SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 10, 2015

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Renwick, DeGrasse, Manzanet-Daniels, Gische, JJ.

14005 The People of the State of New York Ind. 3754N/10
Respondent,

-against-

Levan Mallard,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Edward J. McLaughlin, J. at *Hinton* hearing; Lewis Bart Stone, J. at nonjury trial and sentencing), rendered July 21, 2011, as amended August 11, 2011, convicting defendant of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of four years, affirmed.

Although the court improperly permitted the People to rebut an agency defense that defendant never actually asserted, we find that the error was harmless. In his motion for a trial order of

dismissal at the end of the People's case, defense counsel made a reference to the concept of agency, but in response to the court's inquiry he unequivocally disclaimed any intention of asserting the agency defense, or any defense other than his client's complete noninvolvement in the drug transaction. While defense counsel's reference to the agency defense during his dismissal motion may have been confusing, prompting the court to allow the People to reopen their case to present evidence rebutting that defense, we find that in the context of this nonjury trial, this error was harmless because there is no reasonable possibility that the error might have contributed to the conviction (*People v Crimmins*, 36 NY2d 230, 237 [1975]).

An undercover officer (UC 19) testified that he had approached a man he identified as JD Braids, seeking to buy heroin. After agreeing to help UC 19 buy the drugs if he was allowed to keep $10 for himself, JD Braids approached and spoke to defendant. JD Braids returned to UC 19 conveying that defendant would "take" him if he too could keep $10 for himself. UC 19 understood this to mean that defendant would escort him to buy drugs. UC 19 agreed to this arrangement and then JD Braids, in his presence, handed the payment money over to defendant. Defendant asked UC 19 to walk with him to a nearby park.

Defendant placed one phone call on the way there and a second call once inside the park, stating in substance, "I'm here." Defendant told UC 19 to have a seat and defendant walked over to a group of people. UC 19 observed one of the men in the group (later identified as McKeney, a codefendant) greet defendant and hand him something. Defendant returned to UC 19 and as they left the park, defendant handed UC 19 2 glassine envelopes, which later tested positive for heroin. Given this overwhelming evidence of guilt, there is no reason to believe that the erroneously admitted evidence affected the court's verdict.

The *Hinton* hearing court, which closed the courtroom for the testimony of two undercover officers and which offered to permit family members or other persons designated by defendant to enter, properly exercised its discretion in rejecting defense counsel's proposal that a court officer screen members of the general public who sought to enter during the testimony. The court concluded that this suggestion would have been impracticable because there was no additional court officer available to be posted outside the courtroom, and because in any event the officer would frequently have to interrupt the testimony to report the presence of persons seeking to enter. Therefore, under the circumstances presented, defendant's proposal was not a

"reasonable alternative[] to closing the proceeding" (*Waller v Georgia*, 467 US 39, 48 [1984]).

All concur except Manzanet-Daniels, J. who dissents in a memorandum as follows:

MANZANET-DANIELS, J. (dissenting)

Since I believe it was error for the trial court to allow the prosecution to reopen its case to introduce prejudicial evidence relevant to a putative agency defense, I would reverse and order a new trial.

The prosecution alleged that defendant acted in concert to sell heroin to an undercover police officer. At the end of the People's case, defendant moved to dismiss on the ground that the trial evidence did not make out a prima facie case, asserting that the testimony established "nothing more than criminal facilitation."

The prosecutor responded that defense counsel was "arguing an agency defense," and asked to present rebuttal evidence. The court agreed, and asked counsel whether he was "making an agency defense." The court noted that counsel had repeatedly stated that he was not asserting an agency defense, and indicated that counsel's manner of handling the issue had been "inappropriate."

During the ensuing colloquy, defense counsel repeatedly insisted that he was not interposing an agency defense, stating,

> "I am making a trial order of dismissal based upon what I argue are failings or shortcomings or deficiencies in the People's case."

Whatever the Court's ruling is, the defense will put on a

> case, but it will not be an agency nor will I ask the Court to charge itself so to speak in this bench trial on criminal facilitation as a lesser-included.
>
> "I am merely arguing at this juncture, which is a procedural step after the People's direct case as they have rested, that this evidence fall[s] short legally. The defense case will consist of my client testifying, but he will not claim agency, to use the vernacular, nor will I argue that he acted as an agent, nor will I ask the Court to charge itself that criminal facilitation should be submitted."

The court accused defense counsel of "trying to draw distinctions without a substantive difference. And to the extent that you are trying to do so at this point, it would seem to me a bad faith response to the discussion that we had before as to what this trial is about and you have misled the People as to what your intentions were." The court stated that "whether you call it an order of dismissal or otherwise," it would permit the prosecution, which had "effectively relied on what [defense counsel] had said," to reopen its case.

At the end of the People's reopened case, defendant again moved for a trial order of dismissal. Defense counsel reiterated that he was not interposing an agency defense. The court replied that whether or not defendant had "intend[ed] to interpose" an agency defense, defendant had nonetheless made a "back door attempt" to assert the defense, entitling the People to submit rebuttal evidence.

Defendant denied having taken part in the sale of heroin to the undercover officer. He testified that he had a social relationship with the alleged accomplice, and had been present in the park for the purpose of exercising with him. According to defendant, the alleged accomplice and the man referred to as "JD Braids" retrieved the heroin, and he took no part in the transaction. He denied having taken money from the undercover, or handing heroin to the officer. At the conclusion of the evidence, defense counsel specifically declined to have the court, acting as fact-finder, receive an agency charge. Defense counsel noted, inter alia, that his client had altogether denied participating in the sale.

Rather than simply denying the motion to dismiss, the court agreed with the People that defendant was interposing an agency defense, and ruled that doing so opened the door to rebuttal evidence.

As even the majority recognizes, there was no justification for ascribing an agency defense to defendant when counsel explicitly stated that he was not asserting one. While a court possesses discretion in determining whether to permit the reopening of the prosecution's case (*see People v Whipple*, 97 NY2d 1, 8 [2001]), that discretion ought to be sparingly

exercised – where, for example, the missing element is not seriously contested, and re-opening the case is not unduly prejudicial to defendant (*id.*). The court's discretion should not be exercised to allow reopening of the prosecution's case so as to present evidence rebutting a defense the defendant has expressly disavowed.

Assertion of an agency defense opens the door to evidence that tends to disprove agency, but would otherwise be inadmissible, such as *Molineux* evidence (*see e.g. People v Nealon*, 36 AD3d 1076, 1078 [3rd Dept 2007], *lv denied* 8 NY3d 988 [2007]), and prior convictions (*see e.g. People v Rivera*, 260 AD2d 323 [1st Dept 1999], *lv denied* 93 NY2d 977 [1999]). The introduction of such evidence here subverted defendant's right to chart his own defense and deprived him of a fair trial. Given the breadth and amount of the erroneously admitted evidence, including an analysis indicating that a large volume of calls and texts had been placed between defendant and the putative accomplice's cell phones, and texts related to other, uncharged drug sales, the error likely affected the outcome and was not harmless. While a court sitting as the trier of fact is presumed to have considered only the legally competent evidence adduced and to have excluded extraneous matters from its deliberations

(*see e.g. People v Gibson*, 210 AD2d 8, 9 [1st Dept 1994], *lv denied* 84 NY2d 1031 [1995]), the colloquy among court and counsel indicates that notwithstanding defense counsel's protestations to the contrary, the court construed defendant as asserting a "back door" agency defense. I would accordingly reverse and remand for a new trial.

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

ENTERED: MARCH 10, 2015

CLERK

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

13957 The People of the State of New York, Ind. 99013/13
Respondent,

-against-

Paul Macchia,
Defendant-Appellant.

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Law Office Of Zachary Margulis-Ohnuma, New York (Zachary Margulis-Ohnuma of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Diane A. Shearer of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Megan Tallmer, J.), entered on or about August 8, 2013, which adjudicated defendant a level two sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Defendant entered a plea of no contest in a Florida State court to three counts of lewd or lascivious exhibition (offender 18 years of age or older and victim less than 16 years of age), and one count of use of a computer service to seduce, solicit, lure, or entice a child for pornography while misrepresenting age. He was sentenced to concurrent terms of 364 days in county jail, to be followed by four years of sex offender probation. Defendant was required to register as a sex offender in Florida.

Upon his relocation to Bronx County, the State of New York Board of Examiners of Sex Offenders (the Board) determined that defendant was required to register under the New York State Sex Offender Registration Act (SORA). The Board prepared a case summary, which stated that the crime occurred over a three-day period, beginning when defendant entered an Internet chat room and began electronically conversing with an undercover agent who was posing as a 13 year-old girl (the girl). Defendant asked the girl if she would like to view him over his webcam, and when she said yes, he showed her his face and upper body without clothing. Defendant then prodded the girl to agree to view him dancing without any clothes, although he only exhibited his bare upper body. He also asked her if she would like him to masturbate, and if she was masturbating.

