SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 16, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Friedman, J.P., Gische, Oing, Singh, Moulton, JJ.

8055 Francesco Bellucia, Index 150207/11
M-4980 Plaintiff-Respondent, 154546/12
M-5186 155764/12
-against- 155973/13

CF 620, et al.,
Defendants-Appellants-Respondents,

Building Service 32BJ Health Fund,
et al.,
Defendants-Respondents-Appellants,

Robinson Elevator LLC, et al.,
Defendants-Respondents.

- - - - -

Jesus Rivera, et al.,
Plaintiffs-Respondents,

-against-

CF 620 Owner One, et al.,
Defendants-Appellants-Respondents,

Building Service 32BJ Health Fund, et al.,
Defendants-Respondents-Appellants,

Robinson Elevator Group, LLC, et al.,
Defendants-Respondents,

Schimenti Construction Company, et al.,
Defendants.

- - - - -

Brian Christian,
Plaintiff,

-against-

Building Service 32BJ Health Fund, et al.,
Defendants-Respondents-Appellants,

Robinson Elevator Group, LLC, et al.,
Defendants-Respondents.

- - - - -

Efrain Hernandez,
Plaintiff,

-against-

CF 620 Owner One, et al.,
Defendants-Appellants-Respondents,

Building Service 32BJ Health Fund, et al.,
Defendants-Respondents-Appellants,

Robinson Elevator Group, LLC, et al.
Defendants-Respondents.

- - - - -

Phillip Nicholas, et al.,
Plaintiff,

-against-

CF 60 Owner One, LLC, et al.,
Defendants-Appellants-Respondents,

Building Service 32BJ Health Fund, et al.,
Defendants-Respondents-Appellants,

Robinson Elevator LLC, et al.,
Defendants-Respondents.

- - - - -

Glen Gerisch,
Plaintiff,

-against-

CF 60 Owner One, LLC, et al.,
Defendants-Appellants-Respondents,

Building Service 32BJ Health Fund, et al.,
Defendants-Respondents-Appellants,

Robinson Elevator LLC, et al.,
Defendants-Respondents.

- - - - -

Joseph Marandola, et al.,
Plaintiffs-Respondents-Appellants,

-against-

CF 60 Owner One, LLC, et al.,
Defendants-Appellants-Respondents,

Building Service 32BJ Health Fund, et al.,
Defendants-Respondents-Appellants,

Newmark Knight Frank Global Management Services, LLC,
Defendants-Respondents.

- - - - -

David Kwarta,
Plaintiff,

Robinson Elevator LLC, et al.,
Defendants-Respondents,

-against-

Henegan Construction Co., Inc., et al.,
Defendants-Respondents-Appellants,

CF 60 Owner One, LLC, et al.,
Defendants-Appellants-Respondents.

- - - - -

Joseph DeSimone,
Plaintiff-Respondent,

-against-

Bonjour 620 I, LLC, et al.,
Defendants-Appellants-Respondents,

Newark Knight Global Management Services, et al.,
Defendants-Respondents,

Henegan Construction., Inc.,
Defendant-Respondent-Appellant.

- - - - -

Jose Molina, et al.,
Plaintiffs-Respondents,

-against-

CF 60 Owner One, LLC, et al.,
Defendants-Appellants-Respondents,

Henegan Construction., Inc.,
Defendant-Respondent-Appellant,

Robinson Elevator LLC, et al.
Defendants-Respondents.

_____

Shaub, Ahmuty, Citrin & Spratt, LLP, Lake Success (Timothy R. Capowski of counsel), for appellants-respondents.

Eustace, Marquez, Epstein Prezioso & Yapchanyk, New York (Richard C. Prezioso of counsel), for Building Service 32BJ Health Fund Service Employees International Union 32BJ, respondent-appellant.

Brody & Branch LLP, New York (Mary Ellen O'Brien of counsel), for Henegan Construction, respondent.

Gottlieb, Siegel & Schwartz, LLP, New York (Daniel J. Goodstadt of counsel), for Robinson Elevator LLC, Robinson Elevator Group LLC, MJR Consulting, LLC, MJR Consulting, Inc. and MJR Elevator Consulting Group, respondents.

Sabatini & Associates, New York (Steve S. Efron of counsel), for Schindler Elevator Corporation, respondent.

Creedon & Gill P.C., Northport (Peter J. Creedon of counsel), for Fransceco Bellucia, respondent.

Neil Greenberg & Associates, P.C., Massapequa (Neil H. Greenberg of counsel), for Jesus Rivera, Diane Acevedo, Brendan Giannini, Edward Quimby, Naomi Quimby, William Clifton, Linda Clifton, David Jenne, Christopher Franzone and Maria Franzone, respondents.

Sullivan Papain Block McGrath & Cannavo P.C., New York (Brian J. Shoot of counsel), for Joseph Marandola and Antonella Marandola, respondents.

Pollack, Pollack, Isaac & DeCicco, New York (Brian J. Isaac of counsel), for Joseph DeSimone, respondent.

Fiore Law Group, Central Islip (Andrew J. Fiore of counsel), for Jose Molina and Rachel Molina, respondents.

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered July 12, 2017, which, to the extent appealed from as limited by the briefs, granted defendants Robinson Elevator, LLC, Robinson Elevator Group, LLC, and MJR Elevator Consulting Group, LLC's (collectively, Robinson Elevator) and Schindler Elevator Corporation's (Schindler Elevator) motions for summary judgment dismissing the complaint of plaintiffs Joseph Marandola and Antonella Marandola (the Marandola plaintiffs) and the common-law indemnity cross claims of defendants CF 620 Owner, LLC, CF 620 Owner One, LLC, CF 620 Owner Two, LLC, and CF 620 Owner Three, LLC, Bonjour 620 I, LLC, Bonjour 620 II, LLC, YL 620 Sixth, LLC, Newmark Knight Frank Global Management Services, LLC, and Newmark & Company Real Estate, Inc.'s (collectively, CF620); granted the Marandola plaintiffs' and other plaintiffs'[1] cross motions for summary judgment against CF620 with respect to Labor Law § 241(6)

[1]Glen Gerisch, Brian Christian, Efrain Hernandez, Philip Nicholas and Susan Nicholas.

predicated on CF620's violation of 12 NYCRR 23-1.7(f) and granted defendants Building Service 32BJ Health Fund's (Fund) and Henegan Construction Co., Inc.'s (Henegan) motions for summary judgment with respect to indemnification against CF620, unanimously reversed, on the law, without costs, and the motions denied.

This action arises out of an accident in which a manually operated freight elevator in a building undergoing construction dropped suddenly from the fourth floor to the basement while carrying plaintiff Joseph Marandola, and other individuals working on the project, causing injuries.

Robinson Elevator had recently serviced the elevator for conditions implicated in the accident. Various experts identified a broken switch/spring inside the elevator control handle and improperly installed brakes as proximate causes of the accident. Robinson Elevator had purportedly repaired the control handle and performed modifications to the brake system in the weeks preceding the accident. Just over a week before the accident, CF620 had emailed Robinson Elevator, informing it that the elevator car had fallen and requesting service. Robinson Elevator serviced the elevator and told CF620 that the free fall had been caused by operator error. Accordingly, issues of fact as to Robinson Elevator's negligence preclude summary judgment dismissing the Marandola plaintiffs' complaint and CF620's cross

claim for common-law indemnity as against it (*see Dzidowska v Related Cos., LP*, 157 AD3d 447, 448 [1st Dept 2018]).

