SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 20, 2015

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Renwick, Andrias, DeGrasse, Kapnick, JJ.

13495 Francoise Jean-Baptiste, Index 103042/07
Plaintiff-Appellant,

-against-

153 Manhattan Avenue Housing
Development Fund Corp.,
Defendant-Respondent.

[And a Third-Party Action]

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Pollack Pollack Isaac & DeCicco, LLP, New York (Jillian Rosen of counsel), for appellant.

Barry, McTiernan & Moore LLC, New York (David H. Schultz of counsel), for respondent.

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Order, Supreme Court, New York County (Paul Wooten, J.), entered July 17, 2012, which, to the extent appealed from as limited by the briefs, granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant established prima facie entitlement to summary judgment by demonstrating its status as an out-of-possession

landlord under the terms of the lease (*see Kittay v Moskowitz*, 95 AD3d 451 [1st Dept 2012], *lv denied* 20 NY3d 859 [2013]; *Babich v R.G.T. Rest. Corp.*, 75 AD3d 439 [1st Dept 2010]). Plaintiff's attempt, by way of opposition, to subject defendant to liability on the ground that it retained the right to reenter and make repairs to the premises (*Guzman v Haven Plaza Hous. Dev. Fund Co.*, 69 NY2d 559, 565-566 [1987]), is both procedurally improper and substantively without merit. The complaint, as supplemented by her bill of particulars dated January 22, 2007, alleged only generic Labor Law and OSHA violations (*see e.g. Cintron v New York City Tr. Auth.*, 77 AD3d 410 [1st Dept 2010]). The new allegations, asserted nearly five years later – six months after the filing of plaintiff's note of issue – that defendant violated provisions of the Building Code (Administrative Code § 27-375 [c], [d], [e], and [f]) constitutes a substantive change to her theory of the case. In the absence of a motion for leave to amend the pleadings (CPLR 3025[b]), it was properly rejected.

Even if plaintiff's disregard for procedure could be ignored, an application to amend a pleading requires the movant to set forth a viable cause of action, without which leave must be denied (*see Thomas Crimmins Contr. Co. v City of New York*, 74 NY2d 166, 170 [1989]). The specific section of the Building Code

plaintiff alleges to have been violated (§ 27-375) does not apply to stairs leading from the ground floor to the basement of a building (*Cusumano v City of New York*, 15 NY3d 319, 324 [2010]). Thus, plaintiff has failed to demonstrate "that the purported hazard constituted a structural or design defect that violated a specific statutory provision" to hold the landlord answerable in damages for her injuries (*Boateng v Four Plus Corp.*, 22 AD3d 323, 324 [1st Dept 2005]). Furthermore, plaintiff has no recollection of events surrounding the accident and, unlike the cases she relies upon, no reasonable inferences as to causation can be drawn between the alleged violations and her unwitnessed fall (*see Reed v Piran Realty Corp.*, 30 AD3d 319 [1st Dept 2006], *lv denied* 8 NY3d 801 [2007]; *Kane v Estia Greek Rest.*, 4 AD3d 189 [1st Dept 2004]; *Lynn v Lynn*, 216 AD2d 194 [1st Dept 1995]).

We have considered the remainder of plaintiff's arguments and find them unavailing.

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

ENTERED: JANUARY 20, 2015

CLERK

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

13700 230 Park Avenue Holdco, LLC, Index 653178/11
Plaintiff-Appellant-Respondent,

-against-

Kurzman Karelsen & Frank, LLP, et al.,
Defendants-Respondents-Appellants.

_____

Klein & Solomon, LLP, New York (Jay B. Solomon of counsel), for appellant-respondent.

Kurzman Karelsen & Frank, LLP, New York (Charles Palella of counsel), for respondents-appellants.

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Order, Supreme Court, New York County (Ellen Coin, J.), entered May 6, 2013, which, inter alia, denied that part of plaintiff's motion for summary judgment seeking dismissal of the affirmative defense of breach of a stipulation, and granted that part of the motion seeking dismissal of the affirmative defense of surrender, affirmed, without costs.

The motion court properly found that the surrender defense was barred by the lease provision requiring a surrender and any waiver or modification of the lease to be in writing and further providing that delivery of the keys to the landlord shall not constitute a surrender.

The motion court also correctly denied plaintiff, the landlord's successor in interest, summary judgment dismissing the

third affirmative defense asserting that plaintiff breached a stipulation of settlement. Following a holdover proceeding brought by plaintiff to recover possession of the subject premises, the parties entered into a stipulation, dated August 22, 2011, in which defendant tenant consented to the entry of a final judgment of possession in favor of plaintiff and plaintiff reclaimed the premises. The stipulation expressly provides, however, that it does not constitute a surrender of the lease "by operation of law," and the lease forbids a surrender of the lease, except in writing. Nothing in the stipulation releases defendant from any further rent obligation under the terms of the lease, which was not due to expire before December 31, 2012. The parties reserved their rights, claims and defenses, including those available under the lease.

