Richter, J.P., Gische, Webber, Gesmer, JJ.

10506 & Index 603611/08
M-7778 Gentry T. Beach, et al.,
Plaintiffs-Respondents,

-against-

Touradji Capital Management, LP,
Defendant-Appellant.

- - - - -

Touradji Capital Management, et al.,
Counterclaim Plaintiffs-Appellants,

-against-

Gentry T. Beach, et al.,
Counterclaim Defendants-Respondents.

- - - - -

Touradji Capital Management, LP, et al.,
Counterclaim Plaintiffs-Appellants,

Deeprock Venture Partners, LP,
Counterclaim Plaintiffs,

-against-

Vollero Beach Capital Partners LLC, et al.,
Counterclaim Defendants-Respondents.

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Kellogg, Hansen, Todd, Figel & Frederick, PLLC, New York (Aaron M. Panner of counsel), for appellants.

The Stolper Group, LLP, New York (Michael Stolper of counsel), for Gentry T. Beach and Robert A. Vollero, respondents.

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Judgment, Supreme Court, New York County (Andrew Borrok, J.), entered June 10, 2019, in favor of plaintiffs/counterclaim defendants, unanimously reversed, on the law, without costs, and the matter remanded for a new trial.

This appeal centers around an employment compensation dispute between defendant Touradji Capital Management (TCM), a

commodities hedge fund, and two of its former portfolio managers, plaintiffs Gentry T. Beach and Robert A. Vollero. Plaintiffs brought this action alleging that TCM breached the parties' oral employment contracts. TCM and its principal Paul Touradji (together appellants) asserted counterclaims, including a breach of fiduciary duty claim against each plaintiff. Central to those causes of action are allegations that plaintiffs violated certain regulations of the Securities and Exchange Commission (SEC) while employed at TCM, and that Vollero destroyed his handwritten notes of his conversations with Touradji, replacing them with word-processed versions that progressively became more favorable to plaintiffs.

Prior to trial, plaintiffs' counsel asked appellants to produce documents related to the SEC claim, arguing that they should have been produced in response to previous discovery demands. When appellants did not respond to that request, plaintiffs asked the court to strike the breach of fiduciary duty counterclaims absent immediate production, and appellants responded that they were under no obligation to produce the documents based on the prior requests. At a pretrial conference for which there is no transcript, the court apparently "asked" appellants to turn over the SEC communications, but did not sign an order to that effect, and the documents were not produced at that time.

In his opening statement, counsel for appellants

told the jury that the SEC had made a "finding" that plaintiffs "violated the securities laws." Plaintiffs' counsel objected, arguing that the SEC document upon which appellants' counsel relied was not a finding, but rather a settlement agreement between the SEC and TCM that did not explicitly state that plaintiffs had violated any SEC regulations. Appellants' counsel responded that, although the SEC settlement did not identify plaintiffs by name, it nevertheless stated its "finding[]" that the violations were made by "two former employees of [TCM]." Appellants' counsel told the court that it was prepared to introduce evidence showing that those two employees were plaintiffs.

After reviewing the SEC settlement agreement, the court, as a curative measure, directed appellants' counsel to clarify his remarks to the jury. Counsel told the jury that the SEC rule violation was against TCM, and that the SEC did not identify plaintiffs in the agreement. Counsel also stated that he intended to introduce evidence showing that the two unnamed employees referenced in the agreement are, in fact, plaintiffs. The court read the operative parts of the settlement agreement into the record, and entered the entire agreement into evidence.

The court also ordered appellants to turn over TCM's communications with the SEC. After appellants produced the SEC communications, the court identified three earlier discovery demands to which the documents were purportedly responsive. The

court concluded that appellants had an ongoing obligation to produce those communications in response to these prior demands. As a sanction, the court precluded appellants from relying on the SEC violations as a basis for their fiduciary duty counterclaims, and told the jury that all references to the SEC violations were stricken from the record. The court also precluded appellants from making any reference to plaintiffs' alleged spoliation of evidence (i.e., Vollero's destruction of his handwritten notes of conversations with Touradji). The jury subsequently rendered a verdict finding in favor of plaintiffs on the breach of contract claims, and against appellants on their counterclaims. Appellants appeal from the subsequent judgment.

First, appellants argue that counsel's remarks to the jury about the SEC's findings were accurate, but even if they were not, any misstatement was trivial and did not require a cure. We agree with the court that appellants' counsel did not fairly describe the SEC's findings in the opening statement. While not outrightly false, counsel's statement that the SEC found that plaintiffs had violated the securities laws was misleading and required correction. It is undisputed that the settlement agreement does not implicate plaintiffs by name. That counsel was prepared to subsequently show that plaintiffs were in fact the employees referenced in the agreement does not alter the fact that the SEC made no specific finding of wrongdoing as to plaintiffs. The curative measure taken by the court – requiring

appellants' counsel to clarify his remarks – was appropriate, and no further sanction was warranted.

Next, appellants contend that they committed no discovery violations, but even if they did, the court's preclusion orders constituted an excessive sanction that deprived them of a fair trial.[1] Plaintiffs maintain, and the court agreed, that appellants violated their discovery obligations by failing to produce the SEC documents in response to prior pretrial demands. Appellants counter that plaintiffs' litigation conduct constituted a waiver of post-note of issue discovery on the SEC issue, and that even if such discovery were proper, the documents in question bear, at most, a tenuous connection to only two of plaintiffs' earlier demands. We need not determine whether a discovery omission occurred, because even if the SEC communications should have been turned over prior to the trial, the delay in the document production did not warrant the severe sanctions imposed.

Pursuant to CPLR 3126, if a party "refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed . . . , the court may make such orders with regard to the failure or refusal as are

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[1] Under the circumstances here, we reject plaintiffs' contention that appellants waived this claim. Although appellants declined the court's offer of a mistrial, they preserved the claim by noting their objection several times (*see* CPLR 4017), and the court expressly acknowledged their right to appeal the issue.

just." Although "[i]t is within the trial court's discretion to determine the nature and degree of the penalty," "[t]he sanction should be commensurate with the particular disobedience it is designed to punish, and go no further than that" (*Merrill Lynch, Pierce, Fenner & Smith, Inc. v Global Strat Inc.*, 22 NY3d 877, 880 [2013] [internal quotation marks omitted]). Further, "the drastic remedy of striking a party's pleading . . . for failure to comply with a discovery order is appropriate only where [it is] conclusively demonstrate[d] that the non-disclosure was willful, contumacious or due to bad faith" (*Henderson-Jones v City of New York*, 87 AD3d 498, 504 [1st Dept 2011] [internal quotation marks omitted]).

Although the court here did not strike a pleading, its ruling could fairly be viewed as having done so, since the precluded evidence was critical to the fiduciary duty claims. Moreover, the court's drastic sanctions were disproportionate to the alleged discovery malfeasance. It is unclear why a short continuance to give plaintiffs time to review the newly-produced documents would not have been a viable option, or why further curative instructions would not have sufficed. The record as a whole does not support a finding of willfulness or bad faith so as to justify the severe sanctions imposed (*see Corrigan v New York City Tr. Auth.*, 144 AD3d 495, 496 [1st Dept 2016] [because the discovery failures were not wilful or contumacious or in bad faith, the court's drastic sanction of striking the answer and

precluding evidence at trial was unwarranted]). No basis exists to indicate that this was anything other than a disagreement over the scope of discovery. Indeed, the court at trial stated that the alleged discovery omissions "appear[] not to have been in bad faith."

Nor is there support in the record for plaintiffs' current assertion that appellants refused to obey a discovery order issued at the pretrial conference. Although a transcript of the pretrial conference does not exist, the court expressly acknowledged at trial that it did not issue a discovery order, but merely "asked" appellants to produce the documents. The court further observed that when appellants were subsequently "order[ed]" to produce the material, appellants complied. Likewise, at trial, counsel for plaintiffs described the court as merely having directed the parties to "work it out."

