SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 5, 2015

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

12973 Lyn Rollins, Index 106303/09
Plaintiff-Respondent,

-against-

Fencers Club, Inc., et al.,
Defendants-Appellants.

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Miranda Sambursky Slone Sklarin, Verveniotis LLP, Mineola (Michael A. Miranda of counsel), for appellants.

Schwartz & Perry, LLP, New York (Brian Heller of counsel), for respondent.

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Order, Supreme Court, New York County (Debra A. James, J.), entered August 15, 2013, which denied defendants' motion for summary judgment dismissing the complaint alleging age-based discrimination in violation of the New York City Human Rights Law, affirmed, without costs.

It is essentially undisputed that plaintiff has made out the first three elements of a prima facie case of discrimination by showing that, aged 58 at the time of her hiring, she was a member of a protected class based on her age, was qualified for the

position of Executive Director of defendant Club, and was terminated and thereby subjected to a disadvantageous employment action (*see Askin v Department of Educ. of the City of N.Y.*, 110 AD3d 621, 622 [1st Dept 2013]). Contrary to our dissenting colleague, we conclude that the fourth element of a prima facie case of discrimination, namely, that plaintiff was disadvantaged under circumstances giving rise to an inference of discrimination, is sufficiently made out to warrant a trial.

Plaintiff testified that Elizabeth Cross, the Club board member who succeeded plaintiff as executive director, "very frequently" made references to plaintiff's age, including by saying, "Are you sure you're up for this? You know you're at that age where you . . . need more rest. You look tired," and asking whether plaintiff was "up for" meetings that "might be too much" for her and would "tire [her] out." Notwithstanding the dissent's dismissive characterization of these statements as "stray remarks" and, more incredibly, as the concern of a solicitous employer, as if they had no discriminatory import or implication, we find that when plaintiff's testimony is credited for purposes of this motion, these remarks directly reflect age-based discriminatory bias on Cross's part (*see Weiss v JPMorgan Chase & Co.*, 332 Fed Appx 659, 665 [2d Cir 2009]), and raise an

inference of age-related bias sufficient to make out plaintiff's prima facie case of employment discrimination (*see Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 35 [1st Dept 2011], *lv denied* 18 NY3d 811 [2012]). In concluding that no inference of discriminatory motive can be drawn from this evidence, the dissent fails to abide by the precept that "all of the evidence must be viewed in the light most favorable to the party opposing the motion, and all reasonable inferences must be resolved in that party's favor" (*Udoh v Inwood Gardens, Inc.*, 70 AD3d 563, 565 [1st Dept 2010]). In particular, in observing that there is no direct evidence that Cross communicated to the board her views regarding plaintiff's age-related unfitness for the job, the dissent fails to recognize that given her position as executive director, it is fair to infer that Cross would have made such communications in the normal course of carrying out her responsibilities.

Under these circumstances, the fact that several of the persons involved in the decision to fire plaintiff were close to her in age, and thereby in the same protected class, does not vitiate the inference of discriminatory animus raised by Cross's claimed remarks (*see O'Connor v Consolidated Coin Caterers Corp.*, 517 US 308, 312 [1996]). In particular, Elizabeth Cross's age of

53 does not eliminate the import or weight of her remarks; indeed, she was not only implying that plaintiff, at 59, almost 60, was infirm, but was also implicitly suggesting that the board should view Cross herself, at 53, as a member of a younger age group than that in which she placed plaintiff. Nor is the discriminatory inference negated because plaintiff was hired at the age of 58. When plaintiff was hired, Cross was not a part of the decision-making process; however, Cross was allegedly a prime mover in the board's decision to fire plaintiff, and her discriminatory impulse may be attributable to the board.

In response to plaintiff's showing, defendants contend that they terminated her because of her poor performance, as reflected in Cross's findings in a management study she submitted to the Club's executive committee on November 7, 2008. In particular, defendants contend that, among other things, plaintiff was rude to members, failed to boost membership levels, was inefficient and unnecessarily raised Club operating expenses. Defendants' submissions shift the burden back to plaintiff to prove that the proffered reasons were merely a pretext for discrimination (*see Bennett*, 92 AD3d at 36). However, notwithstanding the dissent's implication, defendants' assertions are not established facts, they are simply allegations that are disputed by plaintiff.

To show that the reasons offered by the Club for her firing were pretextual, plaintiff points out that, on September 2, 2008, defendant board member James Melcher wrote an open letter to all Club members in which he stated that, since becoming Club manager in August 2007, plaintiff had "done a terrific job of reorganizing and modernizing our procedures across the board, while continuing our tradition of friendly and welcoming interaction with members, parents, and coaches." This praise directly contradicts Cross's finding that plaintiff had poor relations with members. The 20% total bonus she was awarded in late September 2008 also supports plaintiff's position. Coming as little as six weeks before Cross's study, the Melcher letter and the 20% bonus substantially undermine defendants' proffered reason for plaintiff's termination (*see Carlton v Mystic Transp., Inc.*, 202 F3d 129, 137 [2d Cir 2000], *cert denied* 530 US 1261 [2000]).

Documentary evidence also undercuts Cross's finding that plaintiff unnecessarily boosted expenses. Notably, Club records indicate that expenses for calendar year 2009, when Cross was in charge, increased by over $500,000 (from $1.2 million to $1.7 million) from calendar year 2008, when plaintiff was in charge until mid-November.

Plaintiff has thus met her burden of showing pretext by "respond[ing] with some evidence that at least one of the reasons proffered by defendant is false, misleading, or incomplete" (*Bennett*, 92 AD3d at 45; *accord Sandiford v City of New York Dept. of Educ.*, 94 AD3d 593, 595 [1st Dept 2012], *affd* 22 NY3d 914 [2013]). Accordingly, a trial is warranted, and the motion court correctly denied defendants' summary judgment motion.

Because defendants have not shown that they are entitled to summary judgment under the *McDonnell Douglas* burden-shifting framework, (*see McDonnell Douglas Corp. v Green*, 411 US 792 [1973), we need not analyze plaintiff's claims under the "mixed motive" framework (*see Bennett*, 92 AD3d at 40-41).

All concur except Friedman, J.P. who dissents in a memorandum as follows:

FRIEDMAN, J.P. (dissenting)

I respectfully dissent because the record before us does not give rise even to a prima facie case that defendants violated the New York City Human Rights Law by discriminating against plaintiff based on her age. In brief, plaintiff was hired at age 58, discharged at age 59 and replaced by a 53-year-old woman only six years younger than herself — a member of the same protected class to which plaintiff belongs — and there is no other evidence in the record from which it could reasonably be inferred that defendants' adverse actions against plaintiff were motivated by age-based discriminatory bias.[1] Plaintiff's vague testimony about stray remarks made by the 53-year-old woman who replaced her, to the effect that plaintiff looked "tired" or seemed to need "rest" on certain occasions, do not, by themselves, suffice to support an inference of discrimination, as Supreme Court, notwithstanding its denial of the summary judgment motion, recognized at certain points in its decision.[2] The lack of a

[1]I note that the federal analogue of the New York City Human Rights Law for these purposes, the Age Discrimination in Employment Act of 1967, protects "individuals who are at least 40 years of age" (29 USC § 631[a]).

[2]In its decision, Supreme Court acknowledged that none of the statements on which plaintiff relies "implies that [she] was being treated differentially because of her age" and that such

prima facie case makes it unnecessary to reach the question of whether defendants' stated reasons for demoting and subsequently terminating plaintiff were pretexts.[3] Accordingly, defendants' motion for summary judgment dismissing the complaint should have been granted, and the order denying that motion should be reversed.

While this circumstance forms no part of the legal basis for my dissent, this lawsuit does illustrate the truth of the old adage, "No good deed goes unpunished." Defendants are

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statements "are insufficient, standing alone, to support an inference of age discrimination." Unfortunately, Supreme Court failed to recognize that, since nothing else in the record gives rise to an inference of age discrimination, defendants are entitled to summary judgment dismissing the action, regardless of any disputes about how well plaintiff performed her job.

[3]While plaintiff naturally disagrees with defendants' account of the perceived deficiencies in her performance as a Club employee, disputes about the quality of plaintiff's performance are not legally relevant, given the lack of any basis for inferring that the Club demoted or fired plaintiff with discriminatory intent. In the absence of circumstances from which discriminatory intent can reasonably be inferred, an employer's adverse action against an employee is not actionable under the Human Rights Law, even if the fairness of the employer's appraisal of the value of the employee's services is subject to reasonable dispute. The Human Rights Law does not give courts a general mandate to review the business judgment of nondiscriminatory employment decisions. Contrary to the majority's statement, I make no implication that defendants' assertions about plaintiff's work performance are "established facts" rather than disputed allegations.

plaintiff's former employer, Fencers Club, Inc. (the Club) — a not-for-profit corporation dedicated to the promotion of the sport of fencing — and the volunteer officer of the Club who recommended plaintiff's hiring, James Melcher. It is undisputed that Melcher met plaintiff, then 58 years old, when she interviewed for a position at Melcher's firm in the summer of 2007. Although Melcher did not offer plaintiff a job at his firm, he told plaintiff that the Club, of which he was then chairman of the board, was searching for a new general manager and suggested that she apply for that position. In August 2007, the Club hired plaintiff as general manager at a salary of $60,000. In February 2008, at plaintiff's request, the Club gave her the title of executive director and broader responsibilities, including bringing in new members.

In November 2008, due to deficiencies in plaintiff's performance perceived by the Club's executive committee (which plaintiff disputes), the Club demoted her from executive director to office manager, but did not decrease her salary. Plaintiff's replacement as executive director (to whom she was to report) was Elizabeth Cross, a 53-year-old member of the Club's executive committee who had substantial business and fund-raising experience and considerable knowledge of fencing. Unfortunately,

plaintiff and Cross proved unable to work together, and the Club terminated plaintiff's employment in December 2008. The Club did not hire anyone to replace plaintiff as office manager.

