaintiff's agent] knew" about her subletting, this statement by defendant, about the state of mind of a person or persons other than herself, has no foundation whatsoever and therefore does not constitute admissible evidence. Defendant did not testify at her deposition, nor did she state in her affidavit, that she ever notified any employee of Samson, either in writing or orally, of her Airbnb subletting. When asked at her deposition how she believed that Samson came to know of the subletting, defendant referred to the visitor advice notification forms that she had supplied to the building staff. There is no evidence in the record, however, that these forms were transmitted to Samson.[8] Defendant, having failed to notify

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before she listed the apartment on Airbnb.

[8]The dissent does not explain how defendant's unfounded testimony (as summarized by the dissent) that "plaintiff knew about her roommates from the visitor logs she completed and gave to the building staff" could possibly constitute admissible evidence, given that, as noted, there is neither any evidence that these forms or the information they contained were transmitted to plaintiff's agent (Samson) nor any evidence that members of the building staff were plaintiff's agents. In any

plaintiff's agent of her plan to book paying guests through Airbnb, cannot use her own unfounded speculation to create a triable issue as to what plaintiff's agent knew about her use of the apartment. Further, there is no evidence that plaintiff had given her any reason to believe that employees of the building's managing agent were also plaintiff's agents.[9]

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event, the visitor advice notification forms did not disclose that defendant was engaged in subletting at an unlawful rental rate.

[9]There is no basis for the dissent's assertion that a triable issue exists as to whether the building's managing agent had actual or apparent authority to act for plaintiff. To begin, there is no evidence in the record that the building's managing agent had actual authority to act as plaintiff's agent. In this regard, the dissent points to no basis for its speculation that Barbara Schmidt, the representative of the building's managing agent, was acting for plaintiff when she told defendant in the summer of 2012 that defendant had placed herself at risk of eviction. As is evident from the cooperative corporation's aforementioned June 2012 letter to plaintiff demanding that there be no "future illegal subletting of the Unit," the cooperative corporation had an independent interest in the cessation of defendant's Airbnb subletting, which was contrary to the interests of the building's other permanent residents. As to apparent authority, the applicability of that doctrine "depends upon a factual showing that the third party relied upon the representation of the agent because of some misleading conduct on the part of the principal — not the agent" (*Indosuez Intl. Fin. v National Reserve Bank*, 98 NY2d 238, 245-246 [2002] [internal quotation marks omitted]). The record is devoid of evidence of any conduct by plaintiff (through its actual agent, Samson) by which defendant reasonably could have been misled to believe that the building's managing agent had authority to act for plaintiff. In the absence of such evidence, no triable issue as to apparent authority arises (*see N.X. v Cabrini Med. Ctr.*, 97 NY2d 247, 252 n 3 [2002]).

Contrary to the dissent's view, there is no issue as to whether defendant "has cured or can cure." The decisions of this Court and the Second Department cited in the first paragraph of our discussion establish that, once substantial profiteering has been established, the tenant is subject to eviction without any right to cure, as a matter of law (*see also Steele*, 53 Misc 3d 150[A], 2016 NY Slip Op 51689[U], *1; *Ikezi*, 50 Misc 3d 130[A], 2015 NY Slip Op 50124[U], *6; *Brookford*, 47 Misc 3d at 743-745; *30-40 Assoc. Corp. v Cuervo*, 16 Misc 3d 127[A], 2007 NY Slip Op 51232[U] [App Term, 1st Dept 2007]). As the Appellate Term stated in *Continental Towers*,

> "The integrity of the rent stabilization scheme is obviously undermined if tenants, who themselves are the beneficiaries of regulated rentals, are free to sublease their apartments at market levels and thereby collect the profits which are denied the main landlord. . . . The tenant was commercializing with the apartment in a manner which defrauded his landlord as well as his subtenant. This practice, which the Rent Stabilization Law was designed to prevent, is not to be condoned by permitting the tenant to remain after the fraud has been found out" (128 Misc 2d at 681-682 [footnotes omitted]).

Accordingly, defendant is not entitled to an opportunity to cure her breach, nor was she entitled to a notice to cure, and her second affirmative defense, based on plaintiff's failure to serve a notice to cure, should be dismissed.

While there are cases in which tenants who have overcharged

their subtenants have nevertheless been permitted to cure, in such cases, as previously noted, the illegal subletting generally has been of short duration (*see e.g. Cambridge*, 68 AD3d at 615 [the illegal overcharging of the subtenant lasted less than one month]). Moreover, in this context, "cure" does not mean simply the termination of the illegal subletting, but also the refund to the subtenants of the overcharges (*see id.*; *Ariel Assoc., LLC v Brown*, 271 AD2d at 370 [affirming denial of eviction where the tenant "promptly refunded all sums to the subtenants"]; *Cuervo*, 16 Misc 3d 127[A], 2007 NY Slip Op 51232[U] [affirming eviction where, inter alia, the tenant "failed to refund the overcharge"]; *Central Park W. Realty v Stocker*, 1 Misc 3d 137[A], 2004 NY Slip Op 50058[U], *2 [affirming denial of eviction based on a one-month sublet where, inter alia, "tenant refunded the overcharge to the subtenant"]). In this case, not only does defendant not allege that she has cured by refunding the overcharges to any of her 93 former subtenants, she has never offered, either before the motion court or upon this appeal, to refund the overcharges to the subtenants.[10] This is not surprising. Given that

[10]Unlike the dissent, we see no issue as to whether defendant has cured, or could cure, by refunding the overcharges, given that defendant, as noted, has neither claimed to have refunded any of her subtenants in the past nor indicated any readiness to refund those subtenants in the future.

defendant hosted 93 different subtenants, with whom she had no direct financial dealings, it appears that the overcharges that defendant collected could not practicably be refunded.

