SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 16, 2020

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Renwick, J.P., Richter, Oing, Singh, JJ.

9461N Ambac Assurance Corporation, et al., Index 651612/10
Plaintiffs-Respondents,

-against-

Countrywide Home Loans Inc., et al.,
Defendants-Appellants.

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Williams & Connolly LLP, Washington, DC (Craig D. Singer of the bar of the District of Columbia, admitted pro hac vice, of counsel), and Simpson Thacher & Bartlett LLP, New York (Joseph M. McLaughlin of counsel), for Countrywide Home Loans Inc., Country Wide Securities Corp., and Country Wide Financial Corp., appellants.

O'Melveny & Myers, LLP, New York (Jonathan Rosenberg of counsel), for Bank of America, appellant.

Quinn Emanuel Urquhart & Sullivan, LLP, New York (Kathleen M. Sullivan of counsel), for respondents.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered January 2, 2019, which denied defendants' various pretrial motions, unanimously modified, on the law, to grant the motions by Bank of America Corp. (BAC) to sever the claims asserted against it, and to strike the jury demand on those claims, and otherwise affirmed, without costs.

The court correctly denied Countrywide's motion seeking

dismissal of the fraudulent inducement claim. As relevant here, Ambac, the monoline insurer, asserts causes of action against Countrywide for: (a) breaching various representations and warranties about their loan-origination practices and the quality of the loans in the securitizations; and (b) fraudulently inducing Ambac to insure the securitizations by making precontractual misrepresentations and omissions. In a prior decision in this case (31 NY3d 569 [2018]), the Court of Appeals concluded that damages for Ambac's contract claims were to be measured by the repurchase protocol contained in the parties' agreements (*id.* at 583-584). As for the fraudulent inducement claim, the Court found that the repurchase protocol was not applicable, and that damages should instead be measured "by reference to claims payments made based on nonconforming loans" (*id.* at 581). Thus, as the motion court properly found, the Court of Appeals recognized distinct measures of damages for the fraudulent inducement claim arising separately from the contract claims.[1]

[1] Indeed, at oral argument before the Court of Appeals, counsel for Countrywide recognized that there was a different measure of damages for the fraud and contract claims. In response to questioning by Judge Garcia, counsel explained that the appropriate measure of damages for the fraud claim was "out-of-pocket loss," and stated that Ambac's expert would have the opportunity to "calculate what the [fraud] damages are."

While a fraudulent inducement claim can be dismissed as duplicative of a breach of contract claim if it seeks the "same damages" (*Mosaic Caribe, Ltd. v AllSettled Group, Inc.*, 117 AD3d 421, 422-423 [1st Dept 2014]), Countrywide has not established, as a matter of law, that the damages sought in connection with the fraud claim are the same as those sought in connection with the contract claims. Ambac has submitted an affidavit from its expert, unchallenged by Countrywide, which explains that the damages for the fraud and contract claims are "qualitatively and quantitatively distinct." The expert explains that whereas the contract damages are calculated based on the terms of the contractual repurchase protocol, the fraud damages are determined based on the portion of Ambac's claims payments that flow from nonconforming loans. Thus, according to the expert, the calculation of the fraud damages does not rely in any way on the contractual repurchase price that governs the contract damages calculation. The expert further explains that the fraud damages differ from the contract damages because they include additional expenses incurred by Ambac that are not recoverable in contract.

In his affidavit, the expert states that he is including the revised damages calculations in a forthcoming supplemental expert report. A motion is currently pending in Supreme Court for leave to serve the new report, which presumably would contain a more

detailed explanation of the differences between the contract and fraud damages. In view of the expert affidavit already submitted, and the motion practice in Supreme Court, it is premature to dismiss the fraud claim as duplicative. Thus, denial of the motion to dismiss the fraud claim, without prejudice to renewal after the conclusion of the proceedings below related to the expert affidavit is appropriate.

MBIA Ins. Corp. v Credit Suisse Sec. [USA] LLC (165 AD3d 108 [1st Dept 2018]) and *Financial Guar. Ins. Co. v Morgan Stanley ABS Capital I Inc.* (164 AD3d 1126 [1st Dept 2018]) do not require a different result. In *MBIA*, the court concluded that fraud damages in the form of all claims payments made were not recoverable, and that "repurchase damages" were duplicative of contract damages (165 AD3d at 113-114). Here, Ambac does not seek to recover all claims payments made, nor does it seek repurchase damages under its fraud claim. Instead, it only seeks fraud damages based on claims payments flowing from nonconforming loans, the precise measure sanctioned by the Court of Appeals (*see Ambac*, 31 NY3d at 581 [Ambac's fraud damages should be measured by reference to claims payments based on nonconforming loans]).

In *Financial Guar.*, the court merely found, on the specific facts alleged, that the fraud damages duplicated the contract

damages (164 AD3d 1126). There was no indication that the plaintiff in that case submitted an expert affidavit explaining any differences between the measures of damages sought by the fraud and contract claims. Put simply, neither *MBIA* nor *Financial Guar.* stands for the sweeping proposition that, in all residential mortgage-backed security cases, a fraudulent inducement claim brought by a monoline insurer is, as a matter of law, duplicative of contract claims based on the same nonconforming loans.

The motion court properly denied Countrywide's motion to strike Ambac's jury demand on the fraudulent inducement cause of action. Ambac's complaint repeatedly alleges that the insurance agreements were obtained through various types of fraudulent conduct. Thus, because it is clear that Ambac's primary claim is fraudulent inducement, the agreements' provisions waiving the right to a jury trial do not apply (*MBIA Ins. Corp. v Credit Suisse Sec. (USA), LLC*, 102 AD3d 488, 488 [1st Dept 2013]; *Ambac Assur. Corp. v DLJ Mtge. Capital, Inc.*, 102 AD3d 487, 487-488 [1st Dept 2013]).

The court correctly denied Countrywide's motion to determine the population of loans at issue in the breach of contract claim. Regardless of whether there are nonconforming loans to which the repurchase protocol may not be applied because of Ambac's failure

to satisfy the notice requirements for application of the protocol, the protocol is also triggered with respect to any loans for which it can be shown that Countrywide, as originator, sponsor, and servicer of the loans, discovered the breaches. Thus, triable issues of fact exist in this regard.

The court correctly denied the motion to preclude Ambac from using statistical sampling to prove its breach of contract claims in terms of both liability and damages. While the motion was not procedurally barred, we find that despite the language of the repurchase protocol, RMBS plaintiffs like Ambac are entitled to introduce sampling-related evidence to prove liability and damages in connection with repurchase claims (*see Deutsche Bank Natl. Trust Co. for Morgan Stanley Structured Trust I 2007-1 v Morgan Stanley Mtge. Capital Holdings LLC* , 289 F Supp 3d 484, 493, 496 [SD NY 2018]); *Assured Guaranty Municipal Corp. v Flagstar Bank, FSB* , 920 F Supp 2d 475, 512 [SD NY 2013]; *see also Federal Hous. Fin. Agency for Fed. Natl. Mtge. Assn. v Nomura Holding Am., Inc.*, 873 F3d 85 [2d Cir 2017], *cert denied* - US -, 138 S Ct 2679 [2018] [upholding a $806 million RMBS judgment following a bench trial in which statistical sampling featured prominently]).

Under the circumstances here, the court erred in failing to grant defendant BAC's motion to sever the claims asserted against

Countrywide from the contingent secondary-liability claims asserted against BAC. Severance of the contingent claims against BAC should have been granted given that the claims could become moot after the first trial of the primary-liability claims (*see e.g. Wallace v Crisman*, 173 AD2d 322 [1st Dept 1991]). Despite some possible overlap in issues and evidence, the primary issue of whether Countrywide breached or fraudulently induced Ambac to enter the agreements between 2004 and 2006 is sufficiently separate from the key issue in the claim against BAC, which concerns whether Countrywide de facto merged with BAC or became BAC's alter ego through a series of different transactions and conduct in 2008 and later, such that a grant of severance would further convenience by expediting the primary proceedings and avoid the risk of prejudicial spillover.

Finally, the court erred in failing to grant BAC's motion to strike Ambac's jury demand for its secondary-liability claim against BAC. Ambac is not entitled to a jury trial on its claims against BAC because the jury demand, regardless of whether or not it is disallowed by the contractual jury waiver, seeks more than "a judgment for a sum of money only" under CPLR 4101(1). It also seeks a declaration that BAC is Countrywide's successor by virtue of a de facto merger, which would render BAC jointly liable for any unpaid "judgment for a sum of money" against Countrywide.

This is an equitable remedy, which must be decided by a court.

The Decision and Order of this Court entered herein on September 17, 2019 (175 AD3d 1156 [1st Dept 2019]) is hereby recalled and vacated (*see* M-7782 decided simultaneously herewith).

