SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JULY 9, 2015

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Mazzarelli, DeGrasse, Kapnick, JJ.

15074 In re Robert Kotick, etc., File 1202/05

- - - - -

Robert Kotick,
Petitioner-Appellant-Respondent,

-against-

Natalia Shvachko,
Respondent-Respondent-Appellant.

- - - - -

Margarita Shvachko, et al.,
Nonparty Respondents.

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Pryor Cashman LLP, New York (David C. Rose of counsel), for appellant-respondent.

Markewich and Rosenstock LLP, New York (Lawrence M. Rosenstock of counsel), for respondent-appellant.

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Order, Surrogate's Court, New York County (Rita Mella, S.), entered January 13, 2014, which, to the extent appealed from as limited by the briefs, granted petitioner Robert Kotick's motion for summary judgment dismissing respondent Natalia Shvachko's defenses of fraud, mistake, and sham transaction, and denied so much of the motion as sought dismissal of the defense of undue

influence with respect to the underlying SCPA 1805 petition, unanimously affirmed, with costs.

Petitioner, the Executor of the Last Will and Testament of the decedent, Charles M. Kotick, brought the instant SCPA 1805 application for permission to pay himself the sum of $1,077,000 plus interest that the decedent allegedly owed him. The debt is allegedly evidenced by a promissory note in the said amount that was executed by the decedent on March 11, 2005, 10 days before he died of prostate cancer.

"The elements of undue influence are motive, opportunity, and the actual exercise of that undue influence" (*Matter of Nofal*, 35 AD3d 1132, 1134 [3d Dept 2006] [internal quotation marks omitted]). As direct proof of undue influence is rare, its elements may be established by circumstantial evidence (*Matter of Paigo*, 53 AD3d 836, 839-840 [3d Dept 2008]). The record contains evidence that payment of the note would benefit petitioner while rendering the estate insolvent, a result that would have been contrary to the decedent's estate plan. Moreover, the note and accompanying letter of instruction were prepared by petitioner's counsel as opposed to the decedent's own estate planning counsel. These factors, combined with the evidence of the decedent's deteriorating health, suffice to raise a triable issue of fact as

to whether the note was the product of undue influence (*see e.g. Matter of O'Brien*, 182 AD2d 1135 [4th Dept 1992]).

The court correctly dismissed Shvachko's defense of fraudulent inducement. Shvachko alleged on information and belief in her answer that Joel M. Kotick – Charles's twin brother, who notarized the promissory note and letter of direction at issue – misrepresented the contents of those documents to Charles. This claim is insufficient to raise a triable issue of fact, because it is based on mere speculation (*see Matter of Ryan*, 34 AD3d 212, 215 [1st Dept 2006], *lv denied* 8 NY3d 804 [2007]).

The dismissal of Shvachko's defense of unilateral mistake was also correct, since a unilateral mistake alone is an insufficient basis for relief (*Angel v Bank of Tokyo-Mitsubishi, Ltd.*, 39 AD3d 368, 369 [1st Dept 2007]). A unilateral mistake induced by fraud is a sufficient basis for rescission (*id.* at 369-370). However, as indicated, Shvachko failed to raise a triable issue as to fraud.

The court correctly dismissed Shvachko's defense that the note was a sham transaction, since she presented no *firsthand* evidence of a sham (*cf. Polygram Holding, Inc. v Cafaro*, 42 AD3d

339, 340 [1st Dept 2007] [affidavits accepted as evidence that loans at issue were "no (loans) at all" were "first-hand accounts" of the parties' dealings] [internal quotation marks omitted]).

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

ENTERED: JULY 9, 2015

CLERK

Gonzalez, P.J., Sweeny, Renwick, Saxe, Feinman, JJ.

15623 Ngina Duckett, Index 114004/10
Plaintiff-Respondent,

-against-

New York Presbyterian Hospital,
Defendant-Appellant.

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Epstein Becker & Green, P.C., New York (James S. Frank and Jill Barbarinc of counsel), for appellant.

The Dweck Law Firm, LLP, New York (H.P. Sean Dweck and Chris Fraser of counsel), for respondent.

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Order, Supreme Court, New York County (Shlomo S. Hagler, J.), entered October 23, 2014, which denied defendant hospital's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Issues of fact exist as to whether the hospital unlawfully terminated petitioner's employment because of her disability. There is evidence in the record that plaintiff was suffering from a mental illness that was affecting her job performance before the hospital terminated her employment. There is also evidence that hospital employees, including plaintiff's supervisor, were aware of her physical and mental health issues shortly before she took medical leave, and that her supervisor was concerned about her fitness to work upon her return (*compare Hazen v Hill Betts &*

Nash, LLP, 92 AD3d 162 [1st Dept 2012], *lv denied* 19 NY3d 812 [2012] [determination that employer unlawfully discriminated against employee was not supported by substantial evidence where there was no evidence that the petitioner was suffering from a mental illness or that the employer knew, before it terminated the petitioner's employment, that the petitioner was disabled by his alleged disorder or that the disorder limited his performance]).

Plaintiff is not estopped from asserting her discrimination claims under the State and City Human Rights Laws. Her application for, and receipt of, federal and state disability benefits is not inconsistent with her claims (*Cleveland v Policy Management Systems Corp.*, 526 US 795 [1999]). Further, the hospital has not established, as a matter of law, that plaintiff could not have performed her job duties with a reasonable accommodation.

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

ENTERED: JULY 9, 2015

CLERK

Gonzalez, P.J., Friedman, Renwick, Moskowitz, Clark, JJ.

15657 The People of the State of New York, Ind. 4921/11
Respondent,

-against-

Pedro Montero,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Andrew C. Fine of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Rena K. Uviller, J.), rendered May 9, 2012, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the third degree, and sentencing him, as a second felony offender, to a prison term of two to four years, unanimously affirmed.

The court properly denied defendant's suppression motion. Police observed defendant, who was standing in the lobby of a Housing Authority building, open the door for another man who had been standing around outside, apparently waiting for access. The officers were aware that the building was normally entered either by means of a key or by being buzzed in by someone in an apartment. Defendant and the other man remained in the lobby for several minutes without going towards the elevators. Their

behavior provided the police with an objective, credible reason to make a minimally intrusive inquiry into whether they lived there (*see People v Wighfall*, 55 AD3d 347 [1st Dept 2008], *lv denied* 11 NY3d 931 [2009]). Although the behavior of the two men may have had innocent explanations, a request for information "need be supported only by an objective credible reason not necessarily indicative of criminality" (*People v Hollman*, 79 NY2d 181, 185 [1992]). Contrary to defendant's contention, this is not a case where the officer's request for information was based merely on a defendant's presence in a drug prone location or desire to avoid contact with police (*see People v Johnson*, 109 AD3d 449, 450 [1st Dept 2013], *appeal dismissed* 23 NY3d 1001 [2014]).

Defendant's remaining suppression arguments are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits. In particular, defendant's answer to the officer's question justified, at least, a further inquiry. The officer's request that defendant remain in the lobby to investigate whether defendant and the other man were residents or guests of the building was not a seizure (*see e.g. People v Francois*, 61 AD3d

524, 525 [1st Dept 2009], *affd* 14 NY3d 732 [2010]), and the information the officers ultimately learned upon investigation provided them with probable cause to arrest defendant for criminal trespass (*see e.g. People v Lozado*, 90 AD3d 582, 583-584 [1st Dept 2011], *lv denied* 18 NY3d 925 [2012]).

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

ENTERED: JULY 9, 2015

CLERK

Gonzalez, P.J., Friedman, Renwick, Moskowitz, Clark, JJ.

15658 Castlepoint Insurance Company, Index 156301/12
Plaintiff-Respondent,

-against-

Hilmand Realty, LLC, et al.,
Defendants-Appellants.

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Cooper & Paroff, PC, Kew Gardens (Todd R. Baltch of counsel), for Hilmand Realty, LLC and Anayatulla Shariff, appellants.

Pollack, Pollack, Isaac & DeCicco, LLP, New York (Jillian Rosen of counsel), for Mujebah A. Abdulla, appellant.

The Law Office of Steven G. Fauth, LLC, New York (Suzanne M. Saia of counsel), for respondent.

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Order, Supreme Court, New York County (Anil C. Singh, J.), entered on or about November 14, 2013, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for summary judgment declaring that it has no duty to defend and indemnify defendants Hilmand Realty, LLC and Anayatulla Shariff in the underlying action, unanimously affirmed, without costs.

The doctrine of judicial estoppel, or estoppel against inconsistent positions, does not bar plaintiff from denying coverage to defendants Hilmand Realty, LLC and Anayatulla Shariff in the underlying personal injury action (*see generally Becerril*

v City of N.Y. Dept. of Health & Mental Hygiene, 110 AD3d 517, 519 [1st Dept 2013], lv denied 23 NY3d 905 [2014]). Plaintiff did not take factually inconsistent positions in hiring counsel to represent its insureds in vacating their default in the personal injury action, thereby allowing for a continued defense and preservation of the insureds' rights, and moving for a declaration that coverage under the policy was vitiated by untimely notice of claim in the event coverage was triggered. Nor was plaintiff a party to the personal injury action. Moreover, in the personal injury action, the court found that Hilmand had not received the summons and complaint, but vacated the default on the ground that Hilmand had been unaware that its address on file with the Secretary of State was incorrect and had not intentionally tried to avoid service. In this declaratory judgment action, however, the fact that Hilmand did not actually receive the summons and complaint in the underlying action, due to its failure to keep its address on file with the Secretary of State current, does not excuse its noncompliance with the notice provisions of the insurance policy (*see e.g. SP & S Assoc., LLC v Insurance Co. of Greater N.Y.*, 80 AD3d 529 [1st Dept 2011]).

To the extent defendants argue that plaintiff was not prejudiced by the late notice, the argument is unavailing as to the subject pre-2009 policy (*see Briggs Ave. LLC v Insurance Corp. of Hannover*, 11 NY3d 377, 381-382 [2008]).

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

ENTERED: JULY 9, 2015

CLERK

Gonzalez, P.J., Friedman, Renwick, Moskowitz, Clark, JJ.

15659 Molly Michels, Index 110644/11
Plaintiff-Appellant,

-against-

Deborah A. Marton,
Defendant-Respondent.

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Louis A. Badolato, Roslyn Harbor, for appellant.

Russo, Apoznanski & Tambasco, Melville (Susan J. Mitola of counsel), for respondent.

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Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered November 3, 2014, which, to the extent appealed from as limited by the briefs, granted defendant's motion for summary judgment dismissing plaintiff's claims of serious injuries to her lumbar spine, cervical spine and right knee under the "permanent consequential" and "significant" limitation of use categories of Insurance Law § 5102(d), unanimously modified, on the law, to deny the motion to the extent it seeks dismissal of plaintiff's claims of serious injuries to the lumbar spine, and otherwise affirmed, without costs.

Defendant made a prima facie showing of the absence of a significant or permanent consequential limitation of use of the spine and right knee by submitting plaintiff's expert

orthopedist's and neurologist's reports showing full range of motion, negative clinical test results, and the absence of neurological deficits (*see Malupa v Oppong*, 106 AD3d 538, 539 [1st Dept 2013]).

In opposition, plaintiff submitted sufficient medical evidence to raise an issue of fact as to whether she suffered a serious injury to her lumbar spine causally related to the accident. Plaintiff submitted the affirmation of her orthopedic expert, who, upon comparison of preaccident and postaccident MRI films, opined that plaintiff had sustained a herniated disc, superimposed over preexisting degenerative bulges, which could only be traumatically induced and causally related to the accident. This evidence provided objective proof of serious injuries (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 358 [2002]). The orthopedist also reviewed physical therapy records documenting range of motion limitations after the accident, and measured quantified limitations in range of motion upon two evaluations (*see Salman v Rosario*, 87 AD3d 482, 484 [1st Dept 2011]; *see also Perl v Meher*, 18 NY3d 208, 217 [2011]; *Toure*, 98 NY2d at 350).

However, plaintiff failed to raise a triable issue of fact as to her claims of serious injury to the cervical spine and

right knee. As to the cervical spine, plaintiff failed to submit any proof of resulting physical limitations (*see generally Toure*, 98 NY2d at 350). While plaintiff's physician found a spasm on examination, plaintiff did not submit any medical evidence explaining why the degenerative changes found in the X-ray study she submitted were not the cause of her cervical spine symptoms (*Figueroa v Ortiz*, 125 AD3d 491, 492 [1st Dept 2015]).

Plaintiff failed to submit any evidence of contemporaneous injury or treatment to her right knee (*see Perl*, 18 NY3d at 217-218). The MRI study performed 10 months after the accident was insufficient to demonstrate any causal relationship between the injury and the accident (*see Henchy v VAS Express Corp.*, 115 AD3d 478, 479 [1st Dept 2014]). While one of plaintiff's doctors measured her right knee range of motion shortly after the accident, that doctor did not indicate the normal range of motion and did not diagnose any knee injury (*see Toure*, 98 NY2d at 350).

If the factfinder at trial determines that plaintiff sustained a serious injury to the lumbar spine, it may award damages for all of plaintiff's injuries causally related to the accident (*Rubin v SMS Taxi Corp.*, 71 AD3d 548, 549 [1st Dept 2010]).

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

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

ENTERED: JULY 9, 2015

CLERK

Gonzalez, P.J., Friedman, Renwick, Moskowitz, Clark, JJ.

15660- Index 108095/06
15661- 591083/07
15662- 590494/09
15662A Leonard Hoffman, et al., 590052/13
590059/13
Plaintiffs-Respondents,

-against-

Biltmore 47 Associates, LLC, et al.,
Defendants-Appellants.

