



for possession, denied respondent's motion, and granted petitioner's motion, unanimously reversed, on the law, without costs, the order of the Appellate Term vacated, and the proceeding dismissed as moot.

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

ENTERED: JANUARY 6, 2015

  
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landlord) predecessor-in-interest and respondent Yitzhak "James" Pastreich (the tenant) entered into a rent-stabilized lease reciting a monthly rent of \$5,747.52. The lease contained a rider which, inter alia, provided for a preferential rent of \$3,000 per month on the condition that the tenant accept the apartment in "as is" condition. The rider further provided that at the end of the term of the initial preferential lease, the tenant had the option to renew with a new monthly preferential rent of \$3,000 adjusted by the corresponding rent guidelines. The parties thereafter executed five lease renewals, each for a two-year term. The rent charged in the renewals was based on the original \$3,000 preferential rent, plus the applicable rent guideline increases. The fifth renewal lease, commencing June 1, 2002, had a preferential rent of \$3,715.64.

In 2004, the landlord offered the tenant a renewal lease with no preferential amount stated; instead, the lease set forth the legal rent amount of \$7,652.26. The landlord contends that a 2003 change in the Rent Stabilization Law allowed it to discontinue the preferential rent. The tenant, believing that he was entitled to a preferential rent for the duration of his tenancy, refused to execute this lease. In November 2004, the tenant filed a rent overcharge complaint with the New York State Division of Housing and Community Renewal (DHCR). On May 27,

2005, DHCR denied the overcharge complaint without conducting a hearing. The tenant thereafter filed a Petition for Administrative Review (PAR), which was denied on December 14, 2005.

Meanwhile, in January 2005, while the DHCR proceeding was pending, the landlord commenced this summary holdover proceeding in the Housing Part of Civil Court (Housing Court) raising the same issues. On May 9, 2005, Housing Court denied the landlord's motion for summary judgment, finding triable issues of fact as to whether the parties intended the preferential rent to continue for the duration of the tenancy. The landlord moved to renew and reargue, and on August 26, 2005, Housing Court stayed the motion and marked the holdover proceeding off-calendar pending conclusion of the DHCR proceedings.

After the PAR was denied, the tenant brought a CPLR article 78 proceeding alleging that DHCR acted in an arbitrary and capricious manner by failing to conduct an evidentiary hearing. Supreme Court dismissed the proceeding and the tenant appealed to this Court. On April 10, 2008, this Court reversed (*Matter of Pastreich v New York State Div. of Hous. & Community Renewal*, 50 AD3d 384 [1st Dept 2008]). The Court rejected DHCR's reliance on 9 NYCRR 2521.2(a), which gives landlords the option, once a preferential rent is charged, of offering a lease renewal based

on either the preferential rent or the legal regulated rent (50 AD3d at 386). The Court found that “[t]hat provision was not intended to obviate the terms of a lease agreement where both the landlord and the tenant are aware that the rent charged could legally be higher, but agree, under a specific set of circumstances, to allow the tenant to pay less, either for a specified period of time or for the duration of the tenancy” (*id.*). Finding that the 1991 preferential lease controlled, and that the parties’ intent could not be unequivocally determined from that agreement (*id.* at 387), the Court remanded to DHCR for a hearing on the parties’ intent concerning the duration of the preferential rent (*id.* at 385).

Upon remand, a DHCR administrative law judge (ALJ) conducted a hearing and took testimony from the landlord’s representatives and the tenant. Based on that testimony, the language contained in the 1991 preferential lease, and the conduct of the parties in renewing the lease five times based on the preferential rent, the ALJ concluded that the landlord and the tenant intended and agreed, at the time the 1991 preferential lease was executed, that the preferential rent would endure for the duration of the tenancy. The record does not reflect that the landlord sought further review of the ALJ’s decision.

The tenant then moved in the Housing Court proceeding for an

award of legal fees on the ground that, as the prevailing party, he was entitled to such fees pursuant to the terms of the lease and Real Property Law § 234. The tenant sought fees incurred in the holdover, DHCR and article 78 proceedings. Housing Court granted the tenant's motion, and restored the matter to the calendar for a hearing on the amount of the legal fees. The Appellate Term reversed Housing Court's order and denied the tenant's motion for attorneys' fees, finding that when the holdover proceeding was commenced, the landlord's possessory claim was "of colorable merit" (37 Misc 3d 138[A], 2012 NY Slip Op 52208[U], \*1 [App Term, 1st Dept 2012]). The Court noted that, in any event, the tenant would not be entitled to recover attorneys' fees incurred in connection with the related DHCR and article 78 proceedings (*id.* at \*2). The tenant appealed and we now modify.