For a prima facie case of discrimination to exist (whether under the framework of *McDonnell Douglas Corp. v Green*, 411 US 792 [1973] or under the "mixed motive" framework recognized in *Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 40 [1st Dept 2011], *lv denied* 18 NY3d 811 [2012]), there must be evidence that:

> "(1) [the plaintiff] is a member of a protected class; (2) she was qualified to hold the position; (3) she was terminated from employment or suffered another adverse employment action; and (4) the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination" (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 [2004]).

It is undisputed that plaintiff satisfies the first three criteria for a prima facie case — she was 58 and 59 years old at the time of the relevant events; defendants had deemed her qualified for the position when they hired her less than a year and a half before she was terminated; and her demotion (notably, without a reduction in salary) and subsequent discharge plainly constitute adverse employment actions. Plaintiff fails, however, to satisfy the fourth criterion of the prima facie test, in that the adverse employment actions against her simply did *not* "occur[] under circumstances giving rise to an inference of

discrimination" (*Forrest*, 3 NY3d at 305). This is because (1) plaintiff's termination at age 59 occurred only about one year after she had been hired at age 58; and (2) plaintiff's replacement as executive director of the Club was the aforementioned 53-year-old Elizabeth Cross, only six years younger than plaintiff and a fellow member of the same protected class to which plaintiff belongs.[4] While these facts would not necessarily negate an inference of discriminatory intent that could be drawn from other evidence, the problem for plaintiff, and the flaw in the majority's analysis, is that, in this case, there is no evidence in the record from which such an inference could rationally be drawn.

The remarks by Cross, after she replaced plaintiff as executive director, about plaintiff looking "tired" or seeming to need "rest" do not suffice to support an inference that the Club discriminated against plaintiff based on her age (*see Ji Sun*

[4]I see no merit in plaintiff's assertion that she was replaced, not by the 53-year-old Cross, but by a woman in her twenties who assumed, upon plaintiff's termination, three tasks that plaintiff had performed (registering new members, processing dues payments, and ordering office supplies). The record establishes that the bulk of plaintiff's responsibilities passed to the new executive director upon plaintiff's demotion from that position to that of office manager. Again, when plaintiff was terminated a month after her demotion, the Club did not hire anyone to replace her as office manager.

Jennifer Kim v Goldberg, Weprin, Finkel, Goldstein, LLP, 120 AD3d 18, 26 [1st Dept 2014] [dismissing a hostile work environment claim where the plaintiff "cites only isolated remarks or incidents" that "a reasonable person would consider . . . nothing more than petty slights"] [internal quotation marks omitted]; *Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 126 [1st Dept 2012] ["stray, marginally age-related remarks . . . , none of which concerned an employment decision," did not create an issue as to whether the defendant's reasons for its actions were pretextual]). Plaintiff's deposition testimony about these remarks was exceedingly vague; she claimed that Cross made remarks of this kind "frequently" but did not describe the context in which Cross made them. Cross, for her part, avers that, on two occasions when she and plaintiff were working very late, she remarked to plaintiff that she looked "tired" and should go home. So far as disclosed by the record, Cross made these remarks to plaintiff and no one else; there is no indication that Cross communicated the remarks to other members of the Club's board who participated in the Club's employment decisions.[5]

[5]Since there is no evidence that Cross communicated the remarks to the Club's board, the record offers no support for the

Even when the evidence is viewed in the light most favorable to plaintiff, Cross's remarks about plaintiff looking "tired" simply do not give rise to a reasonable inference of discriminatory intent on the part of the Club.[6] Yet, given the lack of anything else from which to draw such an inference to support a prima facie case of age discrimination, plaintiff's case — and the majority's affirmance of the denial of defendants' summary judgment motion — rest entirely on these ostensibly innocuous and inoffensive remarks. In my view, Cross's remarks, even as described by plaintiff, simply cannot bear this weight.

To be sure, there are workplace remarks that give rise to an inference of discriminatory bias that is reasonable or even strong (*see Sandiford v City of New York Dept. of Educ.*, 94 AD3d

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majority's assertion that the remarks "implicitly suggest[ed] that *the board* should view Cross herself, at 53, as a member of a younger age group than that in which she placed plaintiff" (emphasis added). The majority, taking the remarks as an indication of bias, simply speculates that Cross made comments of similar import to other members of the Board.

[6]There is no basis for the majority's accusation that I "fail[] to abide" by the requirement that, on a summary judgment motion, the evidence be viewed in the light most favorable to the opponent of the motion. In some cases, the probative value of the evidence relied upon by the opponent of the motion is so slight that, even when viewed in the light most favorable to that party, that evidence fails to raise a triable issue. This is such a case.

593, 595 [1st Dept 2012] ["testimony regarding . . . repeated derogatory remarks regarding gays and lesbians was sufficient to raise a question of fact as to . . . unlawful discriminatory practices"], *affd* 22 NY3d 914 [2013]). It is outlandish, however, to place in the same category as such offensive comments a supervisor's asking an employee about her energy level during a late night at the office, particularly when the record is otherwise devoid of evidence to support an inference of discriminatory bias (*cf. Weiss v JPMorgan Chase & Co.*, 332 Fed Appx 659, 664-665 [2d Cir 2009] [a stray remark could be viewed as indicative of age-related bias when "consider(ed) . . . in the context of the other evidence"]). It is simply fanciful for the majority to assert that such anodyne remarks "*directly* reflect age-based discriminatory bias" (emphasis added) and could reasonably be construed as "implying that plaintiff . . . was infirm." People of any age can become tired when working late, and asking an employee if she would like to go home to get some rest after a long day at the office is not, so far as I am aware, a tort. I am astonished that the majority allows an age discrimination case to go to trial when the record contains not a scrap of evidence besides these comments to support an inference of discriminatory intent.

Allowing an action for age discrimination as weak as this one to go to trial essentially turns the Human Rights Law into a right of action for any discharged or demoted employee within a protected class who feels that the employer undervalued his or her performance, whether or not any rational inference of invidious discrimination — as opposed to disagreements over the quality of the employee's performance — arises from the circumstances of the employer's action. Further, denying the employer summary judgment notwithstanding the absence of any rational basis for inferring discriminatory intent will have the perverse effect of discouraging employers from hiring individuals within classes protected under the Human Rights Law. In nonetheless affirming the denial of summary judgment in this matter, the majority's decision threatens to turn a court considering an employment discrimination case into "a super-personnel department that reexamines an entity's business decisions" (*Baldwin v Cablevision Sys. Corp.*, 65 AD3d 961, 966

[1st Dept 2009] [internal quotation marks omitted], *lv denied* 14 NY3d 701 [2010]). Because this is not the purpose of the Human Rights Law, I respectfully dissent.

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

ENTERED: May 5, 2015

DEPUTY CLERK

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

13910 Jairo Martinez, Index 309937/09
Plaintiff-Respondent-Appellant, 83892/10
83960/10

-against-

342 Property LLC, et al.,
Defendants-Appellants-Respondents,

Site Safety LLC,
Defendant.

[And Other Third-Party Actions]

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Carol R. Finocchio, New York, for appellants-respondents.

Gorayeb & Associates, PC, New York (John M. Shaw of counsel), for respondent-appellant.

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Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about February 11, 2014, which, to the extent appealed from as limited by the briefs, granted so much of defendants 342 Property LLC and Flintlock Construction Services, LLC's motion for summary judgment as sought dismissal of plaintiff's Labor Law § 241(6) cause of action, denied so much of their motion as sought dismissal of plaintiff's Labor Law § 240(1) cause of action, and denied plaintiff's cross motion for partial summary judgment on the Labor Law §§ 240(1) and 241(6) causes of action, unanimously modified, on the law, to grant defendants' motion in its entirety, and otherwise affirmed,

without costs. The Clerk is directed to enter judgment dismissing the complaint as against these defendants.

Plaintiff and his coworkers were moving a piece of an 8,000-pound piece of equipment across a flat platform. The ultimate goal was to place the equipment onto the forks of a forklift. Plaintiff testified that because two wheels broke off, the workers were pushing and pulling the equipment when it pinned him against a column on the side of the platform. Plaintiff testified that they did not lift the equipment into the air, and that it did not fall. Nor did he know what caused the equipment to shift laterally towards his side. Plaintiff's testimony established that the piece of equipment that pinned him to the column was not a "falling object" and that he was not a "falling worker," and the accident did not otherwise flow from the application of the force of gravity. Thus, he was not covered by Labor Law § 240(1) under the current case law (*see Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 8 [2011], citing *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259 [2001]; *Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]; *Mosher v County of Rensselaer*, 232 AD2d 952 [3d Dept 1996]).

The motion court properly granted defendants' motion for summary judgment dismissing plaintiff's Labor Law § 241(6) cause

of action, because the provisions of the Industrial Code relied on by plaintiff (12 NYCRR 23-1.25[b] and 12 NYCRR 23-6.1[c],[d]) are either not sufficiently specific to give rise to a triable claim under section 241(6) (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 502 [1993]) or are inapplicable to the facts of this case. "[S]ection 23-1.5 of the Industrial Code is too general to support a cause of action for violating Labor Law § 241(6)" (*Kochman v City of New York*, 110 AD3d 477, 478 [1st Dept 2013]) and 12 NYCRR 23-6.1(c) and (d) are inapplicable because his accident did not arise out of the operation or loading of "material hoisting equipment." Even if we were to consider the affidavit stating that the equipment was being loaded onto the forklift at the time of the accident, subdivisions 23-6.1(c) and (d) would still not apply because the general requirements of those provisions do not apply to "fork lift trucks" (12 NYCRR 23-6.1[a]). Further, there is no evidence that plaintiff's accident was caused by the unsafe operation of material hoisting equipment

(*see* 12 NYCRR 23-6.1[c]) or an overloaded or improperly balanced load being moved by material hoisting equipment (*see* 12 NYCRR 23-6.1[d]).

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

ENTERED: May 5, 2015

DEPUTY CLERK

Friedman, J.P., Sweeny, Saxe, Feinman, Clark, JJ.