> The Decision and Order of this Court entered herein on September 17, 2019 (175 AD3d 1156 [1st Dept. 2019]) is hereby recalled and vacated (*see* M-7782 decided simultaneously herewith).

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

ENTERED: JANUARY 16, 2020

CLERK

Friedman, J.P., Richter, Kern, Singh, JJ.

10805N NCCMI, Inc., Index 650276/15
Plaintiff-Respondent,

-against-

Bersin Properties, LLC, et al.,
Defendants-Appellants.

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An appeal having been taken to this Court by the above-named appellants from an order of the Supreme Court, New York County (O. Peter Sherwood, J.), entered on or about January 16, 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 19, 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 16, 2020

CLERK

Friedman, J.P., Richter, Kern, Singh, JJ.

10785 & M-8467 The People of the State of New York, Respondent,

-against-

John Cornachio, Defendant-Appellant.

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Mischel & Horn, PC, New York (Richard E. Mischel of counsel), for appellant.

Letitia James, Attorney General, New York (Dennis A. Rambaud of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Jeanette Rodriguez-Morick, J.), rendered March 23, 2018, convicting defendant, after a jury trial, of grand larceny in the second degree, and sentencing him to a term of 2 to 6 years, unanimously affirmed. The matter is remitted to Supreme Court for further proceedings pursuant to CPL 460.50(5).

Defendant was convicted of grand larceny in the second degree under a theory of false pretenses (Penal Law § 155.05[2][a]) for stealing more than $50,000 from Narco Freedom, Inc., a not-for-profit drug rehabilitation program, between January 1, 2009 and December 31, 2013. The indictment alleged that defendant, while "acting in concert and aided and abetted by others," and as part of a "common scheme or plan," "received salary and benefits from Narco Freedom, directly and

through B&C Management, that he was not entitled to" receive.

Defendant's legal sufficiency claims, including those relating to corroboration of accomplice testimony, are unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Moreover, we find that the evidence overwhelmingly established a shared larcenous intent and acts by defendant in furtherance of the crime so as to support a conviction under a theory of accomplice liability (*see* Penal Law § 20.00). Defendant's pattern of conduct, viewed as a whole, had no reasonable explanation other than a shared larcenous intent (*see e.g. People v Williams*, 123 AD3d 527 [1st Dept 2014], *lv denied* 25 NY3d 1209 [2015]), and there was ample proof of acts he took in aid of the fraudulent schemes. Accordingly, we need not reach the issue of whether the People also established direct liability, including the elements of misrepresentation and reliance (*see* Penal Law § 155.05[2][a]; *People v Drake*, 61 NY2d 359, 362 [1984]), an issue about which, in any event, defendant improperly raises new arguments in his reply brief (*see e.g. People v Edwards*, 58 AD3d 412 [1st Dept 2009], *lv denied* 12 NY3d 815 [2009]). In view of the evidence, the jury reasonably

rejected defendant's claim that his salary from Narco Freedom paid for his work at another not-for-profit entity, Canarsie AWARE, and there is no basis to disturb the jury's credibility determinations.

Any error in the court's rereading, in its response to a jury note, of only the elements of the crime, without certain definitions, was harmless in view of the overwhelming evidence of defendant's guilt under a theory of accomplice liability, to which the definitions at issue would not have been material (*see People v Crimmins*, 36 NY2d 230 [1975]).

The court providently exercised its discretion under *People v Molineux* (168 NY 264, 293 [1901]) in admitting payroll payments made by Canarsie AWARE into the bank accounts of defendant's children, which defendant then transferred to a joint account with his wife. The evidence was probative on the issue of defendant's intent to steal from Narco Freedom, as it showed that the payments into the children's bank accounts were ultimately intended for defendant, as part of a scheme, which included payments for defendant's no-show job at Narco Freedom. Furthermore, it tended to refute defendant's anticipated defense that Narco Freedom was paying for his work at Canarsie AWARE, by showing that Canarsie AWARE was paying him, albeit indirectly, through his children. The probative value of the evidence was

not outweighed by any potential for prejudice. It did not suggest that defendant took money that his children actually earned, but rather, strongly suggested that the children performed no work for Canarsie AWARE and that the money deposited into their accounts was intended for defendant from the start.

However, the court incorrectly concluded that defendant opened the door to otherwise inadmissible evidence of similar payments made by another entity. Nevertheless, the error was harmless, in view of the court's limiting instructions and the overwhelming evidence of guilt.

Defendant's remaining contentions are unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we reject them on the merits.

M-8467 ***People v John Cornachio***

Motion to strike portions of reply brief granted only to the extent of permitting respondent to submit surreply brief and deeming surreply brief filed.

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

ENTERED: JANUARY 16, 2020

CLERK

Friedman, J.P., Richter, Kern, Singh, JJ.

10786 Anthony Smith, Index 154726/13
Plaintiff-Appellant,

-against-

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

Parker Waichman, LLP, Port Washington (Jay L.T. Breakstone of counsel), for appellant.

Russo & Toner, LLP, New York (Lee-David Weiner of counsel), for respondents.

Order, Supreme Court, New York County (Paul A. Goetz, J.), entered on or about October 5, 2017, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants established their prima facie entitlement to judgment as a matter of law by showing that Vehicle and Traffic Law § 1214 was violated when the passenger in plaintiff's parked car opened the door into oncoming traffic when it was not safe to do so (*see Tavarez v Castillo Herrasme*, 140 AD3d 453 [1st Dept 2016]; *see also Perez v Steckler*, 157 AD3d 445 [1st Dept 2018]).

In opposition, plaintiff failed to raise a triable issue of fact as to whether defendant bus driver was negligent in failing to see what was there to be seen in that plaintiff did not dispute that his passenger opened the door into oncoming traffic

prior to the collision. Plaintiff's testimony that the passenger was in the process of closing the door when it was struck was insufficient to raise a triable issue of fact since he was unable to state how far the door was open at impact. Plaintiff's argument that his vehicle sustained damage to the right front bumper from the collision, which could not have occurred if the bus driver's account of the accident was accurate, is unavailing. Plaintiff did not submit photographs of his vehicle or testimony from the passenger to support his theory that the bus struck his car as well as the door, and the photographs of the bus are consistent with the bus driver's testimony.

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

ENTERED: JANUARY 16, 2020

CLERK

Friedman, J.P., Richter, Kern, Singh, JJ.

10787-
10787A
10787B
10787C
10787D
10787E In re Lamani C.H., and Others,

Children Under the Age of
Eighteen Years, etc.,

Lucia T.G.,
Respondent-Appellant,

Catholic Guardian Services,
Petitioner-Respondent.

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Andrew J. Baer, New York, for appellant.

Joseph T. Gatti, New York, for respondent.

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

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Orders of disposition, Family Court, Bronx County (Fiordaliza A. Rodriguez, J.), entered on or about November 28, 2018, to the extent they bring up for review a fact-finding order, same court and Judge, entered on or about April 20, 2018, which found that respondent mother neglected/abandoned the subject children, unanimously affirmed, without costs. Appeals from the fact-finding order, unanimously dismissed, without costs, as subsumed in the appeals from the orders of disposition.

Respondent mother's argument that the petitions were

defective for failing to specify the diligent efforts the agency made to encourage and strengthen the parental relationship (Family Ct Act § 614 [1][c]) is raised for the first time on appeal and is therefore unpreserved (*see Matter of Ana M.G. [Rosealba H.]*, 74 AD3d 419 [1st Dept 2010]; *Matter of Christopher S. [Elizabeth S.]*, 155 AD3d 630, 631 [2d Dept 2017]), and we decline review in the interest of justice. As an alternative holding, we find that the petitions sufficiently specified the agency's efforts, which included, inter alia, developing an appropriate service plan, making arrangements for respondent to visit the subject children, and providing counseling, assistance and referrals to appropriate programs to resolve or ameliorate the problems preventing the discharge of the children from foster care, and informed respondent of each child's progress, development and health (*see Matter of Ana M.G.* at 419*; Matter of Toshea C.J.*, 62 AD3d 587, 587 [1st Dept 2009]). Any alleged deficiency was cured by the introduction into evidence at the fact-finding hearing of the case progress notes and the testimony of the caseworker, which demonstrated the diligent efforts made by the agency (*Matter of Kayla Emily W. [Atara W.]*, 67 AD3d 477, 478 [1st Dept 2009]).

Moreover, the evidence at the fact-finding hearing was clear and convincing with respect to the agency's diligent efforts.