The court's order precluding appellants from relying on the SEC violations as a basis for their fiduciary duty counterclaims, and from making any reference during the trial to Vollero's alleged destruction of evidence, warrants reversal and a new trial (*see* CPLR 2002; *cf*. *Nineteen Eighty-Nine, LLC v Icahn*, 155 AD3d 566 [1st Dept 2017]). Plaintiffs' alleged commission of SEC violations, and Vollero's spoliation of evidence, were critical components of appellants' fiduciary duty counterclaims. These allegations were also key to plaintiffs' breach of contract claims, because a faithless servant forfeits any right to

compensation (*see e.g. Art Capital Group, LLC v Rose*, 149 AD3d 447, 449 [1st Dept 2017]). Further, precluding appellants from presenting evidence that Vollero had destroyed evidence denied appellants a fair trial on all claims. As appellants point out, the trial was largely a credibility contest between Touradji and plaintiffs, and the preclusion of Vollero's alleged misconduct unduly hampered appellants' ability to undermine his testimony.

Because we are ordering a new trial, we need not reach appellants' remaining grounds for reversal.

M-7778 - *Beach v Touradji Capital Management, LP*

Motion for leave to file a supplemental record denied.

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

ENTERED: JANUARY 14, 2020

CLERK

Renwick, J.P., Manzanet-Daniels, Oing, Singh, González, JJ.

10641 Shakilla Noorzi, As Administratrix of the Estate of Ata Noorzi, etc., Claimant-Appellant, -against- The State of New York, Defendant-Respondent. - - - - - Rebecca Sheehan, as Executrix of the Estate of John Patrick Sheehan, etc., et al., Claimants-Appellants, -against- The State of New York, Defendant-Respondent. Claim 123824 124666

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Block O'Toole & Murphy, New York (David L. Scher of counsel), for appellants.

Letitia James, Attorney General, New York (Joshua M. Parker of counsel), for respondent.

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Judgment, Court of Claims, State of New York (Walter Rivera, J.), entered September 27, 2018, dismissing the claim, unanimously affirmed, without costs.

Claimants' decedents were killed when the vehicle in which they were driving was struck by a vehicle operated by nonparty John Osorio that had jumped the curb, penetrated the guide rail, and crossed into their lane of the Hutchinson River Parkway. Claimants contend that defendant (the State) was negligent in failing to exchange the median guide rails for a concrete barrier when it performed a signage improvement project in 2003.

The Court of Claims correctly found that the 2003 project, which did not include any changes to the roadway itself but required the replacement of approximately 250 feet of guide rails that had been removed to permit new sign installations, was not a significant repair or reconstruction of the parkway (*see Hubbard v County of Madison*, 93 AD3d 939, 944 [3d Dept 2012], *lv denied* 19 NY3d 805 [2012]; *Fan Guan v State of New York*, 55 AD3d 782, 784-785 [2d Dept 2008]; *Hay v State of New York*, 60 AD3d 1190 [3d Dept 2009]). In addition, the record supports the court's finding that the median was not a proximate cause of the accident (*see Matter of Metropolitan Transp. Auth.*, 86 AD3d 314, 320 [1st Dept 2011]; *see also Schwartz v New York State Thruway Auth.*, 95 AD2d 928, 929 [3d Dept 1983], *affd* 61 NY2d 955 [1984]). The court properly determined that claimants' expert's conclusion was flawed because it rested upon the account of the accident given by Osorio, whom the court found not credible under the circumstances (*see Levine v New York State Thruway Auth.*, 52 AD3d 975, 978 [3d Dept 2008]).

An additional reason for affirming the dismissal is that the State is entitled to qualified immunity for its 2003 highway safety planning decision (*Weiss v Fote*, 7 NY2d 579, 585–586 [1960]; *Ramirez v State of New York*, 143 AD3d 880, 881-882 [2d Dept 2016]).

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

ENTERED: JANUARY 14, 2020

CLERK

Richter, J.P., Gische, Gesmer, Kern, González, JJ.

10745-
10745A Marek Krzyzanowski,
Plaintiff-Respondent,

-against-

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

Index 157165/16

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Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Ian Marc Herman of counsel), for appellants.

Platta Law Firm, PLLC, New York (Laurence D. Rogers of counsel), for respondent.

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Order, Supreme Court, New York County (Margaret A. Chan, J.), entered on or about April 17, 2019, which, to the extent appealed from as limited by the briefs, denied defendants' motion for summary judgment dismissing the Labor Law § 241(6) claim based upon a violation of Industrial Code (12 NYCRR) § 23-1.7(e)(1), and granted plaintiff's motion for partial summary judgment on that claim, unanimously modified, on the law, to deny plaintiff's motion for summary judgment, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered August 29, 2019, which in effect granted defendants' motion to reargue and, upon reargument, adhered to the prior determination, unanimously dismissed, without costs, as academic.

Plaintiff worked as a painter for a nonparty subcontractor on a renovation project owned by defendant City. Defendant STV Construction Inc. (STV) was the construction manager for the project. Plaintiff claims to have been injured when, as he was

walking down a hallway between rooms that he was assigned to paint, he tripped on wooden boards that were laying on the floor. He described the boards as being loose, overlapping and unsecured. Plaintiff testified that as a coworker stepped on a board, it sprang up, and plaintiff caught his foot beneath it, causing him to trip. Plaintiff claims that the boards were a tripping hazard and a violation of Industrial Code § 23-1.7 (e)(1) because defendants failed to provide him with a passageway free of obstructions. Defendants argue, however, that there is no liability because the boards were Masonite, not scattered materials or debris, and because they were purposefully laid out upon the floor each day, this being "integral to" the renovation work being performed.

At the outset, these arguments require us to address whether the "integral-to-the work" defense raised by defendants, but rejected by Supreme Court, equally applies to Industrial Code §23-1.7(e)(1), as well as §23-1.7(e)(2). We hold that it does. To the extent that our decision in *Singh v 1221 Holdings, LLC* (127 AD3d 607 [1st Dept 2015]), states otherwise, it directly conflicts with the Court of Appeals' holding in *O'Sullivan v IDI Constr. Co., Inc.* (7 NY3d 805, 806 [2006], *affg* 28 AD3d 225 [1st Dept 2006]), and we decline to follow *Singh*. As more recently stated by this Court, "[T]he 'integral part of work defense' applies to 12 NYCRR 23-1.7(e)(1)" (*Conlon v The Carnegie Hall Socy., Inc.*, 159 AD3d 655 [1st Dept 2018]). Thus *Conlon*, not

Singh, is in line with the Court of Appeals' view of how and when this defense may be applied. Accordingly, as a general rule, where Masonite is "an integral part of the construction," a Labor Law § 241(6) claim whether predicated on an alleged violation of Industrial Code 12 NYCRR § 23-1.7(e)(1), or (e) (2), should be dismissed (*Conlon, supra*.).

Notwithstanding the availability of this defense, defendants have not established their entitlement to summary judgment. Although STV's project manager and plaintiff each testified that the boards were lifted and replaced each day, plaintiff stated he did not know why they had been placed and the project manager stated they might have been placed as a protective floor covering. The project manager also testified, however, that there was no renovation work being done in November 2015, when plaintiff's accident occurred. The deposition testimony of plaintiff and STV's project manager only established that the boards (possibly Masonite), were removed and replaced each day, but not why they were placed or what condition they were in. This testimony is insufficient to establish as a matter of law that the boards were a protective floor covering integral to the work being done.

These facts, however, are at least sufficient to raise a triable issue of fact regarding whether the boards were a "protective covering [that] had been purposefully installed on the floor as an integral part of the renovation project" (*Thomas*

v Goldman Sachs Headquarters, LLC, 109 AD3d 421, 421-422 [1st Dept 2013]; *see also Savlas v City of New York*, 167 AD3d 546, 547 [1st Dept 2018]). Consequently, plaintiff's motion for summary judgment should be denied. In addition, summary judgment in favor of plaintiff was improper because it was based on the mistaken supposition that the "integral-to-work" defense means integral to plaintiff's specific task. The defense applies to things and conditions that are an integral part of the construction, not just to the specific task a plaintiff may be performing at the time of the accident (*O'Sullivan*, 7 NY3d at 805). Plaintiff failed to establish that the boards were accumulated debris or scattered materials and not protective

covering purposely placed on the floor, while there was ongoing construction (*id.*).

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

ENTERED: JANUARY 14, 2020

CLERK

Richter, J.P., Gische, Gesmer, Kern, González, JJ.