Schindler Elevator is also not entitled to summary dismissal of the Marandola plaintiffs' complaint and CF620's cross claim for common-law indemnity as against it. Factual issues exist as to whether, pursuant to its service contract, Schindler properly serviced the governor, a device that detects and arrests dangerous elevator speeds, and whether it properly serviced the switch/spring inside the elevator control handle.

CF620 also established that Supreme Court erroneously granted summary judgment to the Marandola plaintiffs and to the other plaintiffs who moved for summary judgment with respect to Labor Law § 241(6) predicated on CF620's violation of 12 NYCRR 23-1.7(f), and erroneously granted the Fund's and Henegan's motions for summary judgment with respect to indemnification against CF620. Issues of fact exist as to whether CF620 was negligent and whether any such negligence was a proximate cause of the accident.

Additionally, the Marandola plaintiffs' claims against Robinson Elevator and Schindler Elevator should not have been dismissed because factual issues exist as to whether Robinson and Schindler were negligent in maintaining the freight elevator and whether any such negligence was a proximate cause of the

accident.

CF620's settlements with all plaintiffs and various codefendants do not moot its appeal (*Balyszak v Siena Coll.*, 63 AD3d 1409, 1410-1411 [3d Dept 2009]).

M-4980 & M-5186 - *Bellucia v CF 620 Owner, LLC*

Motions to dismiss the appeal on the ground of waiver denied.

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

ENTERED: MAY 16, 2019

DEPUTY CLERK

Friedman, J.P., Kapnick, Gesmer, Kern, JJ.

8478 Virginia M. Henneberry, Index 600357/10
Plaintiff-Appellant,

-against-

Leon Baer Borstein, et al.,
Defendants-Respondents.

Capuder Fazio Giacoia LLP, New York (Douglas M. Capuder of counsel), for appellant.

Furman Kornfeld & Brennan LLP, New York (Andrew S. Kowlowitz of counsel), for respondents.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered August 24, 2018, to the extent it denied plaintiff's motion for a protective order and to quash subpoenas duces tecum served by defendants on the attorneys who represented plaintiff in an action to vacate an arbitration award and in the appeals arising therefrom, unanimously reversed, on the law, with costs, and the motion granted. Appeal from said order, to the extent it deferred decision on plaintiff's motion for a protective order and to quash subpoenas duces tecum served by defendants on the attorneys who represented plaintiff in a matrimonial action and directed those attorneys to submit affidavits and documents for in camera review, unanimously dismissed, without costs, as taken from a nonappealable order.

The record does not establish that plaintiff affirmatively

waived her attorney-client privilege with counsel in the action to vacate the arbitration award and in the appeals arising therefrom (*Veras Inv. Partners, LLC v Akin Gump Strauss Hauer & Feld LLP*, 52 AD3d 370, 373 [1st Dept 2008]). A review of the complaint shows that plaintiff's claims do not need to be proved through the files from her counsel in the action to vacate the arbitration award and in the appeals arising therefrom. Defendants have not countered that showing or established that those files are vital to their defenses (*Deutsche Bank Trust Co. of Ams. v Tri-Links Inv. Trust*, 43 AD3d 56, 64 [1st Dept 2007]; *see also IDT Corp. v Morgan Stanley Dean Witter & Co.*, 107 AD3d 451, 452 [1st Dept 2013]).

The motion court's deferral of decision on plaintiff's motion to quash and for a protective order as it related to the subpoenas served on plaintiff's counsel in the matrimonial action is not appealable as of right (CPLR 5701[a][2][v]; *Garcia v Montefiore Med. Ctr.*, 209 AD2d 208, 209 [1st Dept 1994]; *see also Albino v New York City Hous. Auth.*, 52 AD3d 321, 321-322 [1st Dept 2008]; *Patterson v Turner Constr. Co.*, 88 AD3d 617, 618 [1st Dept 2011]). We decline to nostra sponte grant leave to appeal (*Garcia*, 209 AD2d at 209).

We have considered the remaining arguments and find them unavailing.

The Decision and Order of this Court entered herein on February 21, 2019 (169 AD3d 562 [1st Dept 2019]) is hereby recalled and vacated (*see* M-1662 decided simultaneously herewith).

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

ENTERED: MAY 16, 2019

DEPUTY CLERK

Gische, J.P., Kahn, Gesmer, Singh, Moulton, JJ.

9320 The People of the State of New York, Respondent, Ind. 850/09

-against-

Jermaine Dunham, Defendant-Appellant.

_____

Christina A. Swarns, Office of the Appellate Defender, New York (Emma L. Shreefter of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Patricia M. Nuñez, J. at suppression hearing; Bruce Allen, J. at jury trial and sentencing), rendered January 4, 2011, convicting defendant of criminal possession of weapon in the second degree, and sentencing him to a term of 4½ years, unanimously affirmed.

The court did not violate defendant's rights under CPL 310.30 and *People v O'Rama* (78 NY2d 270 [1991]) by failing to place on the record and discuss in advance with the attorneys a jury note requesting exhibits, consisting of a revolver and all of the photographs within an unambiguously defined category. Notes that only require the ministerial act of sending exhibits into the jury room do not implicate the requirements of *O'Rama* (*People v Ziegler*, 78 AD3d 545 [1st Dept 2010], *lv denied* 16 NY3d 838 [2011]) Moreover, the parties had explicitly agreed that the

jurors could see exhibits "without going on the record" (*see People v Green*, 82 AD3d 593 [1st Dept 2011], *lv denied* 17 NY3d 816 [2011]). There was nothing about the content of either branch of the jury's request, or the parties' stipulation, that called for input from counsel, and we find defendant's arguments to the contrary unpersuasive.

The court properly denied defendant's application pursuant to *Batson v Kentucky* (476 US 79 [1986]). The record supports the court's finding that the nondiscriminatory reason provided by the prosecutor for the challenge in question was not pretextual. This finding is entitled to great deference (*see People v Hernandez*, 75 NY2d 350 [1990], *affd* 500 US 352 [1991]). The prosecutor explained that the panelist's demeanor displayed hesitation, suggesting an attempt to evade questions. The court understood the prosecutor's explanation to be demeanor-based, and it expressly stated that it had made similar observations of the panelist's demeanor. Although not required to deny a *Batson* claim, such observations by the court itself are of "great importance" (*Thaler v Haynes*, 559 US 43, 49 [2010]).

The hearing court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations, which are supported by the record (*see People v Prochilo*, 41 NY2d 759, 761 [1977]).

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

ENTERED: MAY 16, 2019

DEPUTY CLERK

Gische, J.P., Kahn, Gesmer, Singh, Moulton, JJ.

9321 Irma Perez, Index 302048/15
Plaintiff-Appellant,

-against-

The Pinnacle Group, Inc., et al.,
Defendants-Respondents.

_____

Peña & Kahn, PLLC, Bronx (Raafat S. Toss of counsel), for appellant.