Defendant's remaining affirmative defenses are without merit. The fifth affirmative defense should be dismissed in the absence of any showing that the action is time-barred. The sixth affirmative defense, lack of standing, should be dismissed because, plaintiff established, via its proprietary lease and share certificate evidencing its ownership of the shares appurtenant to the apartment, that it was the landlord. Contrary to the seventh affirmative defense, declaratory relief is appropriate in a landlord-tenant action (*see e.g. Eckstein v New York Univ.*, 270 AD2d 208 [1st Dept 2000], *lv denied* 95 NY2d 760 [2000]). Finally, the eighth affirmative defense and first counterclaim, which seeks attorneys' fees under the reciprocal provision of Real Property Law § 234, should be dismissed because, in view of the foregoing, there is no possibility of a result substantially favorable to defendant (*see e.g. Walentas v Johnes*, 257 AD2d 352 [1st Dept 1999], *lv dismissed* 93 NY2d 958 [1999]).

In considering this appeal, we are mindful of the fact that defendant's age and health status naturally evoke sympathy. We also acknowledge that the forfeiture of a rent-stabilized

leasehold is no small loss, especially after a tenancy that has lasted for more than 40 years. On this record, however, it is simply undeniable that — as defendant herself essentially admits — she exploited the governmentally-conferred privilege of her rent-stabilized tenancy to take financial profits unavailable to her landlord, well in excess of the permissible 10% premium for a furnished apartment. Moreover, defendant's exploitation of her rent-stabilized leasehold disregarded, not only the rights of her landlord, but also the rights of all of her fellow permanent residents of the building, whether shareholders or lessees. The other residents did not bargain to share the building where they made their homes with a continuous stream of transient strangers (to defendant no less than to themselves) of unknown character and reputation, drawn to the building from all over the world by Internet advertising (*see Steele*, 53 Misc 3d 150[A], 2016 NY Slip Op 51689[U], *2 ["tenant's illegal, de facto hotel operation (through Airbnb) showed complete disregard for the legitimate security concerns of landlord and other tenants, as she . . . brought dozens of strangers into a residential building"]). Seen in this light, defendant's systematic commercial exploitation of

her rent-stabilized leasehold fully warrants the termination of her lease. Accordingly, we modify to grant plaintiff summary judgment.

All concur except Richter and Gesmer, JJ. who dissent in a memorandum by Gesmer, J. as follows:

GESMER, J. (dissenting)

In my view, the motion court correctly found that there are material issues of fact that precluded it from granting summary judgment as to plaintiff's complaint, which seeks to evict defendant for unlawfully subletting her rent stabilized apartment, and as to defendant's second affirmative defense, that plaintiff failed to serve a notice to cure, and her third affirmative defense, that her conduct did not rise to the level of profiteering which would justify her eviction from her long-time home.[1] It has long been the rule that the court's task on a motion for summary judgment is "[i]ssue-finding, rather than issue-determination" (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395, 404 [1957] [internal quotation marks omitted]). Therefore, to defeat a summary judgment motion, defendant need only raise triable issues of fact requiring a trial (CPLR 3212[b]), which I would find she has done.

Plaintiff is the owner and proprietary lessee of an apartment in a building owned by a cooperative corporation, 39 Fifth Avenue Owners Corporation (39 Fifth). Samson Management

[1]I concur with the majority that defendant's rental of her rent-stabilized apartment to guests for brief stays does not constitute a roommate situation (*see 220 W. 93rd St., LLC v Stavrolakes*, 33 AD3d 491 [1st Dept 2006], *lv denied* 8 NY3d 813 [2007]), and that her "guests" were subtenants under the Rent Stabilization Code (*see* 9 NYCRR 2525.6).

LLC (Samson) is plaintiff's current managing agent for the apartment.

Defendant, now 69, has lived in the apartment since 1973 pursuant to a rent stabilized lease. The lease required a tenant wishing to sublet to obtain the landlord's consent, which shall not be unreasonably withheld. The lease further provides that, where the tenant defaults on this or other lease obligations, the landlord shall serve a notice to cure on the tenant as a predicate to a notice to terminate and eviction proceedings. There is no evidence in the record that defendant ever had a roommate or defaulted on her lease obligations in any way in the 38 years of her tenancy before the events at issue here.

In 2010, defendant was diagnosed with cancer, and, upon disclosing that to her employer, was terminated from her job. After that, she was not able to find another job, and received unemployment insurance. She then underwent six operations, and was unable to work for more than a year. As her financial situation worsened, she realized that, in order to pay her rent, she needed to find a roommate, but she found it difficult to do so.

A friend suggested that she look for a roommate through Airbnb. Concerned that the building might not approve this arrangement, defendant spoke with the building's property manager

who told her that it would "not be a problem" as long as she completed and returned to management the building's Visitor Advice Notification Form each time she had a guest. The property manager did not tell her to obtain permission from anyone else. The building's superintendent gave defendant a stack of the forms. The form was headed "39 Fifth Ave. Owners Corp." and stated at the bottom, "If you have any questions, please contact Barbara Schmidt, Managing Agent... or Mike Blakaj, Superintendent." Defendant claims that she would not have used Airbnb if the property manager had objected to her doing so. Plaintiff does not dispute that defendant sought and obtained the approval of the property manager.

Defendant then listed the apartment on Airbnb in or about February 2011. The online listing set the cost at $95 per night for single persons and $120 per night for couples. Airbnb received a 3% commission on the sums charged. Each guest was screened by Airbnb, which provided a brief biography of each guest to defendant. Defendant reviewed each guest's biography, and communicated with each potential guest by email before arranging for the guest to stay with her. Defendant continued to use the apartment as her primary residence, and cooked meals for each guest. Each guest shared the entire apartment with her, including the one bathroom and unlimited use of the kitchen.

They even watched TV together. Defendant completed the Visitor Advice Notification Form for each guest and gave it to management to notify them of each guest, which plaintiff does not dispute. Defendant testified at her deposition to her belief that Samson was also aware that she had people staying with her from the forms that she completed.

On or about June 12, 2012, the building's counsel advised plaintiff that defendant had been "illegally sub-subletting the Unit for short-term rentals." The building served plaintiff with a notice to cure on or about August 29, 2012.