10760 In re Carmen Zavala, etc., Index 500083/17
Incapacitated Person-Appellant,

-against-

Selfhelp Community Services, Inc.,
Guardian-Respondent.

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An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Lillian Wan, J.), entered on or about February 28, 2019,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated December 16, 2019,

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

ENTERED: JANUARY 14, 2020

CLERK

Renwick, J.P., Kapnick, Mazzarelli, Webber, JJ.

10765 Wells Fargo Bank, N.A., etc., Index 380873/07
Plaintiff-Respondent,

-against-

Israel P. Javier also known as Israel Javier,
Defendant-Appellant,

Mortgage Electronic Registration Systems Inc., etc.,
Defendant.

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David J. Broderick, P.C., Forest Hills (David J. Broderick of counsel), for appellant.

Sandelands Eyet LLP, New York (Mindy L. Kallus of counsel), for respondent.

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Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered on or about May 8, 2018, which denied defendant Israel P. Javier's motion to vacate his default and to dismiss the complaint for lack of proper service, unanimously affirmed, without costs.

Plaintiff's affidavit of service constituted prima facie evidence of proper service, and defendant's conclusory denial of service was insufficient to rebut the prima facie showing (*Wells Fargo Bank, N.A. v Njoku*, 148 AD3d 438 [1st Dept 2017]). Defendant did not dispute that the property where service was allegedly effected was his primary residence or show that there was no person matching the description in the affidavit of service at the property at the time of service (*see Roberts v Anka*, 45 AD3d 752, 754 [2d Dept 2007], *lv dismissed* 10 NY3d 789,

10 NY3d 851 [2008]). Defendant argues instead that the description of the named recipient of service in the affidavit does not fit that of his one-year-old son, who was also out of the country at the time of service. The affidavit reflects that it was served on "Israel Javier Jr. Son" [all caps deleted]. However, the affidavit describes the person who was served as male, approximately 25, 5'8" tall and weighing 160 pounds. Given that the accuracy of the description of the recipient of service is uncontested, the fact that the stated name may be incorrect is not sufficient to refute proper service (*see Black v Pappalardo*, 132 AD2d 640 [2d Dept 1987]).

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: JANUARY 14, 2020

CLERK

Renwick, J.P., Kapnick, Mazzarelli, Webber, JJ.

10766 In re A'Keria A.H., and Another,

Dependent Children Under the Age
of Eighteen Years, etc.,

Kenneth Q.H.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

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Law Offices of Randall S. Carmel, Jericho (Randall S. Carmel of counsel), for appellant.

James E. Johnson, Corporation Counsel, New York (Claibourne Henry of counsel), for respondent.

Dawne A. Mitchell, The Legal Aid Society, New York (Susan Clement of counsel), attorney for the children.

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Order of fact-finding, Family Court, Bronx County (David J. Kaplan, J.), entered on or about February 15, 2019, which determined, after a hearing, that respondent father neglected the subject children, unanimously affirmed, without costs.

The finding of neglect is supported by a preponderance of the evidence, including the children's cross-corroborated statements to the ACS caseworker that the father left them alone and crying on the sidewalk (*see e.g. Matter of Sania S.[Marcia McG-W.]*, 143 AD3d 545 [1st Dept], *lv denied* 28 NY3d 910 [2016]). The evidence demonstrated that after the children's mother failed to appear for a scheduled visitation exchange, the father brought the children to the mother's home, pushed the children into the mother's apartment, and fled as the children followed him outside

the building, at which point the father left the children on the sidewalk, alone and crying (*see e.g. Matter of Genesis R. [Marcelino C.]*, 145 AD3d 640 [1st Dept 2016]).

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

ENTERED: JANUARY 14, 2020

CLERK

Renwick, J.P., Kapnick, Mazzarelli, Webber, JJ.

10767 The Elsa Zegelstein Revocable Living Trust,
Plaintiff-Respondent,

-against-

Nanto MK Corp., et al.,
Defendants,

Kanaya Masahiro also known as Masahiro Kanaya also known as Mark Kanaya,
Defendant-Appellant.

Index 651743/18

Todd V. Lamb, New York, for appellant.

The Schutzer Group, PLLC, New York (Eric P. Schutzer of counsel), for respondent.

Order, Supreme Court, New York County (Alan C. Marin, J.), entered February 15, 2019, which denied defendant Kanaya Masahiro a/k/a Masahiro Kanaya a/k/a Mark Kanaya (Kanaya)'s, motion to dismiss the complaint as against him, pursuant to CPLR 3211(a)(1) and (5), unanimously affirmed, without costs.

Plaintiff's January 5, 2015 email, which was attached to the complaint and upon which plaintiff relies, when read in its entirety, does not "conclusively establish[] a defense to the asserted claims as a matter of law" (*see* CPLR 3211[a][1]). This includes claims that are premised on facts that allegedly occurred prior to the January 5th email. It also does not conclusively establish that Kanaya was to be released as guarantor of the lease as of the date of the email.

The guaranty at issue states that it is to remain in effect

"to the latest date that Tenant and its assigns and subleases [sic], if any, shall have completely performed all of the following: (i) [v]acated and surrendered the [premises] to the Landlord pursuant to the terms of the Lease, and (ii) [d]elivered the keys to the [premises] to the Landlord, and (iii) paid to Landlord all Accrued Rent to and including the date which is the later of (a) the actual receipt by Landlord of said Accrued Rent, (b) the surrender of the [premises] or (c) receipt by Landlord of the keys to the [premises]."

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

ENTERED: JANUARY 14, 2020

CLERK

Renwick, J.P., Kapnick, Mazzarelli, Webber, JJ.

10768 In re Magdy Ghaly, Index 101137/16
Petitioner-Appellant,

-against-

Columbia University, et al.,
Respondents-Respondents.

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Magdy Ghaly, appellant pro se.

Jackson Lewis P.C., White Plains (Susan D. Friedfel of counsel), for respondents.

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Judgment (denominated decision and order [one paper]), Supreme Court, New York County (Debra A. James, J.), entered October 2, 2018, which granted the motion of respondents Columbia University and the Trustees of Columbia University in the City of New York to dismiss the petition seeking a declaration that respondents' determination that he failed an examination was arbitrary and capricious, an order compelling respondents to give him a passing score or a professional degree, and an award of back pay and other damages, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Petitioner twice failed an examination he was required to pass in order to continue in respondents' engineering Ph.D. program. After requesting, and being granted, a professional degree in Civil Engineering, petitioner brought the instant proceeding. "'Strong policy considerations militate against the intervention of courts in controversies relating to an educational institution's judgment' on core academic policy

regarding a student's academic performance and examinations" (*Keles v Trustees of Columbia Univ. in the City of N.Y.*, 74 AD3d 435, 435 [1st Dept 2010], *lv denied* 16 NY3d 890 [2011], *cert denied* 565 US 884 [2011], quoting *Matter of Susan M. v New York Law School*, 76 NY2d 241, 245 [1990]). Judicial review of "determinations of educational institutions as to the academic performance of their students . . . is limited to the question of whether the challenged determination was arbitrary and capricious, irrational, made in bad faith or contrary to Constitution or statute" (*Matter of Susan M.*, 76 NY2d at 246, citing *Matter of Olsson v Board of Higher Educ. of City of N.Y.*, 49 NY2d 408, 413-414 [1980]).

Petitioner's allegations, rather than addressing whether respondents' determination was arbitrary and capricious, irrational or made in bad faith, "go to the heart of the [] substantive evaluation," his performance on the exam (*Matter of Susan M.*, 76 NY2d at 247). His challenge to the content of one of the examination questions, which the "motion court declined to entertain" by denying his motion to supplement the record filed one year after commencing this proceeding, is not properly raised on appeal, as it does not raise a "strictly legal" issue, and directly contradicts the allegations in the petition (*see Blue Sage Capital, L.P. v Alfa Laval U.S. Holding, Inc.*, 168 AD3d 645, 647 [1st Dept 2019], *lv denied* 33 NY3d 904 [2019]). His contention that he should have been tested under a previous

examination format is unavailing, as he was on notice of the new format, and respondents have the "'right to change the academic degree requirements, provided that such changes are not arbitrary and capricious'" (*Kickertz v New York Univ.*, 110 AD3d 268, 273 [1st Dept 2013]).