The next day, defendant entered the chat room again, where the girl was present, and he invited her to converse with him. This time he was completely naked in front of his webcam, and masturbated. A few hours later, he invited her to view his webcam again. He again masturbated in front of the webcam, and encouraged the girl to do the same. The day after that, defendant again chatted with the girl, and masturbated in front of his webcam. He also asked the girl if she would let him see

her naked in person, and discussed sex acts he would like to perform on her, telling her that he would "satisfy" her.

The Board reviewed two psychiatric reports prepared in connection with the case, and neither concluded that defendant had a disorder. In the Risk Assessment Instrument (RAI), the Board assessed defendant 20 points under Risk Factor 5 ("Age of Victim"), based on the victim having been between the ages of 11 and 16 years, and an additional 20 points under Risk Factor 7 ("Relationship with Victim"), based on the defendant having established the relationship for the purpose of victimizing. Based on the total score of 40 points, the Board assessed defendant as risk level one, with a low risk of re-offending, and found that departure from that risk level was not warranted. The Board also recommended that defendant not be given a sex offender designation.

At his SORA hearing, the court noted that the People could argue for a departure based on the fact that Risk Factor 2 ("Sexual Contact with Victim") could not apply because defendant and the girl were not physically in the same place at the time of their encounter. The court further noted that because defendant's conduct occurred over a period that was longer than 24 hours, he should have been assessed points under Risk Factor 4

("Duration of Offense Conduct with Victim"). The People challenged the Board's determination not to assess points under Risk Factor 12 ("Acceptance of Responsibility"). This argument[1] was based on defendant's having entered a plea in Florida of no contest, and his having written a letter to the Board in which he emphasized that he "pleaded No Contest to these charges and that there was no victim in these incidences." The People characterized the quoted language as an attempt by defendant to minimize his culpability. Defendant's counsel disagreed with that characterization, but in any event offered to produce defendant to accept responsibility in open court.[2]

The court concluded that the Board's allocation to defendant of risk level one was inadequate and determined him to be a risk level two. The court stated, in relevant part:

> "I don't think this level would be appropriate for somebody who might re-engage in this conduct because the next person that he's in contact with could very well be a real child and that person would be

[1] The People never gave formal notice of their intention to seek a higher risk level; however, defendant agreed to waive his right to receive 10 days' notice of such an intention.

[2] For reasons not clear from the record, defendant was never produced for this purpose.

> victimized, and I don't think that this qualifies under the lowest level. This is not like one single, you know, inadvertent contact with somebody. This is a relationship that he attempted to develop, and as if over the period of days he got more and more explicit, counsel, indicated to her what he wanted to do, all the while thinking she's a 13 year-old girl. I don't believe that this risk score or the Board's recommendation accurately reflects even the risk of his re-offending, counsel, or the harm that would be caused if he did re-offend, which are the two factors that the court is supposed to weigh in assessing his risk."

The court also determined that, because defendant had been convicted of a felony, he was required to be designated as a sexually violent offender under Corrections Law § 168-a[7][b].

Although the Board's assessment of a risk level is presumed to be correct, the reviewing court is to consider it as only a recommendation from which it, as an exercise of its discretion, can depart if there is clear and convincing evidence that a departure is warranted (*see People v Johnson*, 11 NY3d 416, 421 [2008]; Correction Law 168-n[3]). The court's analysis is not limited to tallying up points it believes the Board did not assess; rather, the court can adjust the risk level upwards if it determines that there are "aggravating factors not adequately accounted for in the [RAI]" (*People v Vives*, 57 AD3d 312, 313

[1st Dept 2008], *lv denied* 12 NY3D 705 [2009]). This rule derives from the Board's "Risk Assessment Guidelines and Commentary," (the Guidelines), which note that "an objective instrument, no matter how well designed, will not fully capture the nuances of every case. Not to allow for departures would, therefore, deprive the Board or a court of the ability to exercise sound judgment and to apply its expertise to the offender" (*People v Wyatt*, 89 AD3d 112, 119 [2d Dept 2011],*lv denied* 18 NY3d 808 [2012], quoting the Guidelines at 4-5). Conversely, as noted, the Board's determinations are presumptive, and not to be routinely overturned (*id.*).

People v DeDona (102 AD3d 58 [2d Dept 2012]), cited by the People, has facts similar to this case, and is instructive regarding the circumstances in which a court can find that a Board determination may not reflect the severity of a sex offense or sufficiently account for a defendant's propensity to re-offend. There, the defendant corresponded over the Internet with a law enforcement agent whom he believed was a minor, and masturbated in front of a webcam. Unlike this case, the defendant traveled to a location where he had arranged to meet the purported minor and her minor friend to have sex. The Board assessed the defendant 60 points on his RAI, which would have

made him a presumptive level one risk, but elevated him to a level two based on his admitted intent to have sex with two minor children. The court affirmed this determination. First, it found that the RAI did not adequately account for the defendant's intent to achieve sexual contact, since it only contemplates actual contact (102 AD3d at 69). It further found that the RAI did not allow the Board to factor into its threat assessment the fact that the defendant masturbated over the webcam (*id.*).

Both of these aggravating factors existed in this case. Defendant argues that *DeDona* can be distinguished because he did not arrange to meet the girl for sex. However, this is too narrow an approach. In *DeDona*, as far as can be gleaned from the decision, the defendant immediately requested a meeting for sex. Here, defendant's behavior spanned several Internet chats, which escalated gradually from a graphically sexual conversation but exposure only of his upper body, then to masturbation in front of a webcam, then to his telling her the different sex acts he would like to perform on her and finally to his asking if she would let him see her naked "in person" and telling her that if he had the opportunity he would "satisfy" her. We can never know for certain if defendant would have ever sought a meeting with the girl because law enforcement intervened and arrested defendant

before he could. However, based on the gradual escalation, and defendant's having asked the girl if he could see her naked and telling her that he would "satisfy" her, it was not an abuse of the court's discretion when it found that the People presented clear and convincing evidence that the Board's determination did not adequately assess the risk that defendant would offend again. The court also properly considered defendant's refusal to accept responsibility, which conclusion was amply supported by his letter to the Board.

Defendant focuses on the fact that even if he had been assessed points on the RAI for contact and refusal to accept responsibility, his score would still have been within the parameters for level one. Again, however, this is too narrow an approach. The court's analysis was, as it should have been, whether the score attributed to defendant, no matter what it was, accurately reflected his risk of offending again, given all the circumstances (*People v Wyatt* at 116-117). The court appropriately found that it did not.

Finally, we find that the additional classification of defendant as a sexually violent offender was required by statute, because of defendant's conviction in another state of a felony requiring registration in that state (Correction Law § 168-

a[3][b],[7][b]; *see also People v Bullock*, __ AD3d __, 2014 NY Slip Op 08265, ***3-4 [1st Dept 2014], *lv denied* __ NY3d __, 2015 NY Slip Op 63876 [2015]).

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

ENTERED: MARCH 10, 2015

CLERK

Mazzarelli, J.P., Renwick, DeGrasse, Richter, Clark, JJ.

14064 The People of the State of New York, Respondent, Ind. 4230/11

-against-

Alberto Banchon, Defendant-Appellant.

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Scott A. Rosenberg, The Legal Aid Society, New York (Mitchell J. Briskey of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered June 26, 2012, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fourth degree, and sentencing him to five years' probation, unanimously affirmed.

The court properly denied defendant's suppression motion. The record establishes that drugs were recovered from defendant as a result of a valid search incident to an arrest based on probable cause, which existed prior to any seizure. Defendant was seen holding an item that the officer recognized as a type of drug packaging (*see e.g. People v Ramos*, 11 AD3d 286 [1st Dept 2004] *lv denied* 4 NY3d 766 [2005]; *People v Alvarez*, 11 AD3d 217 [1st Dept 2004], *lv denied* 4 NY3d 740 [2004]). Additionally,

defendant and another man were seen engaged in a pattern of suspicious conduct, both before and after the approach of the police, that led an officer to a reasonable conclusion, based on his experience and training, that defendant had been in the process of exchanging a package of drugs for money (*see People v Jones*, 90 NY2d 835 [1997]). There is no basis for disturbing the court's credibility determinations.

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

ENTERED: MARCH 10, 2015

CLERK

Tom, J.P., Renwick, Andrias, Richter, Gische, JJ.

14313 William Smith, Index 307889/10
Plaintiff-Appellant,

-against-

Kaushik Das, M.D., et al.,
Defendants-Respondents.

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Philip J. Rizzuto, P.C., Carle Place (Kristen N. Reed of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Devin Slack of counsel), for respondents.

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Order, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered October 18, 2012, which granted the motion of defendants New York City Health & Hospitals Corp. (HHC) and Kaushik Das, M.D., to dismiss plaintiff's complaint on the grounds that plaintiff failed to timely file a notice of claim, unanimously modified, on the law, the motion denied as to Kaushik Das, M.D., and otherwise affirmed, without costs.