In late July or early August 2012, Barbara Schmidt, who is listed on the Visitor Advice Notification Form as 39 Fifth's managing agent, went to defendant's apartment, banged on her door, and told defendant that she was going to have her evicted. Ms. Schmidt was accompanied by the building's superintendent. Defendant immediately consulted counsel and, promptly thereafter, on or about August 24, 2012, defendant terminated her account at Airbnb.

A rent stabilized tenant is permitted to charge an authorized subtenant 10% above the legal rent if the apartment is rented furnished (9 NYCRR 2526.6[e]). The primary tenant may also charge a subtenant for expenses such as utility payments (*see Cambridge Dev., LLC v Staysna*, 68 AD3d 614, 615 [1st Dept

2009] [primary tenant permitted to cure overcharge of subtenant by applying excess to utility payments and future rent]).[2] During the relevant period, defendant's monthly rent was $1,758.01. Defendant's monthly income from Airbnb exceeded $1,933.81 (her legal rent plus 10%) during only eight months: from June through December 2011, and in August 2012. Looked at another way, defendant's per diem charge of $95 per night for single guests or $120 per night for couples exceeded her rent plus 10% on a per diem basis ($1,933.81/30 = $64.46) by approximately $30 per night for single guests or $55 per night for a couple. The majority's claim that defendant realized a 72% profit over 18 months is misleading for two reasons. First, those calculations are based on the amount she received above her legal rent, rather than in excess of her rent plus 10%. Second, plaintiff's and defendant's charts of the sums received by defendant differ in some respects. It is not clear whether each chart applies sums received to the month in which defendant received them or the month in which each guest stayed in defendant's home. Accordingly, I would find that the amount of

[2]While the record shows that defendant incurred expenses for utilities, household supplies and groceries, and that she argued before the motion court that the sums charged were also intended to pay for her labor in cooking and cleaning for guests, she did not make these arguments on appeal, and, therefore, they are not properly before us.

profit defendant may have realized is a question of fact precluding summary judgment.

It is undisputed that plaintiff never served a notice to cure on defendant. On or about October 4, 2012, plaintiff served defendant with a notice of termination.

The Rent Stabilization Code requires a landlord's consent to sublet (9 NYCRR 2525.6[e]), and prohibits a tenant from charging a subtenant more than the legal rent plus a 10% surcharge if the premises is fully furnished (9 NYCRR 2525.6[b]). Where a tenant violates these provisions, the landlord may terminate the tenancy (9 NYCRR 2525.6[f]). Where a holdover proceeding is based on a claim that the tenant has defaulted under the subleasing provisions of the lease, in addition to any right to cure provided in the lease itself, the tenant is entitled to a 10-day stay of the warrant of eviction in order to cure the default (RPAPL 753[4]).

However, where the tenant's conduct rises to the level of profiteering, courts have found such conduct not subject to cure, since "the integrity of the rent stabilization scheme is obviously undermined if tenants, who themselves are the beneficiaries of regulated rentals, are free to sublease their apartments at market levels and thereby collect the profits which are denied the main landlord" (*Continental Towers Ltd.*

Partnership v Freuman, 128 Misc2d 680, 681 [App Term, 1st Dept 1985]). There is no consistent legal definition of the term "profiteering" in this context. Since tenants who overcharge subtenants are sometimes permitted to cure, "profiteering" does not mean just making a profit. Rather, as the dictionary definition of the term implies, profiteering involves making an "excessive" profit (Oxford English Dictionary [2017]). Cases in which a rent stabilized tenant is evicted for unlawful profiteering generally involve tenants who charge two or more times the legal regulated rent[3] (*Continental Towers* at 681; *see also 42nd & Tenth Assoc. LLC v Ikezi*, 46 Misc 3d 1219[A], 2015 Slip Op 50124[u] [Civ Ct NY County 2015], *affd* 50 Misc 3d 130[A], 2015 NY Slip Op 51915[u] [App Term 1st Dept 2015]*; 30-40 Assoc. Corp. v Cuervo*, 16 Misc 3d 127[A], 2007 NY Slip Op 51232[u] [App Term 1st Dept 2007]; *West 148 LLC v Yonke*, 11 Misc 3d 40 [App Term 1st Dept 2006], *lv denied* 2006 NY Slip Op 73839[u] [1st Dept 2006]), and whose conduct offends their rent stabilized lease in other ways as well, such as inducing the landlord's consent by lying about the rent to be charged (*Continental Towers*, 128 Misc 2d at 681), using the premises from the inception of the lease as

[3]The only authority cited by the majority for its statement that the defendant may only charge her guests for their proportional share of the rent relates solely to roommates and is not applicable here.

a "hotel" and rarely, if ever, as a primary residence for the primary tenant's own use (*42nd & Tenth Assoc.*, 46 Misc 3d 1219[A], 2015 NY Slip Op 50124[u]), or having business cards printed up listing the premises as a "bed and breakfast" (*West 148 LLC*, 11 Misc 3d at 41).

Conversely, a rent stabilized tenant who overcharges a subtenant is not subject to eviction where her conduct does not rise to the level of profiteering and she has cured (*Cambridge Dev.*, 68 AD3d at 615; *Ariel Assoc. v Brown*, 271 AD2d 369 [1st Dept 2000], *lv dismissed* 95 NY2d 844 [2000]; *Central Park West Realty, LLC v Stocker*, 1 Misc 3d 137[A], 2004 NY Slip Op 50058[u] [App Term 1st Dept 2004]). Courts have so held even where the tenant did not obtain the landlord's consent prior to subletting (*672 Ninth Ave. LLC v Burbach*, 14 Misc 3d 1236[A], 2007 NY Slip Op 50321[u] [Civ Ct NY County 2007]; *2328 UNIAVE Corp. v Beheler*, 2003 NY Slip Op 51135[U] [Civ Ct Bronx County 2003]). Such cases usually involve long-term tenants whose sublease period was short relative to the length of their tenancy (*Cambridge Dev., LLC*, 68 AD3d at 615 [16-year tenant sublet for five months]; *Ariel Assoc. v Brown*, 271 AD2d at 370 [20-year tenant sublet for three summers over four years];[4] *Central Park West Realty, LLC*, 1 Misc 3d

[4]The Appellate Division opinion refers to "summer subletting," but the trial court opinion found that the tenant

137[A], 2004 NY Slip Op 50058[u] ["long term" tenant sublet for one month]; *672 Ninth Ave. LLC*, 14 Misc 3d 1236[A], 2007 NY Slip Op 50321[u] [14-year tenant sublet for 21 months]). In such cases, courts have exercised their discretion to permanently stay the warrant of eviction. Whether the trial court should do so depends on the totality of the factual circumstances of each case, including the length of the tenancy, the tenant's conduct prior to the default complained of, and the circumstances and severity of the default (*see 326-330 E. 35th Street Assoc. v Sofizade*, 191 Misc 2d 329 [App Term 1st Dept 2002]). These cases create a test which, applied to this case, I would find precludes the grant of summary judgment.