[And a Third-Party-Action]
- - - - -
Biltmore 47 Associates, LLC, et al.,
Second Third-Party Plaintiffs-Respondents,

-against-

General Concrete Construction, Inc.,
Second Third-Party Defendant
Respondent-Appellant,

Feinstein Ironworks, Inc., et al.,
Second Third-Party Defendants.
- - - - -
Cord Contracting Co., Inc., et al.,
Second Third-Party Defendants-Respondents.
- - - - -

Biltmore 47 Associates, LLC, et al.,
Third Third-Party Plaintiffs-
Appellants-Respondents,

-against-

OMC, Inc.,
Third Third-Party Defendant-Respondent-
Appellant.
- - - - -
Cord Contracting Co., Inc.,
Fourth Third-Party Plaintiff-Respondent,

-against-

OMC., Inc.,
Fourth Third-Party Defendant-Respondent-Appellant.

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Marks, O'Neill, O'Brien, Doherty & Kelly, P.C., Elmsford (David S. Henry of counsel), for Biltmore 47 Associates, LLC, Manhattan Theatre Club, Inc., The Biltmore Theater Corporation, The Biltmore Theater Group Inc., Sweet Construction Corp., Biltmore Theater Independent Manager Corp., Biltmore Theater LLC, The Jack Parker Corporation, Parker Theater Associates, LLC, and Sweet Construction of Long Island, LLC, appellants/appellants-respondents.

Rubin Fiorella & Friedman, LLP, New York (Jeff R. Thomas of counsel), for General Concrete Construction, Inc., respondent-appellant.

Leahey & Johnson, P.C., New York (James P. Tenney of counsel), for OMC, Inc., respondent-appellant.

L'Abbate, Balkan, Colavita & Contini, LLP, Garden city (Marie Ann Hoenings of counsel), for React Industries, Inc., React Technical, Inc., and React AC, respondents.

Brown Gavalas & Fromm LLP, New York (Frank J. Rubino Jr. of counsel), for Cord Contracting Co., Inc., respondent.

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Order, Supreme Court, New York County (Debra A. James, J.), entered September 3, 2013, which, upon renewal, denied defendants Biltmore 47 Associates, LLC; Manhattan Theatre Club, Inc.; the Biltmore Theater Corporation; the Biltmore Theater Group, Inc.; Sweet Construction Corp.; Biltmore Theater Independent Manager Corp.; Biltmore Theater LLC; the Jack Parker Corporation, LLC;

Parker Theater Associates, LLC; and Sweet Construction of Long Island, LLC's (collectively Sweet Construction) motion to vacate plaintiff's note of issue, unanimously reversed, on the law, and in the exercise of discretion, without costs, and the motion granted on condition that the deposition of third third-party defendant OMC Inc. be completed within 60 days of the date of this order. Appeal from order, same court and Justice, entered March 5, 2013, unanimously dismissed, without costs, as academic. Order, same court and Justice, entered December 9, 2013, which, to the extent appealed from as limited by the briefs, granted the motion for summary judgment of second third-party defendants React Industries, Inc., React Technical, Inc., and React AC (React) dismissing the second third party complaint and cross claims as against it, unanimously reversed, on the law, without costs, and the motion denied. Order, same court and Justice, entered December 9, 2013, which denied the motion of second third-party defendant General Concrete Construction, Inc. (General Concrete) for summary judgment dismissing the second third-party complaint and cross claims as against it, unanimously reversed, on the law, without costs, and the second third-party complaint and all cross claims dismissed as to General Concrete. The Clerk is directed to enter judgment accordingly.

Sweet Construction timely impleaded OMC pursuant to Supreme Court's order. However, due to the fact that the only outstanding discovery Sweet Construction could need, and has sought on this appeal, from OMC would be its deposition, its motion to vacate the note of issue is granted on condition that the action remains on the trial calendar and the deposition is completed within 60 days of the date of this order (*see Munoz v 147 Corp.*, 309 AD2d 647 [1st Dept 2003]). Failure to complete discovery by that time is deemed a waiver.

React did not meet its burden of demonstrating that no HVAC work performed on the premises resulted in the creation of a hole large enough to have caused plaintiff's injuries, as described by plaintiff himself.

General Concrete met its burden of showing that it neither created nor had actual or constructive notice of the allegedly

dangerous condition which caused plaintiff's injuries, and that its work was unrelated to the alleged defect (*see Carrera v Westchester Triangle Hous. Dev. Fund Corp.*, 116 AD3d 585, 586 [1st Dept 2014]).

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

ENTERED: JULY 9, 2015

CLERK

Gonzalez, P.J., Friedman, Renwick, Moskowitz, Clark, JJ.

15663 The People of the State of New York, Respondent, Ind. 6306/10

-against-

Camacho Olivero, etc., Defendant-Appellant.

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Labe M. Richman, New York, for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Patrick J. Hynes of counsel), for respondent.

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Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J.), entered on or about September 17, 2014, which denied defendant's CPL 440.10 motion to vacate a 2012 judgment of conviction, unanimously affirmed.

The court properly exercised its discretion in denying defendant's CPL 440.10 motion without holding a hearing (*see People v Samandarov*, 13 NY3d 433, 439-440 [2009]; *People v Satterfield*, 66 NY2d 796, 799-800 [1985]). In this post-*Padilla* case, defense counsel sufficiently met his obligation under *Padilla v Kentucky* (559 US 356 [2010]) to advise defendant of the risk of deportation arising from his guilty plea. Defendant was also advised of this risk in a notice presented to him by the prosecution, as well as in a statement by the court.

In addition to his *Padilla* claim, defendant argues that his counsel affirmatively misadvised him about the immigration consequences of his plea (*see People v McDonald*, 1 NY3d 109 [2003]). However, viewed in context, counsel's reference to the "possibility" of deportation, in the event the immigration authorities took action, was not misleading or inordinately optimistic, and the record provides no reason to believe that counsel told defendant that after pleading guilty to third-degree drug possession he would still be eligible for citizenship.

Defendant also argues that his attorney rendered ineffective assistance in the plea bargaining process, in that he failed to minimize the immigration consequences of the conviction by obtaining a plea to a drug felony based on the weight of the drugs rather than intent to sell. However, the submissions on the motion failed to demonstrate any reasonable probability that the People would have made such an offer (*see Lafler v Cooper*, 566 US __, __, 132 S Ct 1376, 1384-1385 [2012]).

In any event, with regard to all of defendant's claims, we conclude that defendant has not established prejudice. There is no indication that but for his attorney's allegedly deficient performance, defendant would have proceeded to trial instead of pleading guilty (*see People v Hernandez*, 22 NY3d 972, 975-976

[2013]).

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

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

ENTERED: JULY 9, 2015

CLERK

Gonzalez, P.J., Friedman, Renwick, Moskowitz, Clark, JJ.

15665 The People of the State of New York, Ind. 1687/13
Respondent,

-against-

Muamar Nashal,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Jan Hoth of counsel), and White & Case, LLP, New York (Lynn Kaiser of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Juan M. Merchan, J.), rendered January 7, 2014, convicting defendant, after a jury trial, of grand larceny in the third degree and criminal possession of stolen property in the third degree, and sentencing him, as a second felony offender, to an aggregate term of 2½ to 5 years, unanimously affirmed.

The People established, through competent evidence, that defendant stole a jacket worth $3995 and a sweater worth $795 from a department store, and thus established that the value of the stolen merchandise exceeded $3,000. The value was established by way of a properly authenticated business record, and there was no violation of the hearsay rule or the

Confrontation Clause.

A store detective testified that after catching defendant in the act of stealing the two items, he brought them to a cash register, where he watched a salesperson scan the codes on the garments' price tags and print out a receipt displaying their prices. The detective testified about his familiarity with store procedures, and that it was standard practice to make a receipt each time an item was shoplifted by using the same procedure that was used for a purchase, that the receipt at issue was made pursuant to that practice by scanning the code on the price tag, which caused the price of the item (including any sale price, if applicable) to be listed on the receipt, and that the receipt was made at time of the transaction being memorialized. Thus, we find that the receipt qualified as a business record (*see generally* CPLR 4518[a]).

We find unavailing defendant's assertion that the receipt should have been excluded because it was prepared solely for the purpose of litigation. First, the essential business record in this case is not the piece of paper, but the electronically stored information that the garments were selling for certain prices. The price information itself was clearly maintained for the store's business purposes. The actual piece of paper

introduced in evidence was simply a printout of the existing electronically stored information, displayed and memorialized in a convenient form. Second, even if the record was intended to be used in defendant's criminal prosecution, the witness testified that the store makes records of this type in all instances of shoplifting, and "if there are other business reasons which require the records to be made, they should be admissible" (*People v Foster*, 27 NY2d 47, 52 [1970]).

We also find that the store detective was competent to authenticate the record. A proper foundation for admission of a business record may be laid by a witness familiar with the practices and procedures of the particular business; the person who prepared the record need not testify (*see People v Brown*, 13 NY3d 332, 341 [2009]; *People v Kennedy*, 68 NY2d 569, 577 [1986]). Here, the store detective had sufficient familiarity with the store procedures regarding the creation of such receipts to lay a foundation for its admission (*see People v Giordano*, 50 AD3d 467, 468 [1st Dept 2008], *lv denied* 10 NY3d 959 [2008]). The witness was clearly competent to state the unremarkable and familiar fact that when the code on an item is scanned, the computer reveals the item's price, including any applicable sale price. There was no need for further explanation of how the computer system

"functioned," or any reason to believe that a salesperson could provide significantly different information.

Similarly, the admission of the receipt did not violate defendant's right of confrontation, because the document was not testimonial (*see People v Pealer*, 20 NY3d 447, 453 [2013]), even if it could be deemed a statement by the salesperson who operated the cash register (*see Giordano*, 50 AD3d at 468). As noted previously, the computerized cash register simply located and printed out a set of preexisting, nontestimonial electronically stored price information. Such "machine-generated raw data" is not a testimonial statement, contains no "subjective analysis" implicating the right of confrontation (*see Brown*, 13 NY3d at 336, 340 [2009]; *People v Meekins*, 10 NY3d 136, 158-159 [2008], *cert denied* 557 US 934 [2009]), and is not the functional equivalent of testimony.

The court properly declined to submit various lesser included offenses not requiring proof of value in excess of $3,000, because there was no reasonable view of the evidence, viewed most favorably to defendant, that the merchandise he stole did not meet that value threshold (*see People v King*, 102 AD3d 434, 435-436 [1st Dept 2013], *lv denied* 20 NY3d 1100 [2013]). There was no evidence casting doubt on the accuracy of the price

information received from the computerized cash register, or on the store detective's testimony that the computer would reflect any applicable sale price. Defendant's alternative scenarios are far-fetched and speculative.

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

ENTERED: JULY 9, 2015

CLERK

Gonzalez, P.J., Friedman, Renwick, Moskowitz, Clark, JJ.

15666-
15667 Index 151715/14

Antonios Gabriel, et al.,
Plaintiffs-Appellants-Respondents,

-against-

The Board of Managers of the Gallery House Condominium,
Defendant-Respondent-Appellant.

_____

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

Braverman Greenspun, P.C., New York (Tracy Peterson of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Geoffrey D.S. Wright, J.), entered on or about August 22, 2014, which denied plaintiffs tenants' motion for summary judgment, granted defendant condominium board's cross motion for summary judgment dismissing the complaint, and invalidated the $500/day fines imposed, unanimously modified, on the law, to grant plaintiffs' motion on the third and fourth causes of action and declare that the $500/day fines imposed are invalid, and to grant a permanent injunction enjoining the board from imposing such fines, to grant plaintiff's motion on the first cause of action to the extent of declaring that the portion of the rental and guest policy precluding plaintiffs from leasing their apartments for a period

greater than one year is unenforceable, to deny defendant's motion for summary judgment as to the first, third and fourth causes of action, and otherwise affirmed, without costs. Appeal from interim order, same court and Justice, entered on or about July 24, 2014, unanimously dismissed, without costs, as superseded by the order entered on or about August 22, 2014.

Plaintiffs' challenges to defendant Board's 2005 house rules, including its prohibition on subletting, and its 2007 rental and guest policy are barred by the six-year statute of limitations for commencing a declaratory judgment action (*see* CPLR 213[1]; *Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 815 [2003], *cert denied* 540 US 1017 [2003]). Plaintiffs' argument that the limitations period began to run anew each time the guest policy was amended, based on the continuing wrong doctrine, is unavailing under the circumstances of this case (*cf. Kaymakcian v Board of Mgrs. of Charles House Condominium*, 49 AD3d 407, 407-408 [1st Dept 2008] [breach of fiduciary duty claim not time-barred where, pursuant to bylaws, board had continuing duty to repair certain common elements that were source of recurring leaks and failure to do so constituted continuing wrong]).

Contrary to the Board's argument, and the motion court's

finding, the February 2014 amendment requiring that leases be limited to no more than one year does not constitute mere clarification of the by-laws. Rather, it amends the permitted use of plaintiffs' units. The only restriction in the by-laws regarding an owner's use of the apartment is that it cannot be used for transient tenancy. The Board failed to offer any explanation as to how requiring leases not to exceed one year is in keeping with the prohibition on transient tenancies.

Although the Board's authority to impose fines is within its power to implement rules and regulations as provided in the by-laws (*see Board of Mgrs. of Plymouth Vil. Condominium v Mahaney*, 272 AD2d 283 [2d Dept 2000]), the imposition of fines in the amount of $500 per day for violations of the guest policy is confiscatory in nature (*see Sandra's Jewel Box Inc. v 401 Hotel, L.P.*, 273 AD2d 1, 3 [1st Dept 2000]). The Board cites no persuasive authority to support the imposition of such a hefty fine. The cases it cites are distinguishable since they involve the imposition of administrative fees and nominal fines for a

resident's non-compliance with certain rules (*see e.g. Gillman v Pebble Cove Home Owners Assn.*, 154 AD2d 508 [2d Dept 1989]).

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: JULY 9, 2015

CLERK

Gonzalez, P.J., Friedman, Renwick, Moskowitz, Clark, JJ.

15668 Lynn & Cahill LLP, Index 114676/09
Plaintiff-Respondent,

-against-

Nadine Witkin,
Defendant-Appellant.

_____

Boies, Schiller & Flexner LLP, New York (Karen Ann Chesley of counsel), for appellant.

Cahill Partners LLP, New York (John R. Cahill of counsel), for respondent.