Under Real Property Law § 234, when a residential lease provides for a landlord's recovery of attorneys' fees resulting from a tenant's failure to perform a lease covenant, a reciprocal covenant is implied requiring the landlord to pay the tenant's attorneys' fees incurred as a result of, *inter alia*, the tenant's successful defense of an action or summary proceeding commenced by the landlord arising out of the lease (*see Graham Ct. Owner's Corp. v Taylor*, 115 AD3d 50, 55 [1st Dept 2014]). To support an

award of attorneys' fees, the tenant must be the prevailing party, that is, the result must be substantially favorable to the tenant (see *Walentas v Johnes*, 257 AD2d 352, 354 [1st Dept 1999], *lv dismissed* 93 NY2d 958 [1999]).

Here, the terms of the parties' lease plainly triggers the reciprocal covenant mandated by Real Property Law § 234, and the tenant is entitled to recover the attorneys' fees incurred in his successful defense of the holdover proceeding. Contrary to the landlord's assertion, the tenant was the prevailing party regardless of whether the holdover proceeding was formally dismissed, since a tenant is entitled to recover fees "when the ultimate outcome is in his favor, whether or not such outcome is on the merits" (*Centennial Restorations Co. v Wyatt*, 248 AD2d 193 [1st Dept 1998] [internal quotation marks omitted]).

Despite the tenant's status as the prevailing party, the Appellate Term nevertheless denied the fee request because, in its view, the landlord's possessory claim was "of colorable merit" (2012 NY Slip Op 52208[U], \*1). This was an improper standard. "The overriding purpose of [Real Property Law § 234] is to provide a level playing field between landlords and tenants, creating a mutual obligation that provides an incentive to resolve disputes quickly and without undue expense" (*Marsh v 300 W. 106th St. Corp.*, 95 AD3d 560, 560 [1st Dept 2012])

[internal quotation marks omitted]). Because it is a remedial statute, Real Property Law § 234 “should be accorded its broadest protective meaning consistent with legislative intent” (*id.* [internal quotation marks omitted]). The Appellate Term’s conclusion that a tenant’s claim to reciprocal attorneys’ fees can be denied whenever a landlord asserts a colorable claim undermines the salutary purpose of Real Property Law § 234. A “colorable claim” standard would result in the gutting of the protections afforded by the statute because it would allow courts to deny fees whenever the landlord can make a nonfrivolous legal argument in support of its position.

Although courts have some discretion to deny attorneys’ fees sought under Real Property Law § 234, such discretion should be exercised sparingly.<sup>1</sup> Thus, a request for attorneys’ fees should be denied only where a fee award would be manifestly unfair or where the successful party engaged in bad faith (*see Jacreg Realty Corp. v Barnes*, 284 AD2d 280, 280 [1st Dept 2001]; *245 Realty Assoc. v Sussis*, 243 AD2d 29, 35 [1st Dept 1998]; *Grossman v Homenny*, 22 Misc 3d 139[A], 2009 NY Slip Op 50365[U] [App Term, 1st Dept 2009]; *67 E. 2nd St., Inc. v Cejas*, 14 Misc 3d 139[A],

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<sup>1</sup> The tenant does not argue that a court has no discretion in determining whether to award fees under Real Property Law § 234.

2007 NY Slip Op 50300[U] [App Term, 1st Dept 2007]).

Here, the landlord has made no showing of any bad faith on the tenant's part. Nor, under the circumstances, would it be manifestly unfair to award the tenant attorneys' fees in the holdover proceeding. The landlord argues that at the time it commenced that proceeding, it reasonably relied upon a June 2003 amendment to the Rent Stabilization Law. That amendment required the inclusion in the Rent Stabilization Code of a provision stating that where the tenant is charged a preferential rent, the rent that may be charged upon renewal or vacancy may, at the landlord's option, be based upon the previously established legal regulated rent (Rent Stabilization Law of 1969 [Administrative Code of City of NY] § 26-511[c][14]).<sup>2</sup>

That the landlord may have relied on the 2003 amendment when rescinding the tenant's preferential rent and bringing the holdover proceeding does not render an award of attorneys' fees manifestly unfair (*see Huron Assoc., LLC v 210 E. 86th St. Corp.*, 18 AD3d 231, 232 [1st Dept 2005] ["the fact that the (landlord's) position in this litigation has not been frivolous does not render it manifestly unfair to enforce the lease's attorneys'

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<sup>2</sup> The Rent Stabilization Code was amended in September 2005 (effective October 12, 2005) to include such a provision (*see* 9 NYCRR 2521.2[a]).

fees clause"']). As noted earlier, the DHCR ALJ, after an evidentiary hearing, found that at the time the initial lease was executed, the landlord and the tenant intended the preferential rent to last for the duration of the tenancy. Thus, the landlord rescinded the preferential rent and tried to evict the tenant despite the fact that it had agreed to continue the preferential rent for the entire tenancy. The landlord points to no case law, either at the time it commenced the holdover proceeding or now, supporting its view that it could charge the tenant the legal regulated rent in the face of a lease agreement promising a preferential rent for the tenancy's duration.