Plaintiff filed a notice of claim naming HHC, but admittedly filed the notice with the New York City Comptroller. Service on the Comptroller does not constitute service on HHC, since the City and HHC are separate entities for purposes of service of a notice of claim (*see Scantlebury v New York City Health & Hosps. Corp.*, 4 NY3d 606, 611 [2005]). Since plaintiff failed to serve

a notice of claim, or move for leave to serve a late notice, for more than a year and 90 days after accrual of the claim, the court correctly dismissed the complaint as to HHC (*see Pierson v City of New York*, 56 NY2d 950, 954 [1982]).

However, with respect to defendant Kaushik Das, M.D., defendants have not met their burden in showing that he was HHC's employee as a matter of law. Although defendants contend that plaintiff's assertions in his complaint constitutes a judicial admission that Dr. Das was HHC's employee (*see Bogoni v Friedlander*, 197 AD2d 281, 291 [1st Dept 1994], *lv denied* 84 NY2d 803 [1994]), the allegations were made "on information and belief" (*Empire Purveyors, Inc. v Weinberg*, 66 AD3d 508, 509 [1st Dept 2009]), and therefore, were not a judicial admission. Furthermore, defendants' other evidence, such as the assertion that Dr. Das was employed with HHC through an affiliation agreement, is not supported by evidence of such an agreement (*see Ramos v Ravan*, 253 AD2d 582, 583 [1st Dept 1998]).

In any event, plaintiff submitted evidence raising triable issues of fact as to whether Dr. Das was employed with HHC. Were

these issues resolved in plaintiff's favor, this would obviate the need for service of a notice of claim on Dr. Das, and plaintiff's action against Dr. Das would be timely (*see Ramos v Ravan*, 289 AD2d 81, 82 [1st Dept 2001]).

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

ENTERED: MARCH 10, 2015

CLERK

Friedman, J.P., Sweeny, Acosta, DeGrasse, Gische, JJ.

14450 The People of the State of New York, Ind. 7602/96
Respondent,

-against-

Alvin Arnold,
Defendant-Appellant.

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Scott A. Rosenberg, The Legal Aid Society, New York (Desiree Sheridan of counsel) for appellant.

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

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Order, Supreme Court, New York County (Rena K. Uviller, J.), entered on or about July 11, 2012, which adjudicated defendant a level three sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Each of the point assessments at issue was supported by clear and convincing evidence. The assessment under the factor for relationship with victim was supported by the victim's grand jury testimony, which permitted a reasonable inference that she and defendant were strangers (*see People v Gaines*, 39 AD3d 1212 [4th Dept 2007], *lv denied* 9 NY3d 803 [2007]). The assessment under the factors for criminal history and recent prior offense was supported by defendant's youthful offender adjudication (*see*

People v Wilkins, 77 AD3d 588 [1st Dept 2010], *lv denied* 16 NY3d 703 [2011]), and CPL 720.35(2) did not prohibit the court's use of that adjudication (*cf. People v Howard*, 52 AD3d 273 [1st Dept 2008], *lv denied* 11 NY3d 706 [2008][grand jury disclosure permitted]). The assessment under the factor for drug abuse was supported by defendant's admissions (*see People v Watson*, 112 AD3d 501 [1st Dept 2013], *lv denied* 22 NY3d 863 [2014]). The assessment under the factor for failure to accept responsibility was supported by defendant's denials of guilt and expulsion from a sex offender treatment program (*see People v Johnson*, 77 AD3d 548, 549 [1st Dept 2010], *lv denied* 16 NY3d 705 [2011]), notwithstanding that he did not choose to be expelled. The assessment under the factor for unsatisfactory conduct while incarcerated, including sexual misconduct, did not constitute improper double counting even though some of the conduct was also relied on in assessing points for being expelled from the program (*see People v Johnson*, 118 AD3d 684 685 [2d Dept 2014], *lv denied*

24 NY3d 902]). The assessment under the factor for release without supervision did not improperly penalize defendant for serving his maximum term (*see People v Johnson*, 77 AD3d at 549).

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

ENTERED: MARCH 10, 2015

CLERK

Friedman, J.P., Sweeny, Acosta, DeGrasse, Gische, JJ.

14451 James C., an Infant by His Mother and Natural Guardian Eileen C., et al., Plaintiffs-Respondents,

-against-

Tomas Cintron, et al., Defendants-Appellants. Index 24209/05

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Giuliano McDonnell & Perrone LLP, New York (Virginia A. Harper of counsel), for appellants.

Berkowitz & Vargas, P.C., New York (Andrew D. Weitz of counsel), for respondents.

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Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered on or about September 19, 2013, which granted plaintiffs' motion to vacate a prior dismissal of this action and restore the case to the trial calendar, unanimously reversed, on the law, without costs, and the motion denied.

While the record shows that plaintiffs may have demonstrated a reasonable excuse for their default in appearing at status conferences held in 2011 and 2012, plaintiffs failed to demonstrate a meritorious cause of action (*see* CPLR 5015[a]; *Donnelly v Treeline Cos.*, 66 AD3d 563 [1st Dept 2009]). The affidavit of plaintiff James C., which asserts that his injuries were proximately caused by defendants' negligence, directly

contradicts his previously-given deposition testimony that he had no recollection of the accident and therefore does not suffice to demonstrate a meritorious cause of action (*cf. Beahn v New York Yankees Partnership*, 89 AD3d 589, 590 [1st Dept 2011]). We further note that James C.'s affidavit was improperly submitted for the first time in reply.

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

ENTERED: MARCH 10, 2015

CLERK

Friedman, J.P., Sweeny, Acosta, DeGrasse, Gische, JJ.

14452 In re Renaissance Economic Development Corporation,
Petitioner-Respondent,

-against-

Jin Hua Lin, etc.,
Respondent-Appellant.

Index 102313/11

Law Offices of Victor Tsai, Brooklyn (Victor Tsai of counsel), for appellant.

Yuen Roccanova Seltzer & Sverd P.C., New York (Steven Seltzer of counsel), for respondent.

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered June 10, 2013, which denied respondent's motion to vacate a default judgment against her and for credit under the homestead exemption, unanimously affirmed, without costs.

The court properly denied vacatur under CPLR 317, where respondent admitted she had actual notice of the petition in time to defend (*see Residential Bd. of Mgrs. of 99 Jane St. Condominium v Rockrose Dev. Corp.*, 17 AD3d 194 [1st Dept 2005). The court also correctly declined to vacate under CPLR 5015(a)(3), which allows for vacatur where the judgment was obtained by fraud or misconduct. The fraud referenced in the statute must be "extrinsic fraud," that is, a fraud on the

defaulting party that induces them not to defend the case (*Shaw v Shaw*, 97 AD2d 403, 403 [2d Dept 1983]; *see Aguirre v Aguirre*, 245 AD2d 5, 7 [1st Dept 1997]). Respondent's supposed confusion over the relief sought in the petition is not a basis for such vacatur and she points to no other extrinsic fraud. Furthermore, while respondent may have had a partial defense to the action or sale under the homestead exemption of CPLR 5206(e), by defaulting and otherwise failing to assert the exemption, she waived any such privilege (*see e.g. Matter of Balanoff v Niosi*, 16 AD3d 53, 56 [2d Dept 2005]).

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

ENTERED: MARCH 10, 2015

CLERK

Friedman, J.P., Sweeny, Acosta, DeGrasse, Gische, JJ.

14453 James Fontana, Index 111729/09
Plaintiff-Respondent,

-against-

BCRE Grand Street Owner, LLC, et al.,
Defendants-Respondents,

New York Rebar Supply, Inc., et al.,
Defendants,

New York Rebar Installation, Inc.,
Defendant-Appellant.

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An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Debra A. James, J.), entered on or about July 2, 2014,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated February 19, 2015,

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

ENTERED: MARCH 10, 2015

CLERK

Friedman, J.P., Sweeny, Acosta, DeGrasse, Gische, JJ.

14454 The People of the State of New York, Ind. 4910N/10
Respondent,

-against-

Kennard Blount,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Cassandra M. Mullen, J.), rendered September 20, 2011, convicting defendant, after a jury trial, of criminal sale of a controlled substance in or near school grounds, and sentencing him, as a second felony drug offender whose prior felony conviction was a violent felony, to a term of six years, unanimously affirmed.

Defendant has not established that he was deprived of effective assistance of counsel under the state or federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]) when his counsel made a summation remark that inadvertently opened the door to the admission of previously excluded evidence that $49 was recovered from defendant at the time of his arrest. Defendant asserts that

evidence that he possessed $49 undermined the defense theory that defendant was not selling drugs at the time of the incident, but was merely an impoverished addict looking for free drugs. However, $49 was not a particularly large amount of money, the jury was already aware that defendant was at least solvent enough to have a working cell phone at the time, and the court carefully instructed the jury "not to infer that this money is involved in the allegations in this case." Accordingly, we conclude that the introduction of the precluded evidence did not affect the outcome of the case or deprive defendant of a fair trial.