Finally, petitioner was awarded a professional degree, as he requested.

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

ENTERED: JANUARY 14, 2020

CLERK

Renwick, J.P., Kapnick, Mazzarelli, Webber, JJ.

10769-
10769A The People of the State of New York, Respondent,

Ind. 14007/90
14774/90

-against-

Antonio Rodriguez,
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 (Victoria Muth of counsel), for respondent.

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Orders, Supreme Court, New York County (Roger S. Hayes, J.), entered on or about October 19, 2017, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court's discretionary upward departure was based on clear and convincing evidence of aggravating factors not adequately taken into account by the risk assessment instruments (*see People v Gillotti*, 23 NY3d 841, 861-862 [2014]), including the egregiousness of the underlying sex offenses, which demonstrated "a pattern of predatory conduct indicative of sexual recidivism" (*People v Benvenutti*, 165 AD3d 611, 612 [1st Dept 2018]). In addition, the assessment of points under the risk factor for conduct while confined did not adequately take into account the seriousness of the disciplinary infractions that defendant incurred *(see People v Silvagnoli*, 158 AD3d 491, 492

[1st Dept], *lv denied* 31 NY3d 909 [2018]).

The mitigating factors that defendant relies upon were adequately taken into account by the risk assessment instruments, and, in any event, are outweighed by the aggravating factors.

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

ENTERED: JANUARY 14, 2020

CLERK

Renwick, J.P., Kapnick, Mazzarelli, Webber, JJ.

10770 The People of the State of New York, SCI. 1734N/16
Respondent,

-against-

Hursie Garvin,
Defendant-Appellant.

_____

Janet E. Sabel, The Legal Aid Society, New York (William B. Carney of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (John T. Hughes 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 (Richard M. Weinberg at plea; Felicia 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: JANUARY 14, 2020

CLERK

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

Renwick, J.P., Kapnick, Mazzarelli, Webber, JJ.

10771 Scott Crockett, Index 159061/17
Plaintiff-Respondent,

-against-

351 St. Nicholas Avenue LLC,
Defendant-Appellant.

_____

Sperber Denenberg & Kahan, P.C., New York (Jacqueline Handel-Harbour of counsel), for appellant.

Harwood Reiff LLC, New York (Simon W. Reiff of counsel), for respondent.

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Order, Supreme Court, New York County (Alexander M. Tisch, J.) entered April 29, 2019, which granted plaintiff's motion for summary judgment, inter alia, declaring that he is entitled to a rent stabilized lease and awarding him overcharges, treble damages and attorneys' fees, and referred the calculation of treble damages and attorneys' fees to a judicial hearing officer or special referee, unanimously modified, on the law, to direct that the J.H.O. or referee determine whether plaintiff is entitled to any other damages, in accordance herewith, and otherwise affirmed, without costs.

The motion court correctly determined that defendant's receipt of J-51 tax benefits for the building during plaintiff's tenancy conferred rent-stabilized status on his apartment for at least the duration of his occupancy (*Roberts v Tishman Speyer Props., L.P.*, 13 NY3d 270 [2009]). Even if the building briefly lost its rent-regulated status under Rent Stabilization Law

(Administrative Code of City of NY) § 26-403(e)(2)(f) following a foreclosure and sale to the City of New York, by the time the building was sold to defendant's predecessor in interest, it had reverted to its rent stabilized status under Administrative Code § 26-507, which in any event pre-dated the building's receipt of J-51 benefits.

There is no basis on which the court could set aside the rent reduction order issued by Division of Housing and Community Renewal (DHCR) in 1998, which was never appealed or challenged by defendant or its predecessor in interest (Rent Stabilization Code [9 NYCRR] § 2523.3; *Matter of Cintron v Calogero*, 15 NY3d 347, 356 [2010]). Defendant argues that the condition upon which the rent reduction order was based was de minimis. However, even if the court could have disregarded DHCR's determination, defendant failed to present any evidence that the condition did not warrant the enforcement of the order.

The court correctly determined that defendant's belief that its predecessor's J-51 application had been withdrawn – which is belied by the receipt of 11 years of tax abatements – and its similarly unfounded belief that the court could disregard DHCR's rent reduction order failed to rebut the presumption of willfulness as to the rent overcharge, thereby warranting treble damages (*see Draper v Georgia Props.*, 230 AD2d 455, 460 [1st Dept 1997], *affd* 94 NY2d 809 [1999]).

Although the court's calculation of overcharges was correct

under the law at the time its order was entered, plaintiff contends that the changes to the law under the Housing Stability and Tenant Protection Act (L 2019, ch 36) warrant a recalculation of the damages to reflect the extension of the statute of limitations in overcharges cases from four years to six years (CPLR 213-a). Because, by order entered July 23, 2019, we stayed the hearing on treble damages and attorneys' fees pending the hearing and determination of this appeal, we now modify the scope of the reference to determine whether any other damages are warranted consistent herewith (*see Dugan v London Terrace Gardens, L.P.*, 177 AD3d 1, 10 [1st Dept. 2019]).

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

ENTERED: JANUARY 14, 2020

CLERK

Renwick, J.P., Kapnick, Mazzarelli, Webber, JJ.

10773 Cathy Taylor, Index 104299/12
Plaintiff-Appellant,

-against-

Denise Gumora, et al.,
Defendants-Respondents.

_____

Sokolski & Zekaria, P.C., New York (Daphna Zekaria of counsel), for appellant.

Law Office of Harry Kresky, Bronx (Harry Kresky of counsel), for respondents.

_____

Order, Supreme Court, New York County (Gerald Lebovits, J.), entered April 4, 2018, which granted plaintiff's motion and defendants' cross motion only to the extent of ordering a special meeting followed by an election within 45 days of the decision date, and otherwise denied the motions, unanimously affirmed, without costs.

Plaintiff, a shareholder in 702 East Fifth Street Housing Development Fund Corporation (the co-op), failed to establish, by clear and convincing evidence, that defendants, the co-op's board of directors, were in contempt of the IAS court's October 2017 order (*see El-Dehdan v El-Dehdan*, 26 NY3d 19, 28 [2015]; *see also Tener v Cremer*, 89 AD3d 75, 78 [1st Dept 2011]). The IAS court mandated that the parties hold a special meeting with new elections within 60 days, follow the co-op's by-laws, and address each other's complaints or requests within 10 business days. Plaintiff did not establish that defendants failed to hold the

special meeting or breached the co-op's bylaws. Indeed, the documents submitted by the parties reflect that defendants scheduled the special meeting with plaintiff's input and made good faith efforts to reach an agreement with her regarding the agenda items for the meeting. Defendants also acted in accordance with the bylaws and internal policies by requiring that plaintiff follow the formal procedure to inspect the co-op's financial statements. Plaintiff, however, failed to attend the court-mandated special meeting.

Since plaintiff failed to show that defendants violated the IAS court's order, she is not entitled to attorneys' fees (*see Kiperman v Steinberg*, 234 AD2d 518 [2d Dept 1996] [finding of civil contempt was prerequisite for imposing attorney fees]).

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: JANUARY 14, 2020

CLERK

Renwick, J.P., Kapnick, Mazzarelli, Webber, JJ.

10774 In re Alyssa S.,

A Child Under Eighteen
Years of Age, etc.,

Shakira M. S.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Richard L. Herzfeld, P.C., New York (Richard L. Herzfeld of counsel), for appellant.

James E. Johnson, Corporation Counsel, New York (Jonathan A. Popolow of counsel), for respondent.

_____

Order of fact-finding and disposition, Family Court, New York County (Jane Pearl, J.), entered on or about January 11, 2019, insofar as it determined, after a hearing, that respondent mother neglected the subject child, unanimously affirmed, without costs.

A preponderance of the evidence supports the court's finding that respondent medically neglected the child (*see* Family Court Act §§ 1012[f][i][A]; 1046[b][i]). Respondent does not dispute that the child was prescribed medication after she was discharged from the hospital in March 2017 and that between April 2017 and April 2018, while in respondent's care, the child did not take the prescribed medication.

