SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 5, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Gische, Mazzarelli, Webber, Oing, JJ.

7971N Bliss World LLC, Index 657007/17
Plaintiff-Respondent,

-against-

10 West 57th Street Realty LLC,
Defendant-Appellant.

_____

Rosenberg & Estis, P.C., New York (Norman Flitt of counsel), for appellant.

Bryan Cave Leighton Paisner LLP, New York (Steven M. Stimell of counsel), for respondent.

_____

Order, Supreme Court, New York County (Barry R. Ostrager, J.), entered March 28, 2018, which granted plaintiff tenant's motion for the continuation of an existing *Yellowstone* injunction, and further enjoined defendant landlord from taking steps to terminate the lease or from commencing eviction proceedings based upon the second notice to cure during the pendency of the action, unanimously reversed, on the law, with costs and the motion denied.

The purpose of a *Yellowstone* injunction, which tolls the

period in which a tenant may cure a claimed violation of the lease, is for a tenant to avoid forfeiture after a determination against it has been made on the merits, because the tenant will still have an opportunity to cure (*Korova Milk Bar of White Plains, Inc. v PRE-Prop. LLC*, 70 AD3d 646 [2d Dept 2001]).

A necessary lynchpin of a *Yellowstone* injunction is that the claimed default is capable of cure. Where the claimed default is not capable of cure, there is no basis for a *Yellowstone* injunction (*166 Enter. Corp. v IG Second Generation Partners, L.P.* 81 AD3d 154, 158 [1st Dept 2011]). Here, the claimed defaults are the tenant's failure to procure insurance and improper assignment of the lease. The tenant provides various steps that it will take to cure if it is ultimately found to be in material violation of the insurance provisions of the lease. None of these proposed cures involve any retroactive change in coverage, which means that the alleged defaults raised by the landlord are not susceptible to cure (*Three Amigos SJL Rest., Inc. v 250 W. 43rd Owner LLC*, 144 AD3d 490, 491 [1st Dept 2016]; *see also Prince Fashions, Inc. v 60G 542 Broadway Owner, LLC*, 149 AD3d 529, 530 [1st Dept 2017]).

With respect to the assignment of the lease, although the tenant has generally stated that it is willing to cure any

assignment violation, it does not explain how it will undo the assignment or indicate whether it is willing or able to do so (*see Zona, Inc. v Soho Centrale, LLC*, 270 AD2d 12, 14 [1st Dept 2000], *compare Artcorp Inc. v Citrich Realty Corp*, 124 AD3d 545, 546 [1st Dept 2015]). Although some of our decisions have indicated that seeking late consent from the landlord remains a cure in assignment cases, even were that theoretically true, there is no claim made here that this tenant would pursue that cure (*see Gettinger Assoc., LLC v Abraham Kamber & Co., LLC*, 103 AD3d 535,535 [1st Dept 2013]).

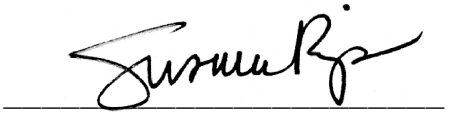
There is an ongoing dispute between the parties regarding whether the landlord's claimed defaults are meritorious, either because they are not really defaults or they are not sufficiently substantial. We do not resolve those disputes. The denial of a *Yellowstone* injunction does not resolve the underlying merits of disputes about whether there is any default warranting termination of the lease in the first instance. Consequently, it is not necessary to resolve those issues in the context of whether a *Yellowstone* injunction is warranted. A reversal in this case does not relieve the landlord of proving the bona fides of the claimed default or prevent the tenant from defending itself. These disputes will be resolved either in connection

with the complaint and counterclaim in this action or in a subsequently commenced commercial summary holdover proceeding.

We reject the tenant's argument, that even if no *Yellowstone* injunction is warranted, it is still entitled to a preliminary injunction. *Yellowstone* injunctions are available on a far lesser showing than preliminary injunctions (*225 E. 36th Street Garage Corp. v 221 E. 36th Owners Corp.*, 211 AD2d 420, 421 [1st Dept 1995]). Because the *Yellowstone* injunction fails, the preliminary injunction does as well. In any event, no injunction is needed to preserve the status quo because the landlord cannot evict the tenant unless and until there is a determination of the merits in the landlord's favor. If the tenant prevails, then there will be no eviction. The right lost by the denial of a *Yellowstone* injunction is the right to cure any default.

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

ENTERED: MARCH 5, 2019



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Acosta, P.J., Gische, Kapnick, Gesmer, Singh, JJ.

8343 In re Joan Sheen Cunningham, Index 154933/16
Petitioner-Respondent,

-against-

Trustees of St. Patrick's Cathedral, et al.,
Respondents-Appellants.

_____

Kelley Drye & Warren LLP, New York (John M. Callagy of counsel), for appellants.

Law Office of Steven Cohn P.C., Carle Place (Steven Cohn of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Arlene P. Bluth, J.), entered June 12, 2018, after a hearing, inter alia, granting the petition for permission to remove the remains of Archbishop Fulton J. Sheen from St. Patrick's Cathedral in New York, New York, to St. Mary's Cathedral in Peoria, Illinois, unanimously affirmed, without cost.

Archbishop Sheen was born in 1895 in El Paso, Illinois and raised in Peoria. He was ordained as a priest in Peoria. In 1951 he was consecrated a Bishop of New York, where he had a beloved and prominent presence.

Archbishop Sheen passed in 1979. Five days before his

death, Archbishop Sheen executed a will directing that his funeral service be held at St. Patrick's Cathedral in New York City, and that he be buried in Calvary Cemetery, the official cemetery of the Archdiocese of New York. At the time of Archbishop Sheen's death, Archbishop Terrence Cardinal Cooke of New York approached petitioner Joan Cunningham, Archbishop Sheen's closest living relative, to request permission to have Archbishop Sheen buried in a crypt beneath the high altar of St. Patrick's Cathedral. Ms. Cunningham consented.

In 2002, Bishop Daniel R. Jenky of the Diocese of Peoria, Illinois, officially opened an investigation into Archbishop Sheen's Cause for Sainthood (the Cause).

In June 2016, Ms. Cunningham sought an order to disinter the remains of Archbishop Sheen, as the family now wished to move the remains to Peoria. The Diocese of Peoria, which had spearheaded the Cause, was constructing a shrine and crypt for that purpose. The Trustees of St. Patrick's Cathedral objected to the request for disinterment on the ground that Archbishop Sheen's will directed that burial be in New York, and Ms. Cunningham had at that time consented to his burial in a crypt at St. Patrick's Cathedral.

We directed an evidentiary hearing as to the late Archbishop

Sheen's wishes in the matter of his interment (*see Matter of Cunningham v Trustee of St. Patrick's Cathedral*, 159 AD3d 161, 164-165 [1st Dept 2018]).

Supreme Court heard testimony on Archbishop Sheen's life and his beliefs and how these factors would inform his desires with respect to the resting place of his remains. The testimony established the importance of Heaven and sainthood to Archbishop Sheen and his immediate kin, the efforts made by Bishop Jenky of the diocese that encompasses the Archbishop's hometown of Peoria to promote the Cause for his sainthood, and the apparent lack of similar efforts by the New York Diocese. Supreme Court properly found that there are good and substantial reasons to disinter Archbishop Sheen's earthly remains and transfer them to St. Mary's Cathedral in Peoria, where he made his first Holy Communion, was ordained a priest and received his first pastoral assignment, and where a shrine is proposed to be erected to honor his life's work in the Church (*see Matter of Currier [Woodlawn Cemetery]*, 300 NY 162, 164 [1949]). This finding was warranted notwithstanding evidence that before his death, and perforce before the Cause, Archbishop Sheen expressed a desire to be buried in New York.

To the extent respondents argue that the prospect of Archbishop Sheen's sainthood is speculative and that a

disinterment should not be ordered on that basis (*see Cunningham*, 159 AD3d at 167-168), the argument is unavailing. The court expressly allowed evidence and argument solely on the issues of the life Archbishop Sheen lived and his beliefs and how these factors would likely inform his wishes with respect to interment. While it is undisputed that burial in a crypt at St. Patrick's Cathedral is a high honor, the testimony of Archbishop Sheen's family and respondents' witness Msgr. Hilary C. Franco demonstrates that Archbishop Sheen lived with an even higher intent and purpose in mind, namely to attain Heaven and, if at all possible, sainthood.

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

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

ENTERED: MARCH 5, 2019

CLERK

Acosta, P.J., Richter, Manzanet-Daniels, Tom, Moulton, JJ.

8564 The People of the State of New York, Ind. 3654/16
Respondent,

-against-

George Fay,
Defendant-Appellant.

_____

Brafman & Associates, P.C., New York (Mark M. Baker of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Melissa C. Jackson, J.), rendered April 17, 2018, convicting defendant, after a jury trial, of rape in the first degree, criminal sexual act in the first degree and sexual abuse in the first degree, and sentencing him to an aggregate term of 10 years, unanimously affirmed.

The verdict was supported by legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]. The evidence established that defendant got into a bed in his apartment, already occupied by the victim and by the victim's sex partner, who was defendant's friend. Defendant then had oral and vaginal sex with the victim, who had never seen defendant before she awoke, while the victim

was incapable of consent as a result of being physically helpless. There is no basis for disturbing the jury's credibility determinations. The record fails to support defendant's assertion that this case does not present a true credibility contest. Defendant posits a theory that, while in a semiconscious state resulting from intoxication and fatigue, the victim mistook defendant for the other man, who was her sex partner, and unwittingly engaged in consensual sex with him, whereas defendant, in a similar state, mistakenly assumed that the victim knew who he was and was knowingly consenting to sex with him. However, this theory was both implausible and was contradicted by the victim's testimony, as well as by defendant's own testimony, in which he asserted that the victim was conscious enough to give express verbal consent several times.

In addition, we reject defendant's claim that there was insufficient evidence of oral sex to support the charge of criminal sexual act. The evidence supports a reasonable inference that defendant engaged in both oral and vaginal sex with the victim while she was physically helpless; in any event, in his own testimony (*see People v Kirkpatrick*, 32 NY2d 17, 21 [1973], *appeal dismissed* 414 US 948 [1973]) defendant admitted having oral sex.

The court providently exercised its discretion in denying defendant's request, made late in the trial, to call an expert on sleep disorders, who would have testified about the effects of alcohol on sleep and behavior, including that consumption of alcohol can cause persons to engage unconsciously in physical activity while appearing to be awake, and to wake up unaware of the activity. To the extent the record establishes that the People had any advance notice of the content of this testimony, that notice was inadequate under the circumstances. This request would have required a lengthy midtrial continuance for a *Frye* hearing (*see Frye v United States*, 293 F 1013 [DC Cir 1923]) and for the People to obtain their own expert. Accordingly, the untimeliness of the request by itself thus warranted denial (*see Matter of Anthony M.*, 63 NY2d 270, 283-84 [1984]).

In any event, defendant failed to offer any scientific basis for the proposed testimony (*see generally People v Bennett*, 79 NY2d 464, 473 [1992]). Defendant did not preserve his contention that *Frye* is inapplicable because he only sought to introduce his expert's opinions based on personal experience, rather than explanation of a scientific theory, and we decline to review it in the interest of justice. As an alternative holding, we find that there is no evidence that the proposed expert had any

experience with the proffered theory.