Because of the fact specific nature of this inquiry, allegations that a tenant engaged in rent profiteering should generally be decided at a plenary trial, and not on summary judgment (*13775 Realty, LLC v Foglino,* 51 Misc 3d 126[A], 2016 NY Slip Op 50335[u] [App Term 1st Dept 2016]; *335-7 LLC v Steele*, 43 Misc 3d 144[A], 2014 NY Slip OP 50891[u] [App Term 1st Dept 2014]). Here, I would find that there is a question of fact as to whether defendant engaged in profiteering, or rather used Airbnb to enable herself to continue to live in her long time

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sublet for three summers over four years (*Ariel Assoc. v Brown,* NYLJ Sept. 18, 1997 at p 4, col 6 [App Term 1st Dept 1997]).

home, which would not be inconsistent with the purposes of the Rent Stabilization Law.[5] Moreover, it is clear on this record that defendant engaged in the practice of subletting for a short time (338 days over 18 months) relative to the length of her tenancy (43 years). There is other evidence in the record as well that demonstrates that she did not turn her apartment into a commercial enterprise, including that she asked permission from the managing agent before establishing her Airbnb account, reviewed the biographies of each guest and communicated with each before permitting them to stay in her apartment, resided in the apartment with each of her guests, gave management notice of each guest, and terminated her Airbnb account upon learning that there was any objection to her conduct and before being served with the notice of termination.[6] In my view, the majority's insistence that defendant's actions in this case constitute profiteering "as a matter of law" fails to take full account of the case law in this area, and the ways in which the facts of this case, as alleged by defendant, differ in significant respects from the facts in cases where profiteering was found.

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[5]Among the purposes of the Rent Stabilization Law is to prevent the "uprooting [of] long-time city residents from their communities" (Administrative Code of City of NY § 26-501).

[6]I do not concede, as the majority claims, that defendant's conduct created a "single-unit tourist hotel."

Therefore, I would find that defendant has raised at least the following factual issues precluding summary judgment: (1) whether defendant overcharged her subtenants, and, if so, in what amounts; (2) whether defendant acted with the knowledge of Samson, her landlord's agent, as defendant testified at her deposition; (3) whether defendant obtained the consent of the building's managing agent; (4) whether the managing agent had apparent authority to act for plaintiff;[7] (5) whether defendant's conduct rises to the level of profiteering requiring termination of her 43-year tenancy; and (6) if it does not, whether defendant

[7]The majority urges that the landlord was not aware of defendant's actions. I view this as yet another factual question precluding summary judgment. Defendant testified at her deposition that plaintiff knew about her roommates from the visitor logs that she completed and gave to the building staff. I would further find that there is also a question of fact as to whether defendant obtained consent from the building's managing agent, as defendant also testified she did, and, if so, whether the managing agent had actual or apparent authority to bind the landlord. There is no evidence that defendant ever had any direct communication with an individual representing plaintiff in the four decades of her tenancy. The only evidence of defendant's dealings with plaintiff's managing agent are the managing agent's signature on her renewal leases, her rent checks sent to the managing agent, and three pieces of correspondence about rent and a renewal lease between 2003 and 2012. Furthermore, it was Barbara Schmidt, the managing agent for 39 Fifth, not plaintiff, who first advised defendant that she was at risk of eviction, suggesting that building staff, at least on some occasions, behaved as if it were an intermediary between defendant and plaintiff. In any event, as discussed above, a tenant who sublets without consent of the landlord is not necessarily subject to eviction on this basis.

has cured or can cure, including by refunding the amount of any overcharge to subtenants found to have been overcharged.[8] Accordingly, I would find that the motion court appropriately denied summary judgment as to plaintiff's complaint and defendant's second and third affirmative defenses.

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

ENTERED: MAY 23, 2017

CLERK

[8]I disagree with my colleagues in the majority that any overcharges collected "could not practicably be refunded," since there is no basis in the record for such a finding.

Sweeny, J.P., Andrias, Moskowitz, Kahn, Gesmer, JJ.

3685N In re People of the State of New York, etc.,
Petitioner-Respondent,

-against-

PriceWaterhouseCoopers, LLP,
Respondent,

Exxon Mobil Corporation,
Respondent-Appellant.

Index 451962/16

Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (Theodore V. Wells, Jr. of counsel), for appellant.

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

Order, Supreme Court, New York County (Barry R. Ostrager, J.), entered on or about October 26, 2016, which granted the petition of New York State Attorney General (NYAG) to compel respondent Exxon Mobile Corporation (Exxon) and its independent auditor, respondent PriceWaterhouseCoopers, LLP (PwC), to comply with a subpoena duces tecum served on PwC, unanimously affirmed, without costs.

In this proceeding arising from an underlying investigation by the NYAG into alleged fraud by respondent Exxon concerning its published climate change information, the motion court properly found that the New York law on privilege, rather than Texas law, applies, and that New York does not recognize an accountant-

client privilege.

We reject Exxon's argument that an interest-balancing analysis is required to decide which state's choice of law should govern the evidentiary privilege. Our current case law requires that when we are deciding privilege issues, we apply the law of the place where the evidence will be introduced at trial, or the place where the discovery proceeding is located (*JP Morgan Chase & Co. v Indian Harbor Ins. Co.*, 98 AD3d 18, 25 [1st Dept 2012], *lv denied* 20 NY3d 858 [2013], citing *People v Greenberg*, 50 AD3d 195, 198 [2008], *lv dismissed* 10 NY3d 894 [2008]). In light of our conclusion that New York law applies, we need not decide how this issue would be decided under Texas law.