Indeed, case law existing at the time the holdover proceeding was brought supported the contrary view. For example, in *Matter of Missionary Sisters of Sacred Heart, Ill. v New York State Div. of Hous. & Community Renewal* (283 AD2d 284 [1st Dept 2001]), this Court concluded that an earlier Rent Stabilization Code provision on preferential rents was not intended to obviate the terms of the parties' lease (*id.* at 286-287). Further, in *448 W. 54th St. Corp. v Doig-Marx* (5 Misc 3d 405 [Civ Ct, NY County 2004], *affd* 11 Misc 3d 126[A], 2006 NY Slip OP 50199[U] [App Term, 1st Dept 2006]), decided about six months before the commencement of this holdover proceeding, the court concluded that the 2003 amendment upon which the landlord here relies could

not alter the parties' lease agreement. In light of this authority, and the parties' agreement that the preferential rent would endure for the duration of the tenancy, it cannot be said that an award of attorneys' fees for the holdover proceeding would be manifestly unfair.

*Kralik v 239 E. 79th St. Owners Corp.* (93 AD3d 569 [1st Dept 2012]), relied upon by the Appellate Term, does not require a different result. First, *Kralik* does not use the "colorable claim" standard. Furthermore, at the time the *Kralik* litigation was commenced, the defendant cooperative's position was supported by appellate precedent – namely, *Gorbatov v Gardens 75th St. Owners Corp.* (247 AD2d 440 [2d Dept 1998]). The reasoning of *Gorbatov*, however, was subsequently rejected by the Court of Appeals (5 NY3d 54, 59 n 2 [2005]), and the plaintiff in *Kralik* ultimately prevailed in the litigation (93 AD3d at 570).<sup>3</sup> Under those circumstances, this Court found no abuse of discretion in the motion court's denial of the plaintiff's request for attorneys' fees (*id.*). As noted above, the landlord in the instant case fails to identify any case law supporting its position that it could cancel the tenant's preferential rent after having agreed to continue that rent for the entire tenancy.

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<sup>3</sup> The procedural history of the *Kralik* litigation was obtained from the briefs in the appeal to the First Department.

The Appellate Term also cited to this Court's decision in *Wells v East 10th St. Assoc.* (205 AD2d 431 [1st Dept 1994], *lv denied* 84 NY2d 813 [1995]). In *Wells*, the Civil Court had granted the defendant landlord summary judgment in a related holdover proceeding based on *Braschi v Stahl Assocs. Co.* (143 AD2d 44 [1st Dept 1988]). This Court's decision in *Braschi*, however, was subsequently reversed by the Court of Appeals (74 NY2d 201 [1989]), and thus we found no abuse of discretion in denying the *Wells* plaintiff attorneys' fees (205 AD2d at 432). No similar change in the controlling appellate precedent is presented here.

The Appellate Term properly concluded, however, that the tenant is not entitled to attorneys' fees expended in the DHCR and article 78 proceedings. It is well settled that the right to attorneys' fees under Real Property Law § 234 does not extend to these types of proceedings (*Matter of Blair v New York State Div. of Hous. & Community Renewal*, 96 AD3d 687, 688 [1st Dept 2012]; *Matter of Ista Mgt. v State Div. of Hous. & Community Renewal*, 161 AD2d 424, 426 [1st Dept 1990]; *Matter of Chessin v New York City Conciliation & Appeals Bd.*, 100 AD2d 297, 306 [1st Dept 1984]). This is true even where the administrative proceeding is related to the summary possession proceeding (see *338 W. 46th St. Realty, LLC v Morton*, 103 AD3d 518, 518 [1st Dept 2013]). The

tenant offers no convincing argument to distinguish this binding precedent.