Pillinger, Millier & Tarallo, LLP, Elmsford (Michael Neri of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Kenneth L. Thompson Jr., J.), entered on or about March 14, 2018, which, upon reargument, granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants satisfied their prima facie burden by showing that freezing rain was falling at the time of plaintiff's accident. Prior to stepping on the ramp on which she slipped and fell, plaintiff testified that she looked down and saw "small balls of ice." When asked what caused her to fall, she testified "the bad weather – the inclement weather. . . It was very slippery. It had to be the ice." She also stated that while she did not know how long the ice had been there, she had used the ramp the previous afternoon, and there was no ice on it at that time (*see Rodriguez v 705-7 E. 179th St. Hous. Dev. Fund Corp.*,

79 AD3d 518 [1st Dept 2010]). Furthermore, certified weather records confirmed that freezing rain began to fall at 6:20 a.m., and continued until 9:51 a.m., and plaintiff's accident occurred at approximately 10:00 a.m.

In opposition, plaintiff failed to raise a triable issue of fact. Her argument in opposition is that defendants had constructive notice of an icy condition on the subject ramp, as alleged in her son's affidavit. This affidavit created only a feigned issue of fact, as plaintiff's son contradicted plaintiff's sworn deposition testimony with respect to the presence of ice on the ramp prior to her accident (*see Luna v CEC Entertainment, Inc.*, 159 AD3d 445 [1st Dept 2018]; *Peralta-Santos v 350 W. 49th St. Corp.*, 139 AD3d 536, 537 [1st Dept 2016]).

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

ENTERED: MAY 16, 2019

DEPUTY CLERK

Gische, J.P., Kahn, Gesmer, Singh, Moulton, JJ.

9322-
9322A In re Nahzzear Y.G., and Another,

Dependant Children Under the
Age of Eighteen, etc.,

Tanisha N.,
Respondent-Appellant,

Abbott House,
Petitioner-Respondent.

_____

Larry S. Bachner, New York, for appellant.

John R. Eyerman, New York, for respondent.

George E. Reed, Jr., White Plains, attorney for the children.

_____

Orders of disposition, Family Court, Bronx County (Ruben Andres Martino, J.), entered on or about January 30, 2018, which, inter alia, upon findings of permanent neglect, terminated respondent mother's parental rights to the subject children, and committed custody and guardianship of the children to petitioner agency and the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

The agency demonstrated by clear and convincing evidence that it made the requisite diligent efforts to strengthen the parental relationship by discussing the mother's service plan with her, monitoring her progress with mental health treatment, and scheduling twice weekly visitation with the children (*see*

Matter of Felicia Malon Rogue J. [Lena J.], 146 AD3d 725 [1st Dept 2017]; *Matter of Davione Rashaun H.*, 55 AD3d 453 [1st Dept 2008]). Despite these diligent efforts, and the mother making some progress, overall, the mother failed to plan for the children as she continued to speak aggressively, curse repeatedly, and threaten violence towards others over the entirety of the case (*see Matter of Brandon H. [Maythe H.]*, 105 AD3d 409 [1st Dept 2013]), and displayed little insight into her therapy and the fact that these actions may prove harmful to her children (*see Matter of L. Children [Wileen J.*, 168 AD3d 455, 456 [1st Dept 2019]). She also refused to sign HIPAA consent forms to allow the agency to monitor her mental health progress, and failed to secure suitable housing (*see Matter of Elizabeth E.R.T. [Alicia T.]*, 168 AD3d 448, 449 [1st Dept 2019]; *Matter of Jessica U. [Stephanie U.]*, 152 AD3d 1001, 1005 [3d Dept 2017]). Furthermore, the mother missed or cancelled approximately a third of her visits with her children over a two-year period (*Matter of Lenny R.*, 22 AD3d 240 [1st Dept 2005], *lv denied* 6 NY3d 708 [2006]).

A preponderance of the evidence supports the determination that termination of the mother's parental rights to free the children for adoption by their foster parent, with whom they

lived with for almost their entire lives and thrived under, was in their best interest (*see Matter of Ariana S.S. [Antoinette S.]*, 148 AD3d 581 [1st Dept 2017]). A suspended judgment was not warranted under the circumstances presented.

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

ENTERED: MAY 16, 2019

DEPUTY CLERK

Gische, J.P., Kahn, Gesmer, Singh, Moulton, JJ.

9323 Teledata Technology Solutions, Inc., et al., Plaintiffs-Appellants, Index 655866/17

-against-

Sandton Fund Assignments, LLC, Defendant-Respondent.

_____

Rattet PLLC, White Plains (Robert L. Rattet and James B. Glucksman of counsel), for appellants.

Pryor Cashman LLP, New York (Andrew M. Goldsmith and Ronald S. Beacher of counsel), for respondent.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered May 10, 2018, which, to the extent appealed from as limited by the briefs, granted defendant's motion to dismiss the complaint, and denied plaintiffs' cross motion for leave to amend the complaint, unanimously affirmed, with costs.

The parties' agreements are complete, clear and unambiguous on their face, and must be enforced according to the plain meaning of their terms (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). While the contemporaneous agreements should be read together (*Abed v John Thomas Fin., Inc.*, 107 AD3d 578, 579 [1st Dept 2013]), that does not support plaintiffs' claims, which would require the court to rewrite the agreements to add obligations that are not included in the agreements (*see Vermont*

Teddy Bear Co. v 538 Madison Realty Co., 1 NY3d 470, 475 [2004]). Plaintiffs err in their attempt to rewrite the agreements by suggesting that reading them together creates mutual rights and duties between all parties even though not all the parties signed each agreement or assumed the same duties under the agreements.

Construing the agreements according to their plain language, it is clear that nonparty Quadrant 4 Cloud, Inc. and its related entities (Q4), not defendant, agreed to pay the federal and state tax liabilities of plaintiff Teledata Technology Solutions, Inc. (TTS), and that Q4's principals personally guaranteed the tax payments. Defendant had no contractual duty to "supervise" the proper segregation of TTS's accounts receivable or tax payments.

Likewise, defendant had no contractual duty, or even the right, to declare an event of default against Q4 under the secured notes given by Q4 and the security agreements between Q4 and defendant, based on Q4's failure to pay TTS's tax liabilities. On its face, the security agreements only secure Q4's payment of its debts to defendant under the notes, and defendant was empowered only to protect its own interest in the collateral.

Plaintiffs' allegation that defendant breached the secured party sales agreement (SPSA) by terminating the UCC security interest in Q4's assets once Q4's debt to defendant was repaid,

but before TTS's tax liabilities were fully paid, is belied by the agreements. Further, UCC § 9-513(c) required defendant to file a termination statement terminating the UCC-1 financing statement upon Q4's demand.

Nothing on the face of the instruments supports plaintiffs' contention that they are third party beneficiaries of the promissory notes and/or security agreement (*see Fourth Ocean Putnam Corp. v Interstate Wrecking Co.*, 66 NY2d 38, 45 [1985]; *Oursler v Women's Interart Ctr.*, 170 AD2d 407 [1st Dept 1991]), or that defendant held the collateral in trust for them.

The facts alleged in the complaint demonstrate sophisticated parties in an arm's-length contractual relationship, and do not give rise to a fiduciary relationship (*see EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19-20 [2005]; *Nuntnarumit v Lyceum Partners LLC*, 165 AD3d 532, 533 [1st Dept 2018]; *Pokoik v Pokoik*, 115 AD3d 428, 429 [1st Dept 2014]).

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

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

ENTERED: MAY 16, 2019

DEPUTY CLERK

Gische, J.P., Kahn, Gesmer, Singh, Moulton, JJ.