The court properly exercised its discretion in precluding defendant from asking an undercover officer whether he had ever been recognized as a police officer in his prior buy and bust operations. While defense counsel asserted the theory that the officer had a motive to fabricate a drug sale because defendant had recognized him to be a police officer, counsel was permitted to elicit sufficient testimony to support that argument without broadening the inquiry into other, unrelated sales. A trial court has discretion to determine the scope of cross-examination

(*People v Corby*, 6 NY3d 231, 234 [2005]), and the court's ruling did not deprive defendant of his right to confront witnesses and present a defense (*see Delaware v Van Arsdall*, 475 US 673, 678-679 [1986]).

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

ENTERED: MARCH 10, 2015

CLERK

Friedman, J.P., Sweeny, Acosta, DeGrasse, Gische, JJ.

14455 Tower Insurance Company of New York, Index 152315/12
Plaintiff-Respondent,

-against-

United Founders Ltd.,
Defendant-Appellant,

702-694 Rockaway Avenue Corp., et al.,
Defendants.

_____

Shayne, Dachs, Sauer & Dachs, LLP, Mineola (Jonathan A. Dachs of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Anil C. Singh, J.), entered on or about October 25, 2013, which granted plaintiff Tower Insurance Company of New York's motion for summary judgment declaring that Tower had no duty to defend or indemnify defendant United Founders Ltd. in the underlying action, and denied United's cross motion for summary judgment, unanimously affirmed, with costs.

Even if the demolition of interior partitions in this case was incidental to covered operations and therefore covered (*see Central Synagogue v Hermitage Ins. Co.*, 36 AD3d 742, 743-744 [2d Dept 2007]), it is undisputed that the work out of which the

claim arose was performed by Apple City, an independent contractor (*see Tower Ins. Co. of N.Y. v BCS Constr. Servs. Corp.*, 118 AD3d 527, 529-530 [1st Dept 2014]). United's contention that Tower cannot rely on the "Independent Contractor Exclusion" in its policy, as its disclaimer was untimely, is unavailing.

There is no bright line test for the timeliness of a disclaimer, as the purpose of Insurance Law § 3420(d) is to protect the insured and other interested parties from being prejudiced by a belated denial of coverage, and it "was not intended to be a technical trap that would allow interested parties to obtain more than the coverage contracted for under the policy" (*Excelsior Ins. Co. v Antretter Contr. Corp.*, 262 AD2d 124, 127 [1st Dept 1999]). Here, timeliness was not readily apparent from the face of the insured's notice, and thus, a two week delay for management review, editing, and mailing, was not unreasonable as a matter of law (*see Tower Ins. Co. of N.Y. v Khan*, 93 AD3d 618, 619 [1st Dept 2012]; *Wausau Bus. Ins. Co. v 3280 Broadway Realty Co. LLC*, 47 AD3d 549, 549 [1st Dept 2008]). Our decision in *Matter of AIU Ins. Co. v Veras* (94 AD3d 642 [1st Dept 2012]) is distinguishable inasmusch as the disclaimer in Veras was based on late notice of the incident giving rise to the

loss, which lateness was readily apparent from the face of the insured's notice (*see George Campbell Painting v National Union Fire Ins. Co. of Pittsburgh, PA*, 92 AD3d 104 [1st Dept 2012]), unlike the applicability of the policy exclusion relied upon by the insurer in this case.

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

ENTERED: MARCH 10, 2015

CLERK

Friedman, J.P., Sweeny, Acosta, DeGrasse, Gische, JJ.

14456- Ind. 3184/11
14456A The People of the State of New York, 2367/12
Respondent,

-against-

Kenneth Guest,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Manu K. Balachandran of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Maxwell Wiley, J. and Renee A. White, respectively), rendered on or about May 23, 2012,

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

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

ENTERED: MARCH 10, 2015

CLERK

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

Friedman, J.P., Sweeny, Acosta, DeGrasse, Gische, JJ.

14457 Chelsea 18 Partners, LP, Index 110264/10
Plaintiff-Appellant-Respondent,

-against-

Sheck Yee Mak, et al.,
Defendants-Respondents-Appellants,

Michael Mak, et al.,
Defendants.

_____

Adam Leitman Bailey, P.C., New York (Jeffrey R. Metz of counsel), for appellant-respondent.

Simpson Thacher & Bartlett LLP, New York (Jonathan S. Zelig of counsel), respondents-appellants.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered February 27, 2014, which, insofar as appealed from, denied plaintiff's cross motion for summary judgment on its claims seeking eviction and for dismissal of defendants' counterclaims, and denied defendants Sheck Yee Mak and Choi Kuen Mak's motion for summary judgment dismissing the complaint as against them, unanimously modified, on the law, to the extent of dismissing defendants' harassment counterclaim, and otherwise affirmed, without costs.

With regard to plaintiff's claim that defendants repeatedly refused access to their apartment to remedy conditions that posed

a threat to health and safety, Supreme Court stated and plaintiff concedes that the alleged nuisance has been abated. Therefore, ejectment is not a proper remedy here (*see e.g. 12 Broadway Realty, LLC v Levites*, 44 AD3d 372, 372 [1st Dept 2007] [despite tenant's refusal to allow access to premises to correct *ongoing condition/s* potentially hazardous to others, notice to cure provision deemed reasonable and sufficient remedy, under the circumstances]).

Defendants' first counterclaim for harassment does not lie (*Edelstein v Farber*, 27 AD3d 202 [1st Dept 2006]).

We note that defendant Michael Mak did not file a notice of appeal.

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

ENTERED: MARCH 10, 2015

CLERK

Friedman, J.P., Sweeny, Acosta, DeGrasse, Gische, JJ.

14458 Datalot, Inc., Index 158869/12
Plaintiff-Appellant,

-against-

Winum Enterprises, LLC, doing business as Leads 2 Profits,
Defendant-Respondent.

_____

Klein Moynihan Turco LLP, New York (John E. Greene of counsel), for appellant.

Koss & Schonfeld, LLP, New York (Simcha D. Schonfeld of counsel), for respondent.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered September 24, 2013, which, insofar as appealed from as limited by the briefs, granted defendant's motion for partial summary judgment on its breach of contract counterclaim, unanimously affirmed, with costs.

Defendant made a prima facie showing that plaintiff breached the parties' "Datalot Lead Sales Agreement," by submitting emails between the parties and the affidavit of defendant's principal (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The emails, in particular the ones dated November 16, 2012, show that plaintiff refused to resume sending leads to defendant unless and until defendant paid in full the invoice dated

November 1, 2012. However, under the terms of the agreement, which incorporated the parties' "Datalot Insertion Order," defendant had until November 30, 2012 to pay the invoice.

In opposition, plaintiff failed to raise a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The evidence does not support plaintiff's assertion that it was unable to resume sending leads by November 16, 2012 because of three reasons unrelated to the parties' payment dispute. Significantly, plaintiff did not address the November 16 emails submitted by defendant, which clearly show that plaintiff refused to turn the leads back on until defendant paid off its November 1, 2012 invoice. Further, none of those emails mention the three problems unrelated to the payment dispute.

We have reviewed plaintiff's remaining contentions, including its argument that summary judgment is premature, and find them unavailing.

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

ENTERED: MARCH 10, 2015

CLERK

Friedman, J.P., Sweeny, Acosta, DeGrasse, Gische, JJ.

14459 In re Friends of Petrosino Square, by and in the name of its President, Georgette Fleischer, et al., Petitioners-Appellants,

-against-

Janette Sadik-Khan, etc., et al., Respondents-Respondents.

Index 100888/13

Gibson, Dunn & Crutcher LLP, New York (Randy M. Mastro of counsel), for appellants.

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

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered October 24, 2013, which denied the petition challenging respondents' decision, dated April 27, 2013, to install a CitiBike Share station at Petrosino Square based on a finding that the installation did not violate the public trust doctrine, and dismissed the proceeding brought pursuant to CPLR Article 78, unanimously affirmed, without costs.

It is assumed for purposes of this decision that Petrosino Square is dedicated parkland that implicates the common-law public trust doctrine, pursuant to which "legislative approval is required when there is a substantial intrusion on parkland for non-park purposes" (*Friends of Van Cortlandt Park v City of New*

York, 95 NY2d 623, 630 [2001]). While structures that have no connection with park purposes are not permitted to encroach upon parkland without legislative approval, structures and conveniences that are common incidents of a park serve park purposes so as not to implicate the public trust doctrine as long they contribute to or facilitate the use and enjoyment of the park (*see Union Sq. Park Community Coalition, Inc. v New York City Dept. of Parks & Recreation*, 22 NY3d 648, 654-655 [2014]; *Williams v Gallatin*, 229 NY 248, 253-254 [1920]).