Respondent contends that the child stopped taking one of the medications because of the side effects and that she was told that she need not take the other anymore. However, the child's

medical records do not show that respondent spoke to anyone before the child stopped taking the medication; rather, they reflect that the child's emergency room doctors said it was unclear why she was not taking the medication. Respondent's failure to ensure that the child took her prescribed medication on a consistent basis placed the child at imminent risk of impairment (*Matter of Joelle T. [Laconia W.]*, 140 AD3d 513, 514 [1st Dept 2016]).

Contrary to respondent's contention, petitioner was not required to submit expert testimony to establish a prima facie case of medical neglect (*see Nicholson v Scoppetta*, 3 NY3d 357, 383 [2004]). In addition, the court's evaluation of the evidence and the credibility of the witnesses is supported by the record (*see Matter of Brianna R. [Maribel R.]*, 115 AD3d 403, 407-408 [1st Dept 2014]).

Respondent's claim that the court deprived her of the effective assistance of counsel is unpreserved and in any event unavailing.

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

ENTERED: JANUARY 14, 2020

CLERK

Renwick, J.P., Kapnick, Mazzarelli, Webber, JJ.

10775 The People of the State of New York, Respondent, Ind. 2058/15 1378/16

-against-

Prince Bryan, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Ruth Pickholz, J.), rendered January 31, 2017, convicting defendant, after a jury trial, of grand larceny in the third degree and two counts of perjury in the first degree, and sentencing him, as a second felony offender, to an aggregate term of 3½ to 7 years, unanimously reversed, on the law, and the matter remanded for a new trial.

The court improvidently exercised its discretion in denying the defense an adjournment to the next business day for the purpose of calling an absent witness, whose testimony would undisputedly have been material (*see People v Foy*, 32 NY2d 473, 476-477 [1973]). We have considered and rejected the People's arguments to the contrary, as well as their claim of harmless error.

Because we are ordering a new trial, we find it unnecessary to reach any other issues.

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

ENTERED: JANUARY 14, 2020

CLERK

Renwick, J.P., Kapnick, Mazzarelli, Webber, JJ.

10776 The People of the State of New York, Ind. 405/17
Respondent,

-against-

Cassandra C. Carter,
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.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Gregory Carro, J.), rendered October 4, 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: JANUARY 14, 2020

CLERK

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

Renwick, J.P., Kapnick, Mazzarelli, Webber, JJ.

10777-
10777A

Index 309966/10

Mark Wroblewski,
Plaintiff-Appellant-Respondent,

-against-

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

Central Logistics, Inc., et al.,
Defendants.

- - - - -

El Sol Contracting and Construction Corporation,
Third-Party Plaintiff-Appellant,

-against-

Hylan Datacom & Electrical, Inc., et al.,
Third-Party Defendants-Respondents,

Gannett Fleming Engineers and Architects, P.C.,
Third-Party Defendant.

_____

An appeal having been taken to this Court by the above-named appellants from orders of the Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered on or about October 9, 2018

And said appeal having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated December 9, 2019,

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

ENTERED: JANUARY 14, 2020

CLERK

Renwick, J.P., Kapnick, Mazzarelli, Webber, JJ.

10778-
10778A Brian Mooney,
Plaintiff-Appellant,

-against-

BP/CG Center II, LLC, et al.,
Defendants-Respondents.

- - - - -

Structure Tone, Inc.,
Third-Party Plaintiff-Respondent,

-against-

Furniture Consulting, Inc.,
Third-Party Defendant-Respondent.

- - - - -

Structure Tone, Inc.,
Second Third-Party Plaintiff-Respondent,

-against-

Steelcase, Inc.,
Second Third-Party Defendant-Respondent.

- - - - -

[And A Fourth-Party Action]

Index 153483/13
590086/14
590176/14
595070/15

_____

Napoli Shkolnik, PLLC, New York (Joseph P. Napoli of counsel), for appellant.

Barry McTiernan & Moore LLC, New York (Laurel A. Wedinger of counsel), for BP/CG Center II, LLC, Citigroup, Inc. and Structure Tone, Inc., respondents.

Law Office of James J. Toomey, New York (Evy L. Kazansky of counsel), for Furniture Consulting, Inc., respondent.

Connell Foley LLP, New York (Abigail Rossman of counsel), for Steelcase, Inc., respondent.

_____

Judgment, Supreme Court, New York County (Margaret A. Chan, J.), entered October 12, 2017, dismissing the complaint,

unanimously affirmed, without costs. Appeal from order, same

court and Justice, entered August 15, 2017, which, inter alia, granted defendants' motions for summary judgment dismissing the complaint, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Defendants are not liable under Labor Law § 200 or in common-law negligence for injuries plaintiff suffered when he knelt on a screw lying on the floor of the construction site where he was installing cabinets. The record demonstrates that defendants neither created or had notice of the condition of the floor nor exercised control over the manner and means of plaintiff's work (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]; *Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143-144 [1st Dept 2012]). Plaintiff testified that the work area was clean at the time of the incident and that he had looked but not seen the screw before kneeling on it.

Nor are defendants liable under Labor Law § 241(6). Plaintiff cites as the predicate for this claim a violation of Industrial Code (12 NYCRR) § 23-1.7(e)(1) or (e)(2). However, the single screw upon which he knelt does not constitute an "accumulation[] of dirt and debris" (12 NYCRR 23-1.7[e][1]; *see Garcia v Renaissance Gardens Assoc.*, 242 AD2d 463 [1st Dept 1997]). Additionally, construing the term "sharp projections" as used in 12 NYCRR 23-1.7(e)(2) broadly (*see Lenard v 1251 Ams. Assoc.*, 241 AD2d 391, 393-394 [1st Dept 1997], *appeal withdrawn* 90 NY2d 937 [1997]), the single screw does not constitute a sharp

projection. It did not project from the floor, and it was not sharp in the sense of being "clearly defined or distinct" (*id.* at 393); *cf. Canning v Barney's N.Y.*, 289 AD2d 32, 34-35 [1st Dept 2001] [loop of wire projecting about 18 inches from wheel of debris-containing dumpster in which it had become entangled constituted accumulated debris]).

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

ENTERED: JANUARY 14, 2020

CLERK

Renwick, J.P., Kapnick, Mazzarelli, Webber, JJ.

10779 The People of the State of New York, Ind. 1331/09
Respondent,

-against-

Raul Espino,
Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Edward J. McLaughlin, J.), entered on or about September 20, 2016, which denied defendant's CPL 440.30(1-a)(a)(2) motion for DNA testing, unanimously affirmed.

The motion court properly determined that defendant, who entered a plea of guilty to second-degree burglary in 2010, is not eligible to apply for postconviction DNA testing. First, defendant was never charged with, or convicted of, any of the enumerated offenses that render the statute applicable where a defendant has pleaded guilty (*see* CPL 440.30[1-a][a][2]). Second, the provision for postplea DNA testing only apples to defendants who, unlike this defendant, entered a plea of guilty on or after August 1, 2012 (*see* L 2012, ch 55, part A, § 2). Third, defendant is essentially asking for retesting of evidence that has already been tested, and the statute does not provide for such retesting (*see People v Witherspoon*, 156 AD3d 828, 828-

29 [2d Dept 2017], *lv denied* 31 NY3d 988 [2018]).

Further, defendant failed to show a substantial probability that the retesting would have established defendant's actual innocence, which is the statutory standard in postplea cases. As noted by the motion court, there was significant evidence of defendant's guilt. In reference to burglaries at two buildings, defendant was captured on video at the scene, wearing the same jacket as when he was arrested (and apparently with the same glasses). Defendant also admitted to the police that he was the person depicted in the videos and made inculpatory statements concerning his presence at all three buildings.

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: JANUARY 14, 2020

CLERK

Renwick, J.P., Kapnick, Mazzarelli, Webber, JJ.

10781 Landmark Ventures, Inc., et al., Index 655089/17
Plaintiffs-Appellants,

-against-

Kreisberg & Maitland, LLP, et al.,
Defendants-Respondents.

_____

Kerr, LLP, New York (William B. Kerr of counsel), for appellants.

Law Offices of Gabriel Mendelberg, P.C., New York (Gabriel Mendelberg of counsel), for respondents.