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

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instructions they are given" (*People v Baker*, 14 NY3d 266, 274 [2010]). Therefore, the court's charge in response to the defective verdict was appropriate under the circumstances (see *People v Ford*, 78 NY2d 878 [1991]; *People v Jolly*, 282 AD2d 474, 474-475 [2d Dept 2001], *lv denied* 96 NY2d 863 [2001]). Contrary to defendant's argument, the charge did not apply improper pressure on the two jurors who did not agree with the verdict or criticize those particular jurors (see *People v Pagan*, 45 NY2d 725 [1978]). Moreover, defense counsel did not actually request any particular instruction. Counsel merely conjectured that the two jurors who initially disagreed with the verdict might be led to believe that the case could not be resolved unless they submitted to the will of the remaining jurors. We note that the jury did not announce the verdict until a full day after the disputed charge was given following the readback of testimony it requested. Accordingly, the record does not support the dissent's position that the court's deadlock charge was coercive.

Defendant's contention that he was deprived of a fair trial when the court denied the jury's request for a readback of defense counsel's summation is unpreserved and waived, since defense counsel expressly agreed to the court's proposal to deny the jury's request. We decline to review this claim in the interest of justice. As an alternative holding, we reject it on

the merits, since “declining to read back a summation is not an abuse of discretion” (*People v Clariot*, 188 AD2d 281, 282 [1st Dept 1992], *lv denied* 81 NY2d 838 [1993]; see also *People v Velasco*, 77 NY2d 469, 474 [1991]).

Defendant’s ineffective assistance of counsel claim relating to the summation readback issue is unreviewable on direct appeal (*People v Love*, 57 NY2d 998 [1982]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claim may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (see *People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

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

MANZANET-DANIELS, J. (dissenting in part)

Because I believe that the deadlock charge in this case was unduly coercive, I would reverse the conviction and remand for a new trial.

Supplemental charges addressing a jury's declaration of deadlock must not coerce jurors "with untoward pressure to reach an agreement" (*People v Aponte*, 2 NY3d 304, 308 [2004] [internal quotation marks omitted]). A court aware of the nature of the jury's split must exercise particular care in delivering a deadlock charge (see *Smalls v Batista*, 191 F3d 272, 280 [2d Cir 1999]). Jurors may not be "impermissibly singled out for noncompliance with the majority" (*People v Pagan*, 45 NY2d 725, 727 [1978]; cf. *People v Kisoan*, 23 AD3d 18, 23-24 [2d Dept 2005] [court's decision not to read jury's note verbatim but to summarize it in such a manner so as not to, inter alia, reveal the jury's 10-2 vote for conviction, constituted prejudicial error requiring a new trial; court noted that had counsel been aware that two jurors were holding out for acquittal, he might have asked the court to include language in its response emphasizing the importance of jurors not surrendering their conscientiously held views merely for the purpose of rendering a verdict], *affd* 8 NY3d 129 [2007]).

The court's initial deadlock charge was balanced,

appropriately encouraging the jurors to reach agreement "if that can be done without surrendering individual judgment." But after the jury revealed that it was split 10-2, the court summarily rejected the verdict and directed the jury to resume deliberations in an effort to reach a unanimous verdict, without including cautionary language admonishing them to adhere to their conscientiously held views. In my view, this was error.

As counsel noted in registering his objection to the charge, the court's instruction left the minority jurors with the impression that "the only way that things [would] ever[] come[] to an end is if they follow to the will of the other ten." The minority jurors very well may have felt "impermissibly singled out for noncompliance with the majority" (*Pagan*, 45 NY2d at 727). The lack of "cautionary language may well have left the minority juror with the belief that he or she had no other choice but to convince or surrender" (*Smalls*, 191 F3d at 280 [absence of language urging jurors not to surrender their conscientiously held beliefs, following revelation of 11-1 split, constituted reversible error]).

The fact that the jury twice requested a readback of the defense summation only bolsters the conclusion that the holdout jurors were struggling with the evidence and perhaps attempting to persuade the other jurors of their views before surrendering

them for purposes of returning a verdict. If the holdouts favored the defense, they (as well as others on the jury) may have perceived the court's denial of the request as a sign of judicial disapproval of the defense position. At the same time, the denial of the request served to deprive any jurors who were predisposed toward the defense of ammunition they might have needed to persuade their fellow jurors.

I would accordingly hold that the court's refusal to include more balanced language in the charge constituted prejudicial error requiring reversal.

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officers, at the very least, a founded suspicion of criminality and a common-law right to inquire. Contrary to defendant's contention, the fact that the officers approached him from opposite sides did not create a forcible detention. Within the bounds of a common-law inquiry, it was permissible for the officers, who did not draw their weapons, to approach defendant and position themselves in front and behind him, and ask him if he had narcotics in his possession (see *People v Becoate*, 59 AD3d 345, 345 [1st Dept 2009] *lv denied* 12 NY3d 851 [2009]).