The use of a portion of parkland for a bicycle rack used for the parking of bicycles, including the CitiBike Share station at Petrosino Square, is an appropriate incidental use of parkland to the extent it contributes to or facilitates the use and enjoyment of the park (*see e.g. Blank v Browne*, 217 AD 624, 629 [2d Dept 1926] [use of a portion of parkland for parking cars an appropriate incidental use]). As the Supreme Court found, the bike share station serves the proper park purpose of allowing members of the public to ride and dock a CitiBike at Petrosino Square, where they may "enjoy the Park as a respite, a spot for a

meal or even as their final destination." Petitioners do not allege facts showing that the bike share station does not facilitate park purposes in this manner, and that it, instead, substantially undermines the use and enjoyment of the park.

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

ENTERED: MARCH 10, 2015

CLERK

Friedman, J.P., Sweeny, Acosta, DeGrasse, Gische, JJ.

14460 The People of the State of New York, Ind. 72/12
Respondent,

-against-

Anthony Ortiz,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered on or about January 31, 2013, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: MARCH 10, 2015

CLERK

Friedman, J.P., Sweeny, Acosta, DeGrasse, Gische, JJ.

14461 135 East 57th Street, LLC, Index 602167/09
Plaintiff-Respondent,

-against-

57th Street Day Spa, LLC, et al.,
Defendants,

GH Day Spas, Inc., et al.,
Defendants-Appellants.

_____

Law Office Of Mark Krassner, New York (Mark Krassner of counsel), for appellants.

Harwood Reiff LLC, New York (Donald A. Harwood and Simon Reiff of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Charles E. Ramos, J.), entered September 25, 2013, which, to the extent appealed from as limited by the briefs, awarded plaintiff attorneys' fees in the amount of $69,106.25 against defendants-appellants (defendants), pursuant to an order, same court and Justice, entered February 21, 2013, which had granted plaintiff's motion to confirm the report of a special referee, entered July 27, 2012, unanimously reversed, on the law, without costs, the judgment vacated, plaintiff's motion denied, and the matter remanded for a new hearing and determination as to the amount of reasonable attorneys' fees incurred as a result of

defendants' discovery defaults.

The admissible evidence submitted at the hearing was not sufficient to determine the reasonable amount of attorneys' fees incurred by plaintiff as a result of defendants' discovery defaults. Accordingly, the motion court should have rejected the Special Referee's report recommending that plaintiff be awarded $69,106.25 in attorneys' fees (*see Kardanis v Velis*, 90 AD2d 727, 727 [1st Dept 1982]). The Special Referee erred in admitting a spreadsheet into evidence as a business record pursuant to CPLR 4518(a), since the document was prepared by plaintiff's counsel for use at the hearing (*see National States Elec. Corp. v LFO Constr. Corp.*, 203 AD2d 49, 50 [1st Dept 1994]), and was not supported by a proper business record foundation (*see West Val. Fire Dist. No. 1 v Village of Springville*, 294 AD2d 949, 950 [4th Dept 2002]). Nor was the limited testimony provided by an associate of the law firm representing plaintiff sufficient to establish that the amount of attorneys' fees and expenses was fair, reasonable and incurred as a result of the discovery defaults (*see Bankers Fed. Sav. Bank v Off W. Broadway Devs.*, 224 AD2d 376, 377-378 [1st Dept 1996]).

Since it is clear that plaintiff is entitled to an award of attorneys' fees, we remand to the motion court for a new hearing and determination (*see* 224 AD2d at 376, 379).

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

ENTERED: MARCH 10, 2015

CLERK

Friedman, J.P., Sweeny, Acosta, DeGrasse, Gische, JJ.

14462 Sandra Campbell, Index 100606/10
Plaintiff-Appellant,

-against-

Mabel M. Fischetti,
Defendant-Respondent.

_____

Ephrem J. Wertenteil, New York for appellant.

Law Office of John C. Buratti & Associates, New York (Dominic Boone of counsel), for respondent.

_____

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered June 13, 2013, which, in an action for personal injuries sustained when plaintiff pedestrian was struck by defendant's vehicle, granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant established entitlement to judgment as a matter of law by showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident. Defendant submitted, inter alia, the affirmed report of an orthopedist who determined that plaintiff's knee replacement surgery was necessary due to her preexisting osteoarthritis, and not the accident (*see Farmer v Ventkate Inc.*, 117 AD3d 562 [1st Dept 2014]). Defendant also relied on

plaintiff's deposition testimony in which she admitted that she was diagnosed with arthritis in her left knee in the early 1990s, and that she walked with a cane before the accident. Furthermore, an X ray taken on the accident date revealed that plaintiff had sustained only a contusion, and had chronic degenerative changes with severe medial joint space narrowing.

In opposition, plaintiff failed to raise a triable issue of fact. Her orthopedic surgeon diagnosed her with left knee osteoarthritis before and after surgery, and provided "no objective basis or reason, other than the history provided by plaintiff," in support of his opinion that the accident was causally related to the knee surgery nine months later (*see Farmer* at 562 [internal quotation marks omitted]). Moreover, plaintiff failed to provide evidence of any injuries that were different from her preexisting arthritic condition (*see Kamara v Ajlan*, 107 AD3d 575, 576 [1st Dept 2013]).

Regarding the 90/180-day claim, plaintiff admitted at her deposition that, although she was allegedly restricted for four to six months following the accident, she was "not really confined," and none of her medical records indicated that she was unable to perform her normal and customary activities. Plaintiff never supplemented her bill of particulars to specify these

activities, or to state how long she was prevented from performing them (*see Copeland v Kasalica*, 6 AD3d 253 [1st Dept 2004]).

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

ENTERED: MARCH 10, 2015

CLERK

Friedman, J.P., Sweeny, DeGrasse, Gische, JJ.

14463-
14464 &
M-5916

Index 103707/07

Elliot Bertram, etc., et al.,
Plaintiffs-Appellants,

-against-

Columbia Presbyterian/New York Presbyterian Hospital,
Defendant-Respondent.

_____

Leon I. Behar, PC, New York (Leon I. Behar of counsel), for appellants.

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

_____

Judgment, Supreme Court, New York County (Lucy Billings, J.), entered July 2, 2013, after a jury trial, in favor of defendant and against plaintiffs, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered May 8, 2013, which denied plaintiffs' posttrial motion to set aside the verdict, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiffs allege that two of defendant's attending physicians committed medical malpractice by failing to remove a femoral arterial line from the then six-week-old infant plaintiff's groin area, resulting in the partial amputation of

his left leg.

Plaintiffs failed to preserve their arguments regarding defense counsel's conduct, as they failed to move for a mistrial before the jury rendered its verdict (*see Boyd v Manhattan & Bronx Surface Tr. Operating Auth.*, 79 AD3d 412, 413 [1st Dept 2010]). Nor are review and a new trial warranted "in the interest of justice" (CPLR 4404[a]), since plaintiffs failed to show that defense counsel's conduct constituted a substantial injustice or that it likely affected the verdict (*see Micallef v Miehle Co., Div. of Miehle-Goss Dexter*, 39 NY2d 376, 381 [1976]; *see also Boyd*, 79 AD3d at 413).

The verdict was not against the weight of the evidence (*Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [1995]). Defendant's witnesses and expert testified that there were contraindications for moving the arterial line, including that the infant remained in critical condition and that he was at risk of uncontrolled bleeding from an incision at another access site. Plaintiffs' sole expert to testify as to defendant's alleged

malpractice never addressed the contraindications.

M-5916 - *Bertram v Columbia Presbyterian/New York Presbyterian Hospital*

Motion to strike reply brief denied.

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

ENTERED: MARCH 10, 2015

CLERK

Friedman, J.P., Sweeny, Acosta, DeGrasse, Gische, JJ.

14465 In re Mariam D.,
Petitioner-Respondent,

-against-

Adama D.,
Respondent-Appellant.

_____

Steven N. Feinman, White Plains, for appellant.

Jo Ann Douglas, New York, for respondent.

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

_____

Order, Family Court, New York County (Monica Shulman, Referee), entered on or about May 5, 2014, which awarded petitioner mother sole legal and physical custody of the subject children, with visitation to respondent father, unanimously affirmed, without costs.

The record supports the finding that the best interests of the children are met by the award of legal and physical custody to the mother (*see generally Eschbach v Eschbach*, 56 NY2d 167, 171-172 [1982]). The order of protection against the father impeded his ability to obtain physical custody of the children, and there is an inability on the part of the parents to put aside the acrimony and distrust resulting from the father's domestic violence. Moreover, the record shows that the mother is the

children's primary care giver, and she has demonstrated an ability to properly care for them and provide for their needs (*see Matter of Rena M. v Derrick A.*, 122 AD3d 457 [1st Dept 2014]; *Matter of Xiomara M. v Robert M.*, 102 AD3d 581 [1st Dept 2013]). There exists no basis to disturb the Referee's credibility determinations (*see Matter of Mildred S.G. v Mark G.*, 62 AD3d 460 [1st Dept 2009]).

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

ENTERED: MARCH 10, 2015

CLERK

Friedman, J.P., Sweeny, Acosta, DeGrasse, Gische, JJ.