The evidence showed that the agency made diligent efforts as to reunification by formulating a service plan tailored to address respondent's anger management issues and parenting challenges, to assist in domestic violence prevention, and by arranging visits between respondent and the children (*see* Social Services Law § 384-b[7][f]). Despite these efforts, respondent failed to communicate with the agency for a year, and missed all visitation set up by the agency (*see e.g. Matter of Shaquel A.M. [Jamel C.M.]*, 176 AD3d 575 [1st Dept 2019]; *Matter of Richie N.V. [Stephanie M.]*, 174 AD3d 427 [1st Dept 2019], *lv denied* 34 NY3d 901 [2019]).

A finding of permanent neglect is warranted despite a parent's participation in programs when the problem that caused the children to enter foster care has not been ameliorated (*see Matter of Amanda R.*, 215 AD2d 220, 220 [1st Dept 1995], *lv denied* 86 NY2d 705 [1995]). As respondent continued to exhibit behaviors that the programs she attended were supposed to help remedy, she failed to gain insight into her parenting problems which undercut the value of having participated in them (*see Matter of Jaheim B. [April M.]*, 176 AD3d 558 [1st Dept 2019]). Moreover, respondent failed to visit the children consistently, which in itself constituted a ground for the finding of permanent neglect (*Matter of Angelica D. [Deborah D.]*, 157 AD3d 587, 588

[1st Dept 2018]).

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

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

ENTERED: JANUARY 16, 2020

CLERK

Friedman, J.P., Richter, Kern, Singh, JJ.

10788 Amanda Oliveras, Index 24874/14
Plaintiff-Appellant,

-against-

New York City Transit Authority, et al.,
Defendants-Respondents,

John Doe, et al.,
Defendants.

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The Law Office of Dino J. Domina, P.C., Garden City (Lisa M. Comeau of counsel), for appellant.

Lawrence Heisler, Brooklyn (Timothy J. O'Shaughnessy of counsel), for respondents.

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Order, Supreme Court, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered October 1, 2018, which denied plaintiff's motion for partial summary judgment on the issue of liability, and granted defendants' cross motion for summary judgment dismissing the complaint, based upon plaintiff's inability to meet the serious injury threshold of Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendants met their prima facie burden of establishing that plaintiff did not sustain a serious injury to her lumbar spine by submitting affirmed medical reports from an orthopedist, Dr. Robert Pick, and neurologist, Dr. Marianne Golden, noting largely negative findings in plaintiff's physical examinations (*see*

Cattouse v Smith, 146 AD3d 670 [1st Dept 2017]; *see also Rosa v Mejia*, 95 AD3d 402, 403 [1st Dept 2012]). Defendants' radiologist also noted that plaintiff's MRI films showed degenerative disease in her lumbar spine (*see Campbell v Drammeh*, 161 AD3d 584 [1st Dept 2018]).

Though Dr. Pick and Dr. Golden did not address plaintiff's diagnostic tests, "the failure of a defendant's medical expert to discuss diagnostic tests indicating bulging or herniated discs will not, by itself, require denial of a defense summary judgment motion" (*Shumway v Bungeroth*, 58 AD3d 431, 431 [1st Dept 2009], citing *Onishi v N & B Taxi, Inc.*, 51 AD3d 594 [1st Dept 2008]). Moreover, Dr. Pick's observation that plaintiff had mild reductions in her range of motion does not undermine his conclusion that she did not sustain a disabling injury in the accident, where his examination findings were otherwise normal and he noted that any decrease in range of motion was inconsistent with her diagnoses (*see Mendoza v L. Two Go, Inc.*, 171 AD3d 462, 462 [1st Dept 2019]).

Plaintiff failed to raise a triable issue of fact, as her claim of a lumbar spine injury is inconsistent with her reports of injury to her right knee and forearm to EMS personnel and hospital staff immediately after the accident (*see Arias v Martinez*, 176 AD3d 548 [1st Dept 2019]). Moreover, her medical

experts' reports and affirmations were too speculative to establish a causal connection between the accident and her lumbar injury (*see Vaughn v Baez*, 305 AD2d 101, 101 [1st Dept 2003]).

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 16, 2020

CLERK

Friedman, J.P., Richter, Kern, Singh, JJ.

10789 J.A.L.D., etc., Index 28292/17E
Plaintiff-Respondent,

-against-

Brightside Academy, Inc.,
Defendant-Appellant,

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

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

The Arce Law Office, PLLC, Bronx (Michael Arce of counsel), for respondent.

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Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered June 5, 2019, which, inter alia, denied the motion of defendant Brightside Acadamy, Inc. for summary judgment dismissing the complaint, unanimously reversed, without costs, and defendant's motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiffs commenced this personal injury action to recover for a laceration sustained by the infant plaintiff to his forehead while he was in the care of defendant day care center. Defendant established its prima facie entitlement to summary judgment by demonstrating that it adequately supervised the infant plaintiff and that the subject classroom was in a

reasonably safe condition (*Stephenson v City of New York*, 19 NY3d 1031, 1033 [2012]; *Kellman v 45 Tiemann Assoc.*, 87 NY2d 871, 872 [1995]).

In response, plaintiffs failed to raise an issue of fact as to whether there was adequate supervision or whether the subject classroom was in a reasonably safe condition.

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

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

ENTERED: JANUARY 16, 2020

CLERK

Friedman, J.P., Richter, Kern, Singh, JJ.

10790 The People of the State of New York, Respondent, Ind. 1951/13

-against-

Alphonso Cagan,
Defendant-Appellant.

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Christina Swarns, Office of The Appellate Defender, New York (Stephen R. Strother of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (David A. Slott of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Judith Lieb, J.), rendered March 13, 2015, convicting defendant, after a nonjury trial, of attempted murder in the second degree, attempted assault in the first degree, and two counts of criminal possession of a weapon in the second degree, and sentencing him to an aggregate term of 20 years, unanimously affirmed.

The record does not cast doubt on defendant's competency to stand trial, and the court was not obligated, sua sponte, to order a CPL article 730 examination (*see generally Pate v Robinson*, 383 US 375 [1966]; *People v Tortorici*, 92 NY2d 757 [1999], *cert denied* 528 US 834 [1999]; *People v Morgan*, 87 NY2d 878 [1995]). Notwithstanding defendant's obstreperousness with the court, contentiousness with counsel, and "strange notions" about his case, "there was no indication that defendant was

unable to understand the proceedings and assist in his defense" (*People v Jackson*, 39 AD3d 394, 394 [1st Dept 2007], *lv denied* 9 NY3d 845 [2007], *cert denied* 553 US 1011 [2008]).

Similarly, the record does not suggest that defendant had a mental condition that would affect his ability to waive counsel and proceed pro se (*see People v Stone*, 22 NY3d 520, 527-529 [2014]). Accordingly, after conducting an appropriate colloquy, the court properly permitted defendant to represent himself for a portion of the trial.

The court, sitting as trier of fact, properly declined to draw a missing witness inference with regard to the shooting victim, who, by the time of trial, was no longer cooperating with the prosecution and was clearly avoiding the prosecution's reasonably diligent, but unsuccessful efforts to locate him (*see People v Gonzalez*, 68 NY2d 424, 427 [1986]; *People v Henriquez*, 147 AD3d 706, 707 [1st Dept 2017], *lv denied* 29 NY3d 1080 [2017]). Under all the circumstances, including the fact that the People sought to bring in the victim by way of a material witness order, there would have been no logical reason to draw an adverse inference.

The court also properly declined to draw an adverse inference from the deletion of a 911 tape regarding the crime, and defendant's argument under *Brady v Maryland* (373 US 83

[1963]) is unavailing. Defendant asserts, based on a speculative inference from another police transmission, that the call described the assailant in this case as 20-year-old man, younger than the 46-year-old defendant. However, this is not reflected in the Sprint report for the deleted call.

In any event, there is no reasonable possibility that the court's verdict would have been different if it had chosen to draw either or both of the adverse inferences at issue on appeal.

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 16, 2020

CLERK

Friedman, J.P., Richter, Kern, Singh, JJ.

10791 The People of the State of New York, Ind. 331/15
Respondent,

-against-

Steven Green,
Defendant-Appellant.

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Janet E. Sabel, The Legal Aid Society, New York (Ellen Dille of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Christopher M. Pederson 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, Bronx County (Marc Whiten, J.), rendered December 1, 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.

ENTERED: JANUARY 16, 2020

CLERK

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

Friedman, J.P., Richter, Kern, Singh, JJ.

10792 Marie J. Rodriguez, etc., Claim 121369
Claimant-Appellant,

-against-

City University of New York,
Defendant-Respondent.

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Parker Waichman LLP, Port Washington (Jay L.T. Breakstone of counsel), for appellant.

Letitia James, Attorney General, New York (Steven C. Wu of counsel), for respondent.