14323 Sabine Von Sengbusch, Index 154209/12
Plaintiff-Respondent,

-against-

Les Bateaux De New York, Inc.,
doing business as SailTime New York,
Defendant-Appellant,

Dolphin Services, LLC, et al.,
Defendants.

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Carroll, McNulty & Kull LLC, New York (David Kupfer of counsel), for appellant.

McGivney & Kluger, P.C., New York (Kerryann Cook of counsel), for respondent.

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Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered on or about July 29, 2014, which, to the extent appealed from as limited by the briefs, denied defendant's motion for summary judgment dismissing the complaint and the cross claims against it and for judgment on its counterclaim for attorneys' fees without prejudice to renewal after discovery, unanimously modified, on the law, to the extent of granting the motion with respect to the negligence, indemnity and diminution of value causes of action, and otherwise affirmed, without costs.

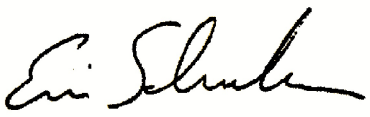
The motion court properly determined that summary judgment is premature because an employee of defendant has not yet been

deposed.

However, the negligence cause of action should have been dismissed as duplicative of the contract claim because it failed to allege a duty independent of the contract (*see Clark-Fitzpatrick, Inc. v Long Is. R. R. Co.*, 70 NY2d 382, 389 [1987]; *Wildenstein v 5H&Co., Inc.*, 97 AD3d 488, 491-492 [1st Dept 2012]), and because it alleges only economic harm (*see Verizon N.Y., Inc. v Optical Communications Group, Inc.*, 91 AD3d 176, 181-182 [1st Dept 2011]). The claim for diminution of the value of the boat does not constitute a separate cause of action, the claim for indemnity is unsupported, and plaintiff failed to address defendant's opposition to both claims before the motion court or on appeal.

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

ENTERED: May 5, 2015



DEPUTY CLERK

Mazzarelli, J.P., Andrias, Saxe, Feinman, Clark, JJ.

14499 Jorge C., an Infant, by His Mother and Natural Guardian Lillian Rivera, et al., Plaintiffs-Appellants

-against-

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

Index 350083/12

Warren S. Hecht, Forrest Hills, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Emma Grunberg of counsel), for respondent.

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered December 9, 2013, which granted the motion of defendants New York City and New York City Board of Education for summary judgment dismissing the complaint, unanimously affirmed, without costs.

According to his deposition testimony, the ten year old infant plaintiff was scheduled to attend a gym class in a public park adjacent to his school. He did not see his physical education teacher and went straight to a playground area with several of his friends. After playing on the swing sets and the slide for most of the period, the infant plaintiff went for a drink at the water fountain near the swings, where Chris, a

classmate in his gym class, had picked up a balloon from the ground and filled it with water. Chris was throwing the water balloon "at everybody," and the infant plaintiff, who had finished his drink, ran when Chris was going to throw it at him. Looking back towards Chris, the infant plaintiff collided with a pole, striking his head near the left eyebrow. He started to cry and a friend took him to his teacher, Mr. Mehling, who was on the baseball field adjacent to the playground, "playing a baseball game with the big kids." According to Mr. Mehling, the incident occurred when he was cleaning up equipment on the baseball field at the end of the class, at which time students were allowed to use the water fountain in the playground.

The complaint as against the City of New York was correctly dismissed. The City is a legal entity separate from the Board of Education and cannot be held liable for torts committed by the Board (*see Perez v City of New York*, 41 AD3d 378 [1st Dept 2007], *lv denied* 10 NY3d 708 [2008]).

As to the claim against the Board, it is well settled that

> "[s]chools are under a duty to adequately supervise the students in their charge and they will be held liable for foreseeable injuries proximately related to the absence of adequate supervision. Schools are not insurers of safety, however, for they cannot reasonably be expected to continuously supervise and control all movements and activities of students; therefore,

> schools are not to be held liable for every thoughtless or careless act by which one pupil may injure another. A teacher owes it to his [or her] charges to exercise such care of them as a parent of ordinary prudence would observe in comparable circumstances (*Mirand v City of New York*, 84 NY2d 44, 49 [1994] [internal citations and quotation marks omitted]).

"Even if a breach of the duty of supervision is established, the inquiry is not ended; the question arises whether such negligence was the proximate cause of the injuries sustained" (*id.* at 50). "'Where an accident occurs in so short a span of time that even the most intense supervision could not have prevented it, any lack of supervision is not the proximate cause of the injury and summary judgment in favor of the [defendant school district] is warranted'" *(Esponda v City of New York*, 62 AD3d 458, 460 [1st Dept 2009] quoting *Convey v City of Rye School Dist.*, 271 AD2d 154, 160 [2d Dept 2000]). Thus, "[a]n injury caused by the impulsive, unanticipated act of a fellow student ordinarily will not give rise to a finding of negligence absent proof of prior conduct that would have put a reasonable person on notice to protect against the injury-causing act" (*Diana G. v Our Lady Queen of Martyrs Sch.*, 100 AD3d 592, 594 [2d Dept 2012], *lv denied* 20 NY3d 859 [2013]).

Here, even assuming that plaintiff could demonstrate that

the supervision during the gym class was inadequate, the Board established a prima facie case for summary judgment by demonstrating that the accident was the result of a series of sudden and spontaneous acts and that any lack of supervision was not the proximate cause of the infant plaintiff's injury (*see Francisquini v Board of Educ.*, 305 AD2d 455, 455-456 [2d Dept 2003]; *Janukajtis v Fallon*, 284 AD2d 428, 429-430 [2d Dept 2001]; *Foster v New Berlin Cent. Sch. Dist.*, 246 AD2d 880 [3rd Dept 1998]). Although the infant plaintiff did not testify as to exactly how much time elapsed, his testimony as to how the accident occurred, as a whole, demonstrates the injury was caused by the impulsive and unanticipated acts of Chris finding a balloon, filling it with water and attempting to throw the water balloon at the infant plaintiff, and the infant plaintiff's running away and looking backwards, rather than ahead, which no additional supervision could have prevented (*see Rivera v Roman Catholic Church of St. Helena*, 114 AD3d 499 [1st Dept 2014]; *Rosborough v Pine Plains Cent. School Dist.*, 97 AD3d 648 [2d Dept 2012]; *Janukajtis*, 284 AD2d at 430).

In opposition, plaintiff failed to raise a triable issue of fact. Given the sudden and spontaneous nature of the events

leading up to the accident, absent proof of prior conduct that would have put a reasonable person on notice to protect against the injury-causing acts, the Board can not be found negligent (*see Diana G.*, 100 AD3d at 594).

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

ENTERED: May 5, 2015

DEPUTY CLERK

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

14993 The People of the State of New York, Ind. 5574/11
Respondent,

-against-

Douglas Johnson,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Charles H. Solomon, J. at 190.50 motion; Ronald A. Zweibel, J. at jury trial and sentencing), rendered January 10, 2013, convicting defendant of robbery in the third degree and grand larceny in the fourth degree, and sentencing him, as a second felony offender, to an aggregate term of 3½ to 7 years, unanimously affirmed.

The court properly denied defendant's motion to dismiss the indictment, made on the ground that he was deprived of his right to testify before the grand jury. The record establishes that the People provided defendant with an opportunity to testify but that his failure to do so resulted from his unruly, volatile and physically menacing behavior before the grand jurors (*see People v Dunn*, 248 AD2d 87 [1st Dept 1998], *appeal withdrawn* 93 NY2d

1002 [1999]; *see also People v Davis*, 287 AD2d 376 [1st Dept 2001], *lv denied* 97 NY2d 680 [2001]). Defendant's behavior in the grand jury was so alarming that when the prosecutor eventually had defendant removed from the grand jury room, his attorney immediately asked the court to order a CPL article 730 psychiatric examination. Although defendant was removed before he could give any testimony, the facts, upon which both the prosecutor and defense counsel agreed, demonstrated an urgent need to remove defendant immediately for the safety of the persons in the grand jury room.

The court also properly denied the dismissal motion on the alternative ground that, where the court has ordered a competency examination, CPL 730.40(3) allows a grand jury to vote an indictment without hearing from a defendant who has requested to testify. While the court had not formally issued such an order before the grand jury voted the indictment, the court had determined that it would issue an examination order the next day, and issued a securing order commanding that defendant be brought before it for that purpose the following morning. Thus, the CPL 730.40(3) exception was properly applied to the unusual circumstances presented (*see People v Galberth*, 14 AD3d 420 [2005], *lv denied* 4 NY3d 853 [2005]).

After defendant was found fit to proceed, the trial court properly granted defendant's request to represent himself. In a thorough inquiry, the court repeatedly emphasized the disadvantages and risks of waiving the right to counsel. The court also sufficiently inquired into whether defendant's mental condition would affect his ability to waive his right to counsel and proceed pro se (*see People v Stone*, 22 NY3d 520, 527-529 [2014]).

There is no merit to defendant's argument that he was deprived of a fair trial. The court was not obligated to assist defendant in trying his case. "Ineptitude, inherent in almost any case of self-representation, is a constitutionally protected prerogative" (*People v Schoolfield*, 196 AD2d 111, 117 [1st Dept 1994], *lv dismissed* 83 NY2d 858 [1994]). Moreover, although not

required to do so, the court permitted defendant to be assisted by standby counsel.

We perceive no basis for reducing the sentence.

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

ENTERED: May 5, 2015

DEPUTY CLERK

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

14994-
14994A Rajagopala S. Raghavendra, etc.,
Plaintiff-Appellant,

-against-

Edward A. Brill, etc., et al.,
Defendants-Respondents,

John Doe, et al.,
Defendants.

Index 600002/11

_____

Robert G. Leino, New York, for appellant.

Proskauer Rose LLP, New York (Susan D. Friedfel of counsel), for Edward A. Brill, Proskauer Rose LLP, Lee C. Bollinger, and The Trustees of Columbia University, respondents.