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

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

ENTERED: MAY 23, 2017

CLERK

Friedman, J.P., Moskowitz, Feinman, Gische, Kahn, JJ.

4064 The People of the State of New York, Respondent, Ind. 5029/14

-against-

Angel Feliciano, Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Tandra L. Dawson, J.), rendered May 12, 2015, as amended June 15, 2015, convicting defendant, upon his plea of guilty, of aggravated family offense and criminal contempt in the second degree, and sentencing him to an aggregate term of one to three years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of vacating the order of protection and remanding the matter for a new determination of the duration of the order, and otherwise affirmed.

The indictment, which charged defendant with aggravated family offense under Penal Law § 240.75(1) and criminal contempt in the second degree under Penal Law § 215.50(3), was not jurisdictionally defective. The indictment gave defendant fair notice of the charges against him (*see generally People v Cohen*,

52 NY2d 584, 586 [1981]), including that the aggravated family offense charge was based on defendant's commission of second-degree criminal contempt.

We perceive no basis for reducing the sentence.

As the People concede, the expiration date of the order of protection is erroneous because it was calculated without taking jail time credit into account (*see People v Jackson*, 121 AD3d 434 [1st Dept 2014]).

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

ENTERED: MAY 23, 2017

CLERK

Friedman, J.P., Moskowitz, Feinman, Gische, Kahn, JJ.

4065 Richard Faver, Index 116742/10
Plaintiff-Appellant,

-against-

Midtown Trackage Ventures, LLC, et al.,
Defendants,

CB Richard Ellis, Inc., et al.,
Defendants-Respondents.

Fortunato & Fortunato, PLLC, Brooklyn (Louis A. Badolah of counsel), for appellant.

Faust, Goetz, Schenker & Blee LLP, New York (Todd M. Hellman of counsel), for respondents.

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered December 2, 2016, which denied plaintiff's motion for partial summary judgment on the issue of liability on his Labor Law § 240(1) claim as against defendants Lexington Operating Partners, LLC, Warburg Pincus, LLC and Lehr Construction Corp. (collectively defendants), unanimously reversed, on the law, without costs, and the motion granted.

Plaintiff established entitlement to partial summary judgment on his Labor Law § 240(1) claim through his own testimony that he was hit in the arm by an electrical wire that shot out of a section of conduit pipe after being jammed inside, causing the unsecured ladder he was standing on to wobble, which

resulted in plaintiff losing his balance and falling to the ground (*see Hill v City of New York*, 140 AD3d 568, 570 [1st Dept 2016]; *Nacewicz v Roman Catholic Church of the Holy Cross*, 105 AD3d 402, 403 [1st Dept 2013]).

Defendants failed to raise a triable issue of fact as to whether plaintiff was the sole proximate cause of the accident.

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

ENTERED: MAY 23, 2017

CLERK

Friedman, J.P., Moskowitz, Feinman, Gische, Kahn, JJ.

4066 In re Giulio D., and Another,

Dependent Children Under the Age
of Eighteen Years, etc.

Sylvia L.,
Respondent-Appellant,

Edwin Gould Services for
Children and Families,
Petitioner-Respondent.

_____

Thomas R. Villecco, Jericho, for appellant.

John R. Eyerman, New York, for respondent.

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

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Order, Family Court, New York County (Clark V. Richardson, J.), entered on or about October 21, 2015, which, to the extent appealed from as limited by the briefs, determined, after a hearing, that respondent mother had permanently neglected the subject children, unanimously affirmed, without costs.

Clear and convincing evidence supports the determination that the mother permanently neglected the subject children by failing to plan for their future, despite petitioner agency's diligent efforts to encourage and strengthen the parental relationship (*see* Social Services Law § 384-b[7][a]; *Matter of Star Leslie W.*, 63 NY2d 136 [1984]; *Matter of Sheila G.*, 61 NY2d

368, 384-386 [1984]). The agency exercised diligent efforts by scheduling regular visitation, and by referring the mother to alcohol and drug treatment, and parenting skills and mental health services (*see Matter of Marissa Tiffany C-W. [Faith W.]*, 125 AD3d 512, 512 [1st Dept 2015]). Although the mother did complete many aspects of her service plan, she failed to gain insight into her parental deficiencies or benefit from the services (*see e.g. Matter of Jaileen X.M. [Annette M.]*, 111 AD3d 502, 502 [1st Dept 2013], *lv denied* 22 NY3d 859 [2014]). Among other things, the mother continued to display poor parenting skills at visits to the point where both children requested that visits be stopped. The mother's therapist reported that the mother had gained little insight since engaging in therapy, and the case planner observed that the mother continually failed to take responsibility for her role in the circumstances that led to the children's placement.

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

ENTERED: MAY 23, 2017

CLERK

Friedman, J.P., Moskowitz, Gische, Kahn, JJ.

4067 United States Aviation Underwriters, Inc., Plaintiff-Respondent, Index 650460/15

-against-

Textron, Inc., Defendant-Appellant.

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Patterson Belknap Webb & Tyler LLP, New York (Erik Haas of counsel), for appellant.

Budd Larner P.C., New York (Joseph J. Schiavone of counsel), for respondent.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered December 28, 2016, which denied defendant's motion to dismiss the complaint, unanimously affirmed, with costs.

The IAS court correctly determined at this pleading stage that the "bordereaux" (statements of premium and loss data) that plaintiff insurer provided to defendant policy holder on a monthly basis reflected a course of conduct between the parties that established an open, mutual, current account (CPLR 206[d]; *Green v Disbrow*, 79 NY 1, 5-9 [1879]), and that the amended complaint provided sufficient specificity to provide defendant

with notice of the transactions forming the basis for the breach of contract cause of action (*see e.g. Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]).

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

ENTERED: MAY 23, 2017

CLERK

Friedman, J.P., Moskowitz, Feinman, Gische, Kahn, JJ.