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Judgment, Supreme Court, New York County (Milton A. Tingling, J.), entered April 1, 2014, after an inquest, awarding plaintiff compensatory and punitive damages in the amount of $75,000 and $50,000, respectively, unanimously modified, on the law and the facts, to reduce the award to $100 compensatory damages and 0 punitive damages, and otherwise affirmed, without costs.

Contrary to plaintiff's argument, this appeal is not barred by res judicata due to defendant's final Chapter 13 bankruptcy plan, which, as confirmed by the bankruptcy court, includes the judgment, and provides for payments to plaintiff that have already commenced. The bankruptcy court had no authority to review defendant's objections to the state court judgment, argued

in her brief on this appeal, which was stayed during the course of the Chapter 13 proceeding (*see In re Residential Capital, LLC*, 501 BR 624, 639 [Bankr SDNY 2013][stating that "a federal trial court cannot sit in the place of a court of appeal reviewing facts or determinations made by state courts."]).

Neither is this appeal barred by the doctrine of judicial estoppel. Defendant's statements, made during the bankruptcy proceeding, that the judgment would be paid in full were made subject to the outcome of defendant's appeal.

The motion court did not err in granting plaintiff's motion for a default judgment as to the defamation claim. Defendant, after being given an opportunity to be heard on the motion, did not provide a reasonable excuse for failing to timely file an answer (*Galaxy Gen. Contr. Corp. v 2201 7th Ave. Realty LLC*, 95 AD3d 789, 790 [1st Dept 2012]).

The evidence does not support an award of more than nominal compensatory damages or any punitive damages.

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: JULY 9, 2015

CLERK

Gonzalez, P.J., Friedman, Moskowitz, Clark, JJ.

15669 The People of the State of New York, Respondent, Ind. 2491/11

-against-

Rene Delgado, Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Elizabeth B. Emmons of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Ronald A. Zweibel, J.), entered on or about February 24, 2012, which adjudicated defendant a level three predicate sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly applied the presumptive override for a prior felony sex crime conviction, which results in a level three adjudication independent of any point assessments. In any event, we have considered defendant's challenges to certain assessments and find them unavailing.

The court properly exercised its discretion in denying a downward departure. Defendant committed the underlying crimes after having already been convicted of a felony sex offense,

involving serious crimes, and after having already been adjudicated a level two sex offender. The mitigating factors cited by defendant, including his efforts at postrelease rehabilitation, are outweighed by his record, which demonstrates a dangerous propensity to commit sex crimes (*see e.g. People v Carter*, 114 AD3d 592 [1st Dept 2014]; *People v Jamison*, 107 AD3d 531 [1st Dept 2013], *lv denied* 22 NY3d 852 [2013]).

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

ENTERED: JULY 9, 2015

CLERK

Gonzalez, P.J., Friedman, Renwick, Moskowitz, Clark, JJ.

15670 Luis S., an Infant, by His Mother and Natural Guardian, Susana B., et al., Plaintiffs-Respondents,

-against-

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

Index 350045/08

Zachary W. Carter, Corporation Counsel, New York (Robert W. Gordon of counsel), for appellants.

Novick, Edelstein, Lubell, Reisman, Wasserman & Leventhal, P.C., Yonkers (Erin C. LaRocca of counsel), for respondents.

Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered July 1, 2014, which denied defendants' motion seeking, inter alia, summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the motion granted and the complaint dismissed. The Clerk is directed to enter judgment accordingly.

In this action alleging negligent supervision in a gym class, defendants established prima facie entitlement to summary judgment dismissing the action against them. Plaintiffs failed to raise a triable issue of fact to refute defendants' evidence that the infant plaintiff, a seventh grade student, was instructed and shown how to properly navigate the obstacle course

in question, which included a two-foot high hurdle. Plaintiff was injured when, after successfully jumping over the hurdle, he suffered a fracture of his right knee upon landing. There was no evidence offered to substantiate the claim that the wooden gym floor was slippery, or that a matted landing area was warranted. Defendants' unrefuted evidence demonstrated that the other students navigated the hurdle without incident, and that there was no known history of injuries occurring in connection with the obstacle course, which the gym teachers regularly used. Moreover, infant plaintiff's two gym teachers jointly observed only half a class at a time, as the boys and then the girls of each class attempted the obstacle course. Plaintiffs offered no evidence, aside from speculation, that plaintiff's injury could have been avoided by having a spotter alongside the hurdle, or a mat on the landing side of the hurdle (*see generally Paredes v City of New York*, 101 AD3d 424 [1st Dept 2012]; *David v County of Suffolk*, 1 NY3d 525 [2003]).

We note that dismissal as to the City is required in any event, since it is not a proper party (*see Perez v City of New York*, 41 AD3d 378 [1st Dept 2007], *lv dismissed* 10 NY3d 708 [2008]).

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

ENTERED: JULY 9, 2015

CLERK

Gonzalez, P.J., Friedman, Renwick, Moskowitz, Clark, JJ.

15671 Jennifer Cangro, Index 100381/13
Plaintiff-Appellant,

-against-

Gina Marie Reitano,
Defendant-Respondent.

_____

Jennifer Cangro, appellant pro se.

_____

Order and judgment (one paper), Supreme Court, New York County (Louis B. York, J.), entered August 5, 2014, dismissing the complaint, granting defendant a protective order, and awarding a sanction against plaintiff, unanimously affirmed, without costs.

In this action, plaintiff raises claims identical to those she raised in a prior action that was dismissed as res judicata (*Cangro v Reitano*, 92 AD3d 483 [1st Dept 2012], *lv denied* 20 NY3d 965 [2012]).

The award of sanctions against plaintiff and a protective order in favor of defendant are fully supported by the record (*see Levy v Carol Mgt. Group*, 260 AD2d 27, 34 [1st Dept 1999]).

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

ENTERED: JULY 9, 2015

CLERK

Gonzalez, P.J., Friedman, Renwick, Moskowitz, Clark, JJ.

15672 The People of the State of New York, SCID 30149/13
Respondent,

-against-

Raymond Sanford,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Nicholas Schumann-Ortega of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Robert M. Mandelbaum, J.), entered September 16, 2013, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The People presented clear and convincing evidence supporting the assessment of 20 points under the risk factor for number of victims (*see People v Mingo*, 12 NY3d 563 [2009]). Defendant's plea covered similar and related conduct committed against at least one additional victim, which supported the hearing court's finding that there were two victims for purposes of this risk factor. The additional conduct was uncharged, but was reflected in a reliable police report (*see People v Epstein*,

89 AD3d 570 [1st Dept 2011]; *People v Johnson*, 77 AD3d 548 [1st Dept 2010], *lv denied* 16 NY3d 705 [2011]).

The court providently exercised its discretion in declining to grant a downward departure to level one, since the alleged mitigating factors were outweighed by, among other things, defendant's repeated acts of subjecting women who lived in his building to sexual contact, and his extensive criminal record (*see generally People v Gillotti*, 23 NY3d 841, 861 [2014]).

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

ENTERED: JULY 9, 2015

CLERK

Gonzalez, P.J., Friedman, Renwick, Moskowitz, Clark, JJ.

15673 Kenneth Levin, et al., Index 108182/11
Plaintiffs-Respondents, 590791/12
590624/13

-against-

Mercedes-Benz Manhattan, Inc.,
Defendant-Appellant.

[And Third-Party Actions]

_____

Biedermann Hoenig Semprevivo, New York (Elaine Chou of counsel), for appellant.

Frank & Seskin, LLP, New York (Scott H. Seskin of counsel), for respondents.

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Order, Supreme Court, New York County (Donna Mills, J.), entered January 23, 2014, which, to the extent appealed from, granted plaintiffs' motion for partial summary judgment, unanimously affirmed, without costs.

It is undisputed that plaintiff Kenneth Levin was injured when a garage door located on the premises of defendant Mercedes-Benz's service center suddenly came down on him. The doctrine of res ipsa loquitur is applicable here because the accident was the kind that does not occur in the absence of negligence (*see Hutchings v Yuter,* 108 AD3d 416, 417 [1st Dept 2013]).

The court properly found that this was one of the "rarest of res ipsa loquitor cases" where the inference of negligence was

inescapable (*Morejon v Rais Constr. Co.*, 7 NY3d 203, 209 [2006]). Mercedes failed to present any evidence of an alternative explanation for the accident. Although the affidavit of the facilities manager indicated that customers should not be waiting in the area under the garage door, no evidence was provided to refute plaintiff's claim that a Mercedes employee, David James, directed him where to stand.

Although Mercedes claimed plaintiffs' motion was premature because depositions had not yet taken place, it failed to indicate what specific discovery might absolve it from liability to plaintiffs.

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

ENTERED: JULY 9, 2015

CLERK

Gonzalez, P.J., Friedman, Renwick, Moskowitz, Clark, JJ.

15674 The People of the State of New York, Ind. 1541/12
Respondent,

-against-

Christian Rivera,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Nicholas Schumann-Ortega of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered April 25, 2013, convicting defendant, after a jury trial, of attempted assault in the first degree and two counts of criminal possession of a weapon in the second degree, and sentencing him to concurrent terms of nine years, unanimously affirmed.

Defendant's legal sufficiency claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. Defendant's confession to the police was sufficiently

corroborated by other proof establishing that the crime was committed (*see* CPL 60.50).

The court properly exercised its discretion in excluding, as irrelevant, a videotape of defendant's conversation with an Assistant District Attorney during which defendant asserted the right to counsel, and the court's ruling did not deprive defendant of his right to present a defense (*see Crane v Kentucky*, 476 US 683, 689-690 [1986]. The conversation took place approximately 12 hours after defendant waived his *Miranda* rights and made an incriminating statement to a detective. The later invocation of the right to counsel, which was not followed by any further statement, had no relevance to the voluntariness of the statement defendant made many hours earlier. The record also fails to support defendant's assertion that the precluded evidence tended to impeach the detective's testimony. To the extent defendant is also making a claim about the scope of cross-examination at the suppression hearing, we find it without merit.

The court properly exercised its discretion in permitting the prosecutor to address leading questions to a witness whom the court declared to be hostile. Defendant did not preserve his specific claim that the prosecutor violated CPL 60.35, and we decline to review it in the interest of justice. As an

alternative holding, we reject it on the merits. Defendant's argument conflates the examination of a hostile witness by leading questions, which is a matter of discretion, with the impeachment of a party's own witness by prior contradictory statements, which is regulated by CPL 60.35 (*see People v Marshall*, 220 AD2d 692 [2d Dept 1995], *lv denied* 87 NY2d 904 [1995]). Here, the prosecutor did not attempt to impeach the hostile witness with any prior statement by her, and the prosecutor's use of a statement by another prosecution witness to refresh the hostile witness's recollection followed the proper procedures for such refreshment. Finally if there was error n permitting the prosecutor's examination of the witness, it was harmless.

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

ENTERED: JULY 9, 2015

CLERK

Gonzalez, P.J., Friedman, Moskowitz, Clark, JJ.

15675- Index 40000/88
15676- 190215/11
15677- 190262/11
15678 In re New York City Asbestos Litigation, 190293/11
- - - - - 190294/11
All NYCAL Cases, 190299/11
Plaintiff-Respondents, 190311/11

-against-

A.O Smith Water Products Co., et al.,
Defendants,

Crane Co., et al.,
Defendants-Appellants.

_____

K & L Gates LLP, Pittsburg, PA, (Michael J. Ross of the bar of the Commonwealth of Pennsylvania, admitted pro hac vice, of counsel), for Crane Co., appellant.

Pillsbury Winthrop Shaw Pittman, LLP, New York (E. Leo Milonas of counsel), and Brennan Law Firm PLLC, New York (Kerry A. Brennan of counsel) for Cleaver-Brooks, Inc., appellant.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Erik C. DiMarco of counsel), for Andal Corp., AT&T Corp, Carrier Corporation, Carver Pump Company, Chevron USA Inc., Clyde Union Inc., Control Components, Inc., Conwed Corporation, Electric Boat Corporation, Ericsson, Inc., Federal-Mogul Abestos, Personal Injury Trust, General Dynamics Corporation, Gulf Oil Corporation, Hess Corporation, Hyde Marine, Inc., International Comfort Products LLC, Ira S. Bushey & Sons, Inc., New Yorker Boiler Company, Inc., Otis Elevator Company, Puget Sound Commerce Center, Inc., RSCC Wire & Cable LLC, S.W. Anderson Sales Corp., Scapa Group, Spencer Heater, TRIM-H LLC, Vanderbilt Minerals, LLC, Warner Communications, Inc., and Warner-Elektra-Atlantic Corporation, appellants.

Nixon Peabody LLP, Buffalo (Samuel Goldblatt of counsel), for Patterson-Kelly Company, appellant.

McGivney & Kluger, P.C., New York (Kerryann Cook of counsel), for Bradco Supply Corporation, Spencer Turbine Company, Stockham Valves & Fittings, Sid Harvey Industries, Madsen & Howell, Inc., Triangle PWC, Inc., Homasote Company, Red Devil, Inc., Safeguard Industrial, Gerosa Incorporated, Patterson Pump Co, Fairbanks Company, Nash Engineering, Fay Spofford, Zurn Industries, Pecora Corporation, CCX, Inc., Gorman-Rupp, DAP, Inc., American Gilsonite, Falk Corporation, Flowserve Corp, Atwood & Morrill Co., Barnes and Jones, Algoma Hardwoods, Courter & Company, George A. Fuller Co, Water Applications & Systems Corporation, Rain Bird Sprinkler, Croll-Reynolds, Treadwell Corp., RCH Newco, Electric Switchboard Co., Levy Tishman Liquidating Corp., Columbia Boiler (NY), Lincoln Electric Products, Elixir Industries, Eckel Industries, AII, Acquisition (Holland Furnace), Serge Elevators, Approval Oil of Brooklyn, Simplex Wire, Bergen Industrial, J. Heller, New York Protective, ADSCO, Sunbeam, Siemens Water Technologies Corp, Henry Company, W.W. Henry Company, Costal Plumbing Supply, Andal Corporation, Alcoa, Inc., Zenith Radio, Seco/Warwick Corporation, J.A. Sexauer, Inc., American Wire & Cable and Twin City, appellants.