Gordon & Rees LLP, New York (Robert Modica of counsel), for Louis D. Stober, Jr., and Law Office of Louis D. Stober, Jr., LLC, respondents.

_____

Orders, Supreme Court, New York County (Lucy Billings, J.), entered on or about February 4, 2014, which, insofar as appealed from as limited by the briefs, granted defendants Lee C. Bollinger and the Trustees of Columbia University (Columbia), Proskauer Rose, LLP, and Edward A. Brill (Proskauer), and the Stober defendants' (Stober) motions to dismiss the complaint as against them, and denied plaintiff's motion for preliminary injunctive relief, unanimously affirmed, with costs.

Plaintiff's claims against Stober relating to alleged

wrongdoing in connection with the negotiation and execution of the July 2009 global settlement agreement of three related federal actions sound in legal malpractice, and are barred by the doctrine of res judicata. The District Court expressly held, in a final order entered upon plaintiff's challenge to a fee award to Stober, that "the retainer agreement was valid and enforceable" and that Stober was entitled to a fee equal to "one-third of the settlement amount, less $10,000.00 for the up-front" retainer fee paid by plaintiff (*Raghavendra v Trustees of Columbia Univ.*, 2012 WL 3778823, *5, *7, 2012 US Dist LEXIS 124598, *16, *21 [SD NY 2012]). Thus, the District Court necessarily concluded that there was no legal malpractice, and plaintiff is barred from relitigating the malpractice claims (*Summit Solomon & Feldesman v Matalon*, 216 AD2d 91 [1st Dept 1995], *lv denied* 86 NY2d 711 [1995]).

Plaintiff's claims against Stober relating to other alleged wrongdoing in connection with the settlement agreement sound, inter alia, in negligence, unjust enrichment, breach of fiduciary duty, and breach of attorney services contract, and are duplicative of the legal malpractice claim (*see Garnett v Fox, Horan & Camerini, LLP*, 82 AD3d 435 [1st Dept 2011]; *InKine Pharm. Co. v Coleman*, 305 AD2d 151 [1st Dept 2003]). To the extent not

duplicative of the malpractice claim, the intentional tort claims are time-barred under the applicable one-year limitations period, since those claims accrued no later than July 30, 2009, and plaintiff did not commence this action until November 2011 (*see* CPLR 215[3]; *Havell v Islam*, 292 AD2d 210 [1st Dept 2002]).

Plaintiff's claims against Stober for breach of the settlement agreement and tortious interference therewith were correctly dismissed because Stober is not a party to the settlement agreement, and plaintiff cannot establish that Columbia (the counterparty to the settlement agreement) breached the agreement, a necessary element of the tortious interference claim. The District Court ruled that Columbia is not yet under an obligation to pay the settlement amount, because, among other things, plaintiff has refused to render his own performance by executing a general release, as ordered by the District Court. The Second Circuit affirmed the District Court's finding that the settlement agreement was valid and enforceable (*see Raghavendra v Trustees of Columbia Univ.*, 434 Fed Appx 31 [2d Cir 2011]). Accordingly, the causes of action against Stober for breach of and tortious interference with the settlement agreement are barred by the doctrine of res judicata (*Englert v Schaffer*, 61 AD3d 1362 [4th Dept 2009]).

Because he cannot establish that there has been any breach, plaintiff's claims against Columbia for breach of or tortious interference with the settlement agreement were correctly dismissed. The doctrines of res judicata and collateral estoppel preclude plaintiff from asserting his claims of fraud and abuse of process and aiding and abetting fraud and abuse of process. The Second Circuit's express holding that the settlement agreement is valid and enforceable disposes of plaintiff's claims that it was reached through oppressive means or is otherwise unenforceable.

Plaintiff's claims against Proskauer overlap with or are derivative of his claims against Columbia, and were correctly dismissed for the same reasons. Plaintiff did not have an attorney-client relationship with Proskauer (*see United States Fire Ins. Co. v Raia*, 94 AD3d 749 [2d Dept 2012]). Nor can he establish any "fraud, collusion, malicious acts, or other special circumstances" necessary to impose liability upon an attorney for harm suffered by parties not in privity with the attorney (*see Raia*, 94 AD3d at 751).

Plaintiff's application for preliminary injunctive relief is rendered academic by the dismissal of the complaint.

We have considered plaintiff's remaining contentions and find them without merit.

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

ENTERED: May 5, 2015

DEPUTY CLERK

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

14995 Rajagopala S. Raghavendra, etc., Index 100389/13
Plaintiff-Appellant,

-against-

Lee C. Bollinger, etc., et al.,
Defendants-Respondents.

_____

Robert G. Leino, New York, for appellant.

Proskauer Rose LLP, New York (Susan D. Friedfel of counsel), for respondents.

_____

Order, Supreme Court, New York County (Lucy Billings, J.), entered on or about February 4, 2014, which, to the extent appealed from as limited by the briefs, granted defendants' motion to dismiss the causes of action under the State and City Human Rights Laws, unanimously affirmed, with costs.

This action is time-barred. Defendants' refusal to rehire plaintiff was communicated to him no later than June 28, 2007; the applicable limitations period started running on that date (*see National R.R. Passenger Corp. v Morgan*, 536 US 101, 114 [2002]). Plaintiff's repeated applications to be rehired could not toll, or restart, the limitations period (*see White v Stackhouse, Inc.*, 910 F Supp 269, 273-274 [WD Va 1995]; *DeFazio v Delta Air Lines, Inc.*, 849 F Supp 98, 102 [D Mass 1994], *affd* 34

F3d 1065 [1st Cir 1994]). Defendants' "application of the non-rehire policy, [to the extent] it occur[red] within the statutory time-limits, can not form the basis of a discrete act of discrimination upon which plaintiff may proceed. Rather, the application of the non-rehire policy was a continuation of the original determination that plaintiff was not eligible for re-employment" (*McMillin v United Airlines*, 2008 US Dist LEXIS 29917, *10-*11 [WD NY 2008]).

As the motion court found, this action is also barred, pursuant to the doctrine of res judicata, by a prior federal court judgment disposing of all of the claims that plaintiff raised or could have raised in that court (*see Vedder v County of Nassau*, 59 AD3d 527 [2d Dept 2009], *lv denied* 13 NY3d 702 [2009]; *Town of New Windsor v New Windsor Volunteer Ambulance Corps., Inc.*, 16 AD3d 403, 405 [2d Dept 2005]). Plaintiff's unceasing applications to be rehired do not remove his postjudgment claims from the bar of res judicata (*see Benjamin v New York City Dept. of Health*, 57 AD3d 403 [1st Dept 2008], *lv dismissed* 14 NY3d 880

[2010]; *Spoon v American Agriculturalist*, 103 AD2d 929 [3d Dept 1984]).

We have considered plaintiff's remaining contentions and find them without merit.

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

ENTERED: May 5, 2015

DEPUTY CLERK

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

14996 In re Terrell H.,

A Person Alleged to
be a Juvenile Delinquent,
Appellant.
- - - - -
Presentment Agency

_____

Tamara A. Steckler, The Legal Aid Society, New York (Diane Pazar of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Emma Grunberg of counsel), for presentment agency.

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Order, Family Court, New York County (Susan R. Larabee, J.), entered on or about February 4, 2014, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed an act that, if committed by an adult, would constitute the crime of criminal trespass in the second degree, and placed him with the Close to Home program for a period of eight months, unanimously affirmed, without costs.

The court properly denied appellant's motion to suppress his statements to the police. During a lawful investigatory detention (*see People v Galloway*, 40 AD3d 240 [1st Dept 2007]), *lv denied* 9 NY3d 844 [2007]) the police only asked clarifying questions that did not require *Miranda* warnings (*see People v*

Huffman, 41 NY2d 29, 33-34 [1976]; *Matter of Rennette B.*, 281 AD2d 78 [1st Dept 2001]). An investigatory seizure of a suspect does not necessarily require the police to administer *Miranda* warnings before asking any questions (*see Berkemer v McCarty*, 468 US 420, 436-437 [1984]; *People v Bennett*, 70 NY2d 891 [1987]).

The fact-finding determination 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 court's credibility determinations.

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

ENTERED: May 5, 2015

DEPUTY CLERK

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

14997 The People of the State of New York, Ind. 4719/11
Respondent,

-against-

Princess Sorden,
Defendant-Appellant.

_____

Scott A. Rosenberg, The Legal Aid Society, New York (Adrienne M. Gantt of counsel) for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Richard Nahas 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 (Charles Solomon, J.), rendered on or about August 7, 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: May 5, 2015

DEPUTY CLERK

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

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

15000 Douglas L. Leight, et al., Index 104686/11
Plaintiffs-Respondents,

-against-

W7879 LLC, et al.,
Defendants-Appellants.

_____

Kucker & Bruh, LLP, New York (Saul D. Bruh of counsel), for appellants.

Collins, Dobkin & Miller, LLP, New York (Seth A. Miller of counsel), for respondents.

_____

Order and judgment (one paper), Supreme Court, New York County (Joan M. Kenney, J.), entered September 3, 2014, which to the extent appealed from as limited by the briefs, denied defendants' motion to dismiss with respect to plaintiffs John Masten and Dianne Wiest, and granted plaintiffs certain relief, unanimously reversed, on the law, without costs, the judgment vacated, defendants' motion granted as to Masten and Wiest, and it is declared that their apartments are not rent-stabilized. The Clerk is directed to enter judgment accordingly.

The motion court erred in determining that defendants had not moved to dismiss the claims as to Masten and Wiest. Defendants' notice of motion clearly states that they moved to dismiss all of the claims asserted in the complaint, and

plaintiffs cross-moved, inter alia, to stay determination of that part of defendant's motion to dismiss directed to plaintiffs Masten and Wiest, pending appeal. Further, the affirmation of James Marino submitted in support of defendants' motion contains an entire section under the argument heading "Plaintiffs Masten and Wiest's Apartments Are Not Subject To Deregulation Since They Had a Full and Fair Opportunity To Challenge the Orders of Deregulation At DHCR," and point II in defendants' memorandum of law has the heading "Plaintiff Masten and Wiest's Claims Are Precluded by the Doctrines of Collateral Estoppel and Administrative Finality." Thus, we will consider those parts of the parties' motions which were overlooked.