When defendant told the officers the pill was oxycodone, but could not provide a prescription, the officers had probable cause to arrest him. Contrary to defendant's argument, the arrest was not based solely on defendant's failure to have a prescription with him, but on the totality of the preceding circumstances. In particular, defendant's act of discarding the pill was highly suspicious. If the pill had been legally possessed, there would have been no apparent reason for defendant to throw it away. Once defendant was arrested, the officers were entitled to search

him incident to the arrest, and the drugs they recovered were properly obtained.

We perceive no basis for reducing the sentence.

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The award for past and future pain and suffering deviated materially from what would be reasonable compensation in light of awards approved in similar cases, the type of injury, the level and duration of pain suffered by plaintiff, the surgical procedure and physical therapy she underwent, her age and activity level, and the long-term effects and limitations on her life (see *Garcia v Queens Surface Corp.*, 271 AD2d 277, 278 [1st Dept 2000]; *Pinto v Gormally*, 109 AD3d 425, 427 [1st Dept 2013], *lv denied* 22 NY3d 862 [2014]).

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defendants regarding the scheduling of examinations under oath (EUO) on two separate occasions (*Nassau Ins. Co. v Murray*, 46 NY2d 828 [1978]) and defendants' failure to appear. Although plaintiff's counsel's affidavit did not state that he personally mailed the particular notices of the EUOs, or describe his office's practice and procedure for mailing such notices (see *Hospital for Joint Diseases v Nationwide Mut. Ins. Co.*, 284 AD2d 374, 375 [2d Dept 2001]), objective proof of mailing (see *Matter of Szaro v New York State Div. of Hous. & Community Renewal*, 13 AD3d 93, 94 [1st Dept 2004]) was provided by the EUO notices, which contained the same certified mail number in their captions that was reflected on the certified mail return receipts and the United States Postal Service "Track & Confirm" report (*cf. New York & Presbyt. Hosp. v Allstate Ins. Co.*, 29 AD3d 547, 548 [2d Dept 2006]).

The attorney who was assigned to the file and who would have conducted the EUO if the defendants had appeared certainly was in a position to state that the defendants did not confirm their appearances as directed in the notice and did not otherwise appear in his office on the date indicated.

The No-Fault Regulation contains explicit language in 11 NYCRR 65-1.1 that there shall be no liability on the part of the no-fault insurer if there has not been full compliance with the

conditions precedent to coverage. Thus, defendants' failure to attend the EUOs is a violation of a condition precedent to coverage that vitiates the policy (see *American Tr. Ins. Co. v Marte-Rosario*, 111 AD3d 442, 442 [1st Dept 2013]; *Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 AD3d 559, 560 [1st Dept 2011], *lv denied* 17 NY3d 705 [2011]).

There is no basis upon which to grant additional discovery.

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courtroom security, specific to this defendant (see *Deck v Missouri*, 544 US 622, 624 [2005]). The court based its decision on defendant's threatening statements and actions only a few weeks earlier at a trial that had resulted in a mistrial. Defendant's threatening behavior was serious, particularly when viewed in the context of belligerent and intimidating conduct by jointly tried codefendants, as well as courtroom spectators. The court minimized any prejudice by taking steps to prevent the jury from seeing defendant's restraints, and by way of an instruction to the jury that defense counsel had requested.

The court properly denied defendant's motion to preclude testimony regarding admissions he made to a fellow inmate while incarcerated on this case, and there was no violation of defendant's right to counsel (see *Massiah v United States*, 377 US 201 [1964]). The record supports the court's finding that the witness was not an agent of the government with regard to the prosecution of this defendant (see *People v Cardona*, 41 NY2d 333 [1977]; *People v Fernandez*, 23 AD3d 317 [1st Dept 2005], *lv denied* 6 NY3d 812 [2006]; *People v Belgrave*, 172 AD2d 335 [1st Dept 1991], *lv denied* 78 NY2d 962 [1991]). Moreover, defendant initiated the conversation and volunteered his statements.

The court properly denied, as untimely, defendant's motion to suppress physical evidence recovered as the result of a search

warrant. Defendant had all the information necessary to make a motion to controvert the warrant much earlier in the proceedings. In any event, there was no prejudice because the objects recovered under the warrant added little or nothing to the People's case.

We find that defendant received effective assistance of counsel under the state and federal standards (see *People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

Defendant did not preserve his challenges to the prosecutor's summation, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal.

We perceive no basis for reducing the sentence.

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Mazzarelli, J.P., DeGrasse, Manzanet-Daniels, Feinman, Gische, JJ.