Because defendant never asserted that, as a matter of constitutional law, he was entitled to introduce the expert testimony, his request to do so only raised questions of state evidentiary law and trial management (*see People v Lane*, 7 NY3d 888, 889 [2006]; *see also Smith v Duncan*, 411 F3d 340, 348-349 [2d Cir 2005]). We likewise decline to review defendant's unpreserved constitutional claim in the interest of justice. As an alternative holding, we reject it on the merits (*see Crane v Kentucky*, 476 US 683, 689-690 [1986]).

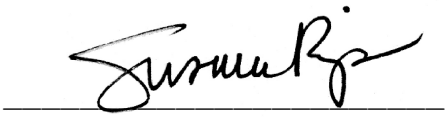
The court also providently exercised its discretion when it permitted the People to ask defendant, on cross-examination, about phone calls made about an hour prior to the incident from his cell phone to phone numbers for prostitution services. Defendant's testimony opened the door to this evidence by raising an issue about whether he was seeking a sexual encounter at the time of the events in question (*see People v Fardan*, 82 NY2d 638, 646 [1993]). Although, earlier in the proceedings, the court mentioned a different way in which defendant might open the door to this evidence, the court, which had not heard defendant's testimony, never intimated that this was the exclusive form of door-opening that might occur.

The trial court's remaining evidentiary rulings, pertaining to preclusion of hearsay statements, were likewise provident exercises of discretion, and they did not deprive defendant of any constitutional right. Defendant was not prevented from eliciting, in the proper manner, any prior inconsistent statements made by the victim.

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 5, 2019



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Acosta, P.J., Richter, Manzanet-Daniels, Tom, Moulton, JJ.

8565-
8566 Index 157754/15

Tower Insurance Company
of New York,
Plaintiff-Respondent,

-against-

Artisan Silkscreen and
Embroidery, Inc.,
Defendant-Appellant,

Castro Realty Corporation, et al.,
Defendants.

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Feder Kaszovitz LLP, New York (David Sack of counsel), for appellant.

Kennedys CMK Law LLP, New York (Max W. Gershweir of counsel), for respondent.

_____

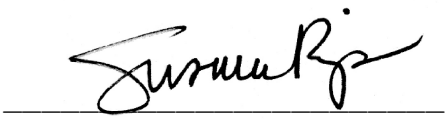
Order and judgment (one paper), Supreme Court, New York County (Manuel J. Mendez, J.), entered August 16, 2017, which granted plaintiff's motion for summary judgment declaring that it has no duty to defend or indemnify defendant Artisan Silkscreen and Embroidery, Inc. (Artisan) in an underlying personal injury action, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered February 23, 2018, which denied Artisan's motion to resettle the court's order dated November 29, 2017, denying Artisan's motion to reargue, unanimously dismissed, without costs.

Artisan is barred from relitigating the issues of the employee exclusion in this proceeding, as this issue, in addition to the "leased contract" exception to the exclusion, was fully litigated in the related third-party action (*Schwartz v Public Administrator*, 24 NY2d 65 [1969]).

"No appeal lies from an order denying resettlement of the substantive portions of a judgment or order" (*Matter of Antonsen v Ward*, 190 AD2d 606 [1st Dept 1993]).

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

ENTERED: MARCH 5, 2019



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Acosta, P.J., Richter, Manzanet-Daniels, Tom, Moulton, JJ.

8569 M&M Realty of New York, LLC, et al., Plaintiffs-Appellants, Index 153949/16

-against-

The Burlington Insurance Company, Defendant-Respondent,

L&M Restoration, Inc., Defendant.

_____

Kennedys CMK LLP, New York (Max W. Gershweir of counsel), for appellants.

Adrian & Associates, LLC, New York (James M. Adrian of counsel), for respondent.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered July 2, 2018, which denied plaintiff Tower Insurance Company's motion for summary judgment declaring that defendant Burlington Insurance Company is required to reimburse it for amounts incurred in defending and indemnifying plaintiff M&M Realty in the underlying action, and granted Burlington's motion for summary judgment dismissing the complaint as against it and declaring that it is not obligated to defend or indemnify Tower in connection with the underlying action, and so declared, unanimously modified, on the law, to deny Burlington's motion and vacate the declaration in its favor, and otherwise affirmed,

without costs.

Defendant L&M Restoration was hired by defendant M&M Realty to perform work at M&M's building. L&M's insurance policy, issued by defendant Burlington Insurance Company, provided additional insured coverage for loss caused, in whole or in part, by L&M's acts or omissions to any entity that L&M agreed in writing to name as an additional insured. Plaintiff Tower Insurance Company, M&M's insurer, assumed M&M's defense of an action brought against it by an L&M employee injured on the job, after Burlington refused M&M's tender, and now seeks reimbursement from Burlington for costs it incurred defending and settling the underlying action.

The contract between M&M and L&M is ambiguous as to whether L&M was required to name M&M as an additional insured under the Burlington policy (*see e.g. Insurance Corp. of N.Y. v Central Mut. Ins. Co.*, 47 AD3d 469 [1st Dept 2008]; *cf. Trapani v 10 Arial Way Assoc.*, 301 AD2d 644, 647 [2d Dept 2003] [no ambiguity where contract "simply required P&W (insured) to provide a certificate of insurance showing that P&W had both liability and workers' compensation coverage," since that phrase "does not pertain in any way to additional insured coverage"]). However, the extrinsic evidence properly considered by the motion court

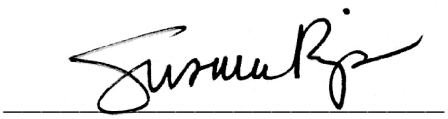
does not conclusively demonstrate the parties' intent in this regard but presents an issue of credibility to be determined by a factfinder.

If it is determined that L&M and M&M intended to name M&M as an additional insured under the Burlington policy, then Burlington will be obligated to reimburse Tower for its defense costs, because the allegations of the underlying complaint and the known facts suggest a reasonable possibility of coverage, i.e., a reasonable possibility that the underlying injury was caused, in whole or in part, by L&M's acts or omissions (*see City of New York v Wausau Underwriters Ins. Co.*, 145 AD3d 614, 617 [1st Dept 2016]; *Fitzpatrick v American Honda Motor Co*, 78 NY2d 61, 67-68 [1991]; *Pioneer Cent. Sch. Dist. v Preferred Mut. Ins. Co.*, 165 AD3d 1646, 1647 [4th Dept 2018]; *see also BP A.C. Corp. v One Beacon Ins. Group*, 8 NY3d 708, 714-715 [2007] [standard for determining additional insured's entitlement to defense is same as that for determining named insured's entitlement to defense]). Moreover, Tower submitted evidence that demonstrates that the acts or omissions of L&M, which directed and controlled the underlying plaintiff's work, were a proximate cause of the plaintiff's injuries (*see Burlington Ins. Co. v NYC Tr. Auth.*, 29 NY3d 313, 321-322 [2017]).

To the extent L&M and M&M intended to name M&M as an additional insured under the Burlington policy, the policy issued to M&M by Tower is excess over the Burlington policy (*see Tishman Constr. Corp. of N.Y. v American Mfrs. Mut. Ins. Co.*, 303 AD2d 323, 324 [1st Dept 2003]).

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

ENTERED: MARCH 5, 2019



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Acosta, P.J., Richter, Manzanet-Daniels, Tom, Moulton, JJ.

8570 In re the Accounting File 4348/09E
by William A. Kass, Esq., etc.,

- - - - -

Barbara K. Miller, et al.,
Petitioners-Appellants,

-against-

Jonathan Mendelson, etc.,
Respondent-Respondent.

_____

Robinson Brog Leinwand Greene Genovese & Gluck, P.C., New York (Lawrence S. Hirsh of counsel), for appellants.

Novick & Associates, P.C., Huntington (Donald Novick of counsel), for respondent.

_____

Order, Surrogate's Court, New York County (Rita Mella, S.), entered on or about July 14, 2017, which, to the extent appealed from, granted respondent's motion for partial summary judgment on objections 17 and 18 to petitioners' first intermediate account of the deceased's estate, unanimously affirmed, without costs.

The Surrogate providently exercised her discretion in determining that the value of the apartment, which was specifically bequeathed to respondent, should not be included in the computation of petitioners' commissions (*see Matter of Brooks*, 119 Misc 738, 740 [Sur Ct, NY County 1922], *affd* 212 App Div 868 [1st Dept 1925]; *see also* SCPA 2307[2][a]). The services

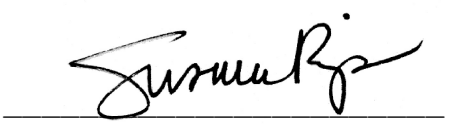
that petitioner Miller testified she rendered, such as visiting weekly to collect mail, arranging for insurance, paying maintenance and bills, and insuring that necessary repairs were properly made, could have been performed by respondent. In any event, it is undisputed that those services were not mandated by the deceased's will or required by the circumstances (*see Matter of Gundlach*, 107 Misc 2d 1032 [Sur Ct, Erie County 1981]).

Petitioners contend that respondent's meritless litigation and dilatory conduct in seeking to have the apartment transferred to him required them to act to preserve the asset. However, as the Surrogate pointed out, respondent had the right to challenge the appointment of Miller as an executor, and petitioners could have deferred to respondent to protect the asset that was specifically left to him.

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

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

ENTERED: MARCH 5, 2019



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Acosta, P.J., Richter, Manzanet-Daniels, Tom, Moulton, JJ.

8571 The People of the State of New York, Ind. 399N/16
Respondent,

-against-

Lajuanda Watson,
Defendant-Appellant.

_____

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

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

_____

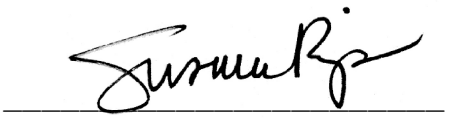
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Richard Weinberg, J. at plea; Felicia A. Mennin, J. at sentencing), rendered July 7, 2016,

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.

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

ENTERED: MARCH 5, 2019



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

Acosta, P.J., Richter, Manzanet-Daniels, Tom, Moulton, JJ.

8572 Lijun Feng, Index 307157/13
Plaintiff-Appellant-Respondent,

-against-

Martin Jansche,
Defendant-Respondent-Appellant.

_____

Polly N. Passonneau, P.C., New York (Polly N. Passonneau of counsel), for appellant-respondent.

Schwartz Sladkus Reich Greenberg Atlas, LLP, New York (Barry Abbott of counsel), for respondent-appellant.

_____

Judgment, Supreme Court, New York County (Joseph P. Burke, Special Referee), entered October 16, 2017, after a trial, to the extent appealed from as limited by the briefs, valuing the marital portion of defendant husband's stock options and restricted stock units at $252,974 and distributing 40% to plaintiff wife, valuing the marital funds at $410,696.82, terminating the pendente lite maintenance award as of July 31, 2017, and declining to award plaintiff post-divorce maintenance, imputing income of $831,710 to defendant husband and imposing an income cap of $400,000 for the purpose of determining child support, and awarding plaintiff $25,000 in counsel fees, unanimously modified, on the law and the facts, to award plaintiff 50% of the value of the marital portion of defendant's

stock options and restricted stock units, impose an income cap of $300,000 for the purpose of determining child support, and make the child support award retroactive to October 1, 2014, and to remand the matter for further proceedings in accordance herewith, and otherwise affirmed, without costs.