Defendants argue that plaintiffs are collaterally estopped from asserting their claims under *Gersten v 56 7th Ave., LLC* (88 AD3d 189 [1st Dept 2011], *appeal withdrawn* 18 NY3d 954 [2012]). We agree that plaintiffs had a full and fair opportunity to participate in the deregulation proceedings held more than a decade earlier before New York State Division of Housing and Community Renewal (DHCR), which proceedings resulted in the issuance of deregulation orders exempting plaintiffs' apartments from rent stabilization under luxury deregulation law. However, plaintiffs' claims here are not subject to collateral estoppel,

since the issues in this litigation are not identical to those in the prior DHCR deregulation proceedings *(Gersten v 56 7th Ave., LLC*, 88 AD3d at 201).

Turning to the merits of plaintiffs' claims, we find that they are not entitled to a declaratory judgment that their apartments are rent-stabilized, since they have failed to establish, as a matter of law, that their apartments became re-regulated upon plaintiffs' execution of subsequent market rate leases.

We note that the orders of deregulation of DHCR remain in all force and effect.

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

ENTERED: May 5, 2015

DEPUTY CLERK

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

15001 Probate Proceeding, Estate of Basil Constant, etc., Deceased. File 514A/12

- - - - -

In re Anthony DeLorenzo,
Petitioner-Appellant,

-against-

Anastasia Benoist, et al.,
Objectants-Respondents,

Jack Stylianou,
Respondent.

_____

Mario Biaggi, Jr., New York, for appellant.

Laurino Laurino & Sconzo, Garden City (Lisa M. Sconzo of counsel), for Anastasia Benoist and Lucille Elko, respondents.

_____

Order, Surrogate's Court, Bronx County (Nelida Malave-Gonzalez, S.), entered on or about June 27, 2014, which denied petitioner's motion to expand discovery beyond the time permitted under 22 NYCRR § 207.27, to permit depositions of the purported attorney draftsman and two attesting witnesses of an alleged 2006 will, to explain decedent's state of mind and reasons for executing the 2010 will as decedent approached 100 years old, unanimously affirmed, without costs.

The court properly exercised its discretion in denying petitioner's motion to expand the scope of discovery, as no

special circumstances are presented in this case (22 NYCRR § 207.27). The alleged 2006 will is not at issue in this probate proceeding, and, to the extent objectants are asserting that the decedent had been incapacitated since 2006, they will bear the burden of such proof. In any event, it is decedent's capacity in 2010, when he executed the propounded will, that is at issue.

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

ENTERED: May 5, 2015

DEPUTY CLERK

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

15002- Ind. 1441/12
15002A The People of the State of New York, 657/12
Respondent,

-against-

Fred Taylor,
Defendant-Appellant.

_____

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

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

_____

Appeals having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Lewis Bart Stone, J. at plea; Jill Konviser J. at sentencing), rendered on or about January 10, 2013,

Said appeals 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 judgments so appealed from be and the same are hereby affirmed.

ENTERED: May 5, 2015

DEPUTY CLERK

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

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

15003 The City of New York, Index 450631/13
Plaintiff-Appellant,

-against-

Abdo M. Hassan,
Defendant-Respondent,

Hudson Associates, et al.,
Defendants.

_____

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

Law Office Of Christopher Lynn, Long Island City, (Christopher Lynn of counsel), for respondent.

_____

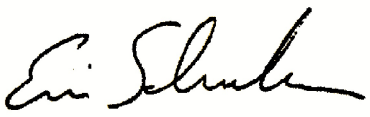
Order, Supreme Court, New York County (Milton A. Tingling, J.), entered September 13, 2013, which, after a hearing, dismissed the City's complaint seeking a permanent injunction and sanctions pursuant to the Nuisance Abatement Law, unanimously reversed, on the law, without costs, the order vacated, and the matter remanded for further proceedings.

Sections 7-706 and 7-707(a) of the Administrative Code of the City of New York provides for a permanent or preliminary injunction to enjoin a public nuisance when the relevant criteria are established. Here, as found by the IAS court, it is undisputed that the City established that, within one year of its

action, illegal sales of alcoholic beverages had occurred at defendants' premises on several occasions, in violation of the Alcohol and Beverage Control Law § 123(1)(a). In light of the proof of illegal sales at the premises over an extended period, the City has an "'ongoing right to ensure that [defendants] do not subsequently recommence their illegal activities in the same location'" (*City of New York v Ring*, 34 AD3d 218, 219 [1st Dept 2006], quoting *City of New York v Partnership 91*, 277 AD2d 164, 164 [1st Dept 2000] and *City of New York v Mor*, 261 AD2d 185, 187 [1st Dept 1999], *appeal dismissed* 93 NY2d 1041 [1999]), despite the apparent abatement of the nuisance due to the removal of alcoholic beverages from the premises and the surrender of defendant's liquor license (*see Ring* at 219).

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

ENTERED: May 5, 2015



DEPUTY CLERK

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

15004- Index 604989/01
15005-
15006 James Montrose Sansum,
Plaintiff-Respondent-Appellant,

-against-

Helen Constantino Fioratti, et al.,
Defendants-Appellants-Respondents.

_____

Morelli & Gold, LLP, New York (Richard L. Gold of counsel), for appellants-respondents.

Aidala & Bertuna, P.C., New York (Sigismondo F. Renda of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Barbara Jaffe, J.), entered May 16, 2013, which denied defendants' motion to strike plaintiff's pleading, unanimously modified, on the law, to order plaintiff to provide substantive responses to defendants' fourth set of interrogatories, and otherwise affirmed, without costs. Order, same court and Justice, entered January 16, 2014, which granted in part and denied in part the parties' competing motions for partial summary judgment, unanimously modified, on the law, to dismiss the sixth cause of action for common law dissolution; to grant defendants' summary judgment as to liability on their fifth counterclaim under the faithless servant doctrine; to reinstate defendants' other affirmative defenses and

counterclaims; and otherwise affirmed, without costs.

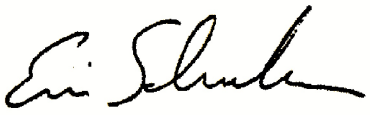
Contrary to the motion court's finding, plaintiff's guilty plea and his deposition testimony conclusively establish that he had embezzled not less than $100,000 from his employer over two years. As such, defendants were entitled to summary judgment as to liability on their fifth counterclaim, under the faithless servant doctrine (*see Feiger v Iral Jewelry*, 41 NY2d 928 [1977]). Plaintiff's claims for breach of fiduciary duty and good faith and fair dealing were properly dismissed as derivative, as they turn on allegations of the individual defendants' looting and mismanagement of the defendant corporation (*see Yudell v Gilbert*, 99 AD3d 108, 114 [1st Dept 2012]). Plaintiff's sixth cause of action for common law corporate dissolution, should have been dismissed under the doctrine of unclean hands, as plaintiff's embezzlement demonstrated that he could not seek equitable relief (*see Blue Wolf Capital Fund II, L.P. v American Stevedoring, Inc.*, 105 AD3d 178, 184 [1st Dept 2013]). We are not persuaded by plaintiff's argument that defendants used unlawful means to acquire the money and property he admittedly embezzled from them. Under the doctrine of in pari delicto, "no court should be required to serve as paymaster of the wages of crime" (*McConnell v Commonwealth Pictures Corp.*, 7 NY2d 465, 469 [1960][citation

omitted]).

Contrary to defendants' assertion, it was not necessary for the court to draw an adverse inference based on plaintiff's invocation of the Fifth Amendment at this point in the proceeding (*see Rodriguez v Galin*, 13 AD3d 188 [1st Dept 2004]). Defendants did not provide sufficient material in the record to justify striking plaintiff's deposition testimony. Finally, the motion court did not err in refusing to strike the pleadings based on plaintiff's failure to provide substantive answers to the Fourth Set of Interrogatories, because plaintiff required his depositions transcripts to answer the questions. However, now that plaintiff has the transcripts, he must respond to the Fourth Set of Interrogatories.

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

ENTERED: May 5, 2015



DEPUTY CLERK

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

15007 Jose Ramon Martinez, Index 301486/11
Plaintiff-Respondent,

-against-

Robert Cofer, et al.,
Defendants-Appellants.

_____

Gallo, Vitucci, Klar, LLP, New York (Kimberly A. Ricciardi of counsel), for appellants.

Ephrem J. Wertenteil, New York, for respondent.

_____

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered March 31, 2014, which granted plaintiff's motion for partial summary judgment on the issue of liability, unanimously affirmed, without costs.

The accident giving rise to plaintiff's claim involved an intersection collision between plaintiff's vehicle, which was traveling on a highway that was not regulated by any traffic control device, and defendants' vehicle, which had come to a stop at a stop sign and then entered the intersection. Since plaintiff had the right of way (Vehicle and Traffic Law § 1142), he was "entitled to anticipate that other vehicles would obey the traffic laws that require them to yield" (*Namisnak v Martin*, 244 AD2d 258, 260 [1st Dept 1997]; *see Jordan v City of New York*, 12

AD3d 326 [1st Dept 2004]). A "presumption of negligence" arises from the failure of a driver at a stop sign "to yield the right of way" to the vehicle on the highway (*Murchison v Incognoli*, 5 AD3d 271, 271 [1st Dept 2004]). Defendants did not raise an issue of fact as to plaintiff's comparative negligence based on defendant Cofer's "bare speculation" that plaintiff must have been speeding because Cofer did not see plaintiff's car before they collided (*id.*; *see also Cadeau v Gregorio*, 104 AD3d 464 [1st Dept 2013]; *Szczotka v Adler*, 291 AD2d 444 [2d Dept 2002]; *compare Nevarez v S.R.M. Mgt. Corp.*, 58 AD3d 295, 296 [1st Dept 2008] [passenger saw other vehicle approaching "mad fast" prior to heavy impact]).