4068 327 Realty, LLC, Index 21380/14
Plaintiff-Appellant-Respondent,

-against-

Nextel of New York, Inc., doing business as Sprint Nextel,
Defendant-Respondent-Appellant.

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Santamarina & Associates, New York (Gil Santamarina of counsel), for appellant-respondent.

Turner & Turner, White Plains (Frederick W. Turner of counsel), for respondent-appellant.

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Order, Supreme Court, Bronx County (John A. Barone, J.), entered February 10, 2015, which, inter alia, denied plaintiff's and defendant's respective motions for summary judgment, unanimously modified, on the law, to grant plaintiff's motion, and otherwise affirmed, without costs.

Under principles of contract interpretation, where an example of a condition is given, that example defines the type of event that will fulfill that condition (*see Lend Lease [U.S.] Constr. LMB Inc. v Zurich Am. Ins. Co.*, 136 AD3d 52, 57 [1st Dept 2015], *affd* 28 NY3d 675 [2017]). Hence, where the lease here gave "signal interference" as an example of a "technological" issue that would justify termination of the lease, the lease could only be terminated under that provision by a physical or

similar condition that would render the premises unsuited for use as a cell tower. To the extent there may be an ambiguity, it is properly construed against the drafter, defendant (*see Schron v Troutman Sanders LLP*, 97 AD3d 87, 93 [1st Dept 2012], *affd* 20 NY3d 430 [2013] [noting that contra proferentum is doctrine of last resort that construes an ambiguity against the drafter]).

The leases in the cases relied upon by defendant have terms that are similar, but in material respects different from those here, and thus are unpersuasive (*see e.g. Public Storage v Sprint Corp.*, 2015 WL 1057923, 2015 US Dist LEXIS 30204 [CD Cal, Mar. 9, 2015, No. CV-14-2594-GW (PLAx)], *appeal dismissed* 15-55575, 15-55646 [9th Cir 2016] [same termination provision, however, liquidated damages included for certain categories of termination]).

Defendant's reason for termination of the lease did not fit within the type of "technological" issues allowed in the lease,

but rather was economic, and therefore, plaintiff is entitled to summary judgment on its breach of contract claim.

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

ENTERED: MAY 23, 2017

CLERK

Friedman, J.P., Moskowitz, Feinman, Gische, Kahn, JJ.

4069-
4070 Index 157639/15

Michael Chutko, et al.,
Plaintiffs-Appellants,

-against-

Oded Ben-Ami, et al.,
Defendants-Respondents.

- - - - -

Michael Chutko, et al.,
Plaintiffs-Appellants,

-against-

Martin Melzer, etc.,
Defendant-Respondent,

The Estate of Marjorie Strider,
Defendant.

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Gold, Benes, LLP, Bellmore (Jeffrey B. Gold of counsel), for appellants.

Vouté, Lohrfink, Magro & McAndrew, LLP, White Plains (William G. Morris of counsel), for Oded Ben-Ami and Davidow, Davidow, Siegal & Stern, LLP, respondents.

Spizz & Cooper, LLP, Mineola (Harvey W. Spizz of counsel), for Martin Melzer, respondent.

_____

Order, Supreme Court, New York County (Debra A. James, J.), entered July 8, 2016, in the attorney action, which granted defendants' motion to dismiss the complaint, unanimously affirmed, without costs. Order, same court (Geoffrey D. Wright, J.), entered August 11, 2016, in the estate action, which granted defendants' motion to dismiss the complaint, unanimously

affirmed, without costs.

The claims against the attorneys (defamation and tortious interference with contract) were correctly dismissed, because the attorneys' letter was "pertinent to a good faith anticipated litigation" as established by irrefutable documentary evidence (*see Front, Inc. v Khalil*, 24 NY3d 713, 715 [2015]). Plaintiffs failed to show that the litigation, commenced in Surrogate's Court by the Estate of Marjorie Strider to recover certain artwork, was not brought in good faith. Indeed, the Surrogate's Court found that there were reasonable grounds to inquire into the Estate's claim of ownership to the work.

The claims against the Estate and its executor, based on the same attorneys' letter, were correctly dismissed as barred by the doctrine of collateral estoppel (*Alamo v McDaniel*, 44 AD3d 149, 153 [1st Dept 2007]).

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

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

ENTERED: MAY 23, 2017

CLERK

Friedman, J.P., Moskowitz, Feinman, Kahn, JJ.

4071 Gedula 26, LLC, et al., Index 653977/14
Plaintiffs-Respondents-Appellants,

-against-

Lightstone Acquisitions III LLC, et al.,
Defendants-Appellants-Respondents.

_____

Rosenberg & Estis, P.C., New York (Alexander Lycoyannis of counsel), for appellants-respondents.

Coritsidis & Lambros, PLLC, New York (Jeffrey A. Gangemi of counsel), for respondents-appellants.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered September 21, 2016, which, to the extent appealed from as limited by the briefs, denied defendants' motion to dismiss the claims for breach of contract, wrongful eviction, reimbursement of legal fees, and punitive damages or, in any event, all claims as against defendant Lightstone Group, and granted the motion as to the fraud claim, unanimously modified, on the law, to grant the motion as to the claim for punitive damages, and otherwise affirmed, without costs.

The motion court was not precluded by the single motion rule from considering defendants' motion, because the stipulation entered into by the parties when defendants withdrew their initial motion based on improper service contemplated that

defendants might "otherwise move with respect to [the] Complaint."

Dismissal of the breach of contract claim would be premature, since discovery may reveal documents that support plaintiffs' allegation that both parties accepted the terms set forth in an internal email by defendants' counsel, which email was allegedly transmitted to plaintiffs on the date of closing (*see Kasowitz, Benson, Torres & Friedman, LLP v Duane Reade*, 98 AD3d 403, 404 [1st Dept 2012], *affd* 20 NY3d 1082 [2013]).

Similarly, with respect to wrongful eviction, discovery may reveal support for plaintiffs' allegations that defendants agreed to permit them to occupy certain space in the building after the closing.