Lewis Brisbois Bisgaard & Smith LLP, New York (Philip J. O'Rourke of counsel), for Kaiser Gypsum Company, Inc., Peerless Industries, Inc., Graybar Electric Company, Inc., Henkel Corporation and NASCO Holdings, Inc., appellants.

Darger Errante Yavitz & Blau LLP, New York (Jonathan Kromberg of counsel), for Amchem Products, Inc., Beazer East, Inc., Certainteed Corporation, Dana Companies, LLC, Gould Electronics Inc., Hobart Brothers Company, Lennox Industries Inc., The Lincoln electric Company, Linde, LLC, Union Carbide Corporation, appellants.

McElroy, Deutsch, Mulvaney & Carpenter, LLP, New York (Joseph LaSala of counsel), for A.O. Smith Water Products Company, Tuthill Corp., Stewart Warner Corporation, Invensys Systems, Inc., Robertshaw Controls Company, Benjamin Moore & Company, Baker Perkins, Inc., Lipe Automation Corporation, Eaton Corporation, Rockwell Automation, Inc., Flowserve U.S. Inc., Edward Valves, Nordstrom Valves, Edward Vogt Valves, Burnham LLC,

and Exxon Mobil Corporation, appellants.

Timothy M. McCann, New York, for Consolidated Edison Company of New York, Inc., and Orange and Rockland Utilities, Inc., appellants.

Schnader Harrison Segal & Lewis LLP, New York (Matther S. Tamasco of counsel), for Fort Kent Holdings, Inc., appellant.

Steptoe & Johnson LLP, New York (Shehzad Hasan of counsel), for Metropolitan Life Insurance Company, appellant.

Lynch Daskal Emery LLP, New York (Scott R. Emery of counsel), for Georgia-Pacific LLC, appellant.

Cullen and Dykman LLP, New York (John J. Fanning of counsel), for Ajax Electric Company, Allied Building Products Corp., AWC 1997 Corporation, Burnham LLC, David Fabricators Of N.Y., Inc., Elof Hansson, Inc., Fordham Supply Co., Inc., Friedrich Metal Products Co., Inc., Goulds Pumps, Inc., Grandview Block & Supply Co., Howden North American, Inc., Long Island Lighting Company, Mario & DiBono Plastering Co., Inc., National Grid Generation LLC, New York Power Authority, Niagara Mohawk Power Corporation, Sleepy Hollow Chimney Supply, Ltd., Spence Engineering Co., Inc., The Brooklyn Union Gas Company, Thermo Products LLC, and Webb & Sons, Inc., appellants.

Ahmuty, Demers & Mcmanus, Albertson (Frank A Cecere, Jr. of counsel), for EX-FM, Inc, Thomas & Betts Corporation, Tishman realty & Construction Co., Webster Plumbing Supply, Inc. and Yuba Heat Transfer, appellants.

Thompson Hine LLP, New York (Joseph Koczko of counsel), for Central Hudson Gas& Electric Corporation, Alcoa Steamship Company, Inc., Aluminum Company of America (ALCOA), American President Lines, Ltd., American Trading and Production Corporation, Central Gulf Lines, Inc., Chiquita Brands International, Inc., Farrell Lines Incorporated, Maersk B.V. and Waterman Steamship Corporation, appellants.

Aaronson Rappaport Feinstein & Deutsch, LLP, New York (Nancy L. Pennie of counsel), for Ford Motor Company, appellant.

Troutman Sanders LLP, New York (Richard P. O'Leary of counsel), for Standard Motor Products, Inc., Parker-Hannifin Corporation, Cleveland Wheel and Brakes, Fisher Scientific Company, L.L.C., Fisher Scientific International, Inc., Hercules, Inc., Champlain Cable Corporation, Ametek, Inc., Ashland, Inc., Mestek, Inc., Advanced Thermal Hydronics, Inc., Champlain Cable Corporation, Ametek Inc., Ashland Inc., Corporation, Mestek, Inc., Sulzer Pumps (US) Inc., and Sulzer Bingham Pumps, Inc., appellants.

Barry, McTiernan & Moore LLC, New York (Suzanne M. Halbardier of counsel), for 84 Lumber Company, Asbestos Corporation Ltd., Atlas Turner, Inc., Bell Asbestos Mines, Ltd., Blackman Plumbing Supply, Davis & Warshaw, Domco Products Texas, Inc., ECR International, Inc., Fulton Boiler Works, Inc., The Olympic Glove & Safety Company, Inc., R.W. Beckett Corporation, Security Supply Corporation, SPX Cooling Technologies, Inc. and Whip Mix Corporation, appellants.

Waters, McPherson, McNeil, P.C., New York (Giovanni Regina of counsel), for Riley Power Inc. and Turner Construction Company, Inc., appellants.

Freehill Hogan & Mahar LLP, New York (Thomas M. Canevari of counsel), for Universe Tankships, Inc., National Bulk Carriers, Inc., and Crowley Marine Services, Inc., appellants.

The Sultzer Law Group, P.C., New York (Joseph Lipari and Jason Pisultzer of counsel), for Leviton Manufacturing Company, Inc., AIW-2010 Wind Down Corp., Long Island Tinsmiths Supply Corp., H.G. Page & Sons, Inc., and Elementis Chemicals Inc., appellants.

Law Offices Of David L. Ferstendig, LLC, New York (David L. Ferstendig of counsel), for Amsted Rail Company, Inc., appellant.

McGuireWoods LLP, New York (Genevieve Macsteel of counsel), for ITT Corporation, appellant.

Pascarella DiVita, PLLC, New York (Lisa M. Pascarella of counsel), for Bird Incorporated, Rheem Manufacturing Company, Trane US, Inc., and Ingersoll Rand Company, appellants.

Landman Corsi Ballaine & Ford, P.C., New York (Christopher S. Kozak of counsel), for American Biltrite Inc., appellant.

Lavin, O'Neil, Cedrone & DiSipio, New York (Timothy J. McHugh of counsel), for 3M Company, appellant.

Kasowitz, Benson, Torres & Friedman LLP, New York (Paul J. Zoeller of counsel), for ArvinMeritor, Inc. and Maremont Corporation, appellants.

O'Toole Fernandez Weiner Van Lieu, LLC, New York (Steven A. Weiner of counsel), for Acme Heat & Power, Inc., Avocet Enterprises, Inc., Clark-Reliance Corporation, IMI Cash Valve/A.W. Cash Valve Manufacturing Company and Pennco Inc., appellants.

Eckert Seamans, Cherin & Mellott, LLC, White Plains (David Katzenstein of counsel), for Cargill, Inc., Superior Lidgerwood Mundy Corporation, Taco, Inc. and Navistar, and (Thomas M. Smith of counsel), for Residual Enterprises Corporation, appellants.

Damon Morey LLP, New York (Heidi B. Ruchala of counsel), for Genuine Parts Company and National Automotive Parts Association. appellants.

Garrity, Graham, Murphy, Garofalo & Flinn, New York (Anthony J. Marino of counsel), for United Conveyor Corporation, appellant.

McDermott Will & Emery LLP, New York (Donald R. Pugliese of counsel), for Honeywell International Inc., appellant.

Hawkins Parnell Thackston & Young LLP, New York (Edward P. Abbot of counsel), for Pneumo Abex LLC, appellant.

Harris Beach PLLC, New York (Cynthia Weiss Antonucci of counsel), for Albany International Corp., Auto Zone, Inc., Armstrong International, Inc., Barker Aggregates, Barker Marine, Ltd., Barker Boys Towing Corp., Cooper Industries, LLC., H.C. Oswald Supply Company Inc., Honeywell International Inc., Allied Chemical Corporation, Hubbell Incorporated, Hubbell Incorporated (Delaware), Hubbell Lighting, Inc., Prescolite Division, LeFrak Organization, Inc., Plastics Engineering Company, Progress Lighting Inc., Saint-Gobain Abrasives, Inc. and Xerox Corporation, appellants.

Littleton Joyce Ughetta Park & Kelly LLP, Purchase (Diane H. Miller of counsel), for Kerr Corporation, Zy-Tech Global Industries, Inc., VWR International, LLC and Ballantyne Strong, Inc., appellants.

Goldberg Corwin LLP, New York (Zachary S. Goldberg of counsel), for Bridgestone Americas Tire Operations, LLC, and Bridgestone Americas, Inc., appellants.

Hoagland, Longo, Moran, Dunst & Doukas LLP, New York (Monica R. Kostrzewa of counsel), for York International Corporation, Johnson Controls, Inc. and Kohler Co., appellants.

Malaby & Bradley, LLC, New York (Robert C. Malaby of counsel), for Alcoa, Inc., Bakers Pride Oven Co., Inc., Crown Boiler Company, Donald Durham Company, J.A. Sexauer, Inc., Met-Pro Technologies LLC, Morse Diesel, Inc., NACCO Materials Handling Group, Inc., Qualitex Company, Reynolds Metals Company, Roper Pump Company, Sears, Roebuck and Co., Superior Boiler Works, Inc. and Terex Corporation, appellants.

Reed Smith LLP, New York (Christopher W. Healy of counsel), for BASF Catalysts LLC, appellant.

Hodges Walsh & Messemer, LLP, White Plains (George S. Hodges of counsel), for Electrolux Home Products Inc., Spirax Sarco, Inc. and Clark-Reliance Corporation, appellants.

Harwood Lloyd, LLC, New York (Russell A. Pepe of counsel), for Carlisle Industrial Brake & Friction, Inc. and Graham Corp., appellants.

McMahon, Martine & Gallagher, LLP, Brooklyn (Heidi C. Baker of counsel), for Eastern Refractories Co., Inc., and Tiswhman Realty & Construction Co., Inc., appellants.

Weitz & Luxenberg, P.C., New York (Alani Golanski of counsel), for respondents.

Levy Komitor, New York (Robert Komitor of counsel), for respondents.

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Order, Supreme Court, New York County (Sherry Klein Heitler, J.), entered April 15, 2014 (the April Order), which modified Section XVII of the New York City Asbestos Litigation Case Management Order, as amended May 26, 2011, to allow punitive damages claims to proceed, and denied defendants' motion to vacate and declare inapplicable the Case Management Order, unanimously modified, on the law, to the extent of deleting the second sentence from the first decretal paragraph, remanding the matter to the Coordinating Justice for a determination of procedural protocols on the issue of punitive damages, staying implementation of the modified order until such a determination is made, and otherwise affirmed, without costs. Appeal from an interim order, same court and Justice, entered May 8, 2014, which partially stayed the application of the April order, unanimously dismissed, without costs, as academic. Appeal from an order, same court and Justice, entered December 18, 2014, which, to the extent appealable, denied defendants' motions to renew the April Order, unanimously dismissed, without costs, as abandoned.

In this New York City Asbestos Litigation (NYCAL), the Case Management Order (CMO) was amended in 1996 by the Coordinating

Justice to add section XVII which provides that "Counts for punitive damages are deferred *until such time as the Court deems otherwise*, upon notice and hearing" (emphasis added). In April 2013, all plaintiffs jointly moved to modify Section XVII to read: "Plaintiffs are permitted to seek punitive damages against defendants upon application to the assigned Trial Court." The NYCAL defendants jointly opposed the motion and moved to vacate and declare inapplicable the CMO, asserting, *inter alia*, that the CMO could not be amended without their consent. In July 2013, six NYCAL plaintiffs moved for permission to allege punitive damages claims and proffer related evidence against the defendants in their cases. The defendants in those six cases, and amici curiae, including the NYCAL defendants, opposed the motion.

The motion court had the authority to modify the CMO. New York's Uniform Rules for Trial Courts Section 202.69 (*see* 22 NYCRR 202.69) allows the Coordinating Justice to "issue case management orders after consultation with counsel." The court reached its determination after consulting with counsel, and hearing and considering defense counsel's objections.

The April Order did not constitute an improper "advisory opinion." The order modified the CMO, something which the court

was empowered to do. Unlike in *Cuomo v Long Is. Light. Co.* (71 NY2d 349 [1998]), the parties to the NYCAL are involved in an actual dispute in New York Courts, and the April Order did not give advice, it set parameters for that litigation.

However, we find that the court exceeded its authority to the extent that the April Order directs that applications for permission to charge the jury on the issue of punitive damages "shall be made at the conclusion of the evidentiary phase of the trial upon notice to the affected defendant(s), to which such defendant(s) shall have an opportunity to respond." Due process requires that a defendant be provided with an "opportunity to conduct discovery and establish a defense with respect to this [] damage[s] claim" since such claims involve "different elements and standards of proof and potentially subject defendants to a far greater and different dimension of liability than would otherwise [be] the case" (*Heller v Louis Provenzano, Inc.*, 303 AD2d 20, 23 [1st Dept 2003]). The April Order deprives defendants of their rights to due process by leaving them guessing, until the close of evidence at trial, whether or not punitive damages will be sought. Even plaintiffs, in their proposed modification of Section XVII, recognized the need for pre-trial resolution of the punitive damages issue. We therefore

modify to delete the second sentence of the first decretal paragraph of the April Order and remand the matter to the Coordinating Justice for a determination of procedural protocols by which plaintiffs may apply for permission to charge the jury on the issue of punitive damages. We note, however, that this decision does not preclude the Coordinating Justice, after consultation with the parties, from reconsidering other aspects of the April Order, including the determination whether to permit claims for punitive damages under the CMO, in the exercise of the court's discretion, either upon application or at its own instance.

In a subsequent order, entered December 18, 2014, the motion court denied defendants' motion for a stay and found, *inter alia*, "there is nothing . . . that prohibits discovery requests tailored to punitive damages issues . . . Nor does the Order or the CMO contain any prohibition against a defendant's moving to dismiss counts for punitive damages." These explanations do not resolve the issue arising from the April Order. Defendants cannot seek discovery in connection with, and the court cannot dismiss, a claim which a plaintiff has not yet actively asserted.