9325 The People of the State of New York, Ind. 2732/15
Respondent,

-against-

Richard Burrell,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Megan DeMarco 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 (Laura Ward, J.), rendered May 31, 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 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: MAY 16, 2019

DEPUTY CLERK

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

CORRECTED ORDER - MAY 21,2019

Gische, J.P., Kahn, Gesmer, Singh, Moulton, JJ.

9326 The People of the State of New York, Respondent,

-against-

Michael Simmons, Defendant-Appellant.

Ind. 5895/13

Salzano, Jackson & Lampert, LLP, New York (Jason Lampert of counsel), for appellant.

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

Judgment, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered February 4, 2015, convicting defendant, after a jury trial, of assault in the second and third degrees and menacing in the third degree, and sentencing him to concurrent terms of six months, unanimously affirmed. **The matter is remitted to Supreme Court for further proceedings pursuant to CPL 460.50(5).**

Defendant's claim that the court should have excused a juror for cause based on his allegedly disqualifying statements during voir dire, notwithstanding the absence of any challenge, is not only unpreserved but unreviewable. By statute (CPL 270.20[2]), an allegedly erroneous failure to excuse a prospective juror for cause is only cognizable when a defendant challenges the panelist for cause, the court denies the challenge, the defendant (who, as

here, has peremptory challenges remaining) peremptorily challenges the same panelist, and the defendant exhausts all peremptories. None of those events happened in this case.

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters not reflected in, or fully explained by, the record, with particular reference to counsel's reasons for deeming the juror at issue a satisfactory juror for the defense (*see People v Rivera*, 71 NY2d 705, 709 [1988]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal.

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

ENTERED: MAY 16, 2019

DEPUTY CLERK

Gische, J.P., Kahn, Gesmer, Singh, Moulton, JJ.

9327-
9328 Batbrothers LLC,
Plaintiff-Respondent,

-against-

Sergey Victorovich Paushok,
Defendant-Appellant.

Index 150122/15

_____

Garson, Segal, Steinmetz, Fladgate LLP, New York (Kevin Murphy of counsel), for appellant.

Holland & Knight LLP, New York (Mitchell J. Geller of counsel), for respondent.

_____

Order, Supreme Court, New York County (Andrew Borrok, J.), entered June 26, 2018, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion to dismiss defendant's counterclaims for abuse of process and intentional infliction of emotional distress, unanimously affirmed, without costs. Order, same court and Justice, entered December 3, 2018, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for summary judgment and recognized the judgment entered in the Cheremushki District Court in Moscow, Russia (the Russian Judgment), in favor of plaintiff against defendant in the amount of $25,030,560.18, unanimously affirmed, without costs.

Supreme Court properly granted plaintiff summary judgment

and recognized the Russian Judgment. Plaintiff made out a prima facie case of entitlement to summary judgment for recognition of the foreign money judgment by showing that the Russian Judgment was final, conclusive, and enforceable when rendered, and that neither of the mandatory grounds for non-recognition applied (*see* CPLR 5301-03, 5304[a]; *Gemstar Can., Inc. v George A. Fuller Co. Inc.*, 127 AD3d 689, 690 [2d Dept 2015]; *Abu Dhabi Commercial Bank PJSC v Saad Trading, Contr. & Fin. Servs. Co.*, 117 AD3d 609, 611-612 [1st Dept 2014]). Defendant's voluntary participation in multiple rounds of appeals in the Russian courts, in which he raised arguments about personal jurisdiction and the merits of the bona fides of the judgments, is fatal to his argument that he did not receive adequate notice or due process in Russia (*see CIBC Mellon Trust Co. v Mora Hotel Corp.*, 100 NY2d 215, 225-226 [2003], *cert denied* 540 US 948 [2003]; *Korea Resolution & Collection Corp. v Hyuk Kee Yoo*, 170 AD3d 485 [1st Dept 2019]).

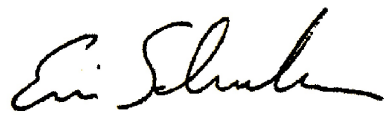
Defendant's arguments that the debt underlying the Russian Judgment has been paid or otherwise terminated by operation of Russian law are misplaced in this Article 53 proceeding, because they go to the merits of the underlying judgment. This proceeding is limited to the "ministerial function of recognizing the foreign country money judgment and converting it into a New York judgment" (*CIBC Mellon*, 100 NY2d at 222). The court

evaluates only whether we are satisfied that the foreign court's exercise of jurisdiction properly comported with New York's concept of personal jurisdiction, and whether the foreign decision was consonant with "our notions of procedure and due process of law" (*Sung Hwan Co. Ltd. v Rite Aid Corp.*, 7 NY3d 78, 83 [2006]).

Supreme Court correctly dismissed defendant's counterclaims, because the dispute has already been resolved against defendant by the Russian courts. To the extent that defendant's abuse of process counterclaim is premised upon plaintiff's commencement of this CPLR article 53 proceeding, it fails to state a cause of action (*see Casa de Meadows Inc. [Cayman Is.] v Zaman*, 76 AD3d 917, 921 [1st Dept 2010]). Moreover, plaintiff's prosecution of a meritorious judgment recognition proceeding cannot support a claim for intentional infliction of emotional distress (*see Howell v New York Post Co.*, 81 NY2d 115, 121-22 [1993]).

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

ENTERED: MAY 16, 2019



DEPUTY CLERK

Gische, J.P., Kahn, Gesmer, Singh, Moulton, JJ.

9329 Orchard Hotel LLC, Index 850044/11
Plaintiff,

-against-

D.A.B. Group LLC, et al.,
Defendants,

Flintlock Construction Services LLC,
Defendant-Respondent,

Brooklyn Federal Savings Bank, et al.,
Defendants-Appellants.

_____

O'Reilly, Marsh & Corteselli P.C., Mineola (James G. Marsh of counsel), for appellants.

Hollander Law Group, PLLC, Great Neck (Larry B. Hollander or counsel), for respondent.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered on or about May 21, 2018, which, insofar as appealed from, denied defendants Brooklyn Federal Savings Bank and State Bank of Texas's motion to dismiss defendant Flintlock Construction Services LLC's fraud and fraudulent concealment cross claims against them, unanimously affirmed, without costs.

This is a foreclosure action concerning two mortgages originated by defendant Brooklyn Federal Savings Bank (BFSB) against real property formerly owned by defendant D.A.B. Group LLC (DAB). Defendant State Bank of Texas (collectively with BFSB, the Lenders) was a participant in the loans. Defendant

Flintlock Construction Services LLC was hired by DAB as the general contractor for construction on the property. Flintlock claims that BFSB fraudulently represented in an Estoppel Certificate that certain funds were available to it as payment for its work, while concealing that these funds would no longer be available after the building loan matured on March 1, 2011. As a result, Flintlock claims, it was never paid for certain work it performed.

Flintlock adequately alleges all of the elements of its fraud and fraudulent concealment claims (*see generally Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 488 [2007]; *P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d 373, 376 [1st Dept 2003]).

It is true that BFSB was not a signatory to the Estoppel Certificate and that the Certificate recited that the representations contained in it were made by DAB and Flintlock. However, Flintlock alleges (in its pleading and through an affidavit by its representative) that the Certificate was prepared solely by BFSB and that BFSB advised Flintlock that execution of it was a condition of being hired. These allegations are sufficient to permit an inference that BFSB effectively made the statements reflected in the Certificate.