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Order, Court of Claims of the State of New York (Jeanette Rodriguez-Morick, J.), entered October 4, 2018, which granted defendant's motion to dismiss the claim for lack of proper service, unanimously affirmed, on the law and the facts, without costs.

Claimant's argument that by producing a receipt for a request for certified mail, return receipt requested, coupled with defendant's admission of receipt of a copy of the claim, she has proved service upon defendant in compliance with Court of Claims Act § 11, is unavailing. It is not enough for claimant simply to point to her receipt for mailing by certified mail, return receipt requested. Instead, claimant must prove not only that she attempted service by certified mail, return receipt requested, but that such service was actually completed (*see*

Court of Claims Act § 11[a]; *Govan v State of New York*, 301 AD2d 757, 758 [3d Dept], *lv denied* 99 NY2d 510 [2003]). Claimant's submissions do not do this.

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

ENTERED: JANUARY 16, 2020

CLERK

Friedman, J.P., Richter, Kern, Singh, JJ.

10793 The People of the State of New York, Ind. 2439/11
Respondent,

-against-

Donald Lopez,
Defendant-Appellant.

_____

Janet E. Sabel, The Legal Aid Society, New York (Harold V. Ferguson, Jr. of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Nicole Coviello 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 (Maxwell Wiley, J.), rendered September 28, 2011,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTERED: JANUARY 16, 2020

CLERK

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

Friedman, J.P., Richter, Kern, Singh, JJ.

10794-
10794A In re Kobe N., and Another,

Children Under Eighteen Years
of Age, etc.,

Juan Carlos N.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

- - - - -

Victoria S.,
Nonparty Respondent.

_____

Carol Kahn, New York, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Claibourne Henry of counsel), for Administration for Children Services, respondent.

Cabelly & Calderon, Jamaica (Lewis S. Calderon of counsel), for Victoria S., respondent.

Janet Neustaetter, The Children's Law Center, Brooklyn (Louise Feld of counsel), attorney for the children.

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Order of disposition, Family Court, Bronx County (Fiordaliza A. Rodriguez, J.), entered on or about May 21, 2018, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about May 21, 2018, which found that respondent father neglected the subject children, unanimously affirmed, without costs. Appeal from fact-finding order, unanimously dismissed, without costs, as subsumed in the appeal

from the order of disposition.

A preponderance of the evidence shows that over the course of a number of years, the father neglected the children by committing multiple acts of domestic violence against the mother in the children's presence (*see* Family Ct Act §§ 1012[f][i][B]; 1046[b][i]; *Matter of Terrence B. [Terrence J.B.]*, 171 A3d 463 [1st Dept 2019]). In addition to the mother's testimony, medical records show that she was treated for bruises following the father's physical abuse (*see Matter of Jaiden M. [Jeffrey R.]*, 165 AD3d 571 [1st Dept 2018]). The evidence also shows that the father, while intoxicated, slapped and yelled at one of the children. There exists no basis to disturb the court's credibility determinations (*see Matter of Irene O.*, 38 NY2d 776, 777 [1975]; *Matter of Sonia C. [Juana F.]*, 70 AD3d 468, 468-469 [1st Dept 2010]).

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

ENTERED: JANUARY 16, 2020

CLERK

Friedman, J.P., Richter, Kern, Singh, JJ.

10795 Castlepoint Insurance Company, Index 650123/14
Plaintiff-Respondent,

-against-

Southside Manhattan View LLC,
Defendant-Appellant,

Focus Construction Group By
B.A., Inc., et al.,
Defendants.

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Babchik & Young, LLP, White Plains (Jordan Sklar of counsel), for appellant.

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

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Order and judgment (one paper), Supreme Court, New York County (Eileen A. Rakower, J.), entered August 8, 2016, which granted plaintiff Castlepoint Insurance Company summary judgment declaring that it has no duty to defend or indemnify defendant Southside Manhattan View LLC in the underlying personal injury action, by virtue of a construction exclusion in the insurance policy, unanimously affirmed, without costs.

Castlepoint issued an insurance policy to Southside, which contains a construction exclusion for bodily injury arising out of the "[c]hange, alteration, or modification of the size of any building or structure"; "[m]ovement of any building or structure"; "[c]onstruction or erection of any new building or

structure"; "[d]emolition of any building or structure"; or "[c]onstruction, demolition, movement of any load-bearing wall or any modification to the structure of any load[-]bearing wall." The exclusion expressly provides that it "applies to any work performed as part of or in connection with any of the foregoing [enumerated operations]," and "applies regardless of whether the described operations are ongoing, completed or in any other stage when the loss occurs."

Defendant Giovanni DiSimone, who is the plaintiff in the underlying action, alleges in that action that while working on sprinklers at the subject premises as part of a renovation project, he fell off a ladder after coming in contact with live, uninsulated electrical wires. Castlepoint disclaimed any duty to defend or indemnify Southside in the underlying action, citing the construction exclusion in the policy.

"[A]n insurance policy, as with any written contract, must be accorded [its] plain and ordinary meaning" (*West 56th St. Assoc. v Greater N.Y. Mut. Ins. Co.*, 250 AD2d 109, 112 [1st Dept 1998]). "Policy exclusions are subject to strict construction and must be read narrowly, and any ambiguities in the insurance policy are to be construed against the insurer. However, unambiguous provisions of insurance contracts will be given their plain and ordinary meaning" (*Country-Wide Ins. Co. v Excelsior*

Ins. Co., 147 AD3d 407, 408 [1st Dept 2017], *lv denied* 30 NY3d 905 [2017]). "When an insurer seeks to disclaim coverage on the ... basis of an exclusion, ... the insurer will be required to provide a defense unless it can demonstrate that the allegations of the complaint cast that pleading solely and entirely within the policy exclusions, and, further, that the allegations, *in toto,* are subject to no other interpretation" (*Automobile Ins. Co. of Hartford v Cook*, 7 NY3d 131, 137 [2006] [internal quotation marks omitted]). By this standard, Castlepoint has met its prima facie burden of demonstrating that DiSimone's work installing or repairing sprinklers was "in connection" with the operations enumerated in the construction exclusion. Southside has failed to raise a material issue of fact.

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

ENTERED: JANUARY 16, 2020

CLERK

Friedman, J.P., Richter, Kern, Singh, JJ.

10797-
10797A Edward Higgins,
Plaintiff-Respondent,

-against-

TST 375 Hudson, L.L.C., et al.,
Defendants-Respondents-Appellants,

ADCO Electrical Corp.,
Defendant-Appellant-Respondent.

- - - - -

Americon Construction Inc.,
Third-Party Plaintiff,

-against-

EMCOR Services of New York/New Jersey Inc.,
Third-Party Defendant,

ADCO Electrical Corp.,
Third-Party Defendant-Appellant-Respondent.

- - - - -

EMCOR Services New York/New Jersey Inc.,
Second Third-Party Plaintiff-Respondent-Appellant,

-against-

OMC, Inc., et al.,
Second Third-Party Defendants-Appellants-
Respondents.

- - - - -

Americon Construction Inc.,
Third Third-Party Plaintiff-Respondent-Appellant,

-against-

OMC, Inc., et al.,
Third Third-Party Defendants-Appellants-
Respondents.

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Index 24722/13E
43057/14E
43112/14E
43202/15E
43102/16E

TST 375 Hudson, L.L.C., et al.,
Fourth Third-Party Plaintiffs-Respondents-Appellants.

-against-

OMC, Inc., et al.,
Fourth Third-Party Defendants-Appellants-Respondents.

- - - - -

ADCO Electrical Corp.,
Fifth Third-Party Plaintiff-Appellant-Respondent,

-against-

OMC, Inc., et al.,
Fifth Third-Party Defendants-Appellants-Respondents.

_____

Perry, Van Etten, Rozanski & Primavera, LLP, New York (Geoffrey H. Pforr of counsel), for ADCO Electrical Corp., appellant-respondent.

Russo & Toner, LLP, New York (Josh H. Kardisch of counsel), for OMC, Inc. and OMC Sheet Metal, Inc., appellants-respondents.

Dillon Horowitz & Goldstein LLP, New York (Michael M. Horowitz of counsel), for Edward Higgins, respondent.

Ahmuty, Demers & McManus, Albertson (Glenn A. Kaminska of counsel), for TST 375 Hudson, L.L.C., and TST 375 Hudson Corp. respondents-appellants.

Kaufman Dolowich Voluck, LLP, Woodbury (Jonathan B. Isaacson of counsel), for Americon Construction, Inc., respondent-appellant.

London Fisher LLP, New York (Brian A. Kalman of counsel), for EMCOR Services New York/New Jersey, Inc., respondent-appellant.