_____

Order, Supreme Court, New York County (Shlomo Hagler, J.), entered June 6, 2018, which granted defendants' motion to dismiss the complaint, unanimously affirmed, with costs.

As in *Landmark Ventures, Inc. v InSightec, Ltd.* (__AD3d__ [1st Dept. 2020]), decided simultaneously herewith, the motion court correctly recognized that defendant Kreisberg & Maitland LLP (K&M) was not a party to the settlement agreement. The agreement defines "Party" as John Doe, LMV, LMV USA, Ralph Klein, and Zeev Klein, and only John Doe and the "remaining Parties" are bound by the non-disparagement clause of paragraph 9. Defendant Gabriel Mendelberg signed the agreement on behalf of K&M as "Attorneys for Plaintiff" on the same page and just above the signature block for plaintiffs' attorneys, who, similarly, signed as "Attorneys for LMV, LMV USA and Kleins." Plaintiffs failed to show that the rule that an agent acting on behalf of a disclosed principal is not bound absent "clear and explicit" evidence of the agent's intention to be bound (*see Savoy Record Co. v*

Cardinal Export Corp., 15 NY2d 1, 4 [1964] [internal quotation marks omitted]) does not apply here or that the requisite evidence of intention exists.

Contrary to plaintiffs' contention, the court's interpretation does not render the attorney signatures superfluous. Among other things, their signatures eliminate any doubt that, in executing the settlement agreement, all parties were represented by counsel, a fact that would support a finding that the agreement is valid in the event that its validity is ever challenged.

Plaintiffs also failed to adequately allege damages (*see Fowler v American Lawyer Media, Inc.*, 306 AD2d 113 [1st Dept 2003]).

The court correctly dismissed the claim for misappropriation of trade secrets. Plaintiffs cite no authority to support their contention that bank records and checks such as those at issue here constitute trade secrets, which are defined as "any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it" (*Ashland Mgt. v Janien*, 82 NY2d 395, 407 [1993] [internal quotation marks omitted]). They cite *Leo Silfen, Inc. v Cream* (29 NY2d 387, 393 [1972]) for the proposition that customer lists may be protected as trade secrets if the customers' patronage was "secured by years of effort and advertising effected by the expenditure of

substantial time and money." However, they do not allege that their clients fall into this category, rather than being "readily ascertainable outside the . . . business as prospective users or consumers of the [business's] services or products" (29 NY2d at 392).

Plaintiffs failed to explain how the disclosure of customers' identity or the dates and amounts of certain payments for unspecified services at unspecified rates could constitute information exploited by their competitors, even assuming the competitors located this information in the 13 days during which they had access to it.

Plaintiffs' argument that the lines between defendant Law Offices of Gabriel Mendelberg P.C. and K&M are blurry is reasonable, but the court's omission of alter ego claims from its analysis does not warrant reversal, given the absence of an enforceable contract between plaintiffs and K&M (and, a fortiori, between plaintiffs and the remaining defendants) and plaintiffs' failure to adequately allege that trade secrets were compromised.

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

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

ENTERED: JANUARY 14, 2020

CLERK

Renwick, J.P., Kapnick, Mazzarelli, Webber, JJ.

10782-
10782A Landmark Ventures, Inc., et al.,
Plaintiffs-Appellants,

-against-

InSightec, Ltd., et al.,
Defendants-Respondents.

Index 653761/16

_____

Kerr, LLP, New York (William B. Kerr of counsel), for appellants.

Schulman & Charish LLP, New York (Eli Schulman of counsel), for Insightec, Ltd., respondent.

Kreisberg & Maitland, LLP, New York (Gabriel Mendelberg of counsel), for Kriesberg & Maitland, LLP, respondent.

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Orders, Supreme Court, New York County (Manuel J. Mendez, J.), entered April 4, 2017, which, to the extent appealed from as limited by the briefs, granted defendant InSightec, Ltd.'s motion to dismiss the cause of action for tortious interference with contract, and granted defendant Kreisberg & Maitland, LLP's (K&M) motion to dismiss the cause of action for breach of contract, unanimously affirmed, with costs.

The court applied the correct standard in deciding the motions under CPLR 3211(a)(7), i.e., presuming the facts alleged are true and according the plaintiff every favorable inference, unless the allegations actually constitute legal conclusions or are inherently incredible or unequivocally contradicted by documentary evidence (*Leder v Spiegel*, 31 AD3d 266 [1st Dept 2006], *affd* 9 NY3d 836 [2007], *cert denied sub nom Spiegel v Rowland*, 552 US 1257 [2008]).

The complaint fails to state a cause of action for interference with contractual relations because it does not allege that InSightec had knowledge of the contract it allegedly interfered with or that it intentionally induced K&M to breach the contract (*e.g. Israel v Wood Dolson Co.*, 1 NY2d 116, 120 [1956]; *Hoag v Chancellor, Inc.*, 246 AD2d 224 [1st Dept 1998]). Plaintiffs allege that InSightec had "full knowledge of the Settlement Agreement and its material terms" upon receipt of their March 1, 2016 email referring to "non-public and proprietary information" in InSightec's and "its agents[']" possession, obtained "in violation of a signed agreement and court Sealing order." However, the email provides no information about the "agreement" that protected the information or the case in which the "court Sealing order" was issued, other than "in the Supreme Court of the State of New York." It says nothing about the parties to the agreement, the date the agreement was executed, or the purpose of the agreement. Thus, contrary to the allegations in the complaint, the email contains no "material terms." Moreover, it describes the allegedly "illegally" obtained information in only the vaguest of terms, i.e., information "including but not limited to confidential information related to third parties, non-public customer lists and records, financial information and bank records, etc." Thus, plaintiffs failed to allege facts that would show that InSightec knew about the settlement agreement or could have been in a

position to induce K&M to breach its terms.

Other than in the most conclusory way, plaintiffs also failed to allege any damages they incurred as a result of the information being available to the public for the limited time alleged – much less the "but for" damages the tort requires (*see Pursuit Inv. Mgt. LLC v Alpha Beta Capital Partners, L.P.*, 127 AD3d 580 [1st Dept 2015]).

The breach of contract claim was correctly dismissed pursuant to CPLR 3211(a)(7) because the settlement agreement was not a contract pursuant to which K&M had any obligations to plaintiffs. The agreement names as parties John Doe, LMV, LMV USA, Ralph Klein, and Zeev Klein, and it is only John Doe and the "remaining Parties" who are bound by the non-disparagement clause of paragraph 9. Gabriel Mendelberg signed the agreement on behalf of K&M as "Attorneys for Plaintiff," just as plaintiffs' firm signed as "Attorneys for LMV, LMV USA and Kleins." Thus, K&M expressly acted on behalf of a disclosed principal, namely, its client, John Doe, and "will not be personally bound [absent] clear and explicit evidence of [its] intention to substitute or superadd [its] personal liability for, or to, that of [its] principal" (*Savoy Record Co. v Cardinal Export Corp.*, 15 NY2d 1, 4 [1964] [internal quotation marks omitted]). When the parties intended to include attorneys in the list of those bound or otherwise affected by the agreement's terms, they did so explicitly; contrary to plaintiffs' contention, they did not

include attorneys in paragraph 4 ("This Agreement shall be binding upon . . .").

The complaint also fails to plead damages arising from the alleged breach (*see Fowler v American Lawyer Media*, 306 AD2d 113 [1st Dept 2003]).

The breach of contract claim also fails under CPLR 3211(a)(1), another ground on which K&M moved to dismiss. The settlement agreement definitively disproves plaintiffs' claims (*see Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept 2003]), and a revised pleading could not cure the deficiency (*Eaton Vance Mgt. v Wilmington Sav. Fund Socy., FSB*, 171 AD3d 626, 627 [1st Dept 2019]). Moreover, absent a breach of contract by K&M, plaintiffs cannot replead a cognizable tortious interference claim against InSightec (*Jack L. Inselman & Co. v FNB Fin. Co.*, 41 NY2d 1078, 1080 [1977]).

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

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

ENTERED: JANUARY 14, 2020

CLERK

Renwick, J.P., Kapnick, Mazzarelli, Webber, JJ.