It is not dispositive that the funds were indisputably

available when the subject statement was made. The allegations that BFSB knew that Flintlock understood this representation to apply to the entire contract term and knew that the promised funds would not be available during this whole time are sufficient to permit an inference that the statement was an actionable "half-truth" (*see Banque Indosuez v Barclays Bank*, 181 AD2d 447, 447 [1st Dept 1992] [internal quotation marks omitted]; *Sheridan Drive-In v State of New York*, 16 AD2d 400, 408 [4th Dept 1962]; Restatement, Torts, § 529).

The caveat in the next paragraph of the Estoppel Certificate, that BFSB had "no obligation to provide any Advances . . . except as provided for in the Building Loan Agreement" is not sufficient to "save" the statement of fund availability, at least not at this pre-discovery stage. Although the loan agreement would have revealed the expiration date of the loans, Flintlock alleges that BFSB intentionally prevented it from gaining access to this document by wrongfully withholding it and insisting upon execution of the Certificate in a compressed time period so that Flintlock would not be able to independently obtain or review it. These allegations are sufficient to permit an inference that BFSB wrongfully prevented Flintlock from verifying whether anything in the loan documents affected its rights. The question whether Flintlock was required to insist

upon copies of the loan documents or on more time for investigation cannot be decided as a matter of law at this stage.

These allegations also are sufficient to permit an inference that Flintlock justifiably relied on the Estoppel Certificate, notwithstanding its failure to read the referenced loan documents, especially in view of Flintlock's allegations that it sought assurances from BFSB regarding the sufficiency of loan funds during the contract term and understood the statement in the Estoppel Certificate to be a confirmation that the funds were sufficient (*see ACA Fin. Guar. Corp. v Goldman, Sachs & Co.*, 25 NY3d 1043, 1045 [2015]). Flintlock would have been required to make "additional inquiry" if it had had "hints of [a misrepresentation's] falsity" (*Loreley Fin. [Jersey] No. 3, Ltd. v Morgan Stanley & Co. Inc.*, 146 AD3d 683, 684 [1st Dept 2017] [internal quotation marks omitted]). The Lenders do not identify any such "hints."

These allegations are also sufficient to permit an inference that BFSB had a duty to disclose information to Flintlock pursuant to the special facts doctrine (*see P.T. Bank*, 301 AD2d at 378). The cases cited by the Lenders are distinguishable, because they involved a party's failure to read materials provided to it or to request materials that were indisputably available (*see UST Private Equity Invs. Fund v Salomon Smith*

Barney, 288 AD2d 87, 88-89 [1st Dept 2001]; *Stuart Silver Assoc. v Baco Dev. Corp.*, 245 AD2d 96, 99 [1st Dept 1997]; *88 Blue Corp. v Reiss Plaza Assoc.*, 183 AD2d 662, 664 [1st Dept 1992]).

Flintlock's allegations are also sufficient to permit an inference that BFSB was aware that Flintlock was operating under the mistaken assumption that the funds were available throughout the contractual term, a fact that, if true, would also support a finding that BFSB owed Flintlock a duty of disclosure (*see Sterling Natl. Bank v Israel Discount Bank of N.Y.*, 305 AD2d 184, 186 [1st Dept 2003]; *Brass v American Film Tech., Inc.*, 987 F2d 142, 151 [2d Cir 1993]).

Contrary to the Lenders' contentions, Flintlock's allegations regarding BFSB's intent to defraud are sufficient to satisfy the heightened pleading standard applicable to fraud-based claims (*see* CPLR 3016[b]; *IKB Intl. S.A. v Morgan Stanley*, 142 AD3d 447, 450 [1st Dept 2016]). Flintlock also adequately

alleged "actual pecuniary loss sustained as a direct result of the wrong" (*Continental Cas. Co. v PricewaterhouseCoopers, LLP*, 15 NY3d 264, 271 [2010]).

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

ENTERED: MAY 16, 2019

DEPUTY CLERK

Gische, J.P., Kahn, Gesmer, Singh, Moulton, JJ.

9330 In re Royal P.,

A Child Under Eighteen
Years of Age, etc.,

Danny P.,
Respondent-Appellant,

Administration for Child Services,
Petitioner-Respondent.

_____

Steven N. Feinman, White Plains, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Julie Steiner of counsel), for respondent.

Dawne A. Mitchell, The Legal Aid Society, New York (Amy Hausknecht of counsel), attorney for the child.

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Order of fact-finding and disposition, Family Court, New York County (Jane Pearl, J.), entered on or about February 1, 2018, to the extent it found that respondent father neglected the subject child, unanimously reversed, on the law, without costs, and the petition dismissed.

In a child protective hearing, proof that a caretaker repeatedly misuses a drug, to the extent that it has or would ordinarily have the effect of producing a substantial state of stupor or the like, is prima facie evidence of neglect (Family Ct Act § 1046[a][iii]). Assuming without deciding that the petitioner established a prima facie case, the respondent must

offer a satisfactory explanation to rebut the evidence of neglect. (*Matter of Philip M.*, 82 NY2d 238 [1993]). In this case, respondent father successfully rebutted the inference of neglect, and the evidence failed to establish that the physical, mental or emotional condition of the child was impaired or placed at imminent risk of impairment. We reach this conclusion regardless of whether his participation in court-ordered substance abuse treatment was voluntary within the meaning of the statute (Family Ct Act § 1046[a][iii]). The record shows that the child was well cared for, healthy, and well fed and clothed, and that his medical needs were addressed. Although respondent tested positive for alcohol and cocaine on several occasions, the child was in the care of a resident babysitter on those occasions, and he never used or was under the influence of drugs or alcohol in the child's presence. There is no evidence in the record that respondent was under the influence of drugs or alcohol when visited by caseworkers when the child was in his care.

There is also no evidence that the child was in imminent danger of becoming impaired as a result of respondent's drug or

alcohol use (*see* Family Court Act § 1012[f][i]; *Nicholson v Scoppetta*, 3 NY3d 357, 369 [2004] [the "focus (is) on serious harm or potential harm to the child, not just on what might be deemed undesirable parental behavior"]).

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

ENTERED: MAY 16, 2019

DEPUTY CLERK

Gische, J.P., Kahn, Gesmer, Singh, Moulton, JJ.

9331 Michelle Shanahan, etc., Index 190011/17
Plaintiff-Respondent,

-against-

Aerco International, Inc., et al.,
Defendants,

Algoma Hardwoods, Inc.,
Defendant-Appellant.

_____

McGivney, Kluger & Cook, P.C., New York (Matthew D. Sampar of counsel), for appellant.

Weitz & Luxenberg, P.C., New York (Gennaro Savastano of counsel), for respondent.

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Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered September 12, 2018, which denied defendant Algoma Hardwoods, Inc.'s (defendant) motion for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Defendant was formed in connection with its 1977 purchase of certain assets from Champion International, a manufacturing company that fabricated asbestos-containing fire-rated doors in Algoma, Wisconsin. Defendant concedes that it manufactured and sold asbestos-core fire-rated doors from April 1977 through November 1980, when it contends that it switched to manufacturing and selling asbestos-free fire-rated doors. According to

defendant, the doors manufactured and sold by it, as well as by Champion International prior to 1977, were all marked "Algoma Grade."