The court properly relied on the valuation of the marital portion of defendant's stock options and restricted stock units (GSUs) performed by Financial Research Associates (FRA). The parties jointly retained FRA to value this marital asset, and FRA's report was stipulated to at trial and entered into evidence without objection. Plaintiff did not call any witness from FRA or present any expert testimony to support her argument on appeal that FRA's methodology was flawed. Moreover, the claimed patent errors in the report, such as omissions of certain stock grants, can be explained by FRA's mandate to value only the stock options and GSUs held by defendant as of the date of the commencement of this action. To the extent the marital portion of defendant's stock options and GSUs represents compensation, plaintiff's award should be increased from 40% to 50% of the value, or $126,487 (*see Greenwald v Greenwald*, 164 AD2d 706, 715, 722 [1st Dept 1991], *lv denied* 78 NY2d 855 [1991]).

The court properly declined to award plaintiff post-divorce

maintenance on the grounds that she holds a doctorate in computer science and is working full-time as a data scientist. The court providently exercised its discretion in maintaining plaintiff's pendente lite maintenance award through July 2017, the month in which it issued its decision. The duration of the pendente lite maintenance was one of the factors the court considered in determining that further maintenance was not warranted.

In determining the child support award, the court properly imputed income to defendant based on the average of his total income for the years 2012 through 2014 (*see generally Matter of Culhane v Holt*, 28 AD3d 251, 252 [1st Dept 2006]). Although defendant argues that the court erred in including "nonrecurring income" related to the grant of stock options and GSUs, he testified that such grants occurred on an annual basis, albeit they fluctuated in size and value. To the extent defendant argues that his income during 2013 and 2014 was artificially inflated by an unusually large and anomalous equity award, the argument is unavailing; we note that defendant's total income in 2012 was $701,546.32, well within range of his imputed income of $831,710.

Given the disparity in the parties' incomes, the court correctly considered the standard of living the child would have

enjoyed had the marriage remained intact in deviating from the statutory cap (*see* Domestic Relations Law § 240[1-b][f][3]). However, as the court also ordered defendant to pay his 88% pro rata share of add-on expenses, including extracurricular activities, summer camp, and any private school, we find that the income cap should be reduced from $400,000 to $300,000.

Plaintiff correctly argues that the court erred in making the child support award prospective only (*see* Domestic Relations Law § 236[B][7][a]). It should be retroactive to October 1, 2014, the date on which plaintiff started receiving court-ordered pendente lite child support. We remand the matter to Supreme Court for a determination of the amount of retroactive child support owed, including adjustments to defendant's pro rata share of add-on expenses, and whether payment of any arrears due should be made in one sum or periodic sums.

In awarding plaintiff counsel fees of $25,000, the court properly considered "the financial circumstances of both parties together with all the other circumstances of the case, which may include the relative merit of the parties' positions" (*DeCabrera v Cabrera-Rosete*, 70 NY2d 879, 881 [1987]). Defendant had already paid $120,000 of her counsel fees, and, together with the fee award, the amount of his share is more than half of

plaintiff's legal costs at the time of trial (*see Schorr v Schorr*, 46 AD3d 351, 351 [1st Dept 2007]).

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

ENTERED: MARCH 5, 2019

CLERK

Acosta, P.J., Richter, Manzanet-Daniels, Tom, Moulton, JJ.

8573 Carmen Rivera, etc., Index 307799/11
Plaintiff-Respondent,

-against-

2732 Bainbridge Associates, L.L.C.,
Defendant-Appellant.

_____

Rosenbaum & Taylor, P.C., White Plains (Dara Rosenbaum of counsel), for appellant.

Weiser & Associates, LLP, New York (David A. Cvengros of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Elizabeth A. Taylor, J.), entered on or about October 20, 2017, which, in this action for personal injuries sustained when plaintiff's decedent fell while descending the interior stairs of defendant's building, denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant failed to establish that plaintiff's claim that a missing chunk from a stair located in its building caused decedent to fall was based on speculation (*see Haibi v 790 Riverside Dr. Owners, Inc.*, 156 AD3d 144, 147 [1st Dept 2017]). The testimony of decedent's son that he was walking approximately three steps behind decedent at the time of her fall, witnessed her slip on a particular step, and that, shortly after the

accident, he returned and saw that the step had a chunk missing in the area where decedent's foot gave out was sufficient to identify the defect and provide facts and circumstances from which causation may reasonably be inferred (*see id.*; *Hecker v New York City Hous. Auth.*, 245 AD2d 131 [1st Dept 1997]).

Defendant further failed to establish that it neither created the defective condition nor had notice of it (*see Hecker* at 131; *see also Hamilton v 3339 Park Dev. LLC*, 158 AD3d 440, 441 [1st Dept 2018]).

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

ENTERED: MARCH 5, 2019

CLERK

Acosta, P.J., Richter, Manzanet-Daniels, Tom, Moulton, JJ.

8576 The People of the State of New York, Respondent, Ind. 2269/14 SCI 3650/15

-against-

Shafik Hirji, Defendant-Appellant.

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

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

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Order, Supreme Court, New York County (Thomas Farber, J.), entered on or about April 14, 2017, which adjudicated defendant a level three predicate sex offender for the conduct underlying his conviction under SCI 3650/15, and a level two offender for the conduct underlying his conviction under Indictment No. 2269/14, pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

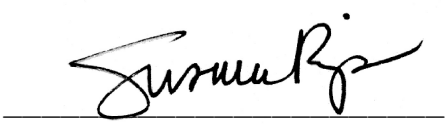
Defendant's two guilty pleas, entered approximately one year apart, based on offenses committed more than one year apart, were properly treated as separate offenses and separate dispositions for SORA purposes, notwithstanding that defendant was sentenced for both at the same time. Defendant was correctly assessed points on both of the two separate risk assessment instruments

prepared for the two offenses (*see People v Miller*, 149 AD3d 1279, 1280 [3d Dept 2017]). On the second instrument, involving the later crime, defendant was correctly assessed points under the risk factors for a prior sex crime and recency of the prior offense based on the first crime, even though he had not yet been sentenced on that conviction when he committed and pleaded guilty to the second sex offense (*see People v Edwards*, 135 AD3d 593, 593 [1st Dept 2016], *lv denied* 27 NY3d 905 [2016]; *People v Franco*, 106 AD3d 417 [1st Dept 2013], *lv denied* 21 NY3d 863 [2013]; *see also* CPL 1.20[13]). Furthermore, there were no redundant proceedings of the type addressed in *People v Cook* (29 NY3d 114, 119-120 [2017]).

The court providently exercised its discretion in declining to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). The mitigating factors argued by defendant were adequately considered and were outweighed by the danger of future recidivism.

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

ENTERED: MARCH 5, 2019



CLERK

Acosta, P.J., Richter, Manzanet-Daniels, Tom, Moulton, JJ.

8577 The People of the State of New York, Ind. 2567/10
Respondent,

-against-

William Powell,
Defendant-Appellant.

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

Darcel D. Clark, District Attorney, Bronx (Nicole Neckles of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (John S. Moore, J.), entered on or about December 8, 2016, which adjudicated defendant a level three sexually violent predicate sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

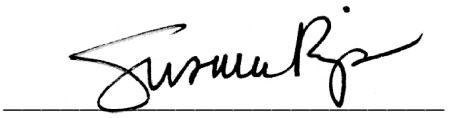
The court providently exercised its discretion in declining to grant an indefinite adjournment, based on the pendency of an article 10 civil commitment proceeding, of defendant's sex offender classification hearing (*see People v Blum*, 166 AD3d 571 [1st Dept 2018]). Defendant's prior felony sex crime conviction automatically resulted in an override to risk level three (*see People v Howard*, 27 NY3d 337, 342 [2016]); moreover, he had been already been designated a level three sexually violent offender

on the prior conviction. The only material issue was whether the court should grant a downward departure despite the override. "Under the circumstances, the possibility that the court would be in a better position to decide the risk assessment issue at the end of defendant's civil commitment, if any, is speculative" (*Blum*, 166 AD3d at 571). In any event, "defendant has the statutory right to seek a modification of his SORA risk level designation in the future" (*People v Gordon*, 147 AD3d 988, 988 [2d Dept 2017], *lv denied* 29 NY3d 910 [2017].

We have considered and rejected defendant's remaining claims.

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

ENTERED: MARCH 5, 2019



CLERK

Acosta, P.J., Richter, Manzanet-Daniels, Tom, Moulton, JJ.

8578 Sabrina Munoz, Index 152701/15
Plaintiff-Appellant,

-against-

Ricky R. Robinson, et al.,
Defendants-Respondents.

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Molod Spitz & DeSantis, P.C., New York (Marcy Sonneborn of counsel), for appellant.

DeSena & Sweeney, LLP, Bohemia (Shawn P. O'Shaughnessy of counsel), for Rickey R. Robinson and Denise L. Robinson, respondents.

Bamundo, Zwal & Schermerhorn, LLP, New York (Edward W. Chen of counsel), for William Paulino, respondent.

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Order, Supreme Court, New York County (Paul A. Goetz, J.), entered on or about January 2, 2018, which, to the extent appealed from as limited by the briefs, granted defendants' motions for summary judgment dismissing the claim of serious injury to the left knee within the meaning of Insurance Law § 5102(d), unanimously reversed, on the law, and the motions denied, without costs.

Defendants established prima facie that plaintiff did not suffer a serious injury to her left knee as a result of the subject accident through the affirmed reports of their experts, who examined plaintiff, documented normal range of motion, and

attributed plaintiff's complaints to a preexisting degenerative condition (*see e.g. Castro v DADS Natl. Enters., Inc.*, 165 AD3d 601 [1st Dept 2018]).

In opposition, plaintiff raised an issue of fact through the affirmed narrative report of her treating orthopedic surgeon, who documented limitations in plaintiff's range of motion, acknowledged plaintiff's preexisting degenerative condition, and concluded, based on a full review of the medical history, physical examination and observations during surgery, that the accident had severely aggravated plaintiff's condition, necessitating surgery for an acute meniscal tear (*see Lazzari v Qualcon Constr., LLC*, 162 AD3d 440, 441 [1st Dept 2018]; *Giap v Hathi Son Pham*, 159 AD3d 484, 486 [1st Dept 2018]; *see also Malloy v Matute*, 79 AD3d 584 [1st Dept 2010]).

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

ENTERED: MARCH 5, 2019

CLERK

Acosta, P.J., Richter, Manzanet-Daniels, Tom, Moulton, JJ.

8579-
8580 The People of the State of New York, Respondent,

-against-

Howard Breedy,
Defendant-Appellant.

Ind. 4939/16
SCI 2143/17

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

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

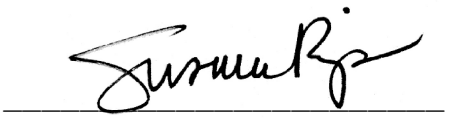
An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Jill Konviser, J.), rendered July 24, 2017,

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

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

ENTERED: MARCH 5, 2019



CLERK

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

Acosta, P.J., Richter, Manzanet-Daniels, Tom, Moulton, JJ.

8581- Index 650953/15
8582 Citi Structure, LLC,
Plaintiff-Appellant,

-against-

Capital One Bank, N.A.,
Defendant,

Wells Fargo Bank, N.A.,
Defendant-Respondent.

_____

Law Offices of Marc H. Supcoff, New York (Marc H. Supcoff of counsel), for appellant.