13882- Index 151578/13  
13882A Susan Sterk-Kirch, et al.,  
Plaintiffs-Appellants,

-against-

Uptown Communications & Electric,  
Inc.,  
Defendant-Respondent,

Time Warner Cable Inc., et al.,  
Defendants.

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The Law Offices of Philip A. Wellner, PLLC, New York (Philip A. Wellner of counsel), for appellants.

Harfenist Kraut & Perlstein LLP, Lake Success (Andrew C. Lang of counsel), for respondent.

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Order, Supreme Court, New York County (Carol R. Edmead, J.), entered June 26, 2013, which denied plaintiffs' motion for a default judgment against defendant Uptown Communications & Electric, Inc., unanimously affirmed, without costs. Order, same court and Justice, entered September 9, 2013, which, to the extent appealed from as limited by the briefs, granted Uptown's motion to dismiss the cause of action for conversion as against it, unanimously affirmed, without costs.

After serving the summons and complaint upon the Secretary of State as agent of defendant Uptown pursuant to Business Corporation Law § 306(b), plaintiffs failed to demonstrate, by

submitting an affidavit on their motion for a default judgment, that they additionally served Uptown by first class mail at its last known address, as required by CPLR 3215(g)(4)(i) (see *Balaguer v 1854 Monroe Ave. Hous. Dev. Fund Corp.*, 71 AD3d 407 [1st Dept 2010]). We reach this issue, although Uptown raised it for the first time on appeal, because the deficiency appears on the face of the record and could not have been avoided if it had been brought before the motion court (see *id.*).

The complaint fails to state a cause of action for conversion against Uptown based on its employee's conversion of plaintiffs' property (see *Naegele v Archdiocese of N.Y.*, 39 AD3d 270 [1st Dept 2007], *lv denied* 9 NY3d 803 [2007]). The employee took property from plaintiffs' apartment while he was supposed to be installing a cable box in the neighboring apartment. His conduct was not in furtherance of Uptown's business and within the scope of his employment, but was based on his own personal motives.

Plaintiffs argue that Uptown can be held vicariously liable for its employee's tortious conduct because the conduct was foreseeable. However, in determining the scope of Uptown's duty to plaintiffs, which is the threshold legal question, we find

that the harm to plaintiffs was not “within the *reasonably* foreseeable risks” of Uptown’s sending its employee to work in the neighboring apartment (see *Di Ponzio v Riordan*, 89 NY2d 578, 583 [1997] [emphasis added]).

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Mazzarelli, J.P., DeGrasse, Manzanet-Daniels, Feinman, Gische, JJ.

13883      In re Sol Goldman Investments LLC      Index 100449/13  
A/A/F 1700 First Avenue LLC,  
Petitioner-Appellant,

-against-

New York State Division of  
Housing and Community Renewal,  
Respondent-Respondent.

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Judith M. Brener, New York (David L. Hamill of counsel), for  
appellant.

Gary R. Connor, New York (Martin B. Schneider of counsel), for  
respondent.

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Judgment, Supreme Court, New York County (Doris Ling-Cohan,  
J.), entered February 25, 2014, denying the petition to modify  
respondent's determination, dated February 8, 2013, which granted  
a major capital improvement rent increase, so as to include  
engineer consultant fees, and dismissing the proceeding,  
unanimously reversed, on the law, without costs, the proceeding  
reinstated, and the petition granted.

Petitioner, an owner of an apartment complex containing two  
buildings with more than 500 rooms and 150 rent-stabilized  
apartment units, installed a new boiler and burner, as well as a  
water tank for the complex, and sought reimbursement for the  
\$537,358.33 total cost by submitting an application for a major  
capital improvement (MCI) rent increase to respondent New York

State Division of Housing and Community Renewal (DHCR). DHCR granted the MCI rent increase for all costs except consulting fees of \$17,900 for the licensed professional engineer petitioner hired to, inter alia, conduct a heating load analysis of the complex, design the new heating system, select the new equipment, solicit and approve contractor bids, obtain all applicable permits, and review and inspect the contractors' work. In denying the inclusion of the engineering consultant fees, DHCR characterized the consultant's work as administrative and supervisory, as well as duplicative of what the contractors would have done. Petitioner challenged the denial as inconsistent with DHCR policy and DHCR's prior determinations as to similar MCI projects.