Finally, no appeal lies from the denial of reargument (*see D'Andrea v Hutchins*, 69 AD3d 541 [1st Dept 2010]), and defendants

have abandoned their appeal from the portion of the order denying renewal (*see Mehmet v Add2Net, Inc.*, 66 AD3d 437, 438 [1st Dept 2009]).

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

ENTERED: JULY 9, 2015

CLERK

Gonzalez, P.J., Friedman, Renwick, Moskowitz, Clark, JJ.

15679-
15680N Index 651841/13

Forty Central Park South, Inc., et al.,
Plaintiffs-Respondents,

-against-

Joseph Anza, et al.,
Defendants-Appellants.

_____

Levine & Associates, P.C., Scarsdale (Michael Levine of counsel), for appellants.

Balestriere Fariello, New York (Thomas J. Foley of counsel), for respondents.

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered October 17, 2014, which, to the extent appealed from as limited by the briefs, granted plaintiffs' motion to amend the complaint to add a cause of action against additional defendant Anza Capital Partners LLC, and order, same court and Justice, entered on or about February 6, 2015, which denied defendants' motion to dismiss the amended complaint or strike certain paragraphs, and limited their discovery to five additional interrogatories, unanimously affirmed, with costs.

Plaintiffs moved to amend the complaint to assert a cause of action for breach of contract against additional defendant Anza Capital Partners LLC (ACP), after their cause of action for

fraudulent inducement was dismissed on the ground that the supporting allegations only gave rise to a breach of contract cause of action (117 AD3d 523 [1st Dept 2014]). Defendants failed to demonstrate substantial prejudice or surprise resulting from the amendment (*see JPMorgan Chase Bank, N.A. v Low Cost Bearings NY Inc.*, 107 AD3d 643 [1st Dept 2013]). The need for additional discovery does not constitute substantial prejudice (*Jacobson v McNeil Consumer & Specialty Pharms.*, 68 AD3d 652, 654 [1st Dept 2009]). Nor does the amended complaint add significant factual allegations.

The added breach of contract claim states a cause of action by alleging that the parties entered into an operating agreement, that plaintiffs performed by investing $500,000, that defendant Anza, as manager of ACP, caused ACP to fail to perform its obligations by, among other things, causing it not to use the investment for its proscribed purpose and permitting withdrawals in violation of specified provisions of the operating agreement, and that plaintiffs were damaged as a result (*see Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]).

The cause of action for fraud is adequately pleaded, as we held in the prior appeal (117 AD3d 523 [1st Dept 2014]). Moreover, the fraud cause of action against Anza is not

duplicative of the breach of contract cause of action against ACP, since it is based upon representations that Anza made that are separate and distinct from ACP's obligations under the operating agreement (*see Manas v VMS Assoc., LLC*, 53 AD3d 451, 453 [1st Dept 2008]).

The paragraphs of the complaint that defendants seek to strike are not scandalous or prejudicial and are relevant to the causes of action pleaded (*see Soumayah v Minnelli*, 41 AD3d 390, 392 [1st Dept 2007]; *New York City Health & Hosps. Corp. v St. Barnabas Community Health Plan*, 22 AD3d 391 [1st Dept 2005]; CPLR 3024[b]).

Since the record makes clear that defendants have had ample opportunity to conduct discovery on both causes of action, the court properly limited their discovery.

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

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

ENTERED: JULY 9, 2015

CLERK

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

14208 Louis A. Russo, as Executor of the Estate of Ronald E. Pecunies,
Plaintiff-Respondent-Appellant,

-against-

David Rozenholc, et al.,
Defendants-Appellants-Respondents,

Lucille Petino,
Defendant.

Index 650457/12

_____

Furman Kornfeld & Brennan LLP, New York (Andrew S. Kowlowitz of counsel), for David Rozenholc and David Rozenholc & Associates, appellants-respondents.

Roberts & Roberts, New York (Michael J. Roberts of counsel), for Mahesh Agashiwala, Loma Agashiwala, John C. Alexander, Theodore Baer, Bertina Baer Nolan Baer, Judy Becker, Johanna Bennett, Mariel Bennett, Jack Biderman, Isabel Barnard Biderman, Barbara E. Bishop, Terry Chabrowe, Paula Chabrowe, Amy R. Cousins, Cathy Marshall, Lori Metz, Brigid O'Connor, Debra Lyn Schinasi, Hyman Schinasi, Jean Schinasi, Kalia Shalleck and Jean Schimotake, appellants-respondents.

Nicholas J. Damadeo, P.C., Huntington (Nicholas J. Damadeo of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Joan A. Madden, J.), entered October 22, 2013, which denied defendants-appellants' motions to dismiss the complaint as against them, and denied plaintiff's cross motion for partial summary judgment on his cause of action for breach of contract, unanimously affirmed, without costs.

In May 2006, the nonparty building owner filed an application with the Department of Housing and Community Renewal (DHCR) seeking to demolish the building located at 220 Central Park South in Manhattan and evict the tenants. As a result, a group of rent-stabilized tenants formed a tenants' association to rebuff the building owner's efforts. One of those tenants was plaintiff's decedent Ronald E. Pecunies (the decedent), who lived with his girlfriend Emel Dilek in apartment 16AB – a large unit created by converting two apartments into one.

The tenants retained defendants David Rozenholc and David Rozenholc and Associates (collectively, DR&A) to represent them in the DHCR proceeding and to negotiate with the building owner. In the retainer agreement, dated April 3, 2009, the tenants represented and warranted that they had "agreed to share equally in any settlement offer made by [the owner]." The retainer agreement also stated that each apartment represented a single share, but specifically stated, "it is further agreed that [decedent], who occupies combined apartment 16 AB[,] will receive two (2) shares and agrees to pay two (2) shares of any legal fees owed."

In April 2009, DHCR issued an order permitting the building owner to evict the tenants. In February 2010, after

unsuccessfully challenging the order, DR&A commenced an article 78 proceeding on behalf of the tenants, including decedent. However, decedent died on May 22, 2010, after the commencement of the article 78 proceeding but before any settlement could be reached with the building owner. On September 24, 2010, counsel for decedent's estate wrote to DR&A, authorizing it to continue to represent the estate's interest. According to the estate's counsel, this authority came from plaintiff, who was the executor of decedent's estate.

A dispute later apparently arose between plaintiff and Dilek as to Dilek's rights with respect to the apartment. Plaintiff and Dilek each had counsel, both of whom remained in communication with DR&A. According to attorney Rozenholc, the building owner refused to offer any money to either Dilek or to the estate, taking the position that no one had any succession rights to the apartment under the Rent Stabilization Code.

The tenants and the building owner ultimately settled the article 78 proceeding for more than $33 million. At approximately the same time, plaintiff, Dilek, and the building owner, entered into an agreement, dated December 2, 2010 (the Dilek Buyout Agreement), in which the plaintiff recited that as executor of the estate, he had no claim to apartment 16AB after decedent died on

May 22, 2010. Plaintiff also recited that Dilek had occupied apartment 16AB before decedent's death "and succeeded to his tenancy." The signatories to the Dilek Buyout Agreement agreed that in exchange for Dilek's vacating apartment 16AB, the building owner would pay her a single share's worth of the $33 million settlement – namely, $1,562,500 ($1,700,000 less $187,500 in counsel fees). The Dilek Buyout Agreement further stated that DR&A represented plaintiff and Dilek in connection with that agreement.

In February 2012, plaintiff, on behalf of decedent's estate, commenced this action against the DR&A defendants and the defendants-tenants,[1] asserting two causes of action – namely, legal malpractice (against the DR&A defendants) and breach of contract (against the DR&A defendants and the defendants-tenants).

As to the legal malpractice claim, the complaint alleged that DR&A breached its duty to the estate when it failed to inform the estate that there was a retainer agreement and that the retainer agreement contained an express agreement among the tenants to "share equally" in any settlement proceeds. Likewise, the complaint alleged that DR&A breached its duty to the estate by

[1] Defendants-tenants consist of all defendants other than David Rozenholc and David Rozenholc & Associates.

failing to inform it that the retainer agreement explicitly recognized decedent's right to receive the two shares of the settlement proceeds based on his occupancy of two apartments. Thus, plaintiff concluded, DR&A committed legal malpractice when it failed to advise plaintiff of the estate's rights under the retainer and instead advised plaintiff to sign the settlement documents, thus forfeiting its right to settlement proceeds.

As to the breach of contract claim, the complaint alleged that the two settlement shares owed to decedent had wrongly been distributed to defendants-tenants, and that all defendants breached the retainer agreement by failing to pay the estate the value of those shares.

In May 2012, DR&A moved under CPLR 3211(a)(7) to dismiss the complaint. On the motion, DR&A stated that plaintiff had actually suffered no damages because in fact, estates cannot succeed to rent-stabilized tenancies. Thus, DR&A concluded, because the estate was never entitled to a portion of the settlement, plaintiff had no legal right to decedent's apartment under the Rent Stabilization Code. DR&A also argued that plaintiff's relinquishment of any rights to the apartment had nothing to do with any malfeasance by DR&A or attorney Rozenholc, but resulted solely from the fact that plaintiff recognized that, in fact, he

had no legal basis to assert any claim under the Rent Stabilization Code.

In July 2012, defendants-tenants cross-moved under CPLR 3211(a)(7) to dismiss the breach of contract cause of action as against them. In their cross motion, defendant-tenants argued that the estate relinquished all rights to decedent's leasehold because none of decedent's family members had statutory succession rights under the Rent Stabilization Code. Similarly, defendants-tenants argued that decedent's death extinguished his buyout rights as a matter of law.

Plaintiff then cross-moved in August 2012 for partial summary judgment under CPLR 3212 on its second cause of action for breach of contract. On the cross motion, plaintiff argued that DR&A breached the retainer agreement by failing to collect and distribute the settlement proceeds in accordance with the agreement's terms. Likewise, plaintiff asserted that defendants-tenants breached the agreement when they failed to "pool" the settlement and pay two shares to decedent. Plaintiff also argued that defendants-tenants were unjustly enriched by receiving amounts exceeding their rightful shares.

In an affidavit in opposition to defendants' motions and in support of plaintiff's cross motion, plaintiff stated that had

attorney Rozenholc "informed [plaintiff] of the Retainer Agreement's terms, or provided [plaintiff] with a copy in advance of the settlement, [plaintiff] would not have agreed to any settlement which resulted in no money to the [e]state." Plaintiff further stated that although the estate forfeited its rights to the apartment under the Rent Stabilization Code, it "did not knowingly or intentionally forfeit its rights to two shares of the settlement under the Retainer Agreement." Plaintiff also specifically stated that "but for" attorney Rozenholc's failure to properly advise the estate of its rights under the retainer, plaintiff "would not have consented to the settlement in its final form but rather would have insisted on payment of the two shares from the total proceeds."

As to the breach of contract claim, the IAS court properly denied the motion to dismiss that claim. Of course, on a motion to dismiss under CPLR 3211(a)(7), a court must determine whether the factual allegations taken as a whole manifest any cause of action cognizable at law (*see Ackerman v 305 East 40th Owners Corp.*, 189 AD2d 665, 666 [1st Dept 1993]).

Despite defendants-tenant's arguments otherwise, the breach of contract cause of action is not defeated by the provisions of the Rent Stabilization Code. On the contrary, the breach of

contract action against defendants-tenants rests upon plaintiff's allegation that by the retainer agreement's express terms, the tenants, including decedent, agreed to "pool" the money they received from the building owner – that is, to share equally in any settlement – and then pay to decedent two shares of the pooled money. Plaintiff asserts that to the extent the defendants-tenants failed to pay decedent his two shares under the retainer agreement, they are in breach of the retainer agreement, or have been unjustly enriched.

These allegations are directed specifically to defendants-tenants' actions with respect to the money they actually received in the settlement with the building owner; this issue is separate from a tenant's rights of succession under the Rent Stabilization Code. Whether or not the decedent had succession rights is not relevant to the allegations of the complaint at this stage of the litigation; the tenants had already received settlement money and, according to the complaint, had agreed to share it equally. Given the allegations in the complaint – namely, that defendants-tenants, contrary to their express agreement, did not share equally in the money they received in settlement, and were unjustly enriched – plaintiff has sufficiently stated a claim for breach of contract.

Likewise, there is no merit to DR&A's argument on appeal that for the purposes of the breach of contract claim, the estate was not a signatory to the retainer agreement and therefore cannot assert decedent's rights under that agreement. Nor is there any merit to DR&A's argument on appeal that the estate lacks standing to assert a malpractice claim against it. On the contrary, the estate stepped into decedent's shoes and indeed, specifically authorized DR&A to represent the estate's interests under the retainer agreement (*see generally Estate of Saul Schneider v Finmann*, 15 NY3d 306 [2010]).

DR&A makes a similarly unavailing argument that the estate's waiver of rights to decedent's apartment operates as a binding judicial admission and a complete bar to the action. A party asserting a waiver of rights has the burden of establishing that the purported waiver constituted an intentional, voluntary relinquishment of a known right (*see Jefpaul Garage Corp. v Presbyterian Hosp. in City of N.Y.*, 61 NY2d 442, 446 [1984]; *White v Church of Our Lady of Sorrows*, 255 AD2d 109 [1st Dept 1998]). Here, plaintiff alleges that DR&A never informed it of the retainer agreement's existence and that, had plaintiff known of the agreement, he would not have consented to a transfer of its rights to Dilek. In light of these allegations, DR&A has not met

its burden on its waiver defense.