The court correctly declined to find that defendants were the prevailing party for purposes of reimbursement of reasonable attorneys' fees and costs under the agreement, because the litigation was still ongoing (*see Sykes v RFD Third Ave I Assoc., LLC*, 39 AD3d 279 [1st Dept 2007]).

The fraud claim was correctly dismissed as duplicative of the breach of contract claim, because the only fraud alleged is that defendants did not intend to comply with the agreement (*see Berger v Roosevelt Inv. Group Inc.*, 28 AD3d 345 [1st Dept 2006], *lv denied* 7 NY3d 712 [2006]).

Dismissal of the complaint as against Lightstone Group is not warranted at this stage of the litigation, because the record suggests that Lightstone Group had a legal relationship with the other defendants sufficient to subject it to liability.

The claim for punitive damages should be dismissed, because the complaint does not allege the requisite egregious tortious conduct that is part of a pattern of similar conduct directed at the public generally, and a demand for punitive damages is not a separate cause of action (*see Rocanova v Equitable Life Assur. Socy. of U.S.*, 83 NY2d 603, 613, 617 [1994]).

We have considered the parties' remaining arguments for affirmative relief and find them unavailing.

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

ENTERED: MAY 23, 2017

CLERK

Friedman, J.P., Moskowitz, Feinman, Gische, Kahn, JJ.

4072 The People of the State of New York, Respondent, Ind. 3662/10

-against-

Angel Gurity also known as Angel Guridy, Defendant-Appellant.

_____

Law Office of John L. Calcagni III, Elmhurst (John L. Calcagni III of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Matthew B. White of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Martin Marcus, J.), rendered April 3, 2014, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 25 years to life, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). In 2008, 15 years after the victim was found stabbed to death in her apartment, advanced DNA testing demonstrated that the semen found in her body was defendant's. While expert testimony made clear that this evidence established only that defendant and the victim had engaged in sexual intercourse at some point within approximately three days of the homicide, and there was evidence of a brief prior relationship between defendant and the victim in the months leading up to the

crime, the totality of the evidence established defendant's guilt beyond a reasonable doubt.

First, when police interviewed defendant in 2008, he claimed that he did not know the victim, that he could not recognize her in a 1993 photo, and that he never had sex with her. Under all the circumstances, the jury could have reasonably understood these responses as intentional falsehoods indicative of consciousness of guilt.

Second, while the medical examiner declined to opine that a sexual assault took place in the absence of evidence of overt trauma, the evidence – including that the victim's legs were spread open and that she was naked below the waist – suggested that the perpetrator committed both a sexual assault and a homicide. The permissible inference that there was a sexual assault would tend to implicate defendant because of the exclusive presence of his semen.

Third, an eyewitness who was outside the victim's apartment on the night of the murder, at a time consistent with the medical evidence regarding when the crime occurred, described a man who entered the apartment. Although the witness could not identify defendant at trial, defendant matched the victim's description in several significant respects, and there were plausible explanations for discrepancies regarding height and weight.

Finally, there was some evidence of a possible motive. A relative of the victim testified that the latter had rebuffed defendant's requests to move in with her because she was still hopeful of getting back together with her baby's father.

Accordingly, the evidence supports the jury's verdict.

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

ENTERED: MAY 23, 2017

CLERK

Friedman, J.P., Moskowitz, Feinman, Gische, Kahn, JJ.

4073 In re Elizabeth S.,
Petitioner-Respondent,

-against-

Edgard N.,
Respondent-Appellant.

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Berke & Berke, New York (Jeffrey R. Berke of counsel), for appellant.

Coffinas & Lusthaus, P.C., Brooklyn (Meredith A. Lusthaus of counsel), for respondent.

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Order, Family Court, New York County (Carol Goldstein, J.), entered on or about October 8, 2015, which, to the extent appealed from, after a nonjury trial, awarded petitioner mother primary physical custody of the parties' child, granted the parties joint legal custody, with the mother having final decision-making authority in the area of education, and granted respondent father parental access pursuant to a schedule providing for the child to stay with him for six out of every fourteen days and one week for summer vacation, unanimously affirmed, without costs.

Family Court's determination of the custody and visitation issues has a sound and substantial basis in the record, and the father has identified no grounds to disturb the determination (*see Eschbach v Eschbach*, 56 NY2d 167, 173-174 [1982]; *Matter of*

Carl T. v Yajaira A.C., 95 AD3d 640, 641 [1st Dept 2012]). The court properly considered the totality of the circumstances and the best interests of the child (*Eschbach*, 56 NY2d at 171, 174). In particular, in awarding primary physical custody to the mother, the court appropriately considered that the child had been residing primarily with the mother since he was 10 months old, pursuant to the parties' voluntary arrangement, and was thriving under that arrangement (*see Matter of Lawrence C. v Anthea P.*, 79 AD3d 577, 579 [1st Dept 2010]). Similarly, the visitation schedule set by the court largely adhered to the parties' long-standing arrangement (*see Eschbach*, 56 NY2d at 171; *see also Steck v Steck*, 307 AD2d 819, 820 [1st Dept 2003]).

Family Court appropriately considered the evaluation of the court-appointed forensic evaluator (*see Matter of Cisse v Graham*, 120 AD3d 801, 806 [2d Dept 2014], *affd* 26 NY3d 1103 [2016]), who concluded that both parties were fit parents, as well all the other evidence, in reaching its conclusion.

Family Court properly awarded the parties joint legal custody with "spheres of influence," given the parties' acrimonious relationship (*see Trapp v Trapp*, 136 AD2d 178, 181 [1st Dept 1988]; *M.R. v A.D.*, 32 Misc 3d 512, 534-535 [Sup Ct, NY County 2011]). Further, the record supports the court's determination to award the mother final decision-making authority

in the area of education, given her resourceful and proactive approach to the child's education and her demonstrated willingness to keep the father fully informed of her decision making on such issues and to solicit his input as appropriate.

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

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

ENTERED: MAY 23, 2017

CLERK

Friedman, J.P., Moskowitz, Feinman, Gische, Kahn, JJ.