Defendant maintains that it established prima facie, through an affidavit by its principal, that it did not sell or distribute asbestos-core fire doors in the New York metropolitan area, where the decedent worked, and that therefore the decedent was not exposed to its product. The affidavit was based on the principal's personal knowledge but unaccompanied by documentation such as sales records substantiating the averments.

Even assuming, without deciding, that defendant met its prima facie burden to "unequivocally establish that its product could not have contributed to the causation of plaintiff's injury" during the relevant time period (*Reid v Georgia-Pacific Corp.*, 212 AD2d 462, 463 [1st Dept 1995]; *see also Matter of New York City Asbestos Litig.*, 146 AD3d 700, 700 [1st Dept 2017]; *Matter of New York City Asbestos Litig.*, 122 AD3d 520, 521 [1st Dept 2014]), plaintiff demonstrates issues of triable fact.[1]

In opposition to defendant's motion, plaintiff submitted the decedent's deposition testimony describing his work cutting and

[1]The relevant time period is from 1982 (based on plaintiff's testimony) or 1983 (based on plaintiff's work records) through 1992.

drilling fire-door product bearing the name Algoma on it during the relevant period and inhaling the white dust generated by the work, which raises an inference that "it is reasonably probable, not merely possible or evenly balanced," that the decedent was exposed to defendant's product and developed mesothelioma as a direct consequence (*Healey v Firestone Tire & Rubber Co.*, 87 NY2d 596, 601 [1996]).

Plaintiff further pointed to minutes from a New York City Board of Standards (BOS) meeting on January 31, 1978 to contradict defendant's principal's assertion that defendant hired its first salesperson to cover custom-ordered direct sales in New York City commencing on March 1982 and that defendant was not authorized to sell doors in New York City until that time. As reflected in the minutes, BOS amended the approvals that it previously granted to Champion International for the manufacture and sale of fire-rated doors in New York City to reflect its approval of defendant as the new owner. Defendant's explanation, that this approval was only for Champion International's "Weldwood" brand fire-rated doors, which defendant decided not to manufacture and sell, is for the trier of fact to consider. Additionally, while defendant asserted that it only made asbestos-free fire-rated doors starting in November 1980, plaintiff pointed to, among other things, defendant's letter to

BOS dated October 16, 1984. In the 1984 letter, defendant requested that BOS revoke its approvals for defendant's asbestos-containing fire-rated doors because "[w]e no longer manufacture the doors with this ingredient" and defendant is "currently approved" to manufacture doors with "our current asbestos-free formula." It is for the trier of fact to determine the weight to be accorded to defendant's statements and whether defendant's letter request, made nearly four years after defendant asserts that it stopped manufacturing and selling asbestos-core fire-rated doors, undermines its position (*see Feivel Funding Assoc. v Bender*, 156 AD3d 416, 418 [1st Dept 2017]).

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

ENTERED: MAY 16, 2019

DEPUTY CLERK

Gische, J.P., Kahn, Gesmer, Singh, Moulton, JJ.

9333 Dennis Escobar, Index 157197/14
Plaintiff-Appellant,

-against-

New York University,
Defendant-Respondent.

_____

Mitchell Dranow, Sea Cliff, for appellant.

Kennedys CMK LLP, New York (Elizabeth J. Streelman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Debra James, J.), entered on or about June 22, 2018, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Summary judgment was properly granted in this action where plaintiff alleges that he was injured when he slipped and fell while ascending the stairs in defendant's library. Plaintiff has not adequately demonstrated that a hazardous condition caused his fall. Plaintiff testified that he did not see anything on the stairs immediately before he fell, and neither he nor anyone else has ever identified the cause of his accident.

Even if plaintiff did adequately identify the condition, the record demonstrates a lack of constructive notice on defendant's part. Although defendant failed to submit evidence showing when

it last inspected or cleaned the stairs before the accident (*see e.g. Graham v YMCA of Greater N.Y.*, 137 AD3d 546 [1st Dept 2016]; *Spector v Cushman & Wakefield, Inc.*, 87 AD3d 422 [1st Dept 2011]), plaintiff's testimony establishes lack of constructive notice as a matter of law.

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

ENTERED: MAY 16, 2019

DEPUTY CLERK

Gische, J.P., Kahn, Gesmer, Moulton, JJ.

9334- Index 153731/18
9335-
9336 Estate of Theodore Lipin, et al.,
Plaintiffs-Respondents,

-against-

Joan C. Lipin,
Defendant-Appellant.

_____

Joan C. Lipin, appellant pro se.

Allegaert Berger & Vogel LLP, New York (Lauren J. Pincus of counsel), for respondents.

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Orders, Supreme Court, New York County (Shlomo S. Hagler, J.), entered on or about January 4, 2019, which, inter alia, denied pro se defendant Joan C. Lipin's cross motion to dismiss plaintiffs' motion for summary judgment in lieu of complaint, her motion to dismiss the action with prejudice, and her motion for contempt, unanimously affirmed, without costs.

Supreme Court denied defendant's motions as "incomprehensible and lacking any basis in law or fact," and defendant presents no reason to disturb that determination on appeal. The appeal is, in large part, an apparent effort to relitigate failed claims asserted by defendant, as the plaintiff, in *Lipin v Danske Bank* (2014 NY Slip Op 32694[U] [Sup Ct, NY County 2014]), a case whose dismissal we affirmed in 2016 (*Lipin*

v Hunt, 137 AD3d 518 [1st Dept 2016], *appeal dismissed* 27 NY3d 1053 [2016]).

We reject defendant's stated effort to shoehorn an alleged appeal from a January 2, 2019 order in *Lipin v Danske Bank* into this appeal.

This action is timely (*see* CPLR 5014[1]). Defendant failed to present grounds for holding any attorney in contempt or in violation of Judiciary Law § 487. To the extent defendant purports to offer factual support for arguments, she cites only her own prior, unproven allegations.

We have considered defendant's remaining arguments and find them without merit.

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

ENTERED: MAY 16, 2019

DEPUTY CLERK

Gische, J.P., Kahn, Gesmer, Singh, Moulton, JJ.

9337 The People of the State of New York, Ind. 2726/16
Respondent,

-against-

Israel Velez,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Alan Gadlin 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 (Felicia Mennin, J.), rendered April 25, 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 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: MAY 16, 2019

DEPUTY CLERK

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

Gische, J.P., Kahn, Gesmer, Singh, Moulton, JJ.

9338-
9339-
9340-
9341

Index 650790/18

River Tower Owner, LLC,
Plaintiff-Respondent,

-against-

140 West 57th Street Corp.,
Defendant-Appellant.

_____

Stempel Bennett Claman & Hochberg, P.C., New York (Richard L. Claman of counsel), for appellant.

Rosenberg & Estis, P.C., New York (Joshua Kopelowitz of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Gerald Lebovits, J.), entered December 20, 2018, declaring the subject lease void, terminating defendant's rights of possession to the subject apartment, and awarding attorneys' fees to plaintiff, unanimously modified, on the law, to vacate the award of attorneys' fees to plaintiff, and otherwise affirmed, without costs. Appeals from orders, same court and Justice, entered October 5, 2018, which granted plaintiff's motion for summary judgment, and denied defendant's motion for an injunction restoring its access to the apartment, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

In 1991, defendant entered into a lease for a rent-stabilized apartment. The apartment was subject to rent stabilization as a result of the building's receiving benefits under RPTL 421-a. The lease provided for a fixed 40-year term that would expire in 2031. Although paragraphs 1 and 36A of the lease required defendant to name an occupant of the apartment, no occupant was ever named. By sublease entered into the same day, defendant sublet the apartment to two sisters for the same 40-year term.