14466 The People of the State of New York, Ind. 4090/11
Respondent,

-against-

Omar Minus,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Joseph M. Nursey of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Michael R. Sonberg, J. at suppression hearing; Cassandra Mullen, J. at jury trial and sentencing), rendered January 4, 2012, convicting defendant of criminal possession of a controlled substance in the third degree, and sentencing him, as a second drug felony offender, to a term of three years, unanimously reversed, as a matter of discretion in the interest of justice, and the matter remanded for a new trial.

One of the three police witnesses testified that he saw defendant ride a bicycle to a street corner in a drug-prone area, have a quick conversation with another man, and then hand the man a small, unidentified object in exchange for cash. The detective inferred, based on his narcotics training and experience, that

this exchange was a drug transaction. After he transmitted a report of these observations to his field team, another detective saw defendant throwing drug packages toward his mouth, two of which landed on the ground and were recovered by the police. The remaining packages entered defendant's mouth and were not recovered.

The trial court issued a pretrial *Molineux* ruling (*People v Molineux*, 168 NY 264 [1901]) precluding the People from using the testimony about the hand-to-hand exchange for any purpose other than to explain the subsequent actions of the police, specifically noting that this testimony could not be used as a evidence of defendant's intent to sell the drugs found in his possession. The prosecutor "disregard[ed] the court's rulings" (*People v D'Alessandro*, 184 AD2d 114, 119 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]) by arguing that the jury could consider the exchange and the detective's view that it was a drug transaction as factors relevant to defendant's intent to sell.

Defense counsel made four general objections to that line of argument; the first two objections were overruled, and the other two were sustained without any timely request for further relief. Defendant's appellate challenge to the prosecutor's summation was not preserved by defense counsel's general objections or a CPL

330.30 motion to set aside the verdict. However, we review the issue in the interest of justice and find that the prosecutor's arguments "prejudic[ed] defendant's right to a fair trial" (*see People v Sandy*, 115 AD2d 27, 32 [1st Dept 1986]).

Given that defendant's counsel prepared the defense and cross-examined the three police witnesses under the assumption that the People would be precluded from using the detective's testimony about the exchange as evidence of defendant's intent, the prosecutor's arguments rendered the trial as a whole unfair. Because of the court's pretrial ruling, under which the exchange was only relevant to the state of mind of the officers, and not defendant's intent to sell, counsel had little or no reason to attempt to cast doubt on whether the exchange was actually a drug sale, or whether it evinced an intent to sell the drugs that defendant was charged with possessing.

The soundness of the pretrial ruling is not properly before us on this appeal. In any event, regardless of the soundness of the ruling, the prejudice here stems from defendant's detrimental reliance upon it.

The unfairness was not mitigated by the fact that the prosecutor obtained the court's permission to contravene the *Molineux* ruling in summation, again after the close of all

evidence. Because of its timing, the court's modification of its prior ruling was itself prejudicial error.

The error was not harmless, since there is a significant probability that defendant would have been acquitted of the possession count if not for the challenged portions of the prosecutor's summations (*see People v Crimmins*, 36 NY2d 230, 242 [1975]). The hand-to-hand exchange was strongly probative of defendant's intent to sell, which was the central issue at trial. Although the court instructed the jury in the final charge and a supplemental charge not to consider the exchange for any purpose other than to explain the police conduct, this did not eliminate the prejudicial effect of the prosecutor's argument repeatedly urging the jury to consider the exchange as evidence of intent (*see People v Riback*, 13 NY3d 416, 423 [2009]; *People v Calabria*, 94 NY2d 519, 523 [2000]). Although the jury was obligated to disregard the prosecutor's arguments to which counsel's objections were sustained, the court's overruling the first two objections "enhanc[ed] the possibility of prejudice" (*People v Zlochevsky*, 196 AD2d 701, 703 [1st Dept 1993], *lv denied* 82 NY2d 854 [1993] [internal quotation marks and citation omitted]).

In light of this determination, we decline to reach any other issues, except that we find that the record supports the hearing court's denial of the suppression motion, and that the verdict was based on legally sufficient evidence.

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

ENTERED: MARCH 10, 2015

CLERK

Friedman, J.P., Sweeny, Acosta, DeGrasse, Gische, JJ.

14467 In re The New York State Office of Mental Health, Petitioner-Appellant, Index 530326/11

-against-

Joseph C. (Anonymous), Respondent-Respondent.

_____

Eric T. Schneiderman, Attorney General, New York (Andrew W. Amend of counsel), for The New York State Office of Mental Health appellant.

Kenneth P. Thompson, District Attorney, Brooklyn (Avshalom Yotam of counsel), for District Attorney, Kings County, appellant.

Marvin Bernstein, Mental Hygiene Legal Services, New York (Maura Martin Klugman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Martin Schoenfeld, J.), entered July 24, 2014, which, after a hearing, denied the application for further retention of respondent at a secure psychiatric facility and directed respondent's transfer to a nonsecure facility, unanimously reversed, on the law, without costs, and the application granted.

Reversal of Supreme Court's order is warranted where the record shows that petitioner established by a preponderance of the evidence, through the testimony and reports of mental health professionals, that respondent continues to exhibit a level of

dangerousness that warrants continued retention in a secure facility (see *Matter of Carpinello v Floyd A.*., 23 AD3d 179 [1s Dept 2005]; CPL 330.20[1][c]). These witnesses testified that although respondent has done well during his time at the secure facility, he continues to suffer from the same paranoid and persecutory delusions that led him to commit the violent crime of killing his girlfriend's mother several years earlier. The witnesses also stated that respondent lacked insight into his schizophrenia; he indicated that he would be all right if he discontinued his medication; and expressed that his girlfriend's mother continued to use voodoo on him. Such evidence sufficiently demonstrates that respondent "is mentally ill and that he poses a current threat to himself and others" (*Matter of Richard H. v Consilvio*, 6 AD3d 7, 15 [1st Dept 2004], *lv denied* 3 NY3d 601 [2004]).

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

ENTERED: MARCH 10, 2015

CLERK

Friedman, J.P., Sweeny, Acosta, DeGrasse, Gische, JJ.

14468 RTN Networks, LLC, Index 154494/12
Plaintiff-Respondent,

-against-

Telco Group, Inc., et al.,
Defendants-Appellants.

_____

Ruta, Soulios & Stratis LLP, New York (Joseph A. Ruta of counsel), for appellants.

Steger Krane LLP, New York (Steven S. Krane of counsel), for respondent.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered April 22, 2014, which denied defendants' motion to dismiss the complaint, unanimously reversed, on the law, the motion granted, and the complaint dismissed. The Clerk is directed to enter judgment accordingly.

In this action alleging causes of action for fraudulent conveyance and conspiracy, plaintiff seeks to recover $324,260.64 pursuant to a judgment awarded in its favor in 2010. Plaintiff alleges that defendants fraudulently conveyed defendant Telco Group, Inc.'s assets (Telco), rendering the company insolvent. It further alleges that defendant Tawfik, a partial owner of Telco, received $40 million from the sale of Telco's assets but that it never received payment pursuant to the judgment. The

complaint, however, fails to plead with sufficient particularity any facts alleging that the conveyance at issue was made without "fair consideration" (Debtor and Creditor Law §§ 273, 274, 275). Notably, it alleges that defendant Telco received $135 million for the sale of its assets. The additional allegations that most of the sale proceeds were used to pay off Telco debts, and that an additional portion was paid to defendant Tawfik, do not demonstrate that the amount paid was not the "fair equivalent" of the value of Telco's assets. Plaintiff's "mere belief" that Telco transferred its assets without fair consideration is insufficient (*see Jaliman v D.H. Blair & Co., Inc.*, 105 AD3d 646, 647 [1st Dept 2013]).

The complaint also fails to plead with particularity defendants' intent to hinder, delay or defraud present or future creditors, as required to properly assert a cause of action for intentional fraudulent conveyance (*see* Debtor and Creditor Law § 276; CPLR 3016[b]). The complaint alleges that Telco used most of the sale proceeds to pay off other creditors. While the judgment owed to plaintiff was not paid at the time, it is clear from the complaint that the judgment had not yet been obtained at the time of the transaction at issue. Moreover, the key allegations regarding the allegedly fraudulent conveyance are

based on information and belief, and as they fail to reveal the source of that information, they are inadequate under CPLR 3016(b) (*see DDJ Mgt., LLC v Rhone Group L.L.C.*, 78 AD3d 442, 443 [1st Dept 2010]).

Since the complaint fails to sufficiently allege an actual intent to defraud, the cause of action seeking reasonable attorneys' fees pursuant to Debtor and Creditor Law § 276-a also should have been dismissed.

Finally, absent any viable underlying tort, the conspiracy cause of action must also be dismissed (*see Bell v Alden Owners*, 299 AD2d 207 [1st Dept 2002], *lv denied* 100 NY2d 506 [2003]; *Alexander & Alexander of N.Y. v Fritzen*, 68 NY2d 968, 969 [1986]).

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

ENTERED: MARCH 10, 2015

CLERK

Friedman, J.P., Sweeny, Acosta, DeGrasse, Gische, JJ.