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Order, Supreme Court, Bronx County (Lizbeth González, J.), entered July 24, 2018, which, insofar as appealed from, granted

plaintiff's motion for summary judgment on his Labor Law § 240(1) claim as against defendants TST 375 Hudson, L.L.C. and TST 375 Hudson Corp. (Hudson), EMCOR Services of New York/New Jersey Inc., and Americon Construction, Inc., denied without consideration defendant ADCO Electrical Corp.'s motion for summary judgment dismissing the Labor Law § 241(6) claim as against it, and implicitly denied Hudson's and EMCOR's motions for summary judgment dismissing all cross claims and counterclaims against them for common-law indemnification and contribution, unanimously modified, on the law, to deny plaintiff's motion, grant EMCOR's and Hudson's motions, and deny ADCO's motion on the merits, and otherwise affirmed, without costs. Order, same court and Justice, entered November 29, 2018, upon reargument, to the extent it granted plaintiff's motion for summary judgment on his Labor Law § 241(6) claim against ADCO, granted conditionally Americon's motion for summary judgment on its contractual indemnification claim against ADCO, granted conditionally EMCOR's motion for summary judgment on its contractual indemnification claims against second, third, fourth and fifth third-party defendants OMC, Inc. and OMC Sheet Metal, Inc. (together, OMC) and unconditionally its motion for summary judgment on its contractual indemnification claim against ADCO, and granted Americon's motion for conditional summary judgment on

its claim for contractual indemnification against OMC, unanimously modified, on the law, to grant EMCOR's motion for summary judgment on its contractual indemnification claim against OMC unconditionally to the extent not barred by the anti-subrogation rule, and deny EMCOR's and Americon's motions for summary judgment on their contractual indemnification and conditional contractual indemnification claims against ADCO and OMC, respectively, and, appeal therefrom, insofar as it adhered to the original determination, dismissed, without costs, as academic, and, insofar as it denied reargument, dismissed, without costs, as taken from a nonappealable order.

Plaintiff seeks damages for personal injuries he sustained in a fall from a ladder while installing duct work on a building renovation project after either he received a shock or an arc fault occurred when he came into contact with a live electrical junction box. Summary judgment in plaintiff's favor as to liability on his Labor Law § 240(1) claim is precluded by an issue of fact as to whether the ladder, which was properly set up, provided plaintiff with proper protection (*see Nazario v 222 Broadway, LLC*, 28 NY3d 1054 [2016]; plaintiff had no problem with the ladder prior to the electric shock and questions of fact exist whether a scaffold could have prevented this accident.

Plaintiff is entitled to summary judgment on his Labor Law §

241(6) claim predicated on violations of Industrial Code (12 NYCRR) § 23-1.13(b)(2), (3) and (4) against ADCO, the electrical subcontractor, which failed to warn of and de-energize or "safe off" the junction box so that a worker would not come into contact with it. Because ADCO had been delegated authority to control the electrical work that gave rise to plaintiff's injury, it was a statutory agent subject to liability under the statute (*see Schaefer v Tishman Constr. Corp.*, 153 AD3d 1169, 1170 [1st Dept 2017]; *Martinez v Tambe Elec., Inc.*, 70 AD3d 1376, 1377 [4th Dept 2010]).

ADCO contends that the junction box was outside the scope of its work at the time of the accident. This contention is based on the assertion by its director of safety, in an affidavit in opposition to plaintiff's motion and in support of ADCO's motion, that ADCO had not yet been instructed to prepare the area for work by other trades. However, the assertion is insufficient to defeat summary judgment, because it has no support in the record and, further, presents a feigned factual issue insofar as it conflicts with the deposition testimony of ADCO's foreman that, upon discovering the live junction box the day before the accident, ADCO "secured it up into the ceiling so it wasn't a hazard to anybody working in the area" (*see e.g. Garcia-Martinez v City of New York*, 68 AD3d 428, 429 [1st Dept 2009]). In

addition, ADCO's foreman acknowledged that ADCO had strung the temporary lighting on the project, which it is uncontroverted was present in the area of the accident. Nor does an issue of fact exist as to plaintiff's comparative negligence, because the record establishes that, even if he moved the junction box, all power except for temporary lights was to be de-energized in his work area, and the presence of temporary lights indicated that the area had otherwise been de-energized.

The indemnification provision in ADCO's subcontract, which requires ADCO to indemnify Americon, the general contractor, for claims or damages resulting from injuries arising out of ADCO's operations "[t]o the fullest extent permitted by law," contemplates indemnification only to the extent Americon is not negligent. Therefore, the provision is not void under General Obligations Law § 5-322.1 (*see Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 210 [2008]). Moreover, Americon is entitled to conditional summary judgment on its contractual indemnification claim against ADCO, even if an issue of fact exists as to its negligence (*Rainer v Gray-Line Dev. Co., LLC*, 117 AD3d 634, 636 [1st Dept 2014]). However, because Americon's negligence, if any, has not yet been determined, the motion court correctly granted it conditional summary judgment on the claim (*id.*).

All common-law indemnification and contribution claims

against EMCOR, the HVAC subcontractor, and Hudson, the owner, must be dismissed, because EMCOR and Hudson are free from negligence. Moreover, because EMCOR is free from negligence, it is entitled to unconditional contractual indemnification from OMC, plaintiff's employer (*see Rainer*, 117 AD3d at 635-636), to the extent not barred by the anti-subrogation rule. Although the indemnification provision in the sub-subcontract between them does not limit EMCOR's right to indemnification where it is partially negligent, the provision is not void under General Obligations Law § 3-522.1 to the extent EMCOR is not negligent (*Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 12 [1st Dept 2011]).

EMCOR is not entitled to contractual indemnification from ADCO. There is no contract between them, and EMCOR was not named in ADCO's subcontract as a party that ADCO was required to indemnify.

Americon is not entitled to contractual indemnification from OMC. As the indemnification provision in its favor in its subcontract with EMCOR does not relate to the scope, quality, character or manner of the work, it is not incorporated into the EMCOR-OMC sub-subcontract (*see Naupari v Murray*, 163 AD3d 401, 402 [1st Dept 2018]; *cf. e.g. Frank v 1100 Ave. of the Ams. Assoc.*, 159 AD3d 537 [where subcontract contained indemnification

provision in favor of "Owner" without clearly identifying "Owner," identity was determined by reference to prime contract incorporated into subcontract]).

We have considered the parties' remaining arguments for affirmative relief and find them unavailing, where not academic.

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

ENTERED: JANUARY 16, 2020

CLERK

Friedman, J.P., Richter, Kern, Singh, JJ.

10798 116 Waverly Place LLC, Index 655930/17
Plaintiff-Appellant,

-against-

Spruce 116 Waverly LLC, et al.,
Defendants-Respondents.

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Buchanan Ingersoll & Rooney PC, New York (Natalie N. Peled of counsel), for appellant.

Holland & Knight LLP, New York (Robert S. Bernstein of counsel), for respondents.

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Order, Supreme Court, New York County (Arthur F. Engoron, J.), entered February 8, 2019, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

The General Business Law (GBL) claims were properly dismissed. With respect to GBL 349, the transaction was not consumer oriented, but rather was a single, private transaction (*see New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 320 [1995]). As for the GBL 777 cause of action, the court properly determined that the gut-renovated townhouse was not a "new home" under GBL 777(5).

The causes of action for fraudulent misrepresentation, fraudulent concealment and fraudulent inducement were also properly dismissed. The court correctly determined that these

claims are precluded by the express disclaimers in the parties' agreements stating that the seller made no representations or warranties concerning the subject buildings's condition and that plaintiff would accept the building "as is."

We reject plaintiff's argument that further discovery is warranted to uncover facts peculiarly within defendants' knowledge concerning the concealment of defects in the building. The parties' agreement provides that plaintiff had the right to inspect the premises before closing and was "entering into this contract based solely upon such inspection and investigation." This renders untenable any claim that information regarding the condition of the building was peculiarly within the defendants' knowledge (*see Jana L. v W. 129th St. Realty Corp.*, 22 AD3d 274, 278 [1st Dept 2005]; *see also Centro Empresarial Cempresa S.A. v Am. Movil, S.A.B. de C.V.*, 17 NY3d 269, 278-79 [2011] [if a party can discover "by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations"]). Accordingly, plaintiff's causes of action related to fraud were properly dismissed. As to the breach of contract cause of action, we note that plaintiff does not pursue the court's dismissal of this claim on appeal.

In light of the foregoing, plaintiff's alter-ego theory of liability was also properly dismissed.

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

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

ENTERED: JANUARY 16, 2020

CLERK

Friedman, J.P., Richter, Kern, Singh, JJ.

10799 The People of the State of New York, Ind. 220/17
Respondent,

-against-

John Cortes,
Defendant-Appellant.