This case is virtually indistinguishable from *Matter of 2214 64th Street*, DHCR Adm. Rev. Dkt. No. FE-230459-RO, et al. [July 13, 2000]), in which DHCR approved the owner's MCI application, including professional engineering consulting services, in connection with a similar boiler/burner installation. The consulting engineer's work, like the consulting engineer's work here, involved preparation of drawings and specifications; solicitation of competitive bids from and selection of a contractor; and review of the contractor's work to ensure compliance with drawings and specifications. DHCR's brief does

not even address the case, much less offer any attempt to distinguish it. DHCR's claim that the services provided by petitioner's engineer were duplicative of those performed by the contractor finds no support in the record. DHCR did not annex copies of the contractors' bills or invoices to its answer, and so there is nothing to substantiate this assertion. The project involved a boiler/burner installation at a complex of two large buildings containing over 500 rooms and 150 affected apartments. Hence, under these particular circumstances, DHCR's failure to meaningfully explain why it departed from its precedent renders its determination arbitrary and capricious (*Matter of Klein v Levin*, 305 AD2d 316, 317-318 [1st Dept 2003], *lv denied* 100 NY2d 514 [2003]).

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severity of a potential enhanced sentence. We find the sentence excessive to the extent indicated.

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that he should receive a departure because incest offenders allegedly pose a low risk of reoffense is without merit (see *People v Rodriguez*, 67 AD3d 596 [1st Dept 2009], lv denied 14 NY3d 706 [2010]).

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bail-bond-agent license for Spartan Bail Bonds that he was not presently charged with a crime when criminal charges were pending that subsequently resulted in petitioner pleading guilty to criminal possession of a weapon and attempt to obstruct the arresting officers (see Insurance Law § 6802[k][3]), and that he engaged in extensive misconduct "demonstrat[ing] his incompetency or untrustworthiness to act as a licensee" (Insurance Law § 6802[k][6]). The record further supports the finding that petitioner demonstrated his untrustworthiness and incompetence through numerous other acts of misconduct and by giving conflicting and unpersuasive justifications for his actions in an attempt to minimize or obscure his culpability.

Finally, based on the foregoing and in light of the record evidence indicating that petitioner abused his position of power over criminal defendants and their indemnitors by, among other things, refusing to timely return substantial collateral due them and imposing excessive and unsubstantiated fees, the penalty of license revocation does not shock the conscience (see *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 233-34 [1974]).

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: JANUARY 6, 2015

  
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Mexico resulted in such a reduced risk to public safety as to warrant a downward departure (*see e.g. People v Kachatov*, 106 AD3d 973 [2d Dept], *lv denied* 21 NY3d 863 [2013]).

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ENTERED: JANUARY 6, 2015

  
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Mazzarelli, J.P., DeGrasse, Manzanet-Daniels, Feinman, Gische, JJ.

13892-  
13892A-  
13892B     In re Iyana W., and Another,

Children Under the Age  
of Eighteen Years, etc.,

Shamark W.,  
Respondent-Appellant,

Tonya B.,  
Respondent,

Administration for Children's  
Services,  
Petitioner-Respondent.

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Law Office of Cabelly & Calderon, Jamaica (Lewis S. Calderon of  
counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Scott Shorr of  
counsel), for Administration for Children's Services, respondent.

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

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Appeal from order of disposition, Family Court, Bronx County  
(Linda Tally, J.), entered on or about October 18, 2013, to the  
extent it brings up for review a fact-finding order, same court  
and Judge, entered on or about June 28, 2013, which found, after  
a hearing and inquest, that respondent Shamark W. had sexually  
abused his daughter and derivatively neglected her brother,  
unanimously dismissed, without costs, as taken from a  
nonappealable order. Appeal from orders of protection, same

court and Judge, entered on or about October 18, 2013, unanimously dismissed, without costs, as abandoned.

The record shows that respondent failed to appear on the second date of the fact-finding hearing, and that the Family Court continued the hearing as an inquest. The Family Court properly deemed respondent to be in default, because his trial counsel did not state that she wished to proceed in his absence and was authorized to do so (*see Matter of Jaquan Tieran B. [Latoya B.]*, 105 AD3d 498, 499 [1st Dept 2013]). An order entered upon default is not appealable (*see id.*).

In any event, respondent failed to preserve his ineffective counsel claim (*see Matter of Niyah E. [Edwin E.]*, 71 AD3d 532, 533 [1st Dept 2010]), and the argument is otherwise unavailing (*see Matter of Lenea'jah F. [Makeba T.S.]*, 105 AD3d 514, 515 [1st Dept 2013]; *see also Matter of Nikeerah S. [Barbara S.]*, 69 AD3d 421, 422 [1st Dept 2010]).

THIS CONSTITUTES THE DECISION AND ORDER  
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correctly noted that defendant's and the community's interests would best be served by ongoing parole supervision, rather than by a reduction in sentence that would leave defendant unsupervised. Defendant also absconded during trial for the underlying offense in this case after providing the court with false contact information, which further weighs against resentencing.