Plaintiff's statement that he may have been driving five miles over the posted speed limit of 30 miles per hour was insufficient to raise an issue of fact as to comparative negligence since there is no evidence that it could have contributed to the collision (*see Heltz v Barratt*, 115 AD3d 1298 [4th Dept 2014], *affd* 24 NY3d 1185 [2014]; *Daniels v Rumsey*, 111

AD3d 1408, 1410 [4th Dept 2013]). We note that the police accident report submitted by defendants in opposition to the motion supports plaintiff's claim that his car was broadsided by defendants' van, not the other way around.

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

ENTERED: May 5, 2015

DEPUTY CLERK

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

15008 The People of the State of New York, Ind. 2401/11
Respondent,

-against-

Luis Torres,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (C. Scott McAbee 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 a judgment of the Supreme Court, New York County (Michael J. Obus, J.), rendered on or about March 8, 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: May 5, 2015

DEPUTY CLERK

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

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

15009- Index 1628/06
15009A-
15009B-
15009C Sara Kinberg,
Plaintiff-Appellant,

-against-

Yoram Kinberg,
Defendant-Respondent.

_____

Sara Kinberg, appellant pro se.

Yoram Kinberg, respondent pro se.

_____

Orders, Supreme Court, Bronx County (Doris Gonzalez, J.), entered July 22, 2013, which granted plaintiff's motion for enforcement only to the extent of granting a hearing, and denied her motion for an order holding defendant in contempt, and orders, same court and Justice, entered March 5, 2014, which denied plaintiff's motion to dismiss defendant's counterclaims and to enforce the parties' September 7, 2000 agreement, unanimously affirmed, without costs.

In a prior order (59 AD3d 236 [1st Dept 2009]), we vacated awards made to defendant related to the parties' education fund and his share of the proceeds from the sale of the parties' apartment in Haifa, Israel, and reinstated plaintiff's claims for

damages for loss of value of stock due to its late transfer by defendant in breach of the settlement agreement, for defendant's breach of the settlement agreement by failing to obtain a religious divorce (get) within 30 days of the execution of the settlement agreement, and for the transfer of funds due and owing to her from the excess balance account portion of defendant's retirement account, and remanded the matter for further proceedings.

Supreme Court properly denied plaintiff's motions for enforcement, and properly denied her motion to dismiss defendant's claims. All of the issues and claims raised in these motions could not be determined by the documentary evidence, and, in accordance with our prior order, were properly included in the hearing commenced by Supreme Court.

Supreme Court properly denied plaintiff's motion for contempt on the ground that she had failed to exhaust remedies (see DRL § 245). In addition, while defendant admitted to failing to make certain payments, he correctly noted that Supreme Court's prior order specifically permitted him to withhold

certain payments as a credit against payments owed to him by plaintiff.

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

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

ENTERED: May 5, 2015

DEPUTY CLERK

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

15010 1592 Second Avenue, LLC, Index 113591/11
Plaintiff-Respondent,

-against-

Sonia Torres Hedvat,
Defendant-Appellant.

_____

Mark Guterman, White Plains, for appellant.

Gallet Dreyer & Berkey LLP, New York (Michelle P. Quinn of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Louis B. York, J.), entered February 13, 2014, awarding plaintiff the total sum of $177,895.85 based on a guarantee undertaken by defendant as inducement for a lease, unanimously affirmed, with costs.

The IAS court correctly determined that defendant was absolutely liable under the terms of the lease guarantee (*see*

e.g. Republic Natl. Bank of N.Y. v Haddad, 121 AD2d 986 [1986]).

We have considered the remaining arguments and find them unavailing.

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

ENTERED: May 5, 2015

DEPUTY CLERK

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

15011 In re Paul Bridgwood, Index 100033/13
Petitioner-Appellant,

-against-

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

_____

Glass Krakower LLP, New York (Bryan D. Glass of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Karen M. Griffin of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Donna M. Mills, J.), entered on or about September 19, 2013, denying the petition to annul respondents' determination, dated September 5, 2012, which sustained an unsatisfactory rating for the 2010-2011 school year, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Petitioner's claim that respondents violated Department of Education Bylaw § 4.3.3 based on the absence at the hearing of the assistant principal responsible for three of the four unsatisfactory observation reports is unpreserved since he did not raise this issue before the agency *(see Matter of Seitelman v Lavine,* 36 NY2d 165, 170 [1975]). In any event, respondents' determination had a rational basis as it was supported by the

testimony of the school principal, who conducted a formal observation of petitioner's performance and reached the same conclusions as the assistant principal *(see Matter of Murnane v Department of Educ. of the City of N.Y.*, 82 AD3d 576 [1st Dept 2011]).

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

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

ENTERED: May 5, 2015

DEPUTY CLERK

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

15012- Ind. 4627/07
15012A- 4686/07
15012B The People of the State of New York, 4693/07
Respondent,

-against-

Robert Patterson,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Marianne Stracquadanio of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Margaret L. Clancy, J.), rendered April 4, 2012, as amended May 24, 2012, convicting defendant, after a jury trial, of robbery in the second degree and burglary in the second degree, and judgments (same court and Justice) rendered April 4, 2012, as amended May 24, 2012 and November 8, 2012, convicting defendant, upon his pleas of guilty, of robbery in the first and third degrees and attempted robbery in the first degree, and sentencing him, and sentencing him, as a second violent felony offender, to an aggregate term of 20 years on all convictions, unanimously affirmed.

Authenticated records showing that the person who purchased

a particular prepaid cell phone, which was linked to the crime, supplied pedigree information linked to defendant were properly admitted as circumstantial evidence of defendant's identity as the purchaser of the phone. In the context of the case, the pedigree information did not constitute assertions of fact, but circumstantial evidence that the declarant was, in all likelihood, defendant (*see People v Boswell*, 167 AD2d 928 [4th Dept 1990], *lv denied* 77 NY2d 876 [1991], *lv dismissed* 81 NY2d 785 [1993]). Rather than being factual, the pedigree information was analogous to a fingerprint left on a document, tending to show the true identity of its author (*see People v Johnson,* 237 AD2d 971 [4th Dept 1997], *lv denied* 89 NY2d 1095 [1997]). Although the purchaser of the phone was not under a business duty to provide the pedigree information, that requirement of the business records exception to the hearsay rule did not apply, because the initial declaration was independently admissible (*see Matter of Leon RR*, 48 NY2d 117, 122 [1979]; *Kelly v Wasserman*, 5 NY2d 425 [1959]). The possibility that the phone could have been purchased by an unknown person who had somehow acquired defendant's pedigree information goes to weight, not admissibility. We have considered and rejected defendant's remaining arguments concerning the court's receipt of this

evidence.

Defendant made a valid waiver of his right to appeal with regard to his convictions by plea of guilty. Regardless of whether defendant validly waived his right to appeal in connection with his guilty pleas, we perceive no basis for reducing the sentences for any of defendant's convictions.

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

ENTERED: May 5, 2015

DEPUTY CLERK

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

15013 Inner City Redevelopment Corp., et al., Plaintiffs-Appellants, Index 103830/07

-against-

Thyssenkrupp Elevator Corporation, Defendant-Respondent,

Paramount Plumbing Co. of NY, Inc., Defendant.

[And a Third-Party Action]

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Law Office of Steven G. Fauth, LLC, New York (Steven G. Fauth of counsel), for appellants.

Geringer & Dolan LLP, New York (John T. McNamara of counsel), for respondent.

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Order, Supreme Court, New York County (Milton A. Tingling, J.), entered July 14, 2014, which denied plaintiffs' motion for partial summary judgment against defendant Thyssenkrupp Elevator Corporation seeking indemnification in the amount of $275,000 and setting the matter down for an assessment of damages with respect to its claims for defense costs on the grounds that there was no duty to defend or indemnify unless there was a finding of negligence, unanimously modified, on the law, to the extent of declaring that Thyssenkrupp has a broad duty to defend, and otherwise affirmed, without costs.

The indemnification provision in the elevator installation agreement required Thyssenkrupp, as subcontractor, to defend and indemnify the owner and contractor for bodily injury and damage resulting from Thyssenkrupp's own negligent actions. No finding has yet been made as to Thyssenkrupp's negligence, and thus no determination can yet be made as to its obligation to indemnify. As an indemnitor, Thyssenkrupp is not an insurer, and in that context its duty to defend is no broader than its duty to indemnify (*see Bellefleur v Newark Beth Israel Med. Ctr.*, 66 AD3d 807, 809 [2d Dept 2009]).

Nevertheless, where, as here, a party gives a promise to procure insurance to protect from a certain amount of liability, it may obtain insurance with an self-insured retention or deductible, but the promising party must pay any costs, including defense costs. This proposition is not based on Thyssenkrupp's status as a "self-insurer," but on its promise to procure insurance (*see Hoverson v Herbert Constr. Co.*, 283 AD2d 237, 238 [1st Dept 2001]*; Structure Tone v Burgess Steel Prods. Corp.*, 249

AD2d 144 [1st Dept 1998]). In that context, Thyssenkrupp is acting like an insurer, and has a broad duty to defend, as an insurer would.

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

ENTERED: May 5, 2015

DEPUTY CLERK

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

15014N- Index 115270/09
15015N- 590676/12
15016N-
15017N Jeffrey Maron, et al.,
Plaintiff-Respondents,

-against-

Magnetic Construction Group Corp.,
et al.,
Defendants-Appellants,

Urban Foundation/Engineering, LLC,
et al.,
Defendants.

[And a Third Party Action]

_____

Morris Duffy Alonso & Faley, New York (Kerry E. Sullivan of counsel), for appellants.

Alegria & Barovick LLP, White Plains (Andrew J. Barovick of counsel), for respondents.