Mandelbaum Salsburg P.C., New York (Michael F. Bevacqua, Jr. of counsel), for respondent.

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Order, Supreme Court, New York County (Melissa Crane, J.), entered February 5, 2018, which denied plaintiff's motion for summary judgment and granted defendant Wells Fargo Bank's motion for summary judgment dismissing the complaint as against it, unanimously affirmed, with costs. Order, same court and Justice, entered on or about April 9, 2018, to the extent it denied plaintiff's motion to renew the motions for summary judgment, unanimously affirmed, without costs, and the appeal therefrom otherwise dismissed, without costs, as taken from a nonappealable order.

Defendant did not violate the New Jersey Uniform Commercial

Code (NJ Stat Ann § 12A:3-110) by transferring funds from accounts on which checks were written payable to "York & Fortune Construction Group" to Fortune Construction Group only, without an endorsement by York International Corp., the second intended payee. The statute provides, in pertinent part, "If an instrument payable to two or more persons is ambiguous as to whether it is payable to the persons alternatively, the instrument is payable to the persons alternatively" (§ 12A:3-110[d]). The checks at issue failed to properly identify York and Fortune as two separate entities, and were therefore ambiguous as to whether they were payable to the payees alternatively. Defendant had no knowledge that the checks were intended to be jointly payable to Fortune, a subcontractor on a construction project, and York, the equipment supplier.

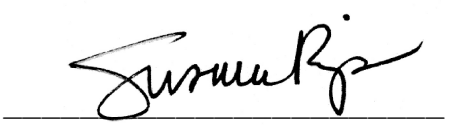
Plaintiff's renewal motion was not based on the requisite new facts not offered on the prior motion (CPLR 2221[e][2]), but on documentary evidence from a different action it filed against defendant before the instant summary judgment motions were made.

No appeal lies from the denial of leave to reargue (*Matter of Black United Fund of N.Y., Inc.*, 167 AD3d 407 [1st Dept 2018]).

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

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

ENTERED: MARCH 5, 2019



CLERK

Acosta, P.J., Richter, Manzanet-Daniels, Tom, Moulton, JJ.

8583 William Spencer, Index 160133/14
Plaintiff-Appellant,

-against-

322 Partners, L.L.C.,
Defendant-Respondent.

_____

Sanders, Sanders, Block, Woycik, Viener & Grossman, P.C., Mineola (Mark R. Bernstein of counsel), for appellant.

Cartafalsa, Turpin & Lenoff, New York (Carolyn Comparato of counsel), for respondent.

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Order, Supreme Court, New York County (Carol R. Edmead, J.), entered February 16, 2018, which, insofar as appealed from as limited by the briefs, granted defendant's motion for summary judgment dismissing plaintiff's claim under Labor Law § 240(1), unanimously affirmed, without costs.

Although plaintiff injured his elbow when the ladder he was using in defendant's building fell over, he is not entitled to relief under Labor Law § 240(1) since he was not engaged in construction-related activity at the time of his accident (*see Rhodes-Evans v 111 Chelsea LLC*, 44 AD3d 430, 431-433 [1st Dept 2007]). Plaintiff's actions of opening a splice box affixed to the wall and splicing telephone wires therein while on a service call for a customer of his employer did not constitute an

alteration of the building, but rather routine maintenance (*see id.*; *Ventura v Ozone Park Holding Corp.*, 84 AD3d 516, 517 [1st Dept 2011]; *Cosentino v Long Is. R.R.*, 201 AD2d 528 [2d Dept 1994]).

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

ENTERED: MARCH 5, 2019

CLERK

Acosta, P.J., Richter, Manzanet-Daniels, Tom, Moulton, JJ.

8584N David Eshaghian, Index 654481/15
Plaintiff-Appellant,

-against-

Marokh Eshaghian, et al.,
Defendants-Respondents,

First American Title Insurance Company,
Nominal Defendant.

_____

Davidoff Hutcher & Citron LLP, New York (Malcolm S. Taub of counsel), for appellant.

Vishnick McGovern Milizio LLP, Lake Success (Jordan M. Freundlich of counsel), for respondents.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered April 26, 2018, which, to the extent appealed from, denied plaintiff's motion for leave to amend the complaint, unanimously reversed, on the law, without costs, and the motion granted.

Plaintiff's proposed new claim arises from the same facts (indeed appears in the same agreement) that formed the basis of the prior claims and counterclaims. Thus, while defendants emphasize plaintiff's long delay in seeking to amend, they have not shown that they are surprised or prejudiced by the amendment (see *Anoun v City of New York*, 85 AD3d 694 [1st Dept 2011]).

On its face, the proposed amendment is not "palpably devoid of merit" (*see Cruz v Brown*, 129 AD3d 455, 456 [1st Dept 2015]). It flows logically from the prior rulings in this case as to the validity of the Letter Agreement and the invalidity of the so-called "Side Agreement."

The prior summary judgment ruling in this action does not constitute a bar to amendment of the complaint on the ground of res judicata, which is applicable only to a judgment in a prior action (*see Hudson-Spring Partnership, L.P. v P+M Design Consultants, Inc.*, 112 AD3d 419 [1st Dept 2013]). There is no violation of the law of the case doctrine, because the proposed amendment is consistent with, rather than contrary to, the prior rulings in this action.

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

ENTERED: MARCH 5, 2019

CLERK

Acosta, P.J., Richter, Manzanet-Daniels, Tom, Moulton, JJ.

8585N In re Progressive Specialty Insurance Company,
Petitioner-Appellant,

-against-

Paul Guzmarino,
Respondent-Respondent.

Index 656333/16

Law Offices of Jennifer S. Adams, Yonkers (Michael A. Zarkower of counsel), for appellant.

Hill & Moin, LLP, New York (Cheryl R. Eisberg Moin of counsel), for respondent.

Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered May 29, 2018, which denied the petition to permanently stay an uninsured motorist arbitration commenced by respondent, and directed the parties to proceed to arbitration of respondent's claim, unanimously affirmed, without costs.

Respondent was hit by an unidentified motor vehicle while he was bicycling on a bike path. Following his demand for uninsured motorist arbitration, petitioner commenced this CPLR article 75 proceeding to stay the arbitration. Petitioner alleged that respondent had failed to establish physical contact with an unidentified vehicle as required by the policy, and that he failed to notify the police within 24 hours of the event or as

soon as was reasonably possible.

On the initial application for a stay of arbitration, the burden rests on the party seeking the stay to establish the existence of evidentiary facts, sufficient to conclude that there is a genuine preliminary issue (*see Matter of Hereford Ins. Co. v Vazquez*, 158 AD3d 470, 471 [1st Dept 2018]; *Matter of Commercial Union Ins. Cos. [Pouncy]*, 120 AD2d 382, 383 [1st Dept 1986]). Here, petitioner failed to meet its burden because its submissions consisted of mere conclusory allegations (*see Matter of Commercial Unit Ins. Cos. [Pouncy]*, 120 AD2d at 383).

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: MARCH 5, 2019

CLERK

Sweeny, J.P., Mazzarelli, Kahn, Oing, Singh, JJ.

7489 The People of the State of New York, Ind. 6947/87
Respondent,

-against-

Ronald Dorsey,
Defendant-Appellant.

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

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

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Order, Supreme Court, New York County (Roger S. Hayes, J.), entered on or about January 4, 2017, which denied defendant's CPL 440.30(1-a) motion for DNA testing and his CPL 440.10 motion to vacate a judgment rendered June 11, 1998, unanimously affirmed.

At defendant's 1988 trial on two counts each of sodomy in the first and second degrees (now known as criminal sexual act), the complainant, who was 13 years old at the time of the alleged crime, testified. He stated that defendant, who had hired the complainant to work in a building defendant was renovating, approached him from behind while he was sweeping the floor, pulled down his pants and underwear, and then placed his penis in the complainant's anus and moved back and forth for about five minutes. The complainant further testified that, on the next

day, defendant followed him into the building's basement, ordered him to lie down, pulled down his pants, and sodomized him again. The complainant did not know if defendant ejaculated on either occasion. Police, who were contacted by the complainant's mother after he told her about the assaults, seized as evidence the complainant's underwear, which he wore during both attacks. The police found a semen stain in the rear of the underwear. A medical examination revealed that the complainant had an external bruise near his anus that could have been caused by sexual abuse and that he did not have any internal tears or lacerations.

Defendant was convicted of all counts. This Court unanimously affirmed his conviction, stating, inter alia, that "[w]hile [complainant]'s and the detectives' testimony were sufficient to sustain the convictions, the presence of semen on the bottom of [complainant]'s underwear further corroborated [complainant]'s account of the attacks" (*People v Dorsey*, 166 AD2d 180, 181 [1st Dept 1990], *lv denied* 76 NY2d 1020 [1990], *lv denied on reconsideration* 77 NY2d 877 [1991]).

On October 26, 1992, defendant filed a petition for a federal writ of habeas corpus. The petition was docketed on December 10, 1992. The petition was granted, and the judgment of conviction vacated, on a finding that defendant had been deprived

of effective assistance of counsel when his attorney did not introduce at trial the results of serological testing that had been performed on the complainant's underwear (*see Dorsey v Kelly*, 1997 WL 400211, 1997 US Dist LEXIS 10205 [SD NY 1997], *affd sub nom Dorsey v People*, 164 F3d 617 [2d Cir 1998]). The habeas court specifically found that the testing showed the presence of two types of antigens at the site of the semen stain, both of which could have come from the victim, but only one of which could have come from defendant, making it impossible that defendant could have been the sole source of the semen. The court held that failing to introduce the results was unreasonable and prejudiced defendant because the reports would have "substantially weakened the probative significance of the semen stain on the underpants" (1997 WL 400211 at *8, 1997 US Dist LEXIS at *22).

When the parties appeared to schedule defendant's second trial, with defendant proceeding pro se, the People informed the court that the physical evidence, including the underwear, rape kit, and blood and saliva samples, had been destroyed by the NYPD in November 1992 (i.e., after defendant filed the habeas petition but before it was docketed). The trial court denied defendant's motion to dismiss the indictment on the basis of the destruction

of the evidence, rejecting defendant's argument that he was prejudiced, since the results of testing that had previously been done on the evidence remained available. The court suggested giving an adverse inference charge, but ultimately did not issue such a charge to the jury.

At the second trial, the complainant gave testimony consistent with his testimony at the first trial, with more detail. His mother testified that he was examined at Harlem Hospital, where the doctor noticed a small bruise near the lower part of his anal-rectal canal, indicating that the complainant had suffered a soft tissue injury with some bleeding. The doctor estimated that the injury had been inflicted between 24 and 48 hours earlier.

Mary Quigg, an NYPD forensic serologist, testified that she had analyzed the contents of the rape kit on November 20, 1987, concluding that a yellowish stain in the rear of the underwear contained sperm. In January 1988, Quigg reexamined the underwear, as well as blood and saliva samples taken from the complainant and defendant. Based on the blood type and antigens present in the samples, Quigg found the tests inconclusive, concluding that the stain could have come from someone with type A blood, like the complainant, but also could have been a mixture

of secretions from a person with type A blood and a person with type O blood. Defendant has type O blood. Quigg further testified that the underwear was not tested for DNA because such testing was not available in November 1987 or January 1988.

Defendant was once again convicted, and this Court affirmed the conviction, finding that there was "overwhelming evidence that defendant used physical force to compel the victim to engage in sexual acts" (300 AD2d 136, 137 [1st Dept 2002]).