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Janet E. Sabel, The Legal Aid Society, New York (Dalourny Nemorin of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Claire Nielsen 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 (Kevin McGrath, J.), rendered March 23, 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.

ENTERED: JANUARY 16, 2020

CLERK

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

Friedman, J.P., Richter, Kern, Singh, JJ.

10800 Flavio Gutierrez, Index 162787/15
Plaintiff-Respondent,

-against-

610 Lexington Property, LLC, et al.,
Defendants-Appellants.

_____

Barry McTiernan & Moore LLC, New York (Laurel A. Wedinger of counsel), for appellants.

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

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Order, Supreme Court, New York County (Kathryn E. Freed, J.), entered June 3, 2019, which, insofar as appealed from, denied defendants' motion for summary judgment dismissing plaintiff's Labor Law § 240(1) claim, and granted plaintiff's motion for partial summary judgment on the issue of liability on the § 240(a) claim, unanimously affirmed, without costs.

Summary judgment was properly granted to plaintiff on his Labor Law § 240(1) claim, where he was injured when, while being passed a heavy concrete form from workers on a scaffold above, he was unable to control the form's descent and fell backwards (*see Runner v New York Stock Exch., Inc.*, 13 NY3d 599 [2009]; *Cardenas v One State St., LLC*, 68 AD3d 436 [1st Dept 2009]). The fact that a nail was embedded in the form and scratched plaintiff immediately prior to his losing control of the form does not take

this matter out of the protections of section 240(1). Even if, as claimed by defendants, plaintiff was receiving a lighter sheet of plywood form cover, rather then the heavier rubber covered form, it is irrelevant because under either version of the accident, liability lies (*see John v Baharestani*, 281 AD2d 114, 119 [1st Dept 2001]). Nor was it plaintiff's responsibility to seek additional help after his partner was called away to perform another task (*see DeRose v Bloomingdale's Inc.*, 120 AD3d 41, 47 [1st Dept 2014]).

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

ENTERED: JANUARY 16, 2020

CLERK

Friedman, J.P., Richter, Kern, Singh, JJ.

10801 & Index 800008/14
M-8477
M-8480 Kalman Kaspiev,
Plaintiff-Appellant,

-against-

Irina Pankova, M.D., et al.,
Defendants-Respondents.

_____

Kalman Kaspiev, appellant pro se.

Matturro & Associates, Westbury (Joseph Brenner of counsel), for respondents.

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Appeal from order, Supreme Court, New York County (Joan A. Madden, J.), entered September 22, 2017, which granted defendants' motion for summary judgment dismissing the complaint, deemed an appeal from the judgment, same court and Justice, entered October 25, 2017 (CPLR 5520[c]), dismissing the complaint, and, so considered, said judgment unanimously affirmed, without costs.

Plaintiff contends that he suffered corneal edema, which required cornea transplant surgery, and loss of vision in his right eye as a result of an Ex-Press glaucoma shunt surgery performed by defendants. On appeal, plaintiff fails to provide any basis for disturbing the motion court's dismissal of his malpractice and informed consent claims. Rather, plaintiff

merely reiterates that defendants are responsible for his corneal edema and vision loss.

Plaintiff's allegation that Dr. Pankova fraudulently held herself out as holding a Doctor of Medicine (M.D.) degree is contradicted by the record, which demonstrates that Dr. Pankova received an M.D. from a foreign medical school and is licensed to practice medicine in New York under a domestically awarded Doctor of Osteopathy (D.O.) degree (*see Matter of Lobacz v Sobol*, 171 AD2d 174, 177 [3d Dept 1991], citing *Matter of New York State Osteopathic Socy. v Allen*, 26 NY2d 20, 25 [1970]). In any event, such an allegation of professional misconduct does not give rise to a private right of action (*Requa v Coopers & Lybrand*, 303 AD2d 159 [1st Dept 2003]).

Kalman Kaspiev v Irina Pankova, M.D.

M-8477 - Motion, in effect, to compel an admission from defendant Irina Pankova, M.D. denied.

M-8480 - Motion to adjourn appeal denied.

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

ENTERED: JANUARY 16, 2020

CLERK

Friedman, J.P., Richter, Kern, Singh, JJ.

10802 In re Ding Sheng Realty Corp., Index 101213/17
Petitioner,

-against-

City of New York, et al.,
Respondents.

_____

Borah, Goldstein, Altschuler, Nahins & Goidel, P.C., New York (Paul N. Gruber of counsel), for petitioner.

Zachary W. Carter, Corporation Counsel, New York (Jamison Davies of counsel), for respondents.

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Determination of respondents, dated April 20, 2017, which, after a hearing, found a violation of the Administrative Code of the City of New York for allowing transient usage of a permanent residence and imposed a fine in the amount of $53,000, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Nancy M. Bannon, J.], entered February 21, 2018) dismissed, without costs.

Petitioner was cited for allowing an apartment classified as a permanent residence to be converted for transient purposes (Administrative Code § 28-210.3). Service of the notice of violation was proper under New York City Charter § 1049-a(d)(2)(b). The issuing officer made a reasonable attempt at service at the premises, as required (*see Matter of Mestecky v*

City of New York, 30 NY3d 239, 245-246 [2017], *affg* 133 AD3d 431 [1st Dept 2015]; *City of New York v Bay Ridge Prince, LLC*, 168 AD3d 808, 809-810 [2d Dept 2019]), and neither the due diligence requirements of the CPLR nor the "reasonable application" requirements of the Real Property Actions and Proceedings Law apply (*Matter of Mestecky*, 133 AD3d at 432). Additionally, respondents were authorized by law to take official notice that the City's mailing software automatically corrects zip codes, and that the mailing affidavit showed the notice of violation was properly mailed to petitioner at the building address (48 RCNY 6-12[e], 6-19[f][2]).

Petitioner does not contest that the unit in question was converted for other than permanent residence purposes, but argues that daily penalties should not have been assessed since it corrected the violation immediately (*see* Administrative Code § 28-202.1[1]). However, there is substantial evidence to support the findings that petitioner was a repeat offender and it failed to meet its burden of proof to show correction within 45 days (1 RCNY 102-01[f][1], [g][1]; *see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180 [1978]). Petitioner's proffer of affidavits "raised credibility issues for the Hearing Officer to resolve" (*Matter of Machicote v Bezio*, 87 AD3d 763, 764 [3d Dept 2011]), and there exists no basis to

overturn the decision not to credit the affiants' statements (*see Matter of Purdy v Kriesberg*, 47 NY2d 354, 358 [1979]; *Lackow v Department of Educ. (or "Board") of City of N.Y.*, 51 AD3d 563, 568 [1st Dept 2016]).

Under the circumstances presented, the penalty imposed is not shocking to one's sense of fairness (*see Matter of Pamela Equities Corp. v Environmental Control Bd. of the* City of N.Y., 171 AD3d 623, 624 [1st Dept 2019]). "The constitutional prohibitions against excessive fines in the Eighth Amendment and the New York Constitution are inapplicable to the fines imposed in this case, which were solely remedial rather than punitive" (*Matter of 42/9 Residential LLC v New York City Envtl. Control Bd.*, 165 AD3d 541, 542 [1st Dept 2018], *lv denied* 33 NY3d 912 [2019]).

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

ENTERED: JANUARY 16, 2020

CLERK

Friedman, J.P., Richter, Kern, Singh, JJ.

10803 Yesenia Negron, Index 805059/16
Plaintiff-Appellant,

-against-

Jian Shou, M.D., et al.,
Defendants-Respondents,

Cheguevara I. Anafeh, M.D., et al.,
Defendants.

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Arnold E. DiJoseph, P.C., New York (Arnold E. DiJoseph, III of counsel), for appellant.

Heidell, Pittoni, Murphy & Bach, LLP, New York (Daniel S. Ratner of counsel), for respondents.

_____

Order, Supreme Court, New York County (Martin Shulman, J.), entered December 5, 2018, which granted the motion of defendants Jian Shou, M.D. and New York-Presbyterian/Weill Cornell Medical Center (hospital) for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Defendants Jian Shou, M.D. and hospital established prima facie that their treatment of plaintiff comported with good and accepted practice (*see generally Anyie B. v Bronx Lebanon Hosp.*, 128 AD3d 1, 3 [1st Dept 2015]). In opposition, plaintiff submitted the conclusory affirmation of an expert who did not address the specific assertions of defendants' expert (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 [1986]), and whose

ultimate conclusions were speculative or unsupported by any evidentiary foundation (*see Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544-545 [2002]). The claims against defendant hospital were also properly dismissed where the record shows that Dr. Shou was an attending physician at the hospital, and not an employee, and plaintiff's expert did not opine that the hospital's medical staff committed independent acts of negligence (*see Suits v Wyckoff Hgts. Med. Ctr.*, 84 AD3d 487, 488 [1st Dept 2011]).