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

ENTERED: JANUARY 6, 2015

  
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Mazzarelli, J.P., DeGrasse, Manzanet-Daniels, Feinman, Gische, JJ.

13896N-

Index 350015/12

13897N Adrienne Faye Saunders,  
Plaintiff-Respondent,

-against-

Richard Mark Guberman,  
Defendant.

- - - - -

Advocate & Lichtenstein, LLP,  
Nonparty Appellant.

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Advocate & Lichtenstein, LLP, New York (Kari H. Lichtenstein of  
counsel), for appellant.

Law Office of Richard E. Lerner, P.C., New York (Richard E.  
Lerner of counsel), for respondent.

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Appeal by nonparty appellant law firm, from an order,  
Supreme Court, New York County (Ellen Gesmer, J.), entered August  
6, 2013, which, to the extent appealed from, denied defendant  
husband's motion for an award of \$150,000 in interim counsel  
fees, unanimously dismissed, without costs, for lack of standing.

The nonparty law firm lacks standing to appeal the denial of  
defendant husband's motion for interim counsel fees. Domestic  
Relations Law § 237(a) authorizes the court in its discretion to  
direct either spouse to pay counsel fees *to the other spouse* "to  
enable that spouse to carry on or defend the action or  
proceeding." The law firm is not a "spouse" in the divorce  
action and therefore any counsel fees requested by it are not

authorized by the Domestic Relations Law. The right to seek remedy for the court's allegedly improper denial of the motions for interim counsel fees belongs solely to defendant husband. While defendant husband initially appealed from both of the court's orders denying his requests for interim counsel fees, the order appealed from herein and an order entered January 24, 2013, he has since withdrawn his notices of appeal.

To the extent the law firm raises issues relating to the January 24, 2013 order, it failed to appeal from that order but had it done so, the appeal would likewise have been dismissed for lack of standing. We note that there are other remedies available to the law firm, one of which it has already pursued, i.e., a statutory charging lien in the amount of \$227,517.91 granted by the motion court.

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

ENTERED: JANUARY 6, 2015

  
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CLERK

Mazzarelli, J.P., DeGrasse, Manzanet-Daniels, Feinman, JJ.

13898N- Index 603146/08

13898NA Epstein Engineering, P.C.,  
Plaintiff-Respondent-Appellant,

-against-

Thomas Cataldo, et al.,  
Defendants-Appellants-Respondents,

Steven Gregorio,  
Defendant.

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Jane M. Myers, P.C., Central Islip (James E. Robinson of  
counsel), for appellants-respondents.

Warshaw Burstein, LLP, New York (Bruce H. Wiener of counsel), for  
respondent-appellant.

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Order, Supreme Court, New York County (George J. Silver,  
J.), entered October 21, 2013, which denied plaintiff's motion  
for renewal and reargument to the extent it sought to renew  
certain discovery motions decided by an order, same court (Judith  
J. Gische, J.), entered October 3, 2012, granted the motion as to  
reargument of those motions, and, upon reargument, vacated the  
portion of the order that directed plaintiff to respond to  
demands for discovery enabling defendants to determine its lost  
profits, unanimously affirmed, without costs. Order, same court  
and Justice, entered October 22, 2013 which, to the extent  
appealed from as limited by the briefs, denied defendants Thomas  
Cataldo and Cataldo Engineering, P.C.'s motion to dismiss either

the complaint or plaintiff's claim for lost profits for failure to respond to discovery demands for financial statements and tax returns, and granted plaintiff's cross motion for a corresponding protective order, unanimously affirmed, with costs.

Plaintiff may elect to measure its damages in this unfair competition action by reference to the profits made by defendants from clients or business opportunities diverted from plaintiff (see *Wolff v Wolff*, 67 NY2d 638 [1986]; *Western Elec. Co. v Brenner*, 41 NY2d 291, 295 [1977]; *Bon Temps Agency v Greenfield*, 184 AD2d 280 [1st Dept 1992], *lv dismissed* 81 NY2d 759 [1992]; *Maritime Fish Prods. v World-Wide Fish Prods.*, 100 AD2d 81, 91 [1st Dept 1984], *appeal dismissed* 63 NY2d 675 [1984]; *Gassman & Gassman v Salzman*, 112 AD2d 82 [1st Dept 1985], *appeal dismissed* 66 NY2d 758 [1985]; *B.W. King, Inc. v McAulay*, 24 AD2d 444 [1st Dept 1965]; *Dorville Corp. v Jackson*, 278 App Div 796 [1st Dept 1951], *affd* 305 NY 665 [1953]).

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

ENTERED: JANUARY 6, 2015

  
CLERK