On August 15, 2016, defendant moved pursuant to CPL 440.30(1-a) for DNA testing of the underwear. He argued that the People had failed to establish that the NYPD actually destroyed the evidence. This was, according to defendant's contention, because they presented no specific evidence about when or how the sample was destroyed, other than telling the court before trial that the prosecutor had been told of its destruction by a sergeant in the property clerk's office. Defendant claimed that a hearing was necessary to establish whether the evidence still existed, and that there was a reasonable probability that the outcome of his trial would have been more favorable if DNA testing had been completed, since it could have proved that the semen came from complainant or a third party. Defendant also moved to set aside his conviction under CPL 440.10(1)(h), arguing

that, assuming he established that the NYPD destroyed the semen sample, it did so in bad faith and in violation of his due process rights, since the exculpatory value of the semen was being litigated in the habeas proceeding when the sample was destroyed.

In opposition, the People submitted documents from the NYPD and the Office of the Chief Medical Examiner (OCME) purporting to show that the rape kit and exemplars containing blood and saliva samples from defendant and the complainant were destroyed in November 1992. Specifically, the People presented a letter from a sergeant in the NYPD Property Clerk Division, who stated that he had "conducted a review of all relevant records" and determined that the subject evidence had been destroyed. For each item, the sergeant provided an invoice that bore the handwritten word "destroyed" next to it. He also attached excerpts from a logbook entitled "Manhattan Property Clerk Closed Vouchers Master Listing," which listed each item along with the "disposition code" that corresponded to "local destruction." The People also submitted a letter from a special counsel at OCME who related that a senior criminologist had searched a variety of databases, detailed in the letter, for the items, but found no matches. The letter further stated that a supervisor in the

evidence unit had searched the evidence database but found nothing pertinent. Finally, the People presented documentation from the NYPD lab, including an affidavit by a managerial criminologist, reflecting that the physical evidence had been analyzed in the lab in 1987 and 1988 and then returned to detectives or the property clerk.

Defendant contended that the People's showing was inadequate to avoid a hearing, since, inter alia, physical searches of the NYPD property unit and laboratory, as opposed to mere record searches, were not conducted. The court summarily denied defendant's motion. With respect to the 440.10 due process claim, the court found that, given that all parties were aware before the second trial in 1998 that the evidence had been destroyed in 1992, facts in support of defendant's current claims could readily have been made to appear on the record in a manner that would have provided adequate basis for review on appeal. Since they were not, the court declined to consider the claim, citing CPL 440.10(3)(a).

The court nevertheless addressed the merits of the 440.10 claim, as well as the 440.30 claim, and found that the People had met their burden of showing that the potential DNA sample had been destroyed. It concluded that the evidence showed that the

People had made "diligent efforts" to locate the property, albeit to no avail. Accordingly, the court found no reason to remand for an evidentiary hearing on this matter. The court further rejected the due process claim that the property was destroyed in bad faith, finding that it was not destroyed while the federal habeas petition was pending because defendant "filed" the petition one month after the evidence was destroyed. The court also found that there was no indication that the police believed the evidence was exculpatory.

Any defendant, regardless of the date of conviction, may move for DNA testing on specified evidence. The court shall grant the application if it determines that had a DNA test been conducted on the evidence and had the results of that evidence been admitted at trial, "there exists a reasonable probability that the verdict would have been more favorable to the defendant" (CPL 440.30[1-a][a][1]). Defendant bears the burden of making the "reasonable probability" showing (*People v Sposito*, 30 NY3d 1110, 1111 [2018]). Where the People assert that the evidence to be tested has been destroyed or cannot be located, the statute provides that the people must make "a representation to that effect" and submit "information and documentary evidence in the possession of the people concerning the last known physical

location of such specified evidence" (CPL 440.30[1-b][b]). It is the People's burden to show that the evidence could no longer be located and was thus no longer available for testing (*People v Garcia*, 65 AD3d 932 [1st Dept 2009], *lv denied* 13 NY3d 907 [2009]).

We find that the People met their burden. Notwithstanding systemic problems that have been identified in the way that the NYPD tracks whether evidence has been destroyed (*see Newton v City of New York*, 779 F3d 140, 154 [2d Cir 2015], *cert denied* __ US__, 136 S Ct 795 [2016]), defendant failed to show that the People, in this instance, did not adequately establish that the evidence cannot be located. First, while the signed letter from the NYPD sergeant in the Property Clerk Division stating that he had reviewed "all relevant records" was not an affidavit by an individual with direct knowledge of the status of the evidence, the case law does not require that. Rather, the necessary showing may be based on "an official record" (*People v Pitts*, 4 NY3d 303, 312). Indeed, this case demonstrates the need for such flexibility, since the subject evidence is more than 2 ½ decades old. Further, the People correctly point out that the sergeant's letter and the attached invoices sufficiently establish that evidence was destroyed in 1992. Also, the affidavit by the NYPD

lab criminologist, together with the lab records themselves, confirms that the invoices of destroyed evidence described the physical evidence in defendant's case. The lack of any signature near the "destroyed" notation on the invoices does little, by itself, to call into question the overall accuracy of the invoices. The People do not specifically address defendant's particular arguments about the lack of clarity as to the physical evidence that was in the kit when it was returned to the property room, other than by pointing to Quigg's trial testimony that she placed all the contents of the rape kit back into the kit and sealed it. This issue and the other recordkeeping issues identified by defendant do not render the People's proof of destruction insufficient under the current case law.

In any event, we find that defendant has not carried his burden of establishing that, even had he been able to secure the original evidence and perform DNA testing on it, there is a reasonable probability that the verdict would have been different (*Pitts*, 4 NY3d at 307). Defendant seeks DNA testing to bolster the serological evidence that was introduced at trial. However, that evidence already raised the possibility that he did not contribute to the semen that was found on the complainant's underwear, and the complainant acknowledged that he was not sure

if defendant ejaculated. Nonetheless, the jury decided to convict, based on what it obviously believed was credible testimony from the complainant. Because of that, defendant has failed to satisfy his burden of showing that DNA evidence would have materially increased his chance of achieving an acquittal.

With respect to the due process claim, defendant argues that the court abused its discretion when it found, pursuant to CPL 440.10(3)(a), that the claim was barred because defendant could have, with due diligence, adduced supporting facts that would have provided an adequate basis for review by this Court on direct appeal. We see no reason to disturb this finding. Even if defendant is correct that the People provided insufficient facts about the destruction of the evidence for him to begin an inquiry into whether they acted in bad faith, his effort would have been for naught. That is because, as discussed above, DNA testing was likely not to have had a material effect on the outcome at trial. For destruction of evidence to result in a due process violation, the destruction not only needs to be done in bad faith, it must be "potentially useful" (*see Arizona v Youngblood*, 488 US 51, 58 [1988]). Even were the standard more flexible under the New York State Constitution, as defendant argues, surely he would have to at least draw a connection

between the destroyed evidence and the possible outcome at trial. Indeed, his argument under the State Constitution derives from the concurrence in *Youngblood*, in which Justice Stevens stated that "there may well be cases in which the defendant is unable to prove that the State acted in bad faith but in which the loss or destruction of evidence is nonetheless *so critical to the defense* as to make a criminal trial fundamentally unfair" (488 US at 61 [emphasis added]). Here, the destroyed evidence does not approach that heightened standard.

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

ENTERED: MARCH 5, 2019

CLERK

Sweeny, J.P., Renwick, Gische, Kahn, Kern, JJ.

8587 In re J. Martin-Geindo, Index 157373/17
Petitioner-Appellant,

-against-

New York State Division of
Housing and Community Renewal,
et al.,
Respondents-Respondents.

_____

Collins, Dobkin & Miller LLP, New York (W. Miller Hall of counsel), for appellant.

Mark F. Palomino, New York (Jason G. Parpas of counsel), for New York State Division of Housing and Community Renewal, respondent.

Borah, Goldstein, Altschuler, Nahins & Goidel, P.C., New York (Andrew I. Bart of counsel), for Heights HQ, LLC and Livingston Management, respondents.

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Judgment, Supreme Court, New York County (Erika M. Edwards, J.), entered January 22, 2018, denying the petition to annul respondent New York State Division of Housing and Community Renewal's determination, dated July 13, 2017, settling a non-compliance proceeding against respondents Heights HQ, LLC and Livingston Management, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

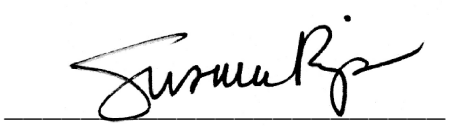
Petitioner failed to establish that respondent New York State Division of Housing and Community Renewal (DHCR) exceeded its authority by entering into an agreement with respondents

Heights HQ, LLC and Livingston Management settling a non-compliance proceeding initiated against them, or that DHCR's decision to enter into such an agreement either violated a lawful procedure or was arbitrary and capricious (*see Matter of Power v New York State Div. of Hous. & Community Renewal*, 61 AD3d 544, 544 [1st Dept 2009], *lv denied* 13 NY3d 716 [2010]*; Matter of Soho Alliance v New York State Liq. Auth.*, 32 AD3d 363, 363 [1st Dept 2006]*; Matter of Town of Marilla v Travis*, 151 AD3d 1588, 1589-1590 [4th Dept 2017]). DHCR's prior order, which required Heights HQ and Livingston to reinstate door-to-door trash collection in petitioner's building within thirty days, did not preclude Heights HQ or Livingston from filing an application for a reduction or modification of services pursuant to section 9 NYCRR 2522.4(e) of the Rent Stabilization Code. Accordingly, DHCR's subsequent settlement of an enforcement action against Heights HQ and Livingston, in which DHCR required them to file such an application within sixty days, did not constitute a

revocation or modification of its prior order, and did not require notice to petitioner pursuant to section 9 NYCRR 2527.8 of the Rent Stabilization Code.

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

ENTERED: MARCH 5, 2019



CLERK

Sweeny, J.P., Renwick, Gische, Kahn, Kern, JJ.

8588 In re Harmony Spring G.,

A Dependent Child Under the Age of Eighteen Years, etc.,

Letticia Y. R.,
Respondent-Appellant,

Little Flower Children and Family Services of New York,
Petitioner-Respondent,

Damon S. G.,
Respondent.

_____

Douglas H. Reiniger, New York, for appellant.

Carrieri & Carrieri, P.C., Mineola (Ralph R. Carrieri of counsel), for respondent.

Karen Freedman, Lawyers for Children, Inc., New York (Brenda Soloff of counsel), attorney for the child.

_____

Order, Family Court, New York County (Karen I. Lupuloff, J.), entered on or about December 15, 2017, which, inter alia, upon a finding of permanent neglect, terminated respondent mother's parental rights to the subject child and committed custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

Clear and convincing evidence supports the determination

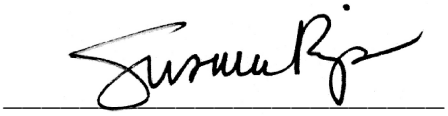
that the mother permanently neglected the child by failing to plan for her future, despite the agency's diligent efforts to encourage and strengthen the parental relationship (*see* Social Services Law § 384-b[7][a]). Notwithstanding her partial compliance with her service plan, the mother failed to gain insight into her parental deficiencies or benefit from the services or visitation with which she may have complied (*see e.g. Matter of Dina Loraine P. [Ana C.]*, 107 AD3d 634 [1st Dept 2013]).