Plaintiff purchased the building in 2016. In 2017, the apartment was surrendered to defendant by the surviving sister. Plaintiff then commenced this action seeking, inter alia, a declaration that the lease is illegal and void as against public policy. Defendant answered, and, inter alia, asserted counterclaims for constructive eviction based on certain work being performed in the building. It moved for a preliminary injunction to restore its access to the apartment, and plaintiff moved for summary judgment.

The court correctly granted plaintiff's motion and denied defendant's as moot. The lease reflects an impermissible intention to remove the apartment from rent stabilization under Rent Stabilization Code (9 NYCRR) § 2520.13. The requirements of the Rent Stabilization Law and Code are not waivable, no matter

how favorable the alternative terms are to the tenant (*Drucker v Mauro*, 30 AD3d 37, 39 [1st Dept 2006] ["Any lease provision that subverts a protection afforded by the rent stabilization scheme is not merely voidable, but void"], *lv dismissed* 7 NY3d 844 [2006]).

The lease violated the rent stabilization scheme in several respects. The 40-year term violated 9 NYCRR 2522.5(a)(1) and (b)(1), which allows a tenant to choose between a one- and two-year lease or renewal only. By setting the 40-year fixed term, the lease effectively removed the apartment from rent stabilization for a generation. Most critically, the lease failed to name an occupant, which is required of corporate tenants to insure that the apartment is occupied as a natural person's primary residence (*see* 2520.11[k]) and to avoid "perpetual . . . leases" (*see Manocherian v Lenox Hill Hosp.*, 84 NY2d 385, 391 [1994], *cert denied* 514 US 1109 [1995]).

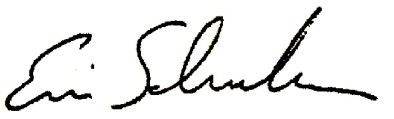
We modify only to deny plaintiff's request for attorneys' fees. On appeal, plaintiff argues that it would be inequitable to allow defendant to avoid attorneys' fees under the lease from which it has benefitted because of its own illegal conduct.

However, as plaintiff concedes, in cases in which a lease has been deemed void, attorneys' fees under the lease have been denied because there is no lease (*see e.g. Rivertower Assoc. v Chalfen*, 167 AD2d 309 [1st Dept 1990]).

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

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

ENTERED: MAY 16, 2019



DEPUTY CLERK

Gische, J.P., Kahn, Gesmer, Singh, Moulton, JJ.

9342N In re Richard Horowitz, M.D., Index 155912/18
Petitioner-Appellant,

-against-

Howard Zucker, M.D., et al.,
Respondents-Respondents.

_____

Jacques G. Simon, Jericho, for appellant.

Letitia James, Attorney General, New York (Philip V. Tisne of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Melissa A. Crane, J.), entered November 28, 2018, denying the petition to quash an administrative subpoena issued by respondent New York State Department of Health, State Board for Professional Medical Conduct, to declare the subpoena unconstitutional, and to issue an injunction, and granting respondents' cross motion to compel compliance with the subpoena, unanimously affirmed, without costs.

In light of the confidentiality requirements imposed by Public Health Law § 230(11)(a), the article 78 court's in camera review of the complaint submitted to respondents concerning potential professional misconduct by petitioner was warranted (*see Matter of Levin v Murawski*, 59 NY2d 35, 42 n 4 [1983]; *Matter of Levin v Guest*, 112 AD2d 830, 832 [1st Dept 1985], *affd*

67 NY2d 629 [1986], *cert denied* 476 US 1171 [1986]; *Atkins v Guest*, 201 AD2d 411, 411-412 [1st Dept 1994]; *Halper v State Bd. for Professional Med. Conduct*, 151 AD2d 643, 644 [2d Dept 1989]; *Matter of St. Elizabeth's Hosp. v State Bd. of Professional Med. Conduct, Dept. of Health of State of N.Y.*, 174 AD2d 225, 228 [3d Dept 1992]; *Matter of BU 91-04-1356A*, 186 AD2d 1054 [4th Dept 1992]). The court's in-camera review and consideration of the confidential documents in assessing whether the subpoena was valid and enforceable did not violate petitioner's Fourth Amendment or Due Process rights (*see Matter of Michaelis v Graziano*, 5 NY3d 317, 323 [2005]; *Murawski*, 159 NY2d at 42 n 2; *Atkins*, 201 AD2d at 411-412; *see generally Securities & Exch. Commn. v Jerry T. O'Brien, Inc.*, 467 US 735, 742 [1984]). The court therefore correctly denied petitioner's request for declaratory relief and an injunction pursuant to 42 USC § 1983 (*see generally Duffy v Holt-Harris*, 159 AD2d 542 [2d Dept 1990], *lv dismissed* 83 NY2d 801 [1994]).

The court also properly ordered petitioner to comply with the subpoena, as it was valid and enforceable (*see generally Murawski*, 59 NY2d at 41). Respondents had authority to issue the subpoena pursuant to Public Health Law § 230(10)(k), and the court's in camera review established relevancy and a basis for

the inquisitorial action (*see Matter of Levin v Guest*, 112 AD2d at 832).

Even assuming that the court did not specifically delineate which facts it deemed essential to its decision (CPLR 4213[b]), the record is sufficient for our review, and it is not necessary to remand the matter to the court (*see Matter of Allen v Black*, 275 AD2d 207, 209 [1st Dept 2000]; *Matter of Zisman*, 128 AD2d 789 [2d Dept 1987]).

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

ENTERED: MAY 16, 2019

DEPUTY CLERK

Gische, J.P., Kahn, Gesmer, Singh, Moulton, JJ.

9343N In re Pepsi-Cola Bottling Company of New York, Inc., Petitioner-Appellant, -against- New York Pepsi-Cola Distributors Association, Inc., Respondent-Respondent, A.J.A. Beverage Distributors, Inc., et al., Respondents. Index 652209/18

Epstein Becker & Green, P.C., New York (Patrick G. Brady of counsel), for appellant.

Haynes and Boone, LLP, New York (David Fleischer of counsel), for respondent.

Order, Supreme Court, New York County (Andrea Masley, J.), entered August 24, 2018, which denied, in part, petitioner's motion pursuant to CPLR 7502(c) to quash an arbitration subpoena, and granted, in part, respondent's cross motion to compel compliance with the subpoena, unanimously affirmed, without costs.