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

ENTERED: JANUARY 16, 2020

CLERK

Friedman, J.P., Richter, Kern, Singh, JJ.

10804 Miguel Rosario, Index 150040/18
Plaintiff-Respondent,

-against-

Port Authority of New York & New Jersey,
Defendant-Appellant,

One World Trade Center LLC, et al.,
Defendants.

_____

London Fischer LLP, New York (Brian A. Kalman of counsel), for appellant.

Gorayeb & Associates, P.C., New York (Martin J. Moskowitz of counsel), for respondent.

_____

Order, Supreme Court, New York County (Kathryn E. Freed, J.), entered December 12, 2018, which, inter alia, denied the motion of defendant Port Authority of New York & New Jersey to dismiss the Labor Law §§ 240(1) and 241(6) claims as against it, unanimously affirmed, without costs.

The court properly rejected the Port Authority's arguments that as a bistate entity created by a federally approved compact (*see Matter of Agesen v Catherwood*, 26 NY2d 521, 524 [1970]), it cannot be held liable under Labor Law §§ 240(1) or 241(6) for injuries plaintiff allegedly sustained while working in a building owned by the Port Authority (*see Wortham v Port Auth. of N.Y. & N.J.*, __ AD3d __, 2019 NY Slip Op 08278 [1st Dept 2019];

see generally Agesen, 26 NY2d at 525). The Compact Clause of the United States Constitution is not implicated by the application of such New York workplace safety statutes to the Port Authority work site located in New York, which does not encroach on federal supremacy (*see Cuyler v Adams*, 449 US 433, 440 [1981]).

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

ENTERED: JANUARY 16, 2020

CLERK

Friedman, J.P., Richter, Kern, Singh, JJ.

10806N Chao Jiang, Index 652260/15
Plaintiff-Respondent,

-against-

Ping An Insurance, etc., et al.,
Defendants,

Huatai Insurance Group of China, etc., et al.,
Defendants-Appellants.

_____

Hinshaw & Culbertson LLP, New York (Concepcion A. Montoya of counsel), for appellants.

Mandel Bhandari LLP, New York (Rishi Bhandari of counsel), for respondent.

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Order, Supreme Court, New York County (Andrea Masley, J.), entered December 7, 2018, which, to the extent appealed from as limited by the briefs, denied defendants' cross motion to dismiss the complaint as against them for lack of personal jurisdiction, granted plaintiff's motion to compel defendant Huatai Insurance Group of China (Huatai Group) to procure a license to do an insurance business in New York or to post a bond in the amount of $2.5 million pursuant to New York Insurance Law § 1213(c) before the remainder of the cross motion will be considered, held the remainder of the cross motion in abeyance pending compliance with New York Insurance Law § 1213, and held plaintiff's motion to compel defendants Huatai Insurance Company of China Limited

(Huatai Limited) and Huatai Property and Casualty Insurance Company Limited (Huatai P&C) to comply with the requirements of Insurance Law 1213(c) in abeyance pending a hearing as to personal jurisdiction of and service on those parties, unanimously affirmed, with costs.

Huatai Group waived any objection to jurisdiction by appearing by notice of pro hac vice admission in this dispute, failing, twice, to file timely pre-answer motions to dismiss, and defending on the merits (*see American Home Mtge. Servicing, Inc. v Arklis*, 150 AD3d 1180 [2d Dept 2017]; *see also U.S. Bank N.A. v Pepe*, 161 AD3d 811 [2d Dept 2018]; *Capital One Bank, N.A. v Faracco*, 149 AD3d 590 [1st Dept 2017]). Pro hac vice admission is akin to an appearance (*see Marina Dist. Dev. Co., LLC v Toledano*, 174 AD3d 431, 432-433 [1st Dept 2019], citing *Arrowhead Capital Fin., Ltd. v Cheyne Specialty Fin. Fund L.P.*, 32 NY3d 645 [2019]). Even if, as defendants contend, granting pro hac vice admission is a ministerial act, Huatai Group waived any objection to jurisdiction by failing to timely challenge it in an answer or a pre-answer motion to dismiss in accordance with the CPLR, as well as by defending on the merits (*see Rubino v City of New York*, 145 AD2d 285, 288 [1st Dept 1989]; *Braman v Braman*, 236 App Div 164, 167 [1st Dept 1932]).

The court correctly ordered a traverse hearing as to Huatai

Limited and Huatai P&C as to service of process and personal jurisdiction (*see C. Mahendra (NY), LLC v National Gold & Diamond Ctr., Inc.*, 125 AD3d 454, 457 [1st Dept 2015]; *Armada Supply Inc. v Wright*, 858 F2d 842, 849 [2d Cir 1988]; *Caronia v American Reliable Ins. Co.*, 999 F Supp 299, 303 [ED NY 1998]).

In addition to the above-cited jurisdictional requirement, Insurance Law § 1213(c) requires an "unauthorized foreign or alien insurer" to post a bond before filing "any pleading" in a proceeding against it. On this record the court appropriately imposed a bond requirement upon Huatai Group (*see Levin v Intercontinental Cas. Ins. Co.*, 95 NY2d 523, 528 [2000]) and held in abeyance defendants' cross motion as to the insurance policy's choice of law and dispute resolution clauses pending Huatai Group's compliance with Insurance Law § 1213(c).

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

ENTERED: JANUARY 16, 2020

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rolando Acosta, P.J.
Dianne T. Renwick
Sallie Manzanet-Daniels
Anil C. Singh, JJ.

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In re Robinson Callen, etc.,
Petitioner-Respondent,

-against-

New York City Loft Board,
Respondent-Appellant,

Richard Fiscina, et al.,
Respondents-Respondents,

- - - - -

In re Richard Fiscina,
Petitioner-Respondent,

-against-

New York City Loft Board,
Respondent-Appellant,

Robinson Callen, etc., et al.,
Respondents-Respondents.

_____x

Respondent New York City Loft Board appeals from judgments of the Supreme Court, New York County (Arlene P. Bluth, J.), entered April 10, 2018, granting the petitions and annulling its determination, dated March 16, 2017, which rejected applications for reconsideration of

a prior determination rejecting a proposed settlement agreement between petitioner building owner and residential tenants, and remanded the matter for administrative resolution of the tenants' application for Loft Law coverage.

Zachary W. Carter, Corporation Counsel, New York (Diana Lawless and Scott Shorr of counsel), for appellant.

Belkin Burden Wenig & Goldman, LLP, New York (Magda L. Cruz, Joseph Burden and Sherwin Belkin of counsel), for Robinson Callen, respondent.

David E. Frazer, New York, for Richard Fiscina, respondent.

Goodfarb & Sandercock, LLP, New York (Margaret B. Sandercock and Elizabeth Sandercock of counsel), for Luke Weinstock, Zenia De La Cruz and Maria Theresa Totengco, respondents.

RENWICK, J.

This article 78 proceeding stems from an application for the legal conversion of certain lofts in New York City from commercial use to residential use pursuant to Article 7-C of the Multiple Dwelling Law (§ 283), commonly known as the Loft Law. Where owners register covered buildings and comply with the Loft Law's requirements, the Loft Law will deem a building an "interim multiple dwelling (IMD)" (Multiple Dwelling Law § 284[1]), which would allow the owner to collect rent from residential occupants, despite the lack of a residential certificate of occupancy (Multiple Dwelling Law §§ 283, 285, 301). The Loft Law requires landlords to bring converted residences up to code and prevents them from charging tenants for improvements until the issuance of a certificate of occupancy (Multiple Dwelling Law § 284(1)). The Loft Law is administered by the New York City Loft Board (Multiple Dwelling Law § 282).

In March 2014, four residents of the building located at 430 Lafayette Street Rear submitted Loft Law coverage applications seeking to compel the owner, Robert Callen, to legalize the building in compliance with the Loft Law and to have the Board deem the building an IMD. Callen also owns an adjoining building (front building), which is rent-stabilized. Callen answered, opposing the application primarily on the ground that the four

residents of the subject building were not covered by the Loft Law as their units were not residentially occupied during the window period of the Loft Law (12 consecutive months during 2008 and 2009).[1]

On January 21, 2015, the parties entered into a settlement agreement, which they submitted to the Loft Board, providing that the tenants would withdraw the coverage application with prejudice, and Callen would recognize the tenants as covered by the Rent Stabilization Law. Callen would register the units with DHCR as rent-stabilized and would not increase the rents until a certificate of occupancy was obtained. Callen also agreed to use reasonably diligent efforts to obtain a new certificate of occupancy for residential use.