A preponderance of the evidence supports the determination that termination of the mother's parental rights is in the best interest of the child (*see e.g. Matter of Deime Zechariah Luke M. [Sharon Tiffany M.]*, 112 AD3d 535, 536 [1st Dept 2013], *lv denied* 22 NY3d 863 [2014]; *Matter of Olushola W.A.*, 41 AD3d 179 [1st Dept 2007]). The child is well cared for in her pre-adoptive foster home and her foster parents wish to adopt her. Furthermore, over the past three years, the mother has failed to take any steps toward reunification or set forth a feasible plan to care for the child.

We have considered the mother's remaining arguments, including her request for a suspended judgment, and find them unavailing.

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

ENTERED: MARCH 5, 2019



CLERK

Sweeny, J.P., Renwick, Gische, Kahn, Kern, JJ.

8589 Yu Tian Li, Index 151760/16
Plaintiff-Respondent,

-against-

Louie and Chan Restaurant,
Defendant-Respondent,

SM 303 Broome, LLC, et al.,
Defendants-Appellants.

_____

Cartafalsa, Turpin & Lenoff, New York (Michael P. Bersak of counsel), for appellants.

Napoli Shkolnik PLLC, New York (Kristina Georgiou of counsel), for Yu Tian Li, respondent.

Bartlett LLP, Mineola (Robert G. Vizza of counsel), for Louie and Chan Restaurant, respondent.

_____

Order, Supreme Court, New York County (W. Franc Perry, III, J.), entered on or about April 11, 2018, which, inter alia, granted plaintiff's motion to amend the complaint and denied the motion of SM 303 Broome, LLC and 303 Broome Manager LLC (collectively Broome) to dismiss the complaint as against them, unanimously affirmed, without costs.

Plaintiff was injured when cellar doors situated in the sidewalk in front of premises owned, controlled and managed by Broome, suddenly opened, causing him to trip and fall. He commenced separate actions against Broome and defendant

restaurant, which were subsequently consolidated. In the complaint against Broome, however, plaintiff inadvertently alleged that the accident involved a slip and fall in a parking lot. When Broome moved to dismiss on the basis of that error, plaintiff sought leave to amend to correct the error.

Leave to amend was properly granted absent any prejudice to Broome resulting from the pleading error (*see Hernandez v City of Yonkers*, 74 AD3d 1025, 1026-1027 [2d Dept 2010]; CPLR 3025[b]). Contrary to Broome's contentions, plaintiff's motion included the proposed pleading and sufficiently specified the changes to be made, and any technical defect was properly overlooked (*see Medina v City of New York*, 134 AD3d 433 [1st Dept 2015]). Furthermore, the proposed pleading was clearly not patently insufficient or devoid of merit (*see Ancrum v St. Barnabas Hosp.*, 301 AD2d 474, 475 [1st Dept 2003]; *HSBC Bank v Picarelli*, 110 AD3d 1031 [2d Dept 2013]).

Since the motion to amend was properly granted, the court properly denied Broome's motion to dismiss, which was based on

the inadvertent pleading error (*see also Mahler v North Shore Camp, LLC*, 145 AD3d 678, 679 [2d Dept 2016]).

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

ENTERED: MARCH 5, 2019

CLERK

Sweeny, J.P., Renwick, Gische, Kahn, Kern, JJ.

8590 Faye Ran, Index 101762/16
Plaintiff-Appellant,

-against-

Sam Weiner, et al.,
Defendants-Respondents.

_____

Hunton Andrews Kurth LLP, New York (Joshua S. Paster of counsel), for appellant.

Devitt Spellman Barrett, LLP, Smithtown (Felicia Gross of counsel), for Sam Weiner, respondent.

Ryan & Conlon LLP, New York (Elizabeth E. Malang of counsel), for 451 West Broadway Cooperative, Inc., respondent.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered October 13, 2017, which granted defendants' motions to dismiss the complaint as against them, unanimously affirmed, without costs.

The cause of action for breach of contract asserted against defendant Weiner was correctly dismissed because the proprietary lease and the house rules incorporated therein establish conclusively that plaintiff is not a third-party beneficiary of Weiner's lease with defendant cooperative corporation (*see Dormitory Auth. of the State of N.Y. v Samson Constr. Co.*, 30 NY3d 704, 710 [2018]). Section 11 of the lease provides, in

pertinent part, "The Lessor shall not be responsible to the Lessee for the nonobservance or violation of House Rules by any other lessee or person."

In view of section 11 of the lease, the breach of contract cause of action asserted against the coop was also correctly dismissed; it demanded that the coop enforce its own house rules and cause Weiner to reimburse plaintiff for water damage allegedly caused by a leak emanating from his apartment.

Plaintiff's "footnote request" that she be permitted to amend the complaint a second time to add a claim for a declaratory judgment was improperly raised in opposition papers rather than by notice of motion (*see generally* CPLR 2214). In any event, the proposed amended pleading lacks merit (*see Garcia v New York-Presbyt. Hosp.*, 114 AD3d 615, 615 [1st Dept 2014]).

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

ENTERED: MARCH 5, 2019

CLERK

Sweeny, J.P., Renwick, Gische, Kahn, Kern, JJ.

8591 Yolanda Cruz, Index 162414/14
Plaintiff-Appellant,

-against-

Perspolis Realty LLC, et al.,
Defendants-Respondents.

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Law Office of Ephrem J. Wertenteil, New York (Ephrem J. Wertenteil of counsel), for appellant.

Ahmuty, Demers & McManus, New York (Frank J. Wenick of counsel), for respondents.

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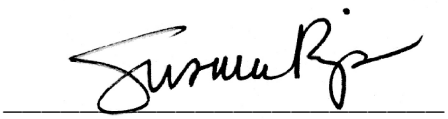
Order, Supreme Court, New York County (Erika M. Edwards, J.), entered May 15, 2017, which granted defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Triable issues of fact exist in this action where plaintiff was injured when, while descending the interior steps of defendants' building, she slipped on melted ice cream that was present on the steps. Although defendants' superintendent testified that he complied with his regular maintenance routine on the day of the accident and never observed the cup of ice cream on the stairs, plaintiff testified that she observed the cup of ice cream in an upright position approximately three hours before her fall when she had returned home from work. Such

conflicting testimony, along with a photograph showing a tipped over cup of melted ice cream taken moments after plaintiff's fall, creates a triable issue as to whether defendants had constructive notice of the condition (*see Kurtz v Supercuts, Inc.*, 127 AD3d 546 [1st Dept 2015]).

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

ENTERED: MARCH 5, 2019



CLERK

Sweeny, J.P., Renwick, Gische, Kahn, JJ.

8592 Jane Burgdoerfer, Index 105644/10
Plaintiff-Respondent,

Steven Burgdoerfer,
Plaintiff,

-against-

CLK/HP 90 Merrick LLC, et al.,
Defendants-Appellants.

_____

Gallo Vitucci Klar LLP, New York (Jessica A. Clark of counsel), for appellants.

Heitz Legal, P.C., New York (Dana E. Heitz of counsel), for respondent.

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Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered on or about January 12, 2018, which denied defendants' motion for summary judgment dismissing the complaint, unanimously modified, on the law, to grant the motion as to defendant CLK/HP 90 Merrick LLC (90 Merrick) and otherwise affirmed, without costs. The Clerk is directed to enter judgment dismissing the complaint as against 90 Merrick.

Plaintiff seeks to recover damages for injuries she sustained when she fell after slipping on water on the white tile floor of a kitchenette area of an office in a building owned by defendant 90 Merrick. She claims that the floor had been dry

when she entered the area about 10 minutes earlier. Nonparty Rosa Alvarado, an employee of defendant ABM Janitorial Services-Northeast, Inc. (ABM), was cleaning the area at the time of plaintiff's accident pursuant to a contract between ABM and 90 Merrick. It is undisputed that there was a mop and bucket in the area when plaintiff fell.

Plaintiff's testimony and that of nonparty Olga Robertson, a coworker who was with plaintiff at the time of the accident, provide a nonspeculative basis for plaintiff's version of the accident and establish a nexus between the water on the floor and the circumstances of plaintiff's fall that render it more likely or more reasonable that plaintiff's injuries were proximately caused by Alvarado than by some other agency (*see Holliday v Hudson Armored Car & Courier Serv.*, 301 AD2d 392, 395-396 [1st Dept 2003], *lv dismissed in part, denied in part* 100 NY2d 636 [2003]). In particular, they testified that the janitor working in the kitchenette had a mop and bucket with her before the accident happened and that after the accident the floor appeared as though it had been recently mopped (*see Brown v Simone Dev. Co., L.L.C.*, 83 AD3d 544, 545 [1st Dept 2011]). Alvarado's testimony that she had not mopped the floor before the accident presents issues of fact as to credibility (*see Santos v Temco*

Serv. Indus., 295 AD2d 218, 218-219 [1st Dept 2002]).

Contrary to ABM's contention, in view of Robertson's testimony that she did not realize that the floor was slippery until she walked on it, an issue of fact exists as to whether the wet floor was an open and obvious condition (*see Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69, 72 [1st Dept 2004]). Furthermore, both plaintiff and Robertson testified that they did not see that the floor had been mopped until after plaintiff fell.

The complaint's allegations that defendants were negligent in their ownership, operation, control and maintenance of the premises by causing or allowing a dangerous condition on the floor gave no indication that plaintiff's theories of liability would include 90 Merrick's negligent retention of ABM or its vicarious liability for ABM's independent contractor's negligence in performing its duties under the contract (*see Darrisaw v Strong Mem. Hosp.*, 74 AD3d 1769, 1770 [4th Dept 2010], *affd* 16 NY3d 729 [2011]). Notwithstanding, a motion for summary judgment must be denied if there are issues of fact as to an actionable claim, even if the claim was not properly pleaded (*Ramos v Jake Realty Co.*, 21 AD3d 744, 745 [1st Dept 2005]). Thus, we have searched the record (*see Commissioner of the State Ins. Fund v*

Weissman, 90 AD3d 417, 417 [1st Dept 2011]), and we find that there are no factual issues as to whether ABM was an independent contractor – it was – when the accident happened. The deposition testimony elicited from nonparty CLK Commercial Management, LLC's employee, John S. Burke, the property manager for the building at the time of the accident, and ABM's manager, Victor Orellana, whose duties at the time of the accident included making sure the building was kept clean, shows that 90 Merrick did not direct, supervise or control ABM's work and that an ABM employee had responsibility for supervising and inspecting the work performed by ABM's employees, which comports with the duties and obligations as set forth in defendants' contract (*see Chuchuca v Chuchuca*, 67 AD3d 948, 950 [2d Dept 2009]).

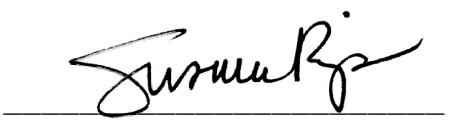
In addition, 90 Merrick may not be held vicariously liable for the negligence of ABM's employee (*see Rosenberg v Equitable Life Assur. Socy. of U.S.*, 79 NY2d 663, 668 [1992]).