The court providently exercised its discretion in declining to grant petitioner's motion to quash the subpoena in its entirety but limiting the scope of respondent's requests for information. Respondent seeks higher commissions to be paid to its members for their sale and delivery of certain beverage

products. The arbitrator declined to bifurcate the proceedings to consider first whether, under the terms of the parties' distribution agreement, respondent may properly seek an arbitration ruling raising the commission rates they are paid for their sale and delivery of certain beverage products, and determined to hear all issues raised in respondent's arbitration demand together. With the limitations in the scope of respondent's requests for information in place, the business-sensitive materials and information requested in the subpoena are not "utterly irrelevant" to the issues that are presently before the arbitrator (*see Matter of Kapon v Koch*, 23 NY3d 32, 34 [2014]; *Harold Levinson Assoc., Inc. v Wong*, 128 AD3d 566 [1st Dept 2015]; *Ledonne v Orsid Realty Corp.*, 83 AD3d 598 [1st Dept 2011]). To the extent the requested information is commercially sensitive, it can adequately be protected by a confidentiality agreement.

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

ENTERED: MAY 16, 2019

DEPUTY CLERK

Gische, J.P., Kahn, Gesmer, Singh, Moulton, JJ.

9344N Charles Marullo, et al., Index 25527/16
Plaintiffs-Respondents, 25507/16
25561/16E

-against-

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

- - - - -

James Intriago, et al.,
Plaintiffs-Respondents,

-against-

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

- - - - -

Luigi Barillaro, et al.,
Plaintiffs-Respondents,

-against-

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

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Fabiani Cohen & Hall, LLP, New York (Allison A. Snyder of counsel), for appellants.

Sullivan Papain Block McGrath & Cannavo P.C., New York (Stephen C. Glasser of counsel), for Charles Marullo and Dawn Marullo, respondents.

Fanning & Fiore, LLP, Garden City (Douglas Fanning of counsel), for James Intriago and Anna Intriago, respondents.

Pazer, Epstein, Jaffe & Fein, P.C., New York (Mark J. Epstein of counsel), for Luigi Barillaro and Gina Barillaro, respondents.

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Order, Supreme Court, Bronx County (Laura G. Douglas, J.),

entered February 28, 2018, which, to the extent appealed from as

limited by the briefs, granted plaintiffs Charles and Dawn Marullo's motion to consolidate three Labor Law cases for a joint unified trial on liability and damages, unanimously modified, on the law and in the exercise of discretion, to deny so much of the motion seeking a joint unified trial as to damages, and otherwise affirmed, without costs.

Plaintiffs allege that they suffered nearly identical types of injuries caused by the same gas explosion. As a result, the medical testimony presented by plaintiffs regarding their damages would overlap. Despite the medical evidence, we find that individual issues would predominate if the damages claims were tried together. Although plaintiffs suffered similar *types* of injuries, their injuries are distinct — each plaintiff sustained different degrees of burns to different parts of his body. Moreover, each plaintiff will have a distinct medical history and will have received individualized medical treatment (*see Addison v New York Presbyt. Hosp./Columbia Univ. Med. Ctr.*, 52 AD3d 269, 270 [1st Dept 2008]). Any benefit gained by trying plaintiffs'

damages claims together would be outweighed by the potential prejudice to defendants.

We have considered the remaining arguments and find them unavailing.

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

ENTERED: MAY 16, 2019

DEPUTY CLERK

Friedman, J.P., Gische, Webber, Gesmer, Moulton, JJ.

9485-
9486 In re New York Times Company, et al., Ind. 2335/18
[M-2170& Petitioners, OP 180/19
M-2171] 181/19

-against-

Hon. James M. Burke, etc., et al.,
Respondents.

- - - - -

In re Court TV Media, LLC,
Petitioner,

-against-

Hon. James M. Burke, etc., et al.,
Respondents.

_____

Davis Wright Tremaine LLP, New York (Katherine M. Bolger of counsel), for The New York Times Company, The New Yorker, NYP Holdings, Inc., Daily News, LP, Reuters America LLC, NBC News and WNBC (Divisions of NBC Universal, LLC), ABC, Inc., Cable News Network, Inc., Newsday LLC, CBS Broadcasting, Inc., Fox News Network LLC, The Associated Press, Dow Jones & Company, Inc., Advance Publications, Inc. and The Reporters Committee for Freedom of the Press, petitioners.

Ballard Spahr LLP, New York (Jacquelyn N. Schell of counsel), for Court TV Media, LLC, petitioner.

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

Ronald S. Sullivan, Jr., Washington, DC, of the bar of the District of Columbia, admitted pro hac vice, for Harvey Weinstein, respondent.

_____

Petitions seeking an order, pursuant to article 78 of the CPLR, directing respondent Hon. James. M. Burke, in his capacity as Justice of the Supreme Court, New York County, to unseal the

record of the *Molineux*/*Sandoval* hearing held on April 26, 2019, in an underlying criminal prosecution, unanimously denied, and the proceedings dismissed, without costs.

In the underlying highly-publicized prosecution of a well-known entertainment-industry figure for felonious sexual misconduct, Supreme Court properly closed the *Molineux*/*Sandoval* hearing to the public and sealed documents relating to that hearing. While the First Amendment guarantees the public and the press a qualified right of access to criminal trials (*see Richmond Newspapers, Inc. v Virginia*, 448 US 555, 580 [1980]), this right of access may be limited where courtroom closure is necessitated by a compelling state governmental interest, and where the closure is narrowly tailored to serve that interest (*see Press-Enterprise Co. v Superior Court of California*, 464 US 501, 509-510 [1984]). Such compelling interests may include the defendant's right to a fair trial, including the right to "fundamental fairness in the jury selection process" (*id.* at 510; *see also Matter of Gannett Co. v De Pasquale*, 43 NY2d 370, 380 [1977] ["At the point where press commentary on those hearings would threaten the impaneling of a constitutionally impartial jury in the county of venue, pretrial evidentiary hearings in this State are presumptively to be closed to the public"], *affd* 443 US 368 [1979]).

Proceedings cannot be closed unless specific findings are made on the record, demonstrating that "closure is essential to preserve higher values and is narrowly tailored to serve that interest" (*Press-Enterprise Co. v Superior Court of California*, 478 US 1, 13-14 [1986] [internal quotation marks omitted]). Where the interest asserted is the right of the accused to a fair trial, specific findings must be made demonstrating that, "there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent," and "reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights" (*id.* at 14).

The subject matter of the *Molineux*/*Sandoval* hearing - allegations of prior uncharged sexual offenses by the defendant, the admissibilty of which is disputed - was likely to be prejudicial and inflammatory. Further, some or all of the allegations may have been determined to be inadmissible at trial, or may not be offered at trial even if found potentially admissible. Contrary to petitioners' suggestion, the People have represented that some of the information has not yet been made public. Given the worldwide media scrutiny this case has received, the motion court reasonably concluded that the sealing of documents relating to this single pretrial hearing was the

only way to prevent tainting the jury pool with such inadmissible, prejudicial information (*see De Pasquale*, 43 NY2d at 379 ["Suppressed evidence should not be used to determine a defendant's guilt, not at trial and certainly not before trial through publication . . . by the media"]; *see also Matter of Daily News v Teresi*, 265 AD2d 129, 133 [3d Dept 2000], *appeal dismissed* 95 NY2d 902 [2000]; *Matter of Gannett Co. v Falvey*, 181 AD2d 1038, 1038-1039 [4th Dept 1992], *lv dismissed* 80 NY2d 866 [1992]). We note that, to the extent information discussed at the hearing is determined to be admissible, such information will become public if and when it is introduced at trial.

Justice James M. Burke has elected, pursuant to CPLR 7804(i), not to appear in this proceeding.

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

ENTERED: MAY 16, 2019

DEPUTY CLERK