Turning now to the legal malpractice claim, we find that the motion court properly allowed the cause of action for legal malpractice to proceed. A viable claim for legal malpractice requires that a complaint allege "'the negligence of the attorney; that the negligence was the proximate cause of the loss sustained; and actual damages'" (*O'Callaghan v Brunelle*, 84 AD3d 581, 582 [1st Dept 2011], *lv denied* 18 NY3d 804 [2012], quoting *Leder v Spiegel*, 31 AD3d 266, 267 [2006], *affd* 9 NY3d 836 [2007], *cert denied* 552 US 1257 [2008]). Here, the logic for the legal malpractice cause of action is similar to the logic in sustaining the breach of contract claim: whether decedent had rights under the Rent Stabilization Code is beside the point for purposes of the pleadings here. The relevant issue is not whether decedent had rights to the rent-stabilized apartment but whether decedent had rights to his two shares under the retainer agreement. Indeed, plaintiff does not argue that but for DR&A's negligence, the estate would have prevailed in the article 78 proceeding; he argues that DR&A failed to tell him about the existence of the retainer agreement and to make sure that the estate received the settlement monies to which it was entitled under the settlement agreement.

The affidavits in support of the complaint assert, among other things, that had attorney Rozenholc informed plaintiff of the retainer agreement's terms, plaintiff would not have agreed to any settlement that resulted in no money to the estate. The affidavits also state that "but for" attorney Rozenholc's failure to properly advise the estate of its rights under the retainer, plaintiff "would not have consented to the settlement in its final form but rather would have insisted on payment of the two shares from the total proceeds." These averments, in addition to the allegations of the complaint, are sufficient to state a claim for legal malpractice.

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

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

ENTERED: JULY 9, 2015

CLERK

Friedman, J.P., Andrias, Saxe, Richter, Gishe, JJ.

15549N Estee Lauder Inc., Index 602379/05
Plaintiff-Appellant,

-against-

OneBeacon Insurance Group, LLC, etc., et al.,
Defendants-Respondents.

_____

Reed Smith LLP, New York (John W. Schryber of counsel), for appellant.

Steptoe & Johnson LLP, New York (Michael C. Miller of counsel), for respondents.

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Order, Supreme Court, New York County (Carol R. Edmead, J.), entered February 10, 2015, which, to the extent appealed from, granted defendants' (OneBeacon) motion for leave to amend their answer to reassert an affirmative defense of late notice, unanimously reversed, on the law, with costs, and the motion denied.

OneBeacon waived its right to assert the affirmative defense of late notice when it failed to raise that ground in its letter of disclaimer to plaintiff. We made this finding in a prior appeal in this case (62 AD3d 33, 35 [1st Dept 2009]), and it remains law of the case. *KeySpan Gas E. Corp. v Munich Reins. Am., Inc.* (23 NY3d 583 [2014]) does not alter this result. There,

the Court of Appeals stated that "*[t]o the extent Estee Lauder Inc. v OneBeacon Ins. Group, LLC* (62 AD3d 33 [1st Dept 2009]) ... and other Appellate Division cases hold that Insurance Law § 3420(d)(2) applies to claims not based on death and bodily injury, those cases were wrongly decided and should not be followed" (*id.* at 591 n 2 [internal citations omitted] [emphasis added]). Our case did not so hold. The opinion states at the outset that "[t]he resolution of this appeal turns on whether OneBeacon waived its right to disclaim coverage on the ground that plaintiff failed to give it timely notice of certain claims against plaintiff" (*id.* at 34). It then finds that "[n]either in the July 24 nor the November 1 letter [rejecting plaintiff's claims] did OneBeacon ever assert that Lauder had failed to give timely notice of a claim or occurrence, let alone disclaim coverage on the ground of such a failure by Lauder" (*id.*). It notes that under New York law, "an insurer is deemed, as a matter of law, to have intended to waive a defense to coverage where other defenses are asserted" and the insurer knows of "the circumstances relating to its defense of untimely notice" (*id.* at 35), and states that OneBeacon did not dispute that it had such knowledge long before it sent the 2002 letters (*id.* at 36). Thus, in a matter involving property damage claims, we relied on the common law for the proposition

that "[a] ground not raised in the letter of disclaimer may not later be asserted as an affirmative defense" (*Benjamin Shapiro Realty Co. v Agricultural Ins. Co.*, 287 AD2d 389, 389 [1st Dept 2001]).

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

ENTERED: JULY 9, 2015

CLERK

Mazzarelli, J.P., Sweeny, Saxe, Richter, Manzanet-Daniels, JJ.

15681 The People of the State of New York, Ind. 584/11
Respondent,

-against-

Robert Williams,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Paul Hershan 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, Bronx County (Megan Tallmer, J.), rendered on or about July 18, 2013,

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: JULY 9, 2015

CLERK

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

Mazzarelli, J.P., Sweeny, Saxe, Richter, Manzanet-Daniels, JJ.

15682 Jose Garcia, Index 104032/10
Plaintiff-Appellant,

Rafael A. Diaz,
Plaintiff,

-against-

Eugene B. Feigelson,
Defendant-Respondent.

_____

Budin, Reisman, Kupferberg & Bernstein, LLP, New York (Scott B. Schwartz of counsel), for appellant.

Petrocelli & Christy, LLP, Mineola (Michael D. Zentner of counsel), for respondent.

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Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered October 24, 2013, which, to the extent appealed from as limited by the briefs, granted defendant's motion for summary judgment dismissing plaintiff Garcia's claims of serious injuries to his right shoulder, cervical spine, and lumbar spine under the significant or permanent consequential limitation of use categories of Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendant made a prima facie showing that plaintiff's claimed injuries to his spine and shoulder were not causally related to a 2009 motor vehicle accident. Defendant submitted, among other

things, the report of a radiologist who opined that plaintiff's 2009 MRIs showed degenerative disc changes and tendinosis, and that the conditions were unchanged from those shown in MRIs taken following a prior 2006 motor vehicle accident. Based on his review and comparison of the MRI films, defendant's radiologist opined that there was no radiological evidence of any injury caused or exacerbated by the 2009 accident (*see Mitrotti v Elia*, 91 AD3d 449, 450 [1st Dept 2012]; *see also Chaston v Doucoure*, 125 AD3d 500, 501 [1st Dept 2015]).

In opposition, plaintiff failed to raise an issue of fact as to whether any of his claimed injuries were caused by the accident. Plaintiff submitted the affirmed report of his orthopedic surgeon, who examined him one year after the 2009 accident and performed a lumbar spine diskectomy and arthroscopic surgery on the right shoulder. While the surgeon noted that plaintiff had been treated in 2006 for claims of neck, back and shoulder injuries, he did not review the 2006 MRI films or reports (*see Dawkins v Cartwright*, 111 AD3d 559, 560 [1st Dept 2013]). His conclusory statement that plaintiff's preexisting conditions were aggravated by the 2009 accident is insufficient to raise an issue of fact, since he failed to offer any basis for his conclusion, or the extent of any exacerbation (*Farmer v Ventkate*

Inc., 117 AD3d 562, 562 [1st Dept 2014]; *Brand v Evangelista*, 103 AD3d 539, 540 [1st Dept 2013]). He also failed to rule out the preexisting conditions as the cause of plaintiff's need for surgery and his current limitations (*Farmer*, 117 AD3d at 562). Plaintiff's submission of unaffirmed reports of his 2009 MRIs does not assist him since, even if they could be considered (*see Malupa v Oppong*, 106 AD3d 538, 539 [1st Dept 2013]), they do not address causation or compare the results of the 2006 MRIs.

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

ENTERED: JULY 9, 2015

CLERK

Mazzarelli, J.P., Sweeny, Saxe, Richter, Manzanet-Daniels, JJ.

15684 The People of the State of New York, SCI. 2261/12
Respondent,

-against-

Glen Slater,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Diane A. Shearer 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, Bronx County (Joseph J. Dawson, J.), rendered on or about January 29, 2013,

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: JULY 9, 2015

CLERK

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

Mazzarelli, J.P., Sweeny, Saxe, Richter, Manzanet-Daniels, JJ.

15685 Alfred Barry, Index 309625/12
Plaintiff-Respondent,

-against-

Pepsi-Cola Bottling Company of New York, Inc.,
Defendant-Appellant,

"John Doe", etc., et al.,
Defendants.

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Law Offices of Christopher P. Di Giulio, P.C., New York (William Thymius of counsel), for appellant.

Friedman & Simon, LLP, Jericho (Roger L. Simon of counsel), for respondent.

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Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered August 13, 2014, which denied the motion of defendant Pepsi-Cola Bottling Company of New York, Inc. for summary judgment dismissing the complaint as against it, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

In this rear-end collision case, even assuming that the Pepsi vehicle, hit from behind, was illegally double-parked, that fact, standing alone "does not automatically establish that such double-parking was the proximate cause of the accident" (*Cervera v Moran*, 122 AD3d 482, 483 [1st Dept 2014] [internal quotation marks

omitted]). Here, the record shows that the double-parked vehicle, given the road conditions at the time of the accident, namely, the favorable weather, the time of day, and the relatively minimal amount of traffic on the road at the time, "merely furnished the condition or occasion for the occurrence of the event but was not one of its causes" (*id.*; *see Pagan v Ouattara*, 115 AD3d 605 [1st Dept 2014]). Plaintiff's proffered excuse for the accident, that sunlight temporary blinded the driver of the rear vehicle, does not constitute a nonnegligent explanation for the rear-end collision (*see Agramonte v City of New York*, 288 AD2d 75, 76 [1st Dept 2001]).

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

ENTERED: JULY 9, 2015

CLERK

Mazzarelli, J.P., Sweeny, Saxe, Richter, Manzanet-Daniels, JJ.

15688- Index 111186/11
15688A Dwight Littlejohn,
Plaintiff-Respondent,

-against-

Dominos Pizza LLC,
Defendant-Respondent,

Nayci Family Properties, LLC,
Defendant-Appellant.

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Law Offices of Glenn J. Wurzel, Hempstead (Glenn J. Wurzel of counsel), for appellant.

Mallilo & Grossman, Flushing (Francesco Pomara Jr. of counsel), for Dwight Littlejohn, respondent.

Goldberg Segalla LLP, Garden City (Brendan T. Fitzpatrick of counsel), for Dominos Pizza LLC, respondent.

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Order, Supreme Court, New York County (Joan M. Kenney, J.), entered February 18, 2014, which granted defendant Dominos Pizza LLC's motion for summary judgment on its cross claim against defendant Nayci Family Properties, LLC for breach of contract for failure to procure insurance, unanimously reversed, on the law, without costs, and the motion denied. Order, same court and Justice, entered February 20, 2014, which denied Nayci Family Properties, LLC's motion for summary judgment dismissing the complaint and cross claims against it and on its cross claims

against Dominos Pizza LLC, unanimously affirmed, without costs.

The lease under which defendant tenant Dominos Pizza LLC leased the ground floor of a building owned by defendant landlord Nayci Family Properties, LLC, as well as the testimony of defendant landlord's owner, established that the cellar was not part of the leased premises. As such, defendant landlord was responsible under the lease for maintaining the cellar doors in the adjoining sidewalk, over which plaintiff alleges he tripped. Accordingly, Supreme Court correctly denied landlord's motion for summary judgment.

However Supreme Court erred in granting defendant tenant's motion for summary judgment on its purported cross claim against defendant landlord for breach of contract for failure to procure insurance. Defendant tenant pleaded a single cross claim which alleged that, if plaintiff sustained such injuries as he alleged, they arose from defendant landlord's "carelessness, recklessness, acts, omissions, negligence and breaches of . . . contract," for which defendant landlord is required to indemnify defendant tenant. In other words, the cross claim only sought indemnification from defendant landlord for damages sustained by *plaintiff* as a result of, inter alia, landlord's breach of contract. Because plaintiff sustained no damages as a result of

defendant landlord's failure to procure insurance, the cross claim cannot be read as asserting a claim for breach of contract for failure to procure insurance. Thus, because defendant tenant never asserted such a claim, its motion for summary judgment should have been denied (*A & J Produce Corp. v De Palo Indus.*, 215 AD2d 317, 318 [1st Dept 1995]).

We further note that while the lease required defendant tenant to procure $1,000,000 in insurance coverage for its own negligence, the primary insurance policy procured by defendant tenant had a deductible equal to this coverage limit, rendering such coverage illusory. Given that defendant landlord was responsible for maintaining the cellar doors and defendant tenant did not assert a cross claim for breach of contract for failure to procure insurance, tenant's failure to procure such insurance is

irrelevant for purposes of this appeal.

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

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

ENTERED: JULY 9, 2015

CLERK

Mazzarelli, J.P., Sweeny, Saxe, Richter, Manzanet-Daniels, JJ.

15689 Michelle D. Johnson, Index 304975/11
Plaintiff-Appellant,

Troy Screen,
Plaintiff,

-against-

Albert Salaj, et al.,
Defendants,

Mohammed O. Rahman, et al.,
Defendants-Respondents.

_____

Sanders, Sanders, Block, Woycik, Viener & Grossman, P.C., Mineola (Melissa C. Ingrassia of counsel), for appellant.

Marjorie E. Bornes, Brooklyn, for respondents.

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Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered April 4, 2014, which, to the extent appealed from as limited by the briefs, granted defendants' motions for summary judgment dismissing the complaint based on plaintiff's inability to demonstrate that she suffered a serious injury to her left knee or a 90/180-day injury within the meaning of Insurance Law § 5102(d), unanimously modified, on the law, to deny the motions as to plaintiff's claims of "significant" and "permanent consequential" limitations in use of her left knee, and otherwise affirmed, without costs.

Plaintiff alleges that she suffered serious injuries requiring arthroscopic surgery on her left knee as the result of a rear-end collision involving three cars. In order to meet their prima facie burden, defendants were required to demonstrate that plaintiff has not suffered a "serious injury," which they could do through medical affirmations concluding that no objective medical findings support her claim that she suffered an injury resulting in permanent or significant limitations in use of her knee, and, if objective evidence exists, that the injury was caused by a preexisting condition and not the accident (*see Neil v Tidani*, 126 AD3d 581 [1st Dept 2015]; *Spencer v Golden Eagle, Inc.*, 82 AD3d 589 [1st Dept 2011]).