With respect to the theory of negligent retention, plaintiff failed to raise an issue of fact as to whether 90 Merrick knew or should have known of ABM's propensity for the conduct that caused her injury (*see Weinfeld v HR Photography, Inc.*, 149 AD3d 1014, 1015-1016 [2d Dept 2017]; *White v Hampton Mgt. Co. L.L.C.*, 35 AD3d 243, 244 [1st Dept 2006]). The complaints that 90 Merrick

received before the accident about ABM's failures to vacuum, dust, take out garbage, or otherwise clean the building on occasions were not sufficiently specific to raise an inference that 90 Merrick knew or should have known that ABM had a propensity for mopping the kitchenette floor negligently (*see Bellere v Gerics*, 304 AD2d 687, 688 [2d Dept 2003]).

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

ENTERED: MARCH 5, 2019



CLERK

Sweeny, J.P., Renwick, Gische, Kahn, Kern, JJ.

8593 The People of the State of New York, Ind. 3191/12
Respondent,

-against-

Juan Gonzalez,
Defendant-Appellant.

_____

Justine M. Luongo, The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sheila O'Shea of counsel), for respondent.

_____

Order, Supreme Court, New York County (Charles H. Solomon, J.), entered on or about December 13, 2012, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Defendant's contention that he should have received a downward departure is unpreserved because he made no such application to the hearing court (*see People v Gillotti*, 23 NY3d 841, 861 n 5 [2014]), and we decline to address this fact-based

argument, made for the first time on appeal. In any event, we find no basis for such a departure.

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

ENTERED: MARCH 5, 2019

CLERK

Sweeny, J.P., Renwick, Gische, Kahn, Kern, JJ.

8594 Ira Millman, Index 652002/15
Plaintiff-Appellant-Respondent,

-against-

Blatt & Dauman, LLP,
Defendant-Respondent-Appellant,

Morton E. Marvin,
Defendant-Respondent.

_____

Schlam Stone & Dolan LLP, New York (Samuel L. Butt of counsel), for appellant-respondent.

Milber Makris Plousadis & Seiden, LLP, Woodbury (John A. Lentinello of counsel), for respondent-appellant.

Furman Kornfeld & Brennan LLP, New York (A. Michael Furman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered April 26, 2018, which granted defendant Morton E. Marvin's motion for summary judgment dismissing the complaint as against him, and denied defendant Blatt & Dauman, LLP's (B&D) motion for summary judgment dismissing the complaint as against it, unanimously affirmed, with costs.

Defendant Marvin made a prima facie showing that he exercised the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession in representing plaintiff in negotiating a settlement agreement between plaintiff

and his wife (*see Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442 [2007]). Contrary to plaintiff's contention, given the facts of this case Marvin was not required to submit an expert affidavit in support of his motion (*see Boye v Rubin & Bailin*, 152 AD3d 1, 9 [1st Dept 2017]).

In opposition, plaintiff failed to raise an issue of fact. His expert affidavit is conclusory (*see Aur v Manhattan Greenpoint Ltd.*, 132 AD3d 595, 596 [1st Dept 2015]), and the only factual issue raised by his own affidavit is not material. It is undisputed that plaintiff decided to file taxes jointly with his wife on the advice of defendant B&D, the couple's accountants. In his affidavit, plaintiff denies that Marvin advised him to file separately, which conflicts with Marvin's testimony and corroborating evidence that Marvin did so advise him. However, plaintiff's theory of Marvin's malpractice does not include Marvin's alleged failure to advise him to file separately.

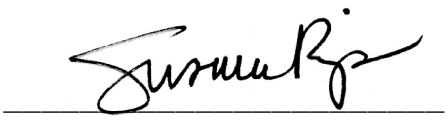
B&D failed to establish prima facie that it adhered to accepted standards of accounting practice. Its expert affidavit commented specifically on B&D's preliminary tax projection only, but failed, among other things, to set forth the accepted standards of accounting practice in preparing such a projection or those applicable to the other alleged instances of negligence.

Further, B&D's argument that its advice did not proximately cause the parties to file jointly because plaintiff's wife would never have agreed to file separately is undermined by, among other things, its failure to cite any authority for the proposition that spouses need one another's permission to file separate tax returns.

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

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

ENTERED: MARCH 5, 2019



CLERK

Sweeny, J.P., Renwick, Gische, Kahn, Kern, JJ.

8595 Chelsea Seidel, etc., et al., Index 307515/13
Plaintiffs,

Sarah Auslander,
Plaintiff-Appellant,

-against-

David Rabassa, et al.,
Defendants-Respondents,

William Seidel,
Defendant.

_____

Joseph I. Orlian, P.C., New York (Justin D. Branlel of counsel), for appellant.

Baker, McEvoy, Morrissey & Moskovits, P.C., Brooklyn (Robert D. Grace of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J., entered on or about October 26, 2017, which, in this action for personal injuries sustained in a motor vehicle accident, granted the motion of defendants David Rabassa and Fakhar Chowdury for summary judgment dismissing the complaint of plaintiff Sarah Auslander (Auslander), unanimously reversed, on the law, without costs, and the motion denied.

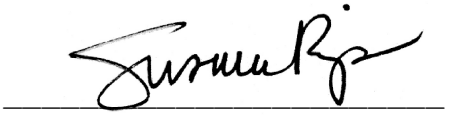
Defendants established their prima facie entitlement to judgment as a matter of law by demonstrating that Auslander did not sustain a serious injury causally related to the accident.

Defendants submitted, inter alia, the emergency room report, CT scans and the reports of a neurologist, a plastic surgeon and an otolaryngologist, all of who examined Auslander and found that she did not sustain a serious injury within the purview of Insurance Law § 5102(d).

In opposition, Auslander submitted objective medical evidence to raise a triable issue of fact as to whether she sustained a nasal fracture (*see Lavy v Zaman*, 95 AD3d 585 [1st Dept 2012]). Her plastic surgeon, who performed a nasal endoscopy, diagnosed a slight nasal fracture, which he observed during the procedure. His report and affidavit were based on the procedure he performed and his observations, and were sufficient objective medical evidence to support his opinion (*see O'Sullivan v Atrium Bus Co.*, 246 AD2d 418 [1st Dept 1998]).

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

ENTERED: MARCH 5, 2019



CLERK

Sweeny, J.P., Renwick, Gische, Kahn, Kern, JJ.

8596 The People of the State of New York, Ind. 4696/14
Respondent,

-against-

Kevin Syphrett,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Noreen M. Stackhouse of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (James M. Burke, J.), rendered July 1, 2015, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree, and sentencing him to a term of six months, unanimously affirmed.

The court properly denied defendant's motion to controvert a search warrant that led to the recovery of drugs from defendant's apartment. Probable cause was established by information provided by a previously reliable confidential informant, who made two controlled buys that were reasonably close in time to

the warrant application (*see e.g. People v Jaen*, 140 AD3d 594 [1st Dept 2016], *lv denied* 28 NY3d 931 [2016]).

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

ENTERED: MARCH 5, 2019

CLERK

Sweeny, J.P., Renwick, Gische, Kahn, Kern, JJ.

8597 Frank Nieto, Index 159273/16
Plaintiff-Appellant-Respondent,

-against-

CLDN NY LLC,
Defendant.
- - - - -
CLDN NY LLC,
Third-Party Plaintiff-Respondent-Appellant,

-against-

ECG Retail Logistics, LLC,
Third-Party Defendant-Respondent-Appellant.

Golomb & Longo, PLLC, New York (Frank A. Longo of counsel), for appellant-respondent.

McAndrew, Conboy, & Prisco, LLP, Melville (Michael J. Prisco of counsel), for CLDN NY LLC, respondent-appellant.

Marshall Conway & Bradley, P.C., New York (Lauren R. Turkel of counsel), for ECG Retail Logistics, LLC, respondent-appellant.

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered July 23, 2018, which, insofar as appealed from, denied plaintiff's motion for partial summary judgment on the issue of liability on his Labor Law § 240(1) claim, and denied the cross motions of defendant CLDN NY LLC (CLDN) and of third-party defendant ECG Retail Logistics, LLC (ECG) for summary judgment dismissing the § 240(1) cause of action, unanimously modified, on

the law, to grant plaintiff's motion, and otherwise affirmed, without costs.

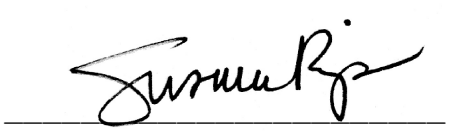
Plaintiff, who fell from a ladder while installing light fixtures in CLDN's building, was forced to install a portion of the light by standing on display cases approximately 20 feet high, and then returning to the top of the ladder to finish that portion of the installation, which was located partially over the cases. While attempting to maneuver himself into position on the ladder, he lost his balance and fell. Whether the ladder shook prior to his fall or during that period in time when he was attempting to recover his balance is of no moment, since the ladder was an inadequate safety device for the work being performed (*see Caceres v Standard Realty Assoc., Inc.*, 131 AD3d 433 [1st Dept 2015], *appeal dismissed* 26 NY3d 1021 [2015]; *Keenan v Simon Prop. Group, Inc.*, 106 AD3d 586, 589 [1st Dept 2013]). The claim of CLDN and ECG that plaintiff was the sole proximate cause of his accident is unpersuasive, since plaintiff's stance was necessary to perform the work (*see Messina v City of New York*, 148 AD3d 493 [1st Dept 2017]; *Cuentas v Sephora USA, Inc.*, 102 AD3d 504 [1st Dept 2013]). It also does not avail defendants that the ladder was not defective, since it is undisputed that the ladder was unsecured, and the worker who had been holding the

ladder walked away only minutes before the accident (*see Howard v Turner Constr. Co.*, 134 AD3d 523 [1st Dept 2015]).

We have considered the remaining contentions and find them unavailing.

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

ENTERED: MARCH 5, 2019



CLERK

Sweeny, J.P., Renwick, Gische, Kahn, Kern, JJ.

8598 Federated Fire Protection Systems Corp., Plaintiff-Respondent, Index 651209/16

-against-

56 Leonard Street, LLC, et al., Defendants,

Lend Lease (US) Construction LMB Inc., Defendant-Appellant.

_____

Quinn McCabe LLP, New York (Jonathan H. Krukas of counsel), for appellant.

Pepper Hamilton LLP, New York (Ira M. Schulman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Erika M. Edwards, J.), entered August 30, 2017, which, to the extent appealed from, denied defendant Lend Lease's motion under CPLR 3211(a)(1) and (a)(7) to dismiss claims for wrongful termination, unjust enrichment and account stated, unanimously modified, on the law, to grant the motion to dismiss as to the unjust enrichment and account stated claims, and otherwise affirmed, without costs.

Lend Lease's core argument as to the wrongful termination claim, that there can be no scenario under which its termination of Federated would be "wrongful," is belied by the plain language of the Trade Contract itself. Paragraph 6.6 expressly

contemplates the possibility that termination could be deemed wrongful and sets out the consequences of such determination, namely, that the termination is governed by article 20 rather than article 6 (*see also Minelli Constr. Co., Inc. v WDF Inc.*, 134 AD3d 508 [1st Dept 2015]).

Supreme Court also appropriately recognized that the wrongful termination claim raises factual issues not resolved by the documentary evidence submitted by Lend Lease in support of its CPLR 3211(a)(1) motion. It was not determinable, on the record before the court, whether Lend Lease's termination was wrongful or instead justified by Federated's alleged defaults.