14469 The People of the State of New York, Ind. 2006/12
Respondent,

-against-

Eric Quinones,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Eve Kessler of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Yuval Simchi-Levi of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Thomas Farber, J.), rendered on or about November 27, 2012,

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: MARCH 10, 2015

CLERK

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

Friedman, J.P., Sweeny, Acosta, DeGrasse, Gische, JJ.

14470 Miron Properties, LLC, Index 652925/11
Plaintiff-Appellant,

-against-

Bruno W. Eberli, et al.,
Defendants-Respondents.

_____

Leon I. Behar, P.C., New York (Leon I. Behar of counsel), for appellant.

Kucker & Bruh, LLP, New York (Nativ Winiarsky of counsel), for respondents.

_____

Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered on or about September 5, 2013, which denied plaintiff's motion for summary judgment, and granted defendants' cross motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants demonstrated that plaintiff was not entitled to a brokerage commission with respect to defendant limited liability company's purchase of a condominium unit. The brokerage agreement did not clearly provide plaintiff with the exclusive right to deal on defendant Eberli's behalf (*see Morpheus Capital Advisors LLC v UBS AG*, 23 NY3d 528, 535 [2014]), and plaintiff did virtually nothing to procure the transaction or even to bring the property to the purchaser's attention (*see Greene v Hellman*,

51 NY2d 197, 205-206 [1980]). The motion court correctly dismissed the other causes of action as duplicative of the deficient breach of contract cause of action.

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: MARCH 10, 2015

CLERK

Friedman, J.P., Renwick, Moskowitz, Richter, Manzanet-Daniels, JJ.

13609 In re Flosar Realty LLC, et al., Index 102799/12
Petitioners-Appellants,

-against-

New York City Housing Authority,
Respondent-Respondent.

_____

Tenenbaum Berger & Shivers LLP, Brooklyn (David M. Berger of counsel), for appellants.

Kelly D. MacNeal, New York City Housing Authority, New York (Gil Nahmias of counsel), for respondent.

_____

Judgment Supreme Court, New York County (Cynthia S. Kern, J.), entered April 9, 2013, modified, on the law, to deny respondent's cross motion to the extent the petition seeks to compel respondent to make a determination on petitioners' requests to increase subsidies and a determination on petitioners' requests to reinstate suspended subsidies, and to reinstate the petition to that extent, and otherwise affirmed, without costs.

Opinion by Richter, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
Dianne T. Renwick
Karla Moskowitz
Rosalyn H. Richter
Sallie Manzanet-Daniels, JJ.

13609
Index 102799/12

_____x

In re Flosar Realty LLC, et al.,
Petitioners-Appellants,

-against-

New York City Housing Authority,
Respondent-Respondent.
_____x

Petitioners appeal from a judgment of the Supreme Court, New York County (Cynthia S. Kern, J.), entered April 9, 2013, to the extent appealed from as limited by the briefs, to dismiss the causes of action seeking to compel respondent to process renewal leases requesting increases in Section 8 rent subsidies and pay the increases requested, and to reinstate previously suspended Section 8 rent subsidies.

Tenenbaum Berger & Shivers LLP, Brooklyn (David M. Berger and Damien Bernache of counsel), for appellants.

Kelly D. MacNeal, New York (Gil Nahmias, Nancy M. Harnett and Matthew G. Dineen of counsel), for respondent.

RICHTER, J.

In this appeal, we are asked to decide whether an article 78 mandamus proceeding can be brought to compel respondent New York City Housing Authority (NYCHA) to (i) process renewal leases requesting increases in Section 8 rent subsidies; and (ii) process requests seeking reinstatement of Section 8 subsidies that were previously suspended due to housing quality violations that were subsequently remedied. We find that although mandamus does not lie to compel NYCHA to reach any particular result with respect to these requests, the petition states a claim for mandamus relief to the extent it seeks to compel NYCHA to make a determination, because NYCHA does not have the discretion to not process petitioners' requests.

Petitioners are 19 owners of residential apartment buildings located in Brooklyn and Staten Island. Some of the units in the buildings are rented, pursuant to rent-stabilized leases, to tenants who participate in the Section 8 voucher program. Under that program, building owners are paid rent subsidies to help lower-income families afford decent, safe and sanitary housing in the private sector. NYCHA is the governmental agency that administers the Section 8 program.

For each tenancy, NYCHA and the building owner enter into a Housing Assistance Payments (HAP) contract pursuant to which

NYCHA pays a monthly subsidy in an amount representing the difference between the total rent and the tenant's share of the rent, which is based on the tenant's income. At all times during a Section 8 tenancy, the rent paid to the owner cannot exceed the reasonable rent, as most recently determined by NYCHA (24 CFR 982.507[a][4]). In addition to determining the reasonable rent for the initial lease, NYCHA must determine the reasonableness of any proposed rent increase (24 CFR 982.507[a][1], [a][2][i]).

Building owners are required to maintain the Section 8 units in accordance with certain housing quality standards (HQS), and NYCHA is required to regularly inspect the units and notify the owner of any defects discovered (24 CFR 982.401, 982.404[a]; 982.405[a], [d]). No subsidy payments may be made for a unit that fails to meet HQS unless the owner corrects the defect within a period specified by NYCHA and NYCHA verifies the correction (24 CFR 982.404[a][3]).[1]

Petitioners commenced this article 78 proceeding asserting

[1] Under procedures set forth in the notice NYCHA sends to owners advising of an HQS violation, the owner can either notify NYCHA that the repairs have been completed, after which NYCHA will reinspect the unit, or submit a form signed by the owner and the tenant certifying that repairs have been completed. If NYCHA does not accept the certification, NYCHA schedules an immediate reinspection to verify completion of repairs. Upon confirmation that the repairs have been completed, any suspended subsidy will be reinstated.

three causes of action. In the first cause of action, petitioners contend that they are entitled to Section 8 subsidy increases upon the renewal of each rent-stabilized lease commensurate with the increases approved by the Rent Guidelines Board (RGB). Petitioners claim they submitted renewal leases to NYCHA requesting the subsidy increases, but NYCHA neither increased the subsidies nor even responded to their requests. In the second cause of action, petitioners allege that NYCHA failed to reinstate previously suspended subsidies for HQS violations even though the owners remedied the deficiencies and submitted certifications of repair to NYCHA. According to petitioners, NYCHA neither accepted the certifications nor reinspected the units to verify that the repairs had been made. Petitioners seek writs of mandamus compelling NYCHA to (i) process the renewal leases and pay the requested increased subsidies; and (ii) reinstate the subsidies that were previously suspended due to HQS violations that were subsequently remedied.[2]

NYCHA did not answer the petition, but instead cross-moved to dismiss, arguing that petitioners are not entitled to mandamus relief, that most of petitioners' claims are time-barred, and

[2] The third cause of action alleges that NYCHA breached the HAP contracts. Petitioners' appeal, as limited by the briefs, does not challenge Supreme Court's dismissal of this claim.

that petitioners failed to file a notice of claim. Supreme Court rejected NYCHA's notice of claim argument but dismissed the proceeding, concluding that petitioners had not demonstrated that they have a clear legal right to the relief sought. The court found that the decision to increase rent subsidies is not a purely ministerial act, but is a matter entrusted to NYCHA's discretion, and that the determination as to whether subsidies should be reinstated after the HQS violations were remedied also is discretionary. The court did not reach the statute of limitations issue. Petitioners appeal and we now modify.

An article 78 mandamus proceeding may be brought to compel an agency "to perform a duty enjoined upon it by law" (CPLR 7803[1]). It is well-settled that a mandamus to compel "applies only to acts that are ministerial in nature and not those that involve the exercise of discretion" (*Matter of Maron v Silver*, 14 NY3d 230, 249 [2010]). Thus, "the petitioner must have a clear legal right to the relief demanded and there must exist a corresponding nondiscretionary duty on the part of the administrative agency to grant that relief" (*Matter of Anonymous v Commissioner of Health*, 21 AD3d 841, 842 [1st Dept 2005] [internal quotation marks omitted]).

Supreme Court properly found that the determination of the amount of any increase in the Section 8 subsidy is not purely

ministerial but a matter entrusted to NYCHA's discretion. An owner cannot receive a rent increase unless NYCHA first determines the reasonable rent (24 CFR 982.507[a][2][i]). In doing so, NYCHA is required to compare the unit's rent to comparable unassisted units and must consider a myriad of discretionary factors, including location, quality, size, type and age of the unit, and any services, utilities and amenities provided (24 CFR 982.507[b]). Because the determination of the amount of any rental increase involves the exercise of discretion, it is not subject to mandamus.