In support of their motions for summary judgment, defendants submitted conflicting expert reports, and thus failed to meet their prima facie burden. While one orthopedic expert found full normal range of motion in the left knee, the other found limitations in range of motion which he did not otherwise explain (*compare Swift v New York Tr. Auth.*, 115 AD3d 507 [1st Dept 2014]). Moreover, both of the defendants' expert radiologists found that the MRI film showed objective evidence of injury, i.e., a partial thickness tear of the anterior cruciate ligament (ACL). While one of the experts opined that the injury was degenerative

in origin, the other opined that the injury could have been caused either by the accident or by prior injury or surgery, if there were any evidence of prior injury or surgery. Since defendants presented no evidence of any prior knee injury or surgery, the defense expert's opinion did not demonstrate as a matter of law that plaintiff's knee injury was not causally related to the accident (*see Fuentes v Sanchez*, 91 AD3d 418 [1st Dept 2012]). Thus, the burden did not shift to plaintiff to submit evidence sufficient to raise an issue of fact (*see Jackson v Leung*, 99 AD3d 489 [1st Dept 2012]).

Had the burden shifted, plaintiff raised an issue of fact through the affirmation of her orthopedic surgeon who reported findings of limited range of motion, as well as other signs of knee injury, both before the surgery and two years later. Further, he attributed the cause of the injury to the accident, noting the absence of any prior complaints of knee pain or dysfunction, which is sufficient to raise an issue of fact (*see Caines v Diakite*, 105 AD3d 404 [1st Dept 2013]).

As to the 90/180-day claim, defendants met their prima facie burden by relying on plaintiff's bill of particulars and deposition testimony (*see Komina v Gil*, 107 AD3d 596 [1st Dept 2013]). In opposition, plaintiff's physician stated that she was

limited during the relevant period, but she presented no medical records from the relevant period showing that she was disabled and her concession that she was limited to home for only a short period and then returned to work undermines her claim that she was disabled from performing substantially all her usual and customary daily activities during said period (*see Vasquez v Almanzar*, 107 AD3d 538, 541 [1st Dept 2013]).

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

ENTERED: JULY 9, 2015

CLERK

Mazzarelli, J.P., Sweeny, Saxe, Richter, Manzanet-Daniels, JJ.

15690-
15690A The People of the State of New York,
Respondent,

-against-

Juan Batista,
Defendant-Appellant.

Ind. 4230/07
3650/08

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Seymour W. James, Jr., The Legal Aid Society, New York (Steven R. Berko of counsel), for appellant.

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

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Judgments, Supreme Court, New York County (Robert M. Stolz, J.), rendered October 29, 2008, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the first degree and criminal possession of a controlled substance in the first degree, and sentencing him, as a second felony drug offender previously convicted of a violent felony, to concurrent terms of 18 years, unanimously affirmed.

For the reasons stated in *People v Tate* (__ AD3d __ [1st Dept 2015], [decided simultaneously herewith]), we find that defendant failed to preserve his claim that the court was required to provide the public with notice of an impending hearing on the closure of the courtroom during an undercover officer's testimony,

and we decline to review it in the interest of justice, and we also find that defendant lacks standing to assert such a claim.

We find no violation of defendant's right to a public trial. The court providently exercised its discretion in ruling that the relatives identified by defendant should be excluded from the courtroom based on their residence in or near areas in which the testifying undercover officers were conducting ongoing investigations (*see People v Campbell*, 16 NY3d 756 [2011]; *People v Alvarez*, 51 AD3d 167, 175 [1st Dept 2008], *lv denied* 11 NY3d 785 [2008]).

We have considered defendant's remaining contentions and find them to be unavailing.

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

ENTERED: JULY 9, 2015

CLERK

Mazzarelli, J.P., Sweeny, Saxe, Richter, Manzanet-Daniels, JJ.

15691 The People of the State of New York, Ind. 602/07
Respondent,

-against-

Julio Cruz,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Steven R. Berko of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered July 8, 2009, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the first degree, criminal possession of a controlled substance in the third degree (three counts), criminal possession of a controlled substance in the fourth degree, and criminally using drug paraphernalia in the second degree (four counts), and sentencing him to an aggregate term of 16 years, 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]). The evidence amply established that defendant was a participant in the drug sale. In addition to evidence plainly supporting the inference that defendant acted as

a lookout during the sale, the police investigation established that defendant was part of an ongoing drug-trafficking operation, and that his role included, among other things, storing drugs in his apartment. In sum, "[d]efendant's entire course of conduct and interactions with his codefendants supported the conclusion that he was a participant in a drug operation, and that he assisted the others by acting as a lookout" (*People v Eduardo*, 44 AD3d 371, 372 [1st Dept 2007], *affd* 11 NY3d 484 [2008]).

For the reasons stated in *People v Tate* (__ AD3d __ [1st Dept 2015] [decided simultaneously herewith]), we find that defendant failed to preserve his claim that the court was required to provide the public with notice of an impending hearing on the closure of the courtroom during an undercover officer's testimony, and we decline to review it in the interest of justice, and we also find that defendant lacks standing to assert such a claim.

We have considered and rejected defendant's remaining claims

concerning closure of the courtroom (*see generally Waller v Georgia*, 467 US 39 [1984]; *People v Ramos*, 90 NY2d 490, 498-499, *cert denied sub nom. Ayala v New York*, 522 US 1002 [1997]).

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

ENTERED: JULY 9, 2015

CLERK

Mazzarelli, J.P., Sweeny, Saxe, Richter, Manzanet-Daniels, JJ.

15692 The People of the State of New York, Ind. 4129/08
Respondent,

-against-

Timothy Tate,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Steven R. Berko of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered July 23, 2009, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree (two counts) and criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to an aggregate term of five years, unanimously affirmed.

Defendant did not preserve his claim that, before closing the courtroom during the testimony of an undercover officer in order to protect his identity, the court was required, under the First Amendment, to provide the public with notice and an opportunity to be heard on the closure. "[E]rrors of constitutional dimension — including the right to a public trial — must be preserved" (*People*

v Alvarez, 20 NY3d 75, 81 [2012], *cert denied* __US__, 133 S Ct 2004 [2013]). Although defendant asserted his own right to a public trial, that assertion did nothing to alert the court that he wanted it to invent, or import from other jurisdictions, new remedies for the benefit of nonparties, including the "posting" or "docketing" of information about the impending hearing on the closure issue. Defendant's entire argument in this regard is raised for the first time on appeal, and we decline to review it in the interest of justice.

We also find that defendant's claim is procedurally barred because he lacks standing to assert it (*see People v Campbell*, 63 AD3d 754 [2d Dept 2009], *lv denied* 13 NY3d 835 [2009], *cert denied* 559 US 1014 [2010]). The issue is not whether defendant has standing to challenge the exclusion of the public during the undercover officer's testimony, but whether he has standing to challenge the absence of *notice* to nonparties of an impending closure hearing. Defendant has not established standing under the principles set forth in *Powers v Ohio* (499 US 400, 410-411 [1991]). Defendant, who had a full opportunity to litigate the closure issue, has not shown how he was injured by the lack of notice to the public.

We find that the court's ruling regarding closure constituted a provident exercise of discretion that did not violated defendant's right to a public trial or anyone's First Amendment rights.

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

ENTERED: JULY 9, 2015

CLERK

Mazzarelli, J.P., Sweeny, Saxe, Richter, Manzanet-Daniels, JJ.

15694N Gem Holdco, LLC et al., Index 650841/13
Plaintiffs,

-against-

Ridgeline Energy Services, Inc. et al.,
Defendants-Appellants-Respondents,

CWT Canada II Limited Partnership, et al.,
Defendants-Respondents-Appellants,

Changing World Technologies, L.P., et al.
Defendants.

[And a Third-Party Action]

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Greenberg Traurig, LLP, New York (William C. Silverman of counsel), for appellants-respondents.

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

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered January 9, 2015, which denied defendants Changing World Technologies, L.P., Ridgeline Energy Services, Inc. and Dennis Danzik's (the Ridgeline defendants) motion to disqualify Schlam Stone & Dolan LLP from representing defendants CWT Canada II Limited Partnership, Resource Recovery Corporation, and Jean Noelting (the CWT defendants), and denied the CWT defendants' motion to supplement the record, unanimously affirmed as to the motion to disqualify, and the appeal therefrom otherwise

dismissed, without costs, as moot.

The motion court properly denied the Ridgeline defendants' motion to disqualify Schlam Stone & Dolan LLP from representing the CWT defendants, since in their retainer agreement with Schlam Stone & Dolan LLP, the Ridgeline defendants specifically waived any conflict of interest that might arise from the firm's representation of both them and the CWT defendants (*see St. Barnabas Hosp. v New York City Health & Hosps. Corp.*, 7 AD3d 83 [1st Dept 2004]). The Ridgeline defendants' contention that they did not give informed consent to the firm's asserting claims against them in this litigation is belied by the clear language of the retainer agreement and the Unit Purchase Agreement. They "cannot now compel the disqualification of counsel simply because the representation to which [they] consented has since devolved into litigation" (*see id.* at 92 [internal quotation marks omitted]).

Nor does the fact that the firm obtained confidential information from the Ridgeline defendants warrant disqualification since the Ridgeline defendants knowingly and expressly agreed in the retainer agreement to the firm's use of their confidential information and the disclosure of that information to the CWT defendants (*see id.* at 90).

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

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

ENTERED: JULY 9, 2015

CLERK

Mazzarelli, J.P., Sweeny, Saxe, Richter, Manzanet-Daniels, JJ.

15696 Transport Workers Union of Greater New York, etc.,
Plaintiff-Appellant,

-against-

Carmen Bianco etc.,
Defendant-Respondent.

Index 652798/13

_____

Advocates For Justice, Chartered Attorneys, New York (Arthur Z. Schwartz of counsel), for appellant.

Lewis S. Finkelman, Brooklyn (Daniel Chiu of counsel), for respondent.

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Order, Supreme Court, New York County (Anil C. Singh, J.), entered September 2, 2014, which, inter alia, granted defendant's motion to dismiss the complaint, unanimously affirmed, without costs.

The court properly dismissed plaintiff union's complaint alleging that the collective bargaining agreement provision setting forth procedures for predisciplinary suspensions was void under Civil Service Law § 75. "Rights under Civil Service Law § 75 may be supplemented, modified or replaced by the terms of a collective bargaining agreement" (*Matter of Patel v New York City Hous. Auth.*, 26 AD3d 172, 174 [1st Dept 2006]), which is the case

here with respect to disciplinary grievance procedures set forth under the Civil Service Law, including those concerning predisciplinary suspensions (*see Matter of Robinson v New York City Tr. Auth.*, 226 AD2d 467, 468 [2d Dept 1996).

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

ENTERED: JULY 9, 2015

CLERK

Mazzarelli, J.P., Sweeny, Saxe, Richter, Manzanet-Daniels, JJ.

15697N In re New York City Transit Authority, Index 451546/14
Petitioner-Respondent,

-against-

Transport Workers Union of Greater
New York Local 100,
Respondent-Appellant.

_____

Advocates For Justice, Chartered Attorneys, New York (Arthur Z. Schwartz of counsel), for appellant.

Lewis S. Finkelman, Brooklyn (James L. Kerwin of counsel), for respondent.

_____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered August 22, 2014, which granted plaintiff New York City Transit Authority's (TA) motion to permanently stay arbitration, unanimously affirmed, without costs.

Respondent Transport Workers Union of Greater New York Local 100 (TWU) brought a contract interpretation grievance against the New York City Transit Authority, asserting that, pursuant to section 5.2(j) of the TWU Collective Bargaining Agreement (CBA), bus maintenance employees who had trained in TWUs Divisional area, and who were, following training, initially assigned to Staten Island despite their preference for an initial assignment location in Brooklyn, because no other positions were available at that

time, were entitled to "transfer" back to Brooklyn when a new class of such employees graduated from training. When the TA denied the grievance, TWU scheduled arbitration, and TA brought the instant article 75 proceeding seeking a permanent stay of arbitration.

The court properly granted TA's motion, finding that TWU lacked standing to bring the grievance. TWU does not represent the subject employees in Staten Island. Rather, they are represented by Amalgamated Transit Union Local 726 (ATU). The employees, therefore, are not "covered employees" or a "group of such covered employees" on whose behalf a "contract interpretation grievance" may be brought under the TWU CBA.

Moreover, section 5.2(j) applies to employees who were transferred out of their Division due to a lack of work in their title in that Division. These subject employees were not transferred out due to a lack of work, but were initially assigned to Staten Island, prior to which they were in training. That their preferred "school pick" was Brooklyn does not render section 5.2(j) applicable since these employees were never employed in their title in Brooklyn. There is, therefore, no reasonable relation between the subject matter of the dispute and section 5.2(j) (*see New York State Off. of Children & Family Servs. v*

Lanterman, 14 NY3d 275, 283 [2010]).

Finally, TWU's grievance appears to be, in fact, an attempt to enforce a provision of the ATU CBA, on behalf of ATU members, which violates public policy (*see e.g. Civil Serv. Empl. Assn., Inc., Local 1000 v Westchester County Civil Serv. Empl. Assn., Inc.*, Case No. U-10884 and U-11114, New York Public Employment Relations Board, 23 PERB P3008 [Feb. 22, 1990]; *Sperry Sys. Mgt. Div., Sperry Rand Corp. v NLRB*, 492 F2d 63, 69 [2d Cir 1974], *cert denied* 419 US 831 [1974]; *Welch Scientific Co. v NLRB*, 340 F2d 199, 202-203 [2d Cir 1965]), particularly since it risks generating an inconsistent result with a settlement of a similar contract interpretation grievance brought by ATU, on behalf of the ATU members and under the ATU CBA.

We have examined TWU's other arguments and find them unavailing.

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

ENTERED: JULY 9, 2015

CLERK

Mazzarelli, J.P., Sweeny, Saxe, Richter, Manzanet-Daniels, JJ.

15698 In re Robert Sanders, Ind. 652/15
[M-2575] Petitioner,

-against-

Hon. April Newbauer, etc., et al.,
Respondents.
- - - - -

Robert T. Johnson, District Attorney,
Nonparty Respondent.

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Robert Sanders, petitioner pro se.