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Order, Supreme Court, New York County (Debra A. James, J.), entered July 8, 2013, which, to the extent appealed from as limited by the briefs, denied defendants Magnetic Construction Group Corp., Crosby Street Hotel, LLC, and 79 Crosby Street, LLC's (defendants) motion to compel plaintiffs to produce unredacted copies of their shareholder meeting minutes, unanimously affirmed, without costs. Order, same court and Justice, entered December 2, 2013, which, to the extent appealed

from as limited by the briefs, granted plaintiffs' motion for leave to renew, and, upon renewal, granted plaintiffs' motion to sever the third party complaint, unanimously affirmed, without costs. Order, same court and Justice, entered May 27, 2014, which granted plaintiffs' motion to quash defendants' nonparty subpoenas, unanimously affirmed, without costs. Order, same court and Justice, entered June 17, 2014, which denied defendants' motion to vacate the note of issue, unanimously affirmed, without costs.

Plaintiffs satisfied their burden with respect to the applicability of the attorney-client privilege to the redacted portions of their meeting minutes (*see Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 378 [1991]). As the motion court found, plaintiffs were conservative with their redactions, and it is apparent from the face of the minutes that the redacted portions reflect communications by and with plaintiffs' attorney. The only reason for plaintiffs' attorney to be at the meetings at issue was to dispense legal advice.

In granting plaintiffs' motion to renew and, upon renewal, granting the motion to sever the third-party complaint, the court properly found that the third-party controversy would unduly delay the determination of the main action (*see* CPLR 1010). In

its original denial of the motion to sever, the court had expressly given plaintiffs leave to renew their application if discovery in the third-party action was not complete by the time the main action was trial-ready. Upon plaintiffs' renewed application five weeks later, when discovery was complete and the main action trial-ready, the court found that defendants had done nothing to advance discovery in the third-party action.

The record supports the court's finding that defendants were dilatory in commencing the third-party action and in seeking discovery from the third-party defendants. Defendants served the subpoenas on the third-party defendants after the note of issue in the main action had been filed. Defendants failed to demonstrate any "unusual or unanticipated circumstances," or even the need for discovery from these nonparty entities, to warrant post-note-of-issue discovery (*see* 22 NYCRR 202.21[d]; *Schroeder v*

IESI NY Corp., 24 AD3d 180 [1st Dept 2005]).

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

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

ENTERED: May 5, 2015

DEPUTY CLERK

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

14315N Danielle Ezzard, Index 114803/08
Plaintiff-Respondent-Appellant,

-against-

One East River Place Realty
Company, LLC, et al.,
Defendants-Respondents,

New York Elevator & Electrical Corp.,
Defendant-Appellant.

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Geringer & Dolan LLP, New York (Robert E. Coleman of counsel), for appellant.

Harnick & Harnick, P.C., New York (Robert Harnick of counsel), for respondent-appellant.

Hitchcock & Cummings LLP, New York (Christopher B. Hitchcock of counsel), for respondents.

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Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered February 24, 2014, modified, on the law and the facts, and in the exercise of discretion, to grant defendant New York Elevator & Electrical Corp.'s motion for consideration of its untimely motion for summary judgment, and otherwise affirmed, without costs.

Opinion by Gische, J. All concur except Tom, J.P. and Andrias, J. who dissent in part in an Opinion by Andrias J.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Dianne T. Renwick
Richard T. Andrias
Rosalyn H. Richter
Judith J. Gische, JJ.

14315
Ind. 114803/08

_____x

Danielle Ezzard,
Plaintiff-Respondent-Appellant,

-against-

One East River Place Realty Company, LLC, et al.,
Defendants-Respondents,

New York Elevator & Electrical Corp.,
Defendant-Appellant.

_____x

Cross appeals by plaintiff and defendant New York Elevator & Electrical Corp. from the order of the Supreme Court, New York County (Jeffrey K. Oing, J.), entered February 24, 2014, which, to the extent appealed from, granted defendants One East River Place Realty Company, LLC and Solow Management Corp.'s motion for summary judgment dismissing the complaint as against them, and denied New York Elevator & Electrical Corp.'s motion for leave to file an untimely motion for summary judgment.

Geringer & Dolan LLP, New York (Robert E. Coleman of counsel), for appellant.

Harnick & Harnick, P.C., New York (Robert Harnick of counsel), for respondent-appellant.

Hitchcock & Cummings LLP, New York (Christopher B. Hitchcock of counsel), for respondents.

GISCHE J.

Plaintiff alleges that, on September 13, 2007, she tripped and fell while exiting a misleveled elevator on the first floor of a building owned by defendant One East River Place Realty Company, LLC (owner) and managed by defendant Solow Management Corp. (Solow). Solow had entered into a full service maintenance contract with, defendant New York Elevator & Electrical Corp. (NYE&E) commencing September 1, 2007, for the building's seven elevators, including weekly maintenance and emergency call-back service.

Plaintiff testified at her deposition that as she was exiting the elevator her right foot became caught in the lip of the floor, causing her to propel forward and land on one hand and knee. Plaintiff also stated that on prior occasions she had personally observed the elevator mislevel once or twice a week. In opposition to NYE&E's motion for summary judgment, plaintiff submitted a sworn affidavit stating that she "tripped and fell while exiting an elevator," reiterating that "something was stopping my right foot from moving," adding that she estimated the misleveling at about "2 to 2 and a half inches," based upon her foot and ankle being blocked by the lip of the floor when the accident occurred.

Although untimely, NYE&E's motion should have been

considered insofar as it presents nearly identical issues and proof as those raised by the owner and Solow in their joint summary judgment motion (*Gubenko v City of New York*, 111 AD3d 471 [1st Dept 2013]).

All three defendants established that there had been no complaints of misleveling before plaintiff's accident and that the elevator was found to be level during City and Local Law 10 inspections performed approximately three weeks and two weeks before the accident (*see San Andres v 1254 Sherman Ave. Corp.*, 94 AD3d 590 [1st Dept 2012]). Consequently, the notice-based claims were properly dismissed against the owner and Solow. They should be dismissed against NYE&E as well because plaintiff failed to show that any of the defendants had actual or constructive notice of the misleveling condition of which she complains (*Meza v 509 Owners LLC*, 82 AD3d 426 [1st Dept 2011]). Plaintiff's testimony of prior, unreported instances of misleveling were insufficient to establish that any of the defendants had notice of a dangerous condition (*see Isaac v 1515 Macombs, LLC*, 84 AD3d 457, 459 [1st Dept 2011], *lv denied* 17 NY3d 780 [2011]).

The motion court also properly found that the doctrine of res ipsa loquitur does not apply to the owner or Solow because of NYE&E's full service maintenance contract for the building's seven elevators. That contract included weekly maintenance and

emergency call-back service. NYE&E's submissions, however, failed to demonstrate there was no defective condition and plaintiff has raised sufficient facts which, if believed by a jury, would support her claim against NYE&E under the doctrine based on its maintenance contract.

Res ipsa loquitur permits a fact finder to infer negligence based upon the sheer occurrence of an event where a plaintiff proffers sufficient evidence that (1) the occurrence is not one which ordinally occurs in the absence of negligence; (2) it is caused by an instrumentality or agency within the defendant's exclusive control; and (3) it was not due to any voluntary action or contribution on the plaintiff's part (*James v Wormuth*, 21 NY3d 540, 547-548 [2013]; *States v Lordes Hospital*, 100 NY2d 208, 211 [2003]). If a plaintiff establishes these elements, then the issue of negligence should be given to a jury to decide (*States* at 212; *Miller v Schindler El. Corp.*, 308 AD3d 312 [1st Dept 2003]).

Res ipsa loquitur does not create a presumption of negligence; rather it is a rule of circumstantial evidence that allows the jury to infer negligence (*see Morejon v Rais Constr. Co.*, 7 NY3d 203, 211 [2006]). A defendant is free to rebut the inference by presenting different facts or otherwise arguing that the jury should not apply the inference in a particular case (*see*

Dermatossian v New York City Tr. Auth., 67 NY2d 219, 226-227 [1986]). Notice of a defect is inferred when the doctrine applies and the plaintiff need not offer evidence of actual or constructive notice in order to proceed (*Dittiger v Isal Realty Corp.*, 290 NY 492, 494 [1943]; *Gutierrez v Broad Fin. Ctr., LLC*, 84 AD3d 648 [1st Dept 2011]; *Gurevich v Queens Park Realty Corp.*, 12 AD3d 566 [2d Dept 2004]). Thus, while there is no proof of actual or constructive notice in this case, res ipsa loquitur can still support plaintiff's claim against NYE&E.

We have a long established jurisprudence in this Department recognizing that elevator malfunctions do not occur in the absence of negligence, giving rise to the possible application of res ipsa loquitur (*see e.g. Gutierrez v Broad Fin. Ctr., LLC*, 84 AD3d at 649 ["the record presents a viable negligence claim as against Schindler under the doctrine of res ipsa loquitur. The alleged misleveling of the elevator was not an event that ordinarily occurs in the absence of negligence"]; *Dubec v New York City Hous. Auth.*, 39 AD3d 410, 412 [1st Dept 2007] [in a case based upon a disputed issue of whether an elevator had misleveled, we held that "[t]he court properly charged the doctrine of res ipsa loquitur" notwithstanding that a retrial was required on other grounds]; *Mogilansky v 250 Broadway Assoc. Corp.*, 29 AD3d 374 [1st Dept 2006] [where motion court improperly

granted the defendant summary judgment, the plaintiff should be allowed to develop elevator malfunction case under res ipsa loquitur doctrine]; *Miller v Schindler El. Corp*., 308 AD2d at 313 [denial of summary judgment dismissing the complaint was upheld based on res ipsa loquitur and the plaintiff's testimony that the elevator malfunctioned when she pushed the button to go to the basement, "which testimony must be treated as true on defendant's motion for summary judgment"]; *Ardolaj v Two Broadway Land Co*., 276 AD2d 264 [1st Dept 2000] [doctrine of res ipsa loquitur available to the plaintiff at trial based on evidence of elevator misleveling]; *Dickman v Stewart Tenants Corp*, 221 AD2d 158 [1st Dept 1995] [the defendant's negligence for elevator misleveling established through the application of res ipsa loquitur]; *Burgess v Otis El. Co*., 114 AD2d 784, 786 [1st Dept 1985] [jury verdict for the plaintiff in elevator case upheld under doctrine of res ipsa loquitur because misleveling "was an event of a kind which would not ordinarily occur in the absence of negligence"], affd 69 NY2d 623, 624 [1986]).