Petitioners counter that rental increases are governed by 24 CFR 982.519, not 24 CFR 982.507. As NYCHA points out, however, section 982.519 does not apply to the Section 8 voucher program at issue here (*see* 24 CFR 982.501[c] [section 982.519 applies only to tenancies under the (distinct, and now-defunct) Section 8 certificate program]). Petitioners nevertheless argue that NYCHA should be judicially estopped from disclaiming reliance on section 982.519 because it relied, in part, on that regulation in its dismissal motion below. We need not decide the issue of estoppel because even if this regulation is applicable, the result would be the same because it too has a discretionary component (*see* 24 CFR 982.519[b][1][ii] [requiring NYCHA to determine the reasonable rent in considering an owner's request

for an increase]).

There is no merit to petitioners' argument that NYCHA is required to accept as presumptively reasonable the rental increase percentages adopted by the RGB for rent-stabilized leases. The determination of rent reasonableness is governed by the Section 8 regulations set forth above, which make no mention of the RGB percentage increases. Moreover, the analysis conducted by the RGB is entirely different from the determination of rent reasonableness contained in the Section 8 regulations. The RGB sets maximum allowable rent increases for leases citywide based, inter alia, on the economic condition of the residential real estate industry, real estate taxes, operating maintenance costs and the availability of financing (*see* Administrative Code of City of NY § 26-510[b]). In contrast, the Section 8 regulations require analysis of unit-specific factors, such as location, quality and size (*see* 24 CFR 982.507[b]). Furthermore, the RGB-approved increases are not mandatory but merely set a maximum allowable ceiling, which an owner cannot exceed. Put simply, the maximum rent an owner may lawfully charge under rent stabilization is not the same as rent reasonableness under the Section 8 regulations (*see* 24 CFR 982.509 [recognizing that in addition to rent reasonableness under the regulations, the amount of rent to owners may also be subject to state and local rent

regulation]).[3]

Although the eventual determination of reasonable rent will be the product of NYCHA's judgment, the agency does not enjoy similar discretion to not make a decision at all on the rent increase requests. The applicable regulation, relied upon by NYCHA, provides that before any rent increase is allowed, NYCHA "*must* redetermine the reasonable rent" (24 CFR 982.507[a][2][i] [emphasis added]; *see also* 24 CFR 982.519[a] [under regulation relied upon by petitioners, NYCHA must annually adjust rent at owner's request]). Upon the proper submission of a request for rent increase, NYCHA must process the request and come to a determination, whether adverse to petitioners' position or not. NYCHA cannot leave petitioners in limbo, neither granting nor denying their requests, many of which have been pending for a significant amount of time. Thus, the petition states a claim for mandamus relief to the extent it seeks an order directing NYCHA to make a determination with respect to the rent increase

[3] Petitioners rely on several statements about RGB increases allegedly posted on a previous version of NYCHA's website. Petitioners, however, provide only an excerpt of the statements precluding effective appellate review. In any event, NYCHA is not bound by any such pronouncements, because equitable estoppel cannot be invoked against a governmental agency to prevent it from discharging its statutory duties (*Matter of Gonzalez v Division of Hous. & Community Renewal of the State of N.Y.*, 95 AD3d 681, 682 [1st Dept 2012], *appeal dismissed and lv denied* 20 NY3d 1003 [2013]).

requests (*see Klostermann v Cuomo*, 61 NY2d 525, 541 [1984] ["to the extent that plaintiffs can establish that defendants are not satisfying nondiscretionary obligations to perform certain functions, they are entitled to orders directing defendants to discharge those duties"]; *Matter of Utica Cheese v Barber*, 49 NY2d 1028, 1030 [1980] [although statute did not define the "reasonable time" within which agency had to render its decision on the petitioner's license application, agency still had to act]; *Matter of Davidson v LaGrange Fire Dist.*, 82 AD3d 1227, 1229 [2d Dept 2011] [where an agency fails or refuses to decide a particular matter where there was a nondiscretionary duty to do so, mandamus is appropriate to compel performance of the required duty]).

Likewise, the petition states a claim for mandamus relief to the extent it seeks to compel NYCHA to make a determination on the requests to reinstate suspended rent subsidies. Petitioners allege that they have submitted certification forms confirming that the requisite repairs have been made, yet NYCHA has failed to either reinstate the subsidies or reinspect the affected units. The relevant federal regulation provides that no subsidy payments can be made for units that fail to meet the HQS "unless the owner corrects the defect . . . and [NYCHA] verifies the correction" (24 CFR 982.404[a][3]). We agree with NYCHA that it

has discretion to determine whether the violations were sufficiently cured and which method to use to verify that the necessary repairs were made (i.e., accepting the certification submitted or scheduling a reinspection). However, as with the rent increase requests, NYCHA does not have discretion to simply not act and indefinitely continue suspension of the subsidies. NYCHA has the duty to verify whether the repairs have been made, either by accepting the certification form or scheduling a reinspection.[4]

We reject NYCHA's alternative argument that the bulk of petitioners' claims are barred by the statute of limitations. An article 78 proceeding seeking mandamus to compel must be commenced within four months "after the [agency's] refusal, upon the demand of the petitioner . . ., to perform its duty" (CPLR 217[1]; *see Matter of Moskowitz v New York City Police Pension Fund*, 82 AD3d 473, 473 [1st Dept 2011]). Thus, a petitioner must "make a demand and await a refusal, and the limitations period does not commence until the refusal" (*Adams v City of New York*, 271 AD2d 341, 341-342 [1st Dept 2000]). "The refusal must be

[4] NYCHA contends that a number of petitioners' claims are now moot because rent increases have been approved and suspended subsidies have been reinstated. These allegations, which have no relevance to the statute of limitations issue, can be raised in NYCHA's answer to the petition.

clear and explicit" (*Matter of Fischer v Roche*, 81 AD2d 541, 542 [1st Dept 1981], *affd* 54 NY2d 962 [1981]), and "[i]f there is no refusal, the limitations period does not begin to run" (*Donoghue v New York City Dept. of Educ.*, 80 AD3d 535, 536 [1st Dept 2011]). Any ambiguity created by the agency should be resolved against it (*Fischer*, 81 AD2d at 542).

Here, petitioners' submission of the renewal leases and repair certification forms to NYCHA constitutes the demand for the agency to perform its duties. Petitioners allege that NYCHA did not issue any denials of the rent increase requests and similarly remained silent after the submission of the repair certification forms. Because there was no clear and explicit refusal of petitioners' demands, the statute of limitations has not yet begun to run (*see Matter of Town of Harrison Police Benevolent Assn., Inc. v Town of Harrison Police Dept.*, 69 AD3d 639, 640-641 [2d Dept 2010] [statute of limitations never began to run, since agency never explicitly refused to entertain the petitioners' demand]; *Matter of Coliseum Towers Assoc. v Livingston*, 153 AD2d 683, 685-686 [2d Dept 1989], *affd* 80 NY2d 961 [1992] [rejecting statute of limitations defense where there was no indication in record that the county had affirmatively refused to comply with the petitioner's request]).

Supreme Court properly rejected NYCHA's contention that this

proceeding should be dismissed because petitioners did not file a notice of claim pursuant to Public Housing Law § 157(1). "A notice of claim is not a condition precedent to [an article 78 mandamus] proceeding . . . seeking judicial enforcement of a legal right derived through enactment of positive law" (*Matter of Speis v Penfield Cent. Schs.*, 114 AD3d 1181, 1183 [4th Dept 2014], quoting *Matter of Sharpe v Sturm*, 28 AD3d 777, 778-779 [2d Dept 2006]; *Matter of Piaggone v Board of Educ., Floral Park-Bellrose Union Free School Dist.*, 92 AD2d 106, 108 [2d Dept 1983]; *see also Rachles v Lugo*, 199 AD2d 151, 151-152 [1st Dept 1993]). To impose such a requirement would not advance "the salutary purpose of allowing municipal defendants to conduct an investigation and examine the plaintiff with respect to the claim, and to determine whether the claim[] should be adjusted or satisfied before the parties are subjected to the expense of litigation" (*Davidson v Bronx Mun. Hosp.*, 64 NY2d 59, 62 [1984] [internal citations omitted]). Since a writ of mandamus seeks only to enforce an already existing legal obligation of which the agency is aware, there is little need for any such investigation or examination (*see Cowan v Board of Educ. of Brentwood Union Free School Dist.*, 99 AD2d 831, 833 [2d Dept 1984] ["notice of claim requirement is inapplicable to cases which seek to vindicate tenure rights which are legal rights guaranteed by

State law and in the public interest"]).

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

Accordingly, the judgment of the Supreme Court, New York County (Cynthia S. Kern, J.), entered April 9, 2013, to the extent appealed from as limited by the briefs, granting respondent's cross motion to dismiss the causes of action seeking to compel respondent to process renewal leases requesting increases in Section 8 rent subsidies and pay the increases requested, and to reinstate previously suspended Section 8 rent subsidies, should be modified, on the law, to deny the cross motion to the extent the petition seeks to compel respondent to make a determination on petitioners' requests to increase subsidies and a determination on petitioners' requests to reinstate suspended subsidies, and to reinstate the petition to that extent, and otherwise affirmed, without costs.

All concur.

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

ENTERED: MARCH 10, 2015

CLERK