Although the stipulation prohibits defendant from subletting or assigning any of its rights or interests under the lease, it also provides that defendant is not prohibited "from locating and/or offering [plaintiff] a potential tenant for the Premises . . . ." As the motion court held, the import of this provision was clearly to provide defendant with an opportunity to cover all or some of the damages that plaintiff is claiming are due under the lease. Otherwise the provision would have no meaning.

There are triable issues of fact as to whether plaintiff improperly interfered with defendant's efforts, in violation of the stipulation, to find a tenant, which would, in turn, affect defendant's liability for future rent. Although plaintiff claims that it only contacted defendant's broker to have the subleasing listing removed, defendant claims that plaintiff interfered with defendant's right to list the space at all. There is evidence that plaintiff contacted defendant's broker directly in order to have the listing removed, and email correspondence between the parties shows that plaintiff did not make the space available for rent after defendant had vacated. The advertising flyer describing the broker retained by defendant as the "sublease agent" and offering the premises for sublet bears the date of July 2011, and there is evidence that it was approved by plaintiff and circulated prior to the date of the parties' August

22, 2011 stipulation. This circular does not satisfy plaintiff's prima facie burden on its motion of showing that its direct contact with the broker on September 15, 2011 was justified.

All concur except Sweeny, J.P. and DeGrasse, J. who dissent in part in a memorandum by DeGrasse, J. as follows:

DEGRASSE, J. (dissenting in part)

I dissent because plaintiff's motion for summary judgment should have been granted to the further extent of dismissing the third affirmative defense by which defendants assert that plaintiff breached an August 22, 2011 stipulation settling a summary proceeding between plaintiff and defendant Kurzman Karelson & Frank, LLP (Kurzman). For reasons set forth below, I submit that the majority misconstrues the stipulation.

Plaintiff brings this action to recover rent and attorneys' fees due under a commercial lease between plaintiff's predecessor in interest, as landlord, and Kurzman, as tenant. The lease's expiration date was December 31, 2012. The stipulation of settlement provided for the entry of a final judgment of possession of the demised premises in favor of plaintiff, and the immediate issuance of a warrant of eviction with the execution thereof to be stayed until September 1, 2011. As required by the stipulation, Kurzman did "vacate and surrender possession of the Premises on or before August 31, 2011 . . . ."

By July 18, 2011, Kurzman had entered into a lease of other premises for a term that began on September 1, 2011. Accordingly, Kurzman retained CB Richard Ellis (CBRE), a brokerage firm, to list the demised premises for sublease. The

New York City CoStar Group (CoStar), a multiple listing service engaged by CBRE, issued marketing flyers listing the demised premises as available for sublease from September 1, 2011 to December 31, 2012. By email dated September 15, 2011, Monday Properties, plaintiff's managing agent, asked CoStar to remove the "sublease listing."

With regard to the third affirmative defense, the majority and defendants rely on the stipulation's provision that "[n]otwithstanding anything herein to the contrary, nothing herein shall prohibit [Kurzman] from locating and/or offering to [plaintiff] a potential tenant for the Premises, subject to [plaintiff's] approval of any such prospective tenant." The majority's apparent premise is that Monday's September 15, 2011 email asking CoStar to remove the sublease listing raises an issue of fact as to whether plaintiff breached Kurzman's purported right to locate prospective tenants for the premises.

I disagree with the majority's analysis for two reasons. First, having relinquished its right to possession of the premises as of August 31, 2011, Kurzman could not have entered into a sublease on September 15, 2011 when Monday emailed CoStar. No sublease can give a sublessee greater rights than those

afforded to its sublessor (*Millicom Inc. v Breed, Abbott & Morgan*, 160 AD2d 496, 497 [1st Dept 1990], *lv denied* 76 NY2d 703 [1990]). In other words, a tenant cannot sublease premises that he or she has no right to possess. Second, the majority adopts Kurzman's erroneous argument that the stipulation, somehow provided for an opportunity for Kurzman to cover all or some of the damages caused by its breach of the lease. This argument misconstrues the stipulation, which merely provided that it *did not prohibit* Kurzman from locating or offering potential tenants subject to plaintiff's approval. This language does not provide for a right to do so. "A stipulation is an independent contract which is subject to the principles of contract law" (*Adelsberg v Amron*, 103 AD3d 571, 572 [1st Dept 2013]). The words of a stipulation, like those of any other contract, must be accorded their fair and reasonable meaning (*see Sutton v East Riv. Sav. Bank*, 55 NY2d 550, 555 [1982]).

Also, the stipulation, by its own terms, was "entered into between the parties . . . solely for the purpose of adjudicating [plaintiff's] right to possession of the Premises . . . ." For this reason, there is no merit to defendants' contention that the stipulation imposed upon plaintiff an obligation to mitigate damages consisting of rent unpaid for the balance of the lease

term.

Kurzman's vague assertions that plaintiff otherwise sabotaged its efforts to identify prospective tenants and resisted CBRE's efforts to show the premises to interested parties are insufficient to raise a triable issue of fact with respect to the third affirmative defense.