Although NYE&E argues, and the dissent agrees, that the doctrine of res ipsa loquitur does not apply to this case because there is no evidence of any defective leveling condition and plaintiff's fall could have occurred in the absence of negligence, including a misstep by her, this is a factual dispute

that cannot and should not be resolved on the appeal of these dispositive motions (*Miller v Schindler El. Corp.*, 308 AD2d at 313). Plaintiff testified at her deposition, and later provided a sworn affidavit, that her foot got caught in something as she exited the elevator. She also testified at her deposition that she had previously observed the elevator mislevel anywhere between 1-to-2 ½ inches. In her affidavit, plaintiff estimated that the height of the misleveling at the time of her accident was approximately 2-to-2 ½ inches. Contrary to the dissent's position, there is no basis to conclude, as a matter of law, that her estimate is feigned. The deposition testimony on which the dissent relies does not clearly require the conclusion that plaintiff had no basis for her estimate of the height differential of the misleveled elevator. In response to a question about whether she determined the height differential at the time of the accident, she merely answered, "No sir." This testimony is not inconsistent with her "estimate" of the height differential at 2-to-2 ½ inches based upon her perception that when her foot and ankle were blocked by the lip of the lobby floor, the "bottom of [her] right foot was approximately 2 inches below floor level." It is up to the jury to determine the credibility of her account about whether the elevator actually misleveled, and if so, the height thereof.

Application of the doctrine does not require the elimination of any other possible cause of the accident, rather "[i]t is enough that the evidence supporting the three conditions afford a rational basis for concluding that it is more likely than not that the injury was caused by defendant's negligence" (*Kambat v St. Francis Hosp.*, 89 NY2d 489, 494 [1997] [internal quotations omitted]). If the jury chooses to believe plaintiff's evidence, that the elevator misleveled, then it may consider the other issues implicated by res ipsa loquitur. On the other hand if the jury chooses to believe that the elevator did not mislevel, but plaintiff merely misstepped, then res ipsa loquitur would not apply. Even when the doctrine is invoked, causation and comparative negligence are still issues for consideration (PJI 2:65).

Moreover, with respect to the third requirement of res ipsa loquitur, i.e., proof that plaintiff's conduct or actions did not voluntarily contribute to the accident, the issue is whether the plaintiff acted in some manner that affected the elevator and caused the misleveling to occur. There is simply nothing in this record to indicate that plaintiff in any way voluntarily caused the elevator to mislevel (*see Dermatossian v New York City Tr. Auth.*, 67 NY2d at 226; *see also Burgess v Otis El. Co.*, 114 AD2d at 787]). Since there is no evidence that she voluntarily caused

the situation alleged, this leaves the issue of plaintiff's comparative negligence for the jury to decide. It is up to the jury to decide whether plaintiff fell because she stumbled, or her injuries are in any measure due to her own actions.

In terms of the element of control required under res ipsa loquitur, NYE&E had a full service contract it entered into with the owner and Solow, requiring NYE&E to furnish "all material, labor, tools and equipment necessary to provide inspection and maintenance" and to "provide a mechanic at minimum one hour per elevator per week" for preventative maintenance. The weekly inspection was to include an examination, cleaning and adjustment of all parts subject to loosening, wearing, and/or burning out, including "floor leveling and safety devices." With regard to leveling, the contract required NYE&E to maintain an accuracy within 1/4 inch. NYE&E was also obligated to provide emergency call-back service 24-hours per day, seven days a week. In *Hodges v Royal Realty Corp.* (42 AD3d 350, 352 [1st Dept 2007]), we recognized that a full service contract to maintain an elevator provides a sufficient predicate for the element of control as against the maintenance company. We have further recognized that where an owner has transferred full responsibility for the maintenance of an elevator to another, the owner is not in control of the instrumentality causing the accident, and res ipsa

loquitur does not apply to the owner (*Camaj v East 52nd Partners*, 215 AD2d 150 [1st Dept 1995]).

Accordingly, the order of the Supreme Court, New York County (Jeffrey K. Oing, J.), entered February 24, 2014, which, to the extent appealed from, granted defendants One East River Place Realty Company, LLC and Solow Management Corp.'s motion for summary judgment dismissing the complaint as against them, and denied defendant New York Elevator & Electrical Corp.'s motion for leave to file an untimely motion for summary judgment, should be modified, on the law and the facts and in the exercise of discretion, to grant New York Elevator & Electrical Corp.'s motion for consideration of its untimely motion for summary judgment, and, upon such consideration, the motion should be granted to the extent of dismissing the notice-based claims and otherwise denied, and the order should otherwise be affirmed without costs.

All concur except Tom, J.P. and Andrias, J. who dissent in part in an Opinion by Andrias, J.

ANDRIAS, J. (dissenting in part)

Plaintiff alleges that she tripped and fell while exiting a misleveled elevator on the first floor of a building owned by defendant One East River Realty and managed by defendant Solow Management. Commencing September 1, 2007, Solow had entered into a full-service maintenance contract with defendant New York Elevator & Electrical (NYEE) for the building's seven elevators, including weekly maintenance and emergency call-back service.

I agree with the majority that One East River and Solow are entitled to summary judgment dismissing the complaint against them. I also agree that the motion court should have considered the motion of NYEE for summary judgment because it seeks the same relief and addresses the same issues as One East River and Solow's timely motion (*Gubenko v City of New York*, 111 AD3d 471 [1st Dept 2013]). The majority would, however, deny NYEE's motion on the ground that plaintiff has raised sufficient facts which, if believed by a jury, would support her claim against NYEE under the doctrine of res ipsa loquitur. I do not agree, and dissent in part.

Contrary to the majority's holding, under the circumstances before us, plaintiff cannot rely on the doctrine of res ipsa loquitur. There is no evidence of any defective leveling condition and "plaintiff's fall could have occurred in the

absence of negligence and could have been caused by a misstep on [her] part" (*Cortes v Central El., Inc.*, 45 AD3d 323, 324 [1st Dept 2007]; *see also Meza v 509 Owners LLC*, 82 AD3d 426, 427 [1st Dept 2011]).

Plaintiff testified at her deposition that at the time of the accident she was carrying office supplies in both hands. Plaintiff also testified that because she was in a hurry, she did not look down to see where the cab had stopped relative to the hallway before she began to move, and that she never "determine[d] where the elevator cab was relative to the hallway floor. It was only after NYEE moved for summary judgment, supported, inter alia, by expert evidence that a misleveling of up to one inch was acceptable in the elevator maintenance industry, that plaintiff submitted an affidavit in which she for the first time stated that the elevator was about two inches below the lobby floor when she stepped out. However, because this affidavit contradicted her earlier deposition testimony, it "can only be considered to have been tailored to avoid the consequences of [such] earlier testimony" and is deemed to be a feigned issue and, consequently, is insufficient to defeat summary judgment (*Fernandez v VLA Realty, LLC*, 45 AD3d 391, 391 [1st Dept 2007] [internal quotation marks omitted]; *see also Beahn v New York Yankees Partnership*, 89 AD3d 589 [1st Dept

2011]). Disregarding the tailored affidavit, as we must, plaintiff has failed to meet her burden of showing that her fall could only have been caused by negligence and not by a misstep over a differential, within acceptable bounds, between the elevator cab and the hallway floor, and the doctrine of res ipsa loquitur is inapplicable.

The majority disagrees, stating that there is no basis to conclude, as a matter of law, that the "estimate" in plaintiff's affidavit is feigned. Citing plaintiff's deposition testimony that she tripped over an elevator that was not flush with the floor and that she had observed the elevator mislevel anywhere between 1 and 2 ½ inches in the past, the majority posits that plaintiff's testimony that she never determined a height differential at the time of the accident "is not inconsistent with her 'estimate' of the height differential." However, this analysis understates plaintiff's testimony and would allow her to defeat NYEE's motion by what is, at best, mere speculation.

Particularly, while plaintiff did testify that after safely stepping out of the elevator with her left foot, the lip of the floor stopped her right foot, she also testified that:

> "Q. You told me before that you felt your foot get caught on something?
>
> "A. Yes.

"Q. And as you were falling and starting to fall you saw it caught against the lip, correct?

"A. Yes.

"Q. Now, at that time, did you determine where the elevator cab was relative to the hallway floor while you were falling?

"A. No, sir.

"Q. At any time, thereafter, did you determine where the elevator cab was relative to the hallway floor at the time you began to fall?

"A. No, sir."

Thus, plaintiff's testimony demonstrates that she did not observe the differential before she started to move, while she was falling, or at any time after she fell. The majority's analysis fails to appreciate the significance of this testimony which establishes that plaintiff had no way of determining the alleged height differential that existed when she tripped by anything other than speculation, and that her affidavit was tailored to create an issue of fact as to whether an actionable height differential existed.

The admission by plaintiff that she never determined the height differential cannot be negated by plaintiff's "estimate," allegedly based on prior observations of misleveling. When asked at her deposition if the elevator cab would stop at the same level below the floor each time it misleveled, plaintiff

responded, "I really couldn't say." When asked if the elevator misleveled in March or April, plaintiff described a differential of one or two inches. Accordingly, based on her past experience, plaintiff could only speculate that the alleged differential at the time of her fall was actionable.

"Because plaintiff's expert's conclusions are based on the feigned facts in plaintiff's affidavit, the expert's affirmation also fails to raise a triable issue of fact" (*Feaster-Lewis v Rotenberg*, 93 AD3d 421, 422 [1st Dept 2012], *lv denied* 19 NY3d 803 [2012]; *see also Luciano v Deco Towers Assoc. LLC*, 92 AD3d 606 [1st Dept 2012]).

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

ENTERED MAY 5, 2015

DEPUTY CLERK