However, the court should have dismissed the unjust enrichment claim based on the plain language of ¶13.7 of the contract, in which Federated agreed that "any claims ... shall be based ... upon the Contract and the Contract Price." Federated's assertion of an unjust enrichment claim directly conflicts with its agreement at ¶13.7, since "[u]njust enrichment is a quasi-contract theory of recovery and 'is an obligation imposed by equity to prevent injustice in the absence of an actual agreement between the parties concerned'" (*Georgia Malone & Co., Inc. v Rieder*, 86 AD3d 406, 408 [1st Dept 2011], *affd* 19 NY3d 511 [2012]). To allow the claim to proceed, on the theory that

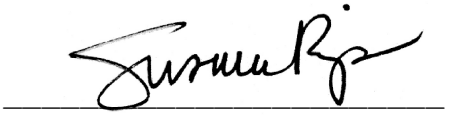
pleading in the alternative is freely allowed, would impermissibly delete from the contract Federated's clear waiver of the right to do so in ¶13.7.

The account stated claim should have been dismissed in light of ¶13.7 as well. An account stated is an agreement, *independent of the underlying agreement*, as to the amount due on past transactions (1 NY Jur 2d, Accounts and Accounting § 8 [emphasis added]; *see Ryan Graphics, Inc. v Bailin*, 39 AD3d 249, 250 [1st Dept 2007]). Since such claim would not be "based upon the Contract" but instead upon the notion of a separate, independent agreement as to the correctness of Federated's invoices and the balance due, it is barred.

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

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

ENTERED: MARCH 5, 2019



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Sweeny, J.P., Renwick, Kahn, Kern, JJ.

8599 Joseph Raia, Index 113006/09
Plaintiff-Respondent,

-against-

Hubert Pototschnig,
Defendant-Appellant,

New Century Mortgage
Corporation, et al.,
Defendants.

_____

Hubert Pototschnig, appellant pro se.

Jeffrey I. Baum & Associates, P.C., Garden City (Jeffrey I. Baum of counsel), for respondent.

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Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered November 29, 2017, which, to the extent appealed from as limited by the briefs, denied defendant Pototschnig's motion to vacate the judgment of foreclosure and sale, or, in the alternative, to dismiss the matter with prejudice, unanimously affirmed, without costs.

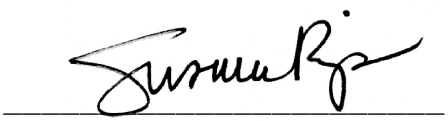
Defendant is seeking to relitigate issues already adjudicated and affirmed by this Court (*see* 148 AD3d 429 [1st Dept 2017]; 127 AD3d 574 [1st Dept 2015]). Furthermore, in opposition to the motion for a judgment of foreclosure and sale, defendant failed to raise his argument concerning the lack of a

valid notice of pendency at the time the judgment of foreclosure and sale was entered. Thus, that argument is waived (*see Wilmington Trust v Sukhu*, 155 AD3d 591 [1st Dept 2017]).

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

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

ENTERED: MARCH 5, 2019



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Sweeny, J.P., Renwick, Gische, Kahn, Kern, JJ.

8600 The People of the State of New York, Ind. 2661/14
Respondent,

-against-

David Knox,
Defendant-Appellant.

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (James Burke, J.), rendered January 7, 2015 ,

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.

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

ENTERED: MARCH 5, 2019

CLERK

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

Sweeny, J.P., Renwick, Gische, Kahn, Kern, JJ.

8601 City National Bank, Index 158388/14
Plaintiff-Respondent,

-against-

Morelli Ratner, P.C., et al.,
Defendants-Appellants.

_____

Kasowitz Benson Torres LLP, New York (Marc E. Kasowitz of counsel), for appellants.

Gibson, Dunn & Crutcher LLP, New York (Robert L. Weigel of counsel), for respondent.

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Order, Supreme Court, New York County (Andrea Masley, J.), entered February 20, 2018, which, insofar as appealed from as limited by the briefs, granted plaintiff's motion for summary judgment, unanimously affirmed, with costs.

Plaintiff seeks to collect the outstanding balance of a loan. Defendants do not dispute the existence of the loan or that it has not been fully paid, but claim that its terms were altered by a subsequent oral modification agreement.

The record is clear that the parties were never truly in agreement on the terms of such a modification (*see Silber v New York Life Ins. Co.*, 92 AD3d 436, 439-440 [1st Dept 2012]). Contrary to defendants' contention, the terms in dispute were not merely ancillary or immaterial (*see generally Matter of Express*

Indus. & Term. Corp. v New York State Dept. of Transp., 93 NY2d 584, 589-591 [1999]).

Even if the parties had come to an oral agreement, it would be void under the statute of frauds because it was not capable of being fully performed within one year (*see* General Obligations Law § 5-701[a][1]; *D & N Boening v Kirsch Beverages*, 63 NY2d 449, 454 [1984]). By defendants' own admission, the agreement was for a period of between 2 and 3 years - notwithstanding their intention to pay the loan off sooner (*see Marcus v C.I.F. Inc.*, 26 AD2d 923 [1st Dept 1966]). The failure to reduce the agreement to writing may not be excused by defendants' alleged partial performance thereof, as this Court has definitively held that the partial performance exception does not apply to GOL § 5-701 - the provision at issue here (*see Gural v Drasner*, 114 AD3d 25, 29-32 [1st Dept 2013], *lv dismissed* 24 NY3d 935 [2014]).

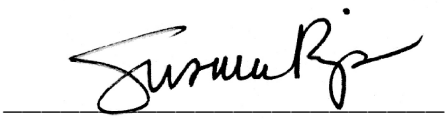
The motion court did not err in considering plaintiff's summary judgment motion, notwithstanding that it had previously moved for summary judgment in lieu of a complaint, because the motion was supported by at least some new evidence and "the policy against multiple summary judgment motions has no application where, as here, the first motion, made before discovery, is denied on the ground of the existence of a factual

issue which, through later uncovering of the facts, is resolved or eliminated" (*Freeze Right Refrig. & A.C. Servs. v City of New York*, 101 AD2d 175, 180-181 [1st Dept 1984]; *see Jones v 636 Holding Corp.*, 73 AD3d 409, 409 [1st Dept 2010]).

We find defendants' affirmative defenses to be unavailing.

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

ENTERED: MARCH 5, 2019



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Sweeny, J.P., Renwick, Gische, Kahn, Kern, JJ.

8604 The People of the State of New York, Ind. 1093/15
Respondent,

-against-

Igor Galagan,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Lee M. Pollack of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Charles Solomon, J.), rendered July 7, 2015,

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.

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

ENTERED: MARCH 5, 2019

CLERK

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

Sweeny, J.P., Renwick, Gische, Kahn, Kern, JJ.

8605 In re Nayci Contracting Associates, LLC, et al., Petitioners, Index 106851/10

-against-

New York City Department of Consumer Affairs, et al., Respondents.

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Wurzel Law Group, PLLC, Floral Park (Glenn J. Wurzel of counsel), for petitioners.

Zachary W. Carter, Corporation Counsel, New York (Jamison Davies of counsel), New York City Department of Consumer Affairs, respondent.

Janet Ricevuto, respondent pro se.

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Proceeding brought pursuant to CPLR article 78 (transferred to this Court by order, Supreme Court, New York County [O. Peter Sherwood, J.], entered May 12, 2011), to annul the decision and order of respondent Department of Consumer Affairs, dated December 23, 2009, which suspended petitioners' contractors' licenses, imposed fines, and ordered petitioners to pay restitution to respondent Ricevuto, unanimously dismissed, without costs.

The rules of the Department of Consumer Affairs (DCA) in effect with respect to the instant proceeding provided that an

administrative appeal from a decision and order imposing a fine and ordering restitution would be denied if the appealing party did not timely deposit with DCA the amount of the fine and restitution (*see* former 6 RCNY 6-40[a][2]). The rules provided further that judicial review of a final decision and order could be sought pursuant to CPLR article 78 "[a]fter exhaustion of the procedure set forth in § 6-40" (former 6 RCNY 6-41). Petitioners did not timely deposit with DCA the amount of the fine imposed and restitution ordered in the challenged decision and order. Thus, they failed to exhaust their administrative remedies, and their article 78 petition must be dismissed (*see e.g. Matter of Rhone v New York City Dept. of Consumer Affairs*, 2011 NY Slip Op 30277[U] [Sup Ct, NY County 2011]; *Matter of Gambino v New York City Dept. of Consumer Affairs*, 26 Misc 3d 1221[A], 2010 NY Slip Op 50206[U] [Sup Ct, NY County 2010]; *see also Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57 [1978]).

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

ENTERED: MARCH 5, 2019

CLERK

Sweeny, J.P., Renwick, Gische, Kahn, Kern, JJ.

8606N In re Ilan Miller, Index 650107/18
Petitioner-Appellant,

-against-

Elrac, LLC,
Respondent-Respondent.

_____

The Law Office of Jason Tenenbaum, P.C., Garden City (Jason Tenenbaum of counsel), for appellant.

Rankin Savidge, PLLC, Mineola (Edward J. Savidge of counsel), for respondent.

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Order, Supreme Court, New York County (Shlomo Hagler, J.), entered July 30, 2018, which denied the petition to vacate the award of a master arbitrator, dated November 22, 2017, affirming the award of the lower arbitrator denying petitioner no-fault benefits, unanimously affirmed, without costs.

Here, the master arbitrator reviewed the no-fault arbitrator's determination and the parties' submissions. He agreed that the sworn independent medical examination report (IME) that the respondent provided established a factual and medical basis for a conclusion that petitioner required no further treatment because the conditions had resolved and there was no objective evidence of disability. The master arbitrator recognized that petitioner's evidence, which included a treating

doctor's affidavit of a subsequent surgery, was considered but rejected by the arbitrator as a factual and credibility determination, within her discretion to make.

Where, as here, there is compulsory arbitration involving no-fault insurance, the standard of review is whether the award is supported by evidence or other basis in reason. This standard has been interpreted to mean that the relevant test is whether the evidence is sufficient, as a matter of law, to support the determination of the arbitrator, is rational and is not arbitrary and capricious (*Matter of Petrofsky [Allstate Ins. Co.]*, 54 NY2d 207, 211 [1981]). Although compulsory arbitration awards are subject to a broader scope of review than awards resulting from consensual arbitration, the scope of judicial review of such an arbitration award is still limited to whether the award is supported by the evidence or other basis in reason as appears in the record (*id.* at 210).

The master arbitrator's award had evidentiary support in the record, therefore, it was not arbitrary and capricious, irrational or without a plausible basis (*Matter of Furstenberg [Aetna Cas. & Sur. Co.-Allstate Ins. Co.]*, 49 NY2d 757 [1980]). Since the master arbitrator found that the no-fault arbitrator reached the decision in a rational manner and that the decision

was not arbitrary or capricious, incorrect as a matter of law, in excess of policy limits, or in conflict with other no-fault arbitration proceedings there were no grounds for its vacatur; the motion court correctly upheld the master arbitrator's determination (*see e.g. Petrofsky* at 211-212). Contrary to petitioner's argument, there is no basis to conclude that the arbitrator made a mistake of law by ignoring whether petitioner's condition could have worsened after respondent's independent medical examination; she just made a factual determination that it had not (*see e.g. Matter of Global Liberty Ins. Co. v Therapeutic Physical Therapy, P.C.*, 148 AD3d 502, 503 [1st Dept 2017]).

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

ENTERED: MARCH 5, 2019

CLERK