10783N Denise A. Rubin, Index 154060/15
Plaintiff-Respondent-Appellant,

-against-

Napoli Bern Ripka Shkolnik, LLP,
et al.,
Defendants-Appellants-Respondents,

Paul J. Napoli,
Defendant.

_____

Ropers, Majeski, Kohn & Bentley, LLP, New York (Kirsten L. Molloy of counsel), for appellants-respondents.

Giskan Solotaroff & Anderson LLP, New York (Jason L. Solotaroff of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Paul A. Goetz, J.), entered October 30, 2018, which, to the extent appealed from as limited by the briefs, denied defendants Napoli Bern Ripka Shkolnik, LLP, Worby Groner Edelman & Napoli Bern, LLP, and Napoli Bern & Associates, LLP's motion for summary judgment on their counterclaim against plaintiff for breach of an employment agreement entitling them to liquidated damages, and granted defendants' motion for summary judgment dismissing plaintiff's second cause of action for breach of contract regarding an unpaid bonus, unanimously modified, on the law, to the extent of reinstating plaintiff's second cause of action, and otherwise affirmed, without costs.

The law firm defendants established as a matter of law that plaintiff violated the confidentiality provision of her

employment agreement when she filed four confidential documents - three email chains discussing client and law firm business issues and a written audit report of the firms' policies and procedures prepared by another law firm - on NYSCEF (New York State Courts Electronic Filing), making them publicly available. At the time of the filing, plaintiff was an attorney licensed in New York and was represented by counsel. Accordingly, under the circumstances, her actions qualified as "knowing[], intentional[] or willful[]" and triggered the liquidated damages provision of her employment agreement. However, on this record, defendants did not make a prima facie showing of entitlement to those damages.

"Liquidated damages constitute the compensation which, the parties have agreed, should be paid in order to satisfy any loss or injury flowing from a breach of their contract" (*Truck Rent-A-Ctr. v Puritan Farms 2nd*, 41 NY2d 420, 423-424 [1977]). "A contractual provision fixing damages in the event of breach will be sustained if the amount liquidated bears a reasonable proportion to the probable loss and the amount of actual loss is incapable or difficult of precise estimation. If, however, the amount fixed is plainly or grossly disproportionate to the probable loss, the provision calls for a penalty and will not be enforced" (*id.* at 425). Although the party challenging the liquidated damages provision has the burden to prove that the liquidated damages are, in fact, an unenforceable penalty (*see*

JMD Holding Corp. v Congress Fin. Corp., 4 NY3d 373, 380 [2005]; *Parker v Parker*, 163 AD3d 405, 406 [1st Dept 2018]), the party seeking to enforce the provision must necessarily have been damaged in order for the provision to apply (*see e.g. J. Weinstein & Sons, Inc. v City of New York*, 264 App Div 398, 400 [1st Dept 1942] ["The proof establishes that no claims were made against defendant and that defendant suffered no financial damage whatsoever."], *affd* 289 NY 741 [1942]). Here, defendants did not identify to the motion court any damages that they sustained as a result of plaintiff's breach of the agreement.

Plaintiff's second cause of action alleged that, in 2013, plaintiff and the law firm defendants agreed that in exchange for her continued employment, she would be paid 5% of all the firms' net attorney's fees recovered in matters to which she was assigned or "materially involved," and she was not paid the full amount she claims she was owed. The law firm defendants met their burden on summary judgment by providing plaintiff's employment agreement which did not include any reference to a 5% nondiscretionary bonus, and which included a general merger clause requiring any modification to be in writing. However, plaintiff raised a triable issue of fact as to this claim. Specifically, in *Rose v Spa Realty Assoc.* (42 NY2d 338, 343-344 [1977]), the Court of Appeals held that while generally an oral modification may not be enforced in light of a merger clause, an oral modification may be enforced if there is partial performance

that is "unequivocally referable to the oral modification" or if one party "induced another's significant and substantial reliance upon an oral modification." Here, plaintiff averred that she was promised the 5% bonus and the law firm defendants partially performed by paying her this bonus on at least five separate occasions. As the law firm defendants sought summary judgment, this Court is obligated to view the evidence in the light most favorable to plaintiff and to accept plaintiff's evidence "as true" (*Aguilar v City of New York*, 162 AD3d 601, 601 [1st Dept 2018]; *Hernandez v Kaisman*, 103 AD3d 106, 112 [1st Dept 2012]). Plaintiff also averred that she relied on this oral agreement and took on certain complex cases with the expectation that she would receive additional compensation for those actions. Accordingly, summary judgment in favor of defendants was not warranted.

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: JANUARY 14, 2020

CLERK

Renwick, J.P., Kapnick, Mazzarelli, Webber, JJ.

10784N U.S. Bank National Association, as Trustee of J.P. Morgan Alternative Loan Trust 2006-S2, Plaintiff-Respondent, Index 115553/09

-against-

Al Thompson, Defendant-Appellant,

V Sellars Management Harlem Inc., et al., Defendants.

_____

David A. Kaminsky & Associates, P.C., New York (James A. English of counsel), for appellant.

Davidson Fink LLP, Rochester (Richard N. Franco of counsel), for respondent.

_____

Order, Supreme Court, New York County (Judith N. McMahon, J.), entered February 15, 2019, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion to vacate a prior order of dismissal of this mortgage foreclosure action pursuant to Uniform Rules for Trial Courts (22 NYCRR) § 202.27(b), unanimously affirmed, without costs.

Contrary to plaintiff's contention, defendant Thompson, the mortgagor, who remains obligated on the note and a potential deficiency judgment, has standing to appeal from the order vacating the dismissal of this action, notwithstanding that he transferred his interest in the encumbered property before the action was commenced (*see JPMorgan Chase Bank, N.A. v Seema*, 169 AD3d 622 [1st Dept 2019]).

In support of its motion to vacate, plaintiff demonstrated a

reasonable excuse for its failure to appear for a court conference as well as a meritorious cause of action (see Diaz v Perlson, 168 AD3d 463 [1st Dept 2019]). Plaintiff submitted court records of the litigation status of the action, the mortgage documents, Thompson's default in performance of his obligations despite notices warning of acceleration of the debt, and an affidavit of merit by its loan servicing agent. Despite lengthy interim delays on its part in prosecuting the action, plaintiff took significant steps towards preparing its case for foreclosure, including filing a motion for summary judgment. It appears from the record that plaintiff attended all court conferences but the one. While law office failure by plaintiff's prior counsel is presumed asserted by its current counsel, and while the explanation is not supported by an affidavit by a person with personal knowledge of the alleged law office failure, we find that the record as a whole does not support the conclusion that the arguably stale action was abandoned. The dismissal order expressly relied on that characterization, which was given to the court in an ex parte communication by Thompson's counsel. However, the record is devoid of evidence to suggest intentional and repeated failures by plaintiff in abiding by its litigation obligations and is devoid of evidence that Thompson would be prejudiced by the restoration of the action to the calendar (*see Spivey v City of New York*, 167 AD3d 487 [1st Dept 2018]; *Imovegreen, LLC v Frantic, LLC*, 139 AD3d 539 [1st Dept

2016]).

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

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

ENTERED: JANUARY 14, 2020

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Dianne T. Renwick, J.P.
Judith J. Gische
Angela M. Mazzarelli
Peter H. Moulton, JJ.

10545
SCI 1544/07

_____x

The People of the State of New York,
Respondent,

-against-

Angel Martinez,
Defendant-Appellant.

_____x

Defendant appeals from an order of the Supreme Court, New York County (Patricia Nuñez, J.), entered on or about June 27, 2018, which denied his CPL 440.10 motion to vacate a June 19, 2007 judgment of conviction.

Lauriano Guzman, Jr., Bronx, for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Nicole Coviello and Sheila L. Bautista of counsel), for respondent.

RENWICK, J.P.