The Administrative Law Judge issued a decision recommending that the Board accept the tenants' withdrawal of the coverage application with prejudice, without making a recommendation as to the agreement. On March 16, 2015, the Board issued an order rejecting the agreement, including the tenants' request to withdraw the coverage application with prejudice, as against

[1] The 2009 Loft Law Amendment created a new window period for recognition of loft tenants that previously did not qualify under the original 1982 Loft Law. The purpose of this bill is to extend provisions of the Loft Law to buildings that have been occupied residentially for 12 consecutive months during the period starting January 1, 2008 and ending December 31, 2009.

public policy, and remanding the application for further adjudication on the coverage application. The Board explained that given the absence of a residential certificate of occupancy, it is illegal for the tenants to reside in the building, unless they obtain protection under Multiple Dwelling Law § 283, which permits residential use in an IMD prior to the issuance of a residential certificate of occupancy, and the Board found that the tenants did not have such protection because they agreed to withdraw their coverage claims.

Callen and the residents then filed applications for reconsideration of the Board's order, arguing that the Board erred as a matter of law in remanding the application because Callen had already registered the units with DHCR, the building could be considered a "single horizontal multiple dwelling" with the already rent-stabilized front building, and the building "cannot be covered by two separate regulatory regimes." They further argued that the Board lacked authority to compel the parties to litigate or deny the tenants the right to withdraw their coverage application, especially where the Board might ultimately conclude that either the units or the tenants were not entitled to Loft Law coverage.

On March 16, 2017, the Board denied the reconsideration applications. In June and July 2017, Callen and one of the

residents filed separate article 78 petitions, alleging that the Board's orders were arbitrary and capricious in that the Board compelled the parties to litigate the coverage applications and prevented the building from being covered by the Rent Stabilization Law. The Board answered, arguing that its orders were not arbitrary or capricious.

Supreme Court granted the petitions on the ground that the order for reconsideration and the underlying Board order were without rational basis. Specifically, the court found that although the building owner and tenants have settled their differences, the Board "has refused to accept the Settlement," leaving the tenants to either default at the forced hearing or to "spend plenty of money and time litigating something they do not wish to litigate. Both those options are wasteful and make no sense." The court did not find irrational the Board's position of not approving a settlement that it considered inappropriate. Nevertheless, the court concluded that even if the Board did not agree with this settlement, it was irrational to refuse to allow the applicant to withdraw the application and to force litigation. This appeal ensued.

Initially, we agree with Supreme Court that it was irrational to refuse to allow the tenants to withdraw their conversion application because the Loft Law was not the sole

basis for legalization of the subject units. The broad remedial purpose of the Loft Law is to confer rent-stabilized status on qualifying buildings by legalizing them as interim multiple dwellings (*see* Multiple Dwelling Law §§ 283, 285, 301; *see also Blackgold Realty Corp. v Milne*, 119 AD2d 512, 515 [1st Dept 1986], *affd* 69 NY2d 719 [1987]). This conversion process, however, does not necessarily negate rent stabilization coverage for qualifying buildings that, for whatever reason, do not undergo the conversion process set forth in the Loft Law. On the contrary, as this Court held in *Acevedo v Piano Bldg. LLC* (70 AD3d 124, 129 [1st Dept 2009], *appeal withdrawn* 14 NY3d 834 [2010]), there is no blanket prohibition barring rent-stabilization of units that are not subject to the Loft Law. "Where zoning expressly allows residential use as of right and apartments can be legalized by the owner filing a certificate of occupancy, there is no rationale ... to foreclose [rent-stabilization]" (*Acevedo*, at 130-131). Thus, the Rent Stabilization Law is "inclusive, rather than exclusive" and, as such, incorporates within rent stabilization "all housing accommodations which it does not expressly [exempt]" *(Matter of Salvati v Eimicke*, 72 NY2d 784, 791 [1988]).

Here, the petitioner tenant claims, and the Loft Board does not dispute, that there is a separate and independent track for

the tenants to obtain rent regulation coverage outside the Loft Law's statutory scheme. It is undisputed that the four residential occupancies are legal under New York City Zoning applicable to the area where the subject building is located. While the Rent Stabilization Law usually requires buildings to have six or more residential units, adjacent buildings with common facilities, ownership, and management are treated as one integrated unit, thereby constituting a horizontal multiple dwelling for purposes of rent stabilization *(see e.g. Matter of Ruskin v Miller*, 172 AD2d 164 [1st Dept 1991]; *Nine Hunts Lane Realty Corp. v New York State Div. of Housing & Community Renewal*, 151 AD2d 465 [2d Dept 1989]); Matter of *Krakower v State of N.Y., Div. of Hous. & Community. Renewal, Office of Rent Admin.*, 137 AD2d 688 [2nd Dept 1988], *lv denied*, 74 NY2d 613 [1989]. In this case, the subject building is a rear building that adjoins a front building that is already subject to rent stabilization. Given that the buildings share common ownership – a sprinkler system, a plumbing system, and their respective electric meters and mailboxes are at the same location -- the rear building appears to be part of a horizontal multiple dwelling that would be subject to rent stabilization once the residential certificate of occupancy is procured by the owner.

The Loft Board expresses unfounded concerns that, since the

tenants are living concomitantly without a certificate of occupancy and devoid of Interim Multiple Dwelling protection under the Loft Law, the tenants are in danger of eviction. This Court, however, has consistently held that a landlord cannot evict a putative rent-stabilized tenant under the Multiple Dwelling Law on the basis that there is no certificate of occupancy, if the housing accomodation can be legalized (*see Acevedo v Piano Bldg, LLC*, 70 AD3d 124; *Duane Thomas LLC v Wallin*, 35 AD3d 232 [1st Dept 2006]; *Sima Realty v Philips*, 282 AD2d 394 [1st Dept 2001]; *Hornfeld v Gaare*, 130 AD2d 398 [1st Dept 1987]). The Multiple Dwelling Law "was enacted to protect tenants of multiple dwellings against unsafe living conditions, not to provide a vehicle for landlords to evict tenants on the ground that the premises are unsafe" (*Sima Realty*, 282 AD2d at 395). Instead of mandating the eviction of tenants, this Court's "tendency would be to compel the landlord's expeditious conversion of the premises to residential use" (*id.*).

While we find that there is no valid reason for the Loft Board's refusal to grant the tenants' request to withdraw the conversion application, we do not agree with the tenants that the Loft Board's rejection of the proposed settlement, as a vehicle for conversion to rent stabilization, has no rational basis (*see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1*

of Towns of Scarsdale & Mamaroneck, Westchester County, 34 NY2d 222, 231 [1974]; *see also Matter of Brady Props. v New York City Loft Bd.*, 269 AD2d 137, 139 [1st Dept 2000]). The Loft Law and several related laws set procedures to protect and preserve residential occupancies in buildings that were originally built for commercial use by ensuring renovations to these buildings to bring them up to the safety standards that are normal in apartment buildings. The Loft Board is the agency charged with the responsibility to oversee the legalization process of such buildings. However, once the tenants decided to withdraw their conversion application (which, as explained above, we find the Loft Board should have permitted them to do), the Board no longer had authority to supervise and approve the legalization process of the building because the tenants relinquished their rights to proceed to conversion pursuant to the Loft Law.

Accordingly, the judgments of the Supreme Court, New York County (Arlene P. Bluth, J.), entered April 10, 2018, annulling respondent New York City Loft Board's determination, dated March 16, 2017, which rejected applications for reconsideration of a prior determination rejecting a proposed settlement agreement between petitioner building owner and residential tenants and remanded the matter for administrative resolution of the tenants' application for Loft Law coverage, should be modified, on the

law, the petitions denied to the extent they sought to vacate the part of the March 16, 2017 determination rejecting a proposed settlement agreement between petitioner building owner and residential tenants, and otherwise affirmed, without costs, to the extent the petitions sought to vacate the part of the March 16, 2017 determination rejecting the residential tenants' request to withdraw their Loft Law coverage applications, and the

matters remitted to respondent New York City Loft Board for further proceedings consistent herewith.

All concur.

Judgment, Supreme Court, New York County (Arlene P. Bluth, J.), entered April 10, 2018, modified, on the law, the petitions denied to the extent they sought to vacate the part of the March 16, 2017 determination rejecting a proposed settlement agreement between petitioner building owner and residential tenants, and otherwise affirmed, without costs, to the extent the petitions sought to vacate the part of the March 16, 2017 determination rejecting the residential tenants' request to withdraw their Loft Law coverage applications, and the matters remitted to respondent New York City Loft Board for further proceedings consistent herewith.

Opinion by Renwick, J. All concur.

Acosta, P.J., Renwick, Manzanet-Daniels, Singh, JJ.

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

ENTERED: JANUARY 16, 2020

CLERK