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

Robert T. Johnson, District Attorney, Bronx (David P. Johnson of counsel), for Robert T. Johnson, District Attorney, nonparty, respondent.

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

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

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

ENTERED: JULY 9, 2015

CLERK

Mazzarelli, J.P., Sweeny, Andrias, Saxe, Richter, JJ.

15423 Dimas Medinas, Index 101003/11
Plaintiff-Appellant, 590701/11

-against-

MILT Holdings LLC, et al.,
Defendants,

The Elevator Man, Inc.
Defendant-Respondent,

[And a Third Party Action]

_____

Rosenberg, Minc, Falkoff & Wolff, LLP, New York (Jesse Minc of counsel), for appellant.

Gallo Vitucci Klar LLP, New York (Kimberly A. Ricciardi and Stephen A. Denberg of counsel), for respondent.

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Order Supreme Court, New York County (Louis B. York, J.), entered July 22, 2014, affirmed, without costs.

Opinion by Saxe, J.P. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
John W. Sweeny, Jr.,
Richard T. Andrias
David B. Saxe
Rosalyn H. Richter, JJ.

15423
Index 101003/11
590701/11

_____x

Dimas Medinas,
Plaintiff-Appellant,

-against-

MILT Holdings LLC, et al.,
Defendants,

The Elevator Man, Inc.
Defendant-Respondent.

[And a Third-Party Action]

_____x

Plaintiff appeals from an order of the Supreme Court, New York County (Louis B. York, J.), entered July 22, 2014, which granted the motion of defendant The Elevator Man, Inc. for summary judgment dismissing the complaint as against it.

Rosenberg, Minc, Falkoff & Wolff, LLP, New York (Jesse Minc of counsel), for appellant.

Gallo Vitucci Klar LLP, New York (Kimberly A. Ricciardi and Stephen A. Denberg of counsel), for respondent.

SAXE, J.

On September 18, 2010, while employed as an attendant in a parking garage, plaintiff was injured when the freight elevator he was using to transport a vehicle suddenly descended in free fall for three stories before hitting the ground. The parking garage was located in a building owned by defendant MILT Holdings LLC (MILT); it was managed by defendant 2009 Venture Group LLC and a related entity. 2009 Venture Group had entered into a maintenance agreement with defendant The Elevator Man, Inc. in October 2009, but it is undisputed that their maintenance agreement was terminated in March 2010 for nonpayment; after that, The Elevator Man agreed to respond to emergency calls only, for a specified sum, which it did.

Plaintiff sued the building owner, the building lessee, the garage's managing agent and its related entities and subsidiaries, as well as The Elevator Man. The current appeal concerns only the grant of The Elevator Man's motion for summary judgment dismissing plaintiff's direct claim against it.

In its motion for summary judgment, The Elevator Man argued that: (i) the maintenance agreement had been terminated approximately six months prior to the incident and thus it did not owe plaintiff, a nonparty to the contract, any legal duty on the date of loss; (ii) plaintiff could not establish a prima

facie case of negligence, as there was no evidence that The Elevator Man created or had actual or constructive notice of any alleged defective condition; and (iii) the doctrine of res ipsa loquitur, relied upon by plaintiff, was inapplicable to the case. The documents it relied on included the deposition testimony of plaintiff and elevator mechanic Slawomir Gwazdacz, an affidavit by its acting president with annexed exhibits, and an expert affidavit of engineer Jon B. Halpern.

In his deposition testimony plaintiff stated that, at the time of the accident, he had been employed as an attendant at the parking garage for 18 years. The freight elevator served to bring vehicles to the various levels of the garage and could only hold one vehicle at a time, but was large enough to hold an SUV. As a general practice, plaintiff would drive the vehicle onto the elevator, turn off the ignition, get out of the vehicle, and close the elevator doors so that he could manually operate the elevator. On the date of the accident, plaintiff was working the overnight shift, and the accident occurred around midnight. Immediately prior to the accident he drove a Ford Expedition onto the elevator, even though it was over the weight limit, because he had been told to do so by his superiors. In order for the elevator to ascend, he had to hold the elevator button down. As he was holding the button, the elevator began to ascend to the

second floor and, upon arrival on the second floor, started rapidly to descend, coming to a full stop at the basement level of the garage, causing an "explosion." Plaintiff also said a coworker informed him on the date of the accident that a mechanic had been performing work on the elevator the day before.

Slawomir Gwazdacz testified that he had been employed as an elevator mechanic by The Elevator Man for the past 12 years, and was familiar with the parking facility at issue, as he had performed maintenance and repairs on the elevator on several occasions while the maintenance agreement was in effect. Gwazdacz said he responded to an emergency call from the premises shortly after the accident occurred on September 18, 2010. He checked on the equipment and to see if the brakes were sliding, explaining that the building had been overloading the elevator "nonstop" prior to the incident, but when he checked on the brakes they were fine. He also observed that the cables were properly on the sheave, but that a crack in the sheave went all the way through the center of the wheel, which caused the brakes that connected to the center of the sheave to be ineffective. He had never seen a condition like that before.

Gwazdacz stated that on May 26, 2010, about four months prior to the date of the accident, he had responded to an emergency call from the same premises related to the elevator,

and its bearing equipment in particular, in response to a request to "[t]roubleshoot for [a] piercing screech" coming from the machine pedestal bearing. Replacement of the bearings causing this noise was recommended, but it was not done and the elevator was not taken out of service. He testified that he flushed out and greased the bearings. The work ticket from this May 26, 2010 visit reflected:

> "Responded to call of elevator making noise.
> Found machine pedestal bearing screeching.
> Lubricated bearing as needed and checked elevator for proper working operation.
> Left elevator in service."

Upon reviewing the work tickets and visits to the premises, Gwazdacz testified that any issue with the bearing component, which he had observed during his May 2010 visit, would not have caused a crack in the elevator sheave, which he asserted was the cause of the accident. He further explained that based upon the fact that the bearing component was located on a different part of the elevator equipment, any issue with the bearing component would not have had an effect on the sheave. He stated that the bearing condition had no relationship with the crack observed following the incident.

Engineer Jon B. Halpern asserted that the accident occurred because the weld between the main drive hub and the main drive shaft had failed due to fatigue, a condition that The Elevator

Man had neither created nor had notice of, and had no duty to correct. Halpern further asserted that The Elevator Man was not negligent in its performance of maintenance and repairs while the elevator was under contract, and did not have notice of any defect.

In opposition, plaintiff points out that on January 14, 2010, pursuant to the then-extant maintenance agreement, The Elevator Man performed the annual and five-year inspections on the elevator as mandated by the New York City Department of Buildings, and concluded that the elevator passed inspection. It offers documentary evidence establishing that at the time of that inspection, the elevator in question was subject to a "cease use" citation issued November 1, 2009, under which the New York City Department of Buildings had ordered that use of the elevator cease until certain violations were resolved. That citation remained in force until it was resolved on October 18, 2012.

Plaintiff's expert witness, Patrick Carrajat, stated that in his opinion the chain of events that resulted in the accident began at least as early as May 26, 2010, with The Elevator Man's negligent inspection, which caused vibrations that ultimately caused the sheave to crack and spin uncontrollably, permitting the elevator to plummet. He noted that the freight elevator, which was installed in 1921, had received an "Unsatisfactory"

rating on annual inspections in 2004 through 2008, that no inspection was done in 2009, and that although the inspection performed by The Elevator Man on January 14, 2010 deemed the elevator "Satisfactory," a "Cease Use" violation had been issued on November 1, 2009, which had required that the elevator be removed from service until all violating conditions had been corrected and a reinspection performed. However, the violation was not corrected until October 2012.

Carrajat asserted that the opinions of defendants' expert, Halpern, concerning the cause of the accident, were unsupported by the evidence, and that The Elevator Man's failure to remove the elevator from service after recognizing that it needed immediate replacement was a competent producing cause of the accident and a departure from standard industry practice. It was his further opinion that merely flushing out and greasing the bearings, as The Elevator Man had done in May 2010, was an improper repair that did not address an unreasonable and foreseeable risk of elevator free fall. The work ticket from the May 2010 visit had recommended that the elevator needed a "bearing replacement ASAP," and no action was taken in response. According to Carrajat:

> "the accident of September 18, 2010 was caused by long standing neglect of underlying maintenance issues of the subject elevator, and that the elevator dating back

> to May, 2010 requiring [sic] bearing replacement at that time. The lubrication of the bearings in May, 2010 was an improper repair and/or remedy and left the elevator in a dangerous condition. It is also my opinion that as of May 26, 2010, the bearings were damaged as evidenced by the noises heard by [Gwazdacz], and the bad bearings created more stress on the drive hub and the mechanical parts that ultimately failed and cracked.

Further, he said that the failure to shut the elevator down at this point "could have and did lead to stress cracks and metal failure and left the subject elevator at risk for catastrophic failure."

Discussion

If the issue were limited to whether The Elevator Man was negligent, a question of fact would preclude summary judgment. However, the issue is not that simple.

"Because a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party" (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138 [2002]). Where a contractor has entered into a contract to render services, it may only be held to have assumed a duty of care to nonparties to the contract in three situations:

> "(1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, 'launches a force or instrument of harm'; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties

> and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely" (*Espinal*, 98 NY2d at 140 [internal citations omitted]).

To the extent plaintiff relies on the inspection performed by The Elevator Man on January 14, 2010 in which it gave the elevator a "Satisfactory" rating, despite a "Cease Use" violation that had been issued on November 1, 2009, The Elevator Man was subject to the maintenance contract then in effect. To the extent plaintiff argues that The Elevator Man was negligent in the work it performed on May 26, 2010, any duty The Elevator Man had toward him could not be based on the terminated 2009 maintenance agreement; nevertheless, The Elevator Man continued to be subject to a more limited contract with the manager of the parking facility, in which it agreed to respond to emergency calls, upon payment of an agreed fee.

We find the rule set forth in *Espinal* to apply here. It is conceded that of the three possibilities listed in *Espinal*, only the first could provide a basis for liability to plaintiff: "where the contracting party, in failing to exercise reasonable care in the performance of his duties, 'launches a force or instrument of harm'" (*id*. at 140). However, even accepting for purposes of this analysis that The Elevator Man negligently inspected the elevator on January 14, 2010 and negligently failed

to correctly assess the condition of the elevator and necessary repair on May 26, 2010, it cannot be said to have launched a force or instrument of harm. That is, in failing to correctly inspect or repair the elevator, it did not create or exacerbate an unsafe condition.

A useful example of the application of this rule is found in *Stiver v Good & Fair Carting & Moving, Inc.* (9 NY3d 253 [2007]). There, the plaintiff, who had been injured in an automobile accident, brought a claim against the mechanic who, two months before the accident, had inspected the other vehicle in the collision, which had caused his accident by becoming disabled in the road; the plaintiff argued that the collision was caused by the mechanic's negligent inspection of that other vehicle. The Court affirmed the dismissal of the claim against the mechanic, observing that "[i]nspecting the car did not create or exacerbate a dangerous condition" (*id.* at 257, citing *Espinal*). The motion court in *Stiver* had relied on a 1998 Third Department decision holding that "'an inspector's duties under the Vehicle and Traffic Law . . . extend to third parties as it is reasonably foreseeable that someone other than [the] owner may be injured in an accident because of a defect in a motor vehicle'" (*id.* at 256, quoting *Wood v Neff*, 250 AD2d 225, 227 [3d Dept 1998]). The Court of Appeals explained that *Wood* had been handed down before

its issuance of *Espinal*.

We reject plaintiff's suggestion that an issue of fact is presented as to whether The Elevator Man launched a force of harm by the work its employee performed on the elevator on May 26, 2010. Although plaintiff's expert, Patrick Carrajat, implies that greasing the bearings on that date created a dangerous condition, his statement recognizes that the bearing were already "bad" at that time. He fails to explain how the act of greasing them increased the risk or made the elevator's condition any *more* dangerous.

Plaintiff also cites a decision of this Court holding that "even in the absence of a contract, an elevator company can be liable in tort, where it negligently services and/or inspects an elevator" (*Casey v New York El. & Elec. Corp.*, 82 AD3d 639 [1st Dept 2011], citing *Alejandro v Marks Woodworking Mach. Co.*, 40 AD2d 770 [1st Dept 1972], *affd* 33 NY2d 856 [1973] and *Alsaydi v GSL Enters.*, 238 AD2d 533 [2d Dept 1997]). The ruling in *Casey* relied on earlier cases that held that "[i]t is well settled that an elevator maintenance company owes a duty of care to members of the public, and may be liable for failing to correct conditions of which it is aware, or failing to use reasonable care to 'discover and correct a condition which it ought to have found'" (*Alsaydi*, 238 AD2d at 534, quoting *Rogers v Dorchester Assoc.*, 32

NY2d 553, 559 [1973]). However, in view of *Espinal*, which post-dated the authorities on which *Casey* relied, although it predated *Casey* itself, we are unwilling to apply the rule recited in *Casey* to the extent it allows a claim of negligent repair or inspection against an elevator repair contractor by a nonparty to its contract in the absence of a showing that by the work it performed, it "launched a force of harm" by creating or exacerbating an unsafe condition. We perceive no evidence that could create a triable issue as to whether The Elevator Man, in its inspection or its work, "creat[ed] or exacerbat[ed] a dangerous condition" (*Espinal*, 98 NY2d at 143 [internal quotation marks omitted]; *Stiver* at 257). Rather, plaintiff's expert essentially asserts that The Elevator Man failed to diagnose and correct an allegedly dangerous condition.

Finally, res ipsa is not applicable to this case, because plaintiff is unable to establish the necessary element of "exclusive control" (*see Hodges v Royal Realty Corp.*, 42 AD3d 350, 352 [1st Dept 2007]).

Accordingly, the order of the Supreme Court, New York County (Louis B. York, J.), entered July 22, 2014, which granted the motion of defendant The Elevator Man, Inc. for summary judgment

dismissing the complaint as against it, should be affirmed, without costs.

All concur.

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

ENTERED: JULY 9, 2015

CLERK