In April 2007, defendant Angel Martinez, along with his cousin, was arrested and charged with criminal possession of a controlled substance in the third and fourth degrees. The charges stemmed from allegations that the police found drugs in a van that Martinez drove and that his cousin rode in as a passenger. The charges against the cousin were dismissed in 2011, when, at a suppression hearing, the arresting officer had no recollection of the events leading up to the discovery of the drugs and the arrest. As for Martinez, he waived indictment, a few weeks after his arrest, and pleaded guilty to criminal possession of a controlled substance in the fourth degree in exchange for a sentence of probation to be served in Massachusetts. At the time of his plea and sentence, Martinez, who was a permanent resident but not a citizen of the United States, resided with his three children and their mother in Massachusetts. At the time of his arrest, Martinez and his immediate family were temporarily in New York City visiting his family.

In March 2017, Martinez moved to vacate his 2007 conviction pursuant to CPL 440.10, on the ground that his attorney was ineffective for failing to adequately advise him of the true immigration consequences of his 2007 guilty plea. Specifically,

prior to the guilty plea, counsel advised Martinez that the crime to which he was pleading guilty subjected him to deportation but that it was possible that his deportation "would not be compulsory"; and that "if [he] did not get in trouble during his probation, [he] should not worry at all." Counsel never advised Martinez that he was pleading guilty to an aggravated felony that subjected him to mandatory deportation (*see Padilla v Kentucky*, 559 US 356, 367-369 [2010], citing 8 USC 1 § 227[a][2][b][1]; *see also People v McDonald*, 1 NY3d 109, 113-115 [2003]; *People v Mebuin*, 158 AD3d 121, 126 [1st Dept 2017]; *People v Doumbia*, 153 AD3d 1139, 1140 [1st Dept 2017]).

Supreme Court held a hearing on the CPL 440.10 motion. Martinez testified that he had been living in the United States since 1991 and that in 2002, he was living in Boston, Massachusetts, with his girlfriend, Johanna Guerrero, and their three children. Guerrero, who was no longer his girlfriend, testified, among other things, that in 2007, they were planning to become United States citizens.[1] Martinez wanted to improve his English proficiency before applying for US citizenship. Guerrero was "shocked" that Martinez was arrested because he was a "hard-working man." Years later, she found out that Martinez

[1] Guerrero and Martinez separated in 2011. Sometime thereafter, she became a United States citizen.

had pleaded guilty to an offense that subjected him to mandatory deportation, and she was very surprised. Martinez's cousin also testified, averring that there had been no drugs in the van, which the cousin had borrowed that day to take Martinez to visit another cousin.

Supreme Court denied Martinez's CPL 440.10 motion to vacate his 2007 conviction, upon a finding that Martinez had failed to establish that counsel's misadvice on the immigration consequences of the 2007 guilty plea prejudiced him. Because it appears that Supreme Court applied the wrong analytical framework to the issue of whether Martinez was prejudiced by the misadvice, we must remand for a de novo hearing on that issue.

Supreme Court found a lack of prejudice essentially because of Martinez's explanation that what triggered his efforts to find out about the immigration consequences of his 2007 guilty plea was the discovery that the conviction was standing in the way of expanding his taxi business to Logan Airport in Boston, Massachusetts. However, for purpose of considering the prejudice prong of Martinez's ineffective assistance claim, it is of no moment what presently motivated Martinez to find out about the immigration consequences of his guilty plea, as these events occurred in 2017, subsequent to Martinez's entry of a guilty plea in 2007. Rather, the appropriate inquiry on the issue of

prejudice should have been limited to Martinez's circumstances as they were at the time of the guilty plea[2] (*Lee v United States*, 528 US at ___, ___, 137 S Ct 1958, 1967-1969 [2017]; *Roe v Flores-Ortega*, 520 US 470, 480 [2000]; *People v Gaston*, 163 AD3d 442, 445-446 [1st Dept 2017]; *People v Picca*, 97 AD3d 170, 183-184 [2d Dept 2012]).

In the context of a guilty plea, the ultimate question of prejudice is whether there was a reasonable probability that a reasonable person in a defendant's circumstances would have gone to trial if given constitutionally adequate advice (*Lee v United States*, __US __, 137 S Ct at 1965). A defendant must convince the court that a decision to reject the plea bargain would have been rational (*id.*; *Padilla v Kentucky*, 559 US at 372; *People v McDonald*, 1 NY3d at 1113-1114). In that regard, appropriate factors to be weighed include, among others, evidence of defendant's incentive, at the time of his plea, to remain in the United States rather than his native country; his respective family and employment ties at the time of his plea, to the United States, as compared to his country of origin; the strength of the People's case; and defendant's sentencing exposure (*People v*

[2] In this case, the proper inquiry should have been whether, in light of his circumstances at the time of the plea in 2007, defendant would have chosen trial versus pleading guilty, receiving probation, and being subject to mandatory deportation.

Gaston, 163 AD3d 442 [1st Dept 2018]; *People v Mebuin*, 158 AD3d at 126; *People v Chacko*, 99 AD3d 527, 527 [1st Dept 2012], *lv denied* 20 NY3d 1060 [2013]; *People v Picca*, 97 AD3d at 183-186).

In answering the prejudice question, judges should be cognizant that a noncitizen defendant confronts a very different calculus than confronts a United States citizen (*People v Mebuin*, 158 AD3d at 128). For a noncitizen defendant, "preserving [his] right to remain in the United States may be more important to [him] than any jail sentence" (*Padilla v Kentucky*, 559 US at 368). Thus, a determination of whether it would be rational for a defendant to reject a plea offer "must take into account the particular circumstances informing the defendant's desire to remain in the United States" (*People v Picca*, 97 AD3d at 183-184).

Significantly, on the record before this Court, there is reason to believe that Martinez would have given paramount importance to avoiding deportation, if he had known that it was more than a mere possibility, but was an unavoidable consequence of his plea to an aggravated felony. Indeed, evidence regarding Martinez's background completely supports his current assertion that his main focus has been always to remain in the United States. This much is undisputed: his long history in the United States, his efforts to become a citizen, his family

circumstances, and his gainful employment in Massachusetts, all signal his strong connection to, and desire to remain in, the United States (*cf. Lee v United States*, __ US __, 137 S Ct at 1962-1963, 1967-1969 [Supreme Court held that under the defendant's circumstances (a lawful permanent resident, who had lived in the US for about 35 years, had established businesses in Tennessee, was the only family member in the US able to care for his elderly parents, had no connections to South Korea, the country of his birth, and had not returned there since he left as a child), rejecting the plea would not have been irrational, where to accept the plea would "certainly lead to deportation."]). Although Martinez made no statements at the plea proceedings about avoiding negative immigration consequences, this is not surprising given counsel's early assurances that there were no immigration consequences to worry about in this case (*see Kovacs v United States*, 744 F3d 44, 53 [2d Cir 2014]).

Finally, we reject the motion court's suggestion that any prejudice from the misadvice given to Martinez was mitigated by the Court's advice that there "could be" immigration consequences to Martinez's 2007 guilty plea, after which "he still took a chance and pleaded guilty." Although the pleading court warned Martinez of the potential for deportation in accordance with

People v Peque (22 NY3d 168 [2013]), his counsel's advice -- that there was no such potential if he stayed out of trouble during the period of probation -- undermined the court's warning (*see People v Corporan*, 135 AD3d 485 [1st Dept 2016], *lv denied* 30 NY3d 983 [2017]). Thus, the court's warning did not obviate the need for a prejudice analysis, which required taking into account the particular circumstances informing defendant's desire to remain in the United States (*see People v Mebuin*, 158 AD23d at 130; *People v Corporan*, 135 AD2d 485).

Accordingly, the order of the Supreme Court, New York County (Patricia Nuñez, J.), entered on or about June 27, 2018, which denied defendant's CPL 440.10 motion to vacate a June 19, 2007 judgment of conviction, should be reversed, on the law, and the matter remanded for a hearing, before a different justice, on defendant's claim of prejudice by ineffective assistance of counsel, and for a decision de novo on the motion.

All concur.

Order, Supreme Court, New York County (Patricia Nuñez, J.), entered on or about June 27, 2018, reversed, on the law, and the matter remanded for a hearing, before a different justice, on

defendant's claim of prejudice by ineffective assistance of counsel, and for a decision de novo on the motion.

Opinion by Renwick, J.P. All concur.

Renwick, J.P., Gische, Mazzarelli, Moulton, JJ.

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

ENTERED: JANUARY 14, 2020

CLERK