4075- Index 652296/15
4076-
4077-
4078-
4079 GE Oil & Gas, Inc.,
Plaintiff-Respondent,

-against-

Turbine Generation Services,
L.L.C., et al.,
Defendants-Appellants.
- - - - -
[And a Third-Party Action]

_____

Mintz & Gold LLP, New York (Ira L. Sorkin of counsel), for appellants.

Reed Smith LLP, New York (Casey D. Laffey of counsel), for respondent.

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Judgment, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered August 3, 2016, in plaintiff's favor as against defendants, unanimously affirmed, without costs. Appeals from orders, same court and Justice, entered July 20, 2016, May 27, 2016, May 18, 2016, March 30, 2016, and March 7, 2016, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The record demonstrates conclusively defendants' nonpayment of a note and guaranty (*see Citibank v Plapinger*, 66 NY2d 90, 92 [1985]; *Grand Pac. Fin. Corp. v 97-111 HALE, LLC*, 90 AD3d 534,

535 [1st Dept 2011]). It is undisputed that defendant Turbine Generation Services, L.L.C. did not repay the note at the extended maturity date and that defendant Moreno absolutely and unconditionally guaranteed payment. Although the motion court initially granted plaintiff's motion for summary judgment as to liability only, on the grounds that the claims arising from the term sheet and the loan documents to which it was appended were "inherent[ly] interconnected[]" (*see e.g. River Bank Am. v Daniel Equities Corp.*, 205 AD2d 476, 476 [1st Dept 1994]), the court correctly found that defendants violated the mandatory forum selection clause in the loan documents when they filed an action in Louisiana state court based on an alleged oral agreement to form a joint venture, the result of which action could have undermined the New York judgment and rendered the subject note and guaranty unenforceable. On these grounds, and in light of defendants' multiple violations of its orders, the motion court appropriately enjoined defendants from litigating in Louisiana

(*see Indosuez Intl. Fin. v National Reserve Bank*, 304 AD2d 429 [1st Dept 2003]), and found them to be in contempt (*see Matter of McCormick v Axelrod*, 59 NY2d 574, 583 [1983]).

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

ENTERED: MAY 23, 2017

CLERK

Friedman, J.P., Moskowitz, Feinman, Gische, Kahn, JJ.

4081 Nefertari Whitney, Index 21444/13E
Plaintiff-Appellant,

-against-

The Bronx-Lebanon Hospital Center, et al.,
Defendants-Respondents.

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Karpf, Karpf & Cerutti, P.C., Astoria (Adam C. Lease of counsel), for appellant.

Garfunkel Wild, P.C., Great Neck (Michael J. Keane, Jr. of counsel), for respondents.

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Order, Supreme Court, Bronx County (Lizbeth Gonzalez, J.), entered on or about December 7, 2016, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff failed to make a prima facie showing of discrimination because she failed to plead facts demonstrating that she had any "disability" within the meaning of the New York State Human Rights Law or the New York City Human Rights Law (*Matter of McEniry v Landi*, 84 NY2d 554, 558 [1994]; *Pimentel v Citibank, N.A.*, 29 AD3d 141, 145 [1st Dept 2006], *lv denied* 7 NY3d 707 [2006]; *see* Executive Law §§ 292[21][a]; 296[1][a]; Administrative Code of City of NY §§ 8-102[16]; 8-107[1][a]). Plaintiff relies solely on a nurse's note that states that

plaintiff suffers from unspecified "chronic medical conditions," and that her inability to sleep during the day was making those conditions worse. The nurse's unsworn, conclusory allegations do not suffice to defeat defendants' motion for summary judgment (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Because plaintiff failed to raise triable issues of fact whether she is an individual with a disability, the motion court also correctly dismissed her reasonable accommodation claim. Moreover, to the extent she ever properly requested a transfer to an earlier, evening shift, defendants were aware that there was no position available on the evening shift, and they were not required to reassign her if no position was open (*Pimentel*, 29 AD3d at 147-148).

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

ENTERED: MAY 23, 2017

CLERK

Friedman, J.P., Moskowitz, Feinman, Gische, Kahn, JJ.

4084 The People of the State of New York, Ind. 2679/13
Respondent,

-against-

Maverick Madore,
Defendant-Appellant.

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Rosemary Herbert, Office of the Appellate Defender, New York (Kerry S. Jamieson of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Stephen J. Kress 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 (Robert Stolz, J.), rendered August 20, 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 23, 2017

CLERK

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

Friedman, J.P., Moskowitz, Feinman, Gische, Kahn, JJ.

4087-
4088N Index 24224/15E

Omadil Cabrera,
Plaintiff-Appellant,

-against-

Yakov Abaev,
Defendant,

Dennis Pantoja, et al.,
Defendants-Respondents.

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The Lambrou Law Firm, P.C., New York (Lambros Y. Lambrou of counsel), for appellant.

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

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Order, Supreme Court, Bronx County (Laura G. Douglas, J.), entered on or about January 9, 2017, which, to the extent appealed from as limited by the briefs, granted defendants-respondents' post-note of issue motion to compel plaintiff to appear for independent medical examinations, unanimously affirmed, without costs.

"Trial courts are authorized, as a matter of discretion, to permit post-note of issue discovery without vacating the note of issue, so long as neither party will be prejudiced" (*Cuprill v Citywide Towing and Auto Repair Services*, — AD3d —, 2017 NY Slip Op 02729 [1st Dept 2017]). We perceive no prejudice here, as the matter remains on the trial calendar (*see Suarez v Shapiro Family*

Realty Assoc., LLC, — AD3d —, 2017 NY Slip Op 02914 [1st Dept 2017]; *see e.g. Dominguez v Manhattan & Bronx Surface Tr. Operating Auth.*, 168 AD2d 376, 376-377 [1st Dept 1990]). Moreover, the court providently exercised its discretion in directing plaintiff to appear for the medical examinations, given defendants' short delay in designating the physicians (*see Henderson-Jones v City of New York*, 104 AD3d 411 [1st Dept 2013]).

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

ENTERED: MAY 23, 2017

CLERK