For the reasons stated by the majority, I agree that the motion court properly dismissed the first and second affirmative defenses by which defendants assert that the premises were surrendered by operation of law. Nonetheless, I would modify the order entered below to the extent of granting plaintiff's motion for summary judgment dismissing the third affirmative defense that is based on an alleged breach of the stipulation of settlement.

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

ENTERED: JANUARY 20, 2015

CLERK

Acosta, J.P., Moskowitz, Richter, Feinman, Clark, JJ.

13876N In re Travelers Property Casualty Company of America,
Petitioner-Appellant,

-against-

Richard Archibald,
Respondent-Respondent,

Lilia Barnes, et al.,
Proposed Additional Respondents-Respondents.

Index 156162/12

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Law Offices of Aloy O. Ibuzor, New York (Erika E.E. Treco of counsel), for appellant.

Shapiro Law Offices, PLLC, Bronx (Ernest S. Buonocore of counsel), for Richard Archibald, respondent.

Morris Duffy Alonso & Faley, New York (Iryna S. Krauchanka and Andrea M. Alonso of counsel), for Lilia Barnes, National Continental Insurance Company and Progressive Northern Insurance Company, respondents.

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Order, Supreme Court, New York County (Anil C. Singh, J.), entered July 16, 2013, which denied the petition to stay an uninsured motorist arbitration commenced by respondent Richard Archibald, unanimously reversed, on the law and the facts, without costs, and the matter remitted to Supreme Court for a framed issue hearing.

Even though CPLR 7503(c) says, "An application to stay arbitration must be made by the party served [with a notice or

demand for arbitration] within twenty days after *service* upon him of the notice or demand" (emphasis added), case law establishes that, when the notice or demand is mailed – as it was in the case at bar – "[t]he notice to arbitrate does not start the time to respond until *receipt"* (*Matter of Knickerbocker Ins. Co. [Gilbert],* 28 NY2d 57, 64 [1971] [emphasis added]).

Proposed additional respondents took the position in the motion court that petitioner received Archibald's demand for arbitration on August 20, 2012. They did not argue that there was insufficient evidence of the date on which petitioner received the demand. If they had made this argument, petitioner could have submitted additional evidence. Hence, proposed additional respondents may not argue for the first time on appeal that petitioner failed to submit sufficient evidence of the date of receipt (*see e.g. Ta-Chotani v Doubleclick, Inc.,* 276 AD2d 313 [1st Dept 2000]).

The issue of whether an application to stay arbitration is "made" (CPLR 7503[c]) when the petition is filed, as opposed to when it is served, is a purely legal one; hence, it "may properly be considered by this Court for the first time on appeal" (*Branham v Loews Orpheum Cinemas, Inc.,* 31 AD3d 319, 323 n 2 [1st Dept 2006], *affd* 8 NY3d 931 [2007]). In fact, an application is

made when the petition is filed (*see e.g. Matter of Government Empls. Ins. Co. v Morris*, 83 AD3d 709, 710 [2d Dept 2011]; *Matter of State Farm Mut. Auto. Ins. Co. [Rickard]*, 250 AD2d 896, 897 [3d Dept 1998]; CPLR 304[a]). Nonetheless, the trial court held that the petition was untimely because it was not served within 20 days from the date that petitioner received the demand for arbitration.

The Supreme Court Records On-Line Library shows that petitioner timely filed its petition on September 7, 2012, within 20 days of its receipt of the demand for arbitration on August 20, 2012. We take judicial notice of this undisputed fact (*see Cato v City of New York*, 70 AD3d 471 [1st Dept 2010]). Thus, petitioner has made a prima facie case for staying arbitration, and a framed issue hearing is required.

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

ENTERED: JANUARY 20, 2015

CLERK

Tom, J.P., Friedman, Acosta, Saxe, Kapnick, JJ.

13929 Brenda Pomerance, etc., Index 650129/11
Plaintiff-Respondent-Appellant,

-against-

Brian Scott McGrath, et al.,
Defendants-Appellants-Respondents.

- - - - -

Lawrence P. Simms, etc.,
Amicus Curiae.

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Kagan Lubic Lepper Finkelstein & Gold, LLP, New York (Jesse P. Schwartz of counsel), for appellants-respondents.

Law Office of Brenda Pomerance, New York (Brenda Pomerance of counsel), for respondent-appellant.

Lawrence P. Simms, amicus curiae pro se.

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Order, Supreme Court, New York County (Barbara Jaffe, J.), entered June 30, 2014, which, to the extent appealed from as limited by the briefs, (1) granted plaintiff's motion for leave to amend her amended complaint to the extent of accepting the first, third, fifth, eighth, tenth, eleventh, twelfth, thirteenth, fifteenth, and seventeenth causes of action in the proposed "Verified Second Amended Complaint (Revision 1)," (2) denied the motion to the extent of striking the second, fourth, sixth, and ninth causes of action without leave to replead and the seventh cause of action as against Robert J.

Braverman without leave to replead, and (3) denied defendants' motion for summary judgment on the fifth cause of action of the amended complaint, unanimously modified, on the law, to also strike the first, third, fifth, eighth, tenth, eleventh, twelfth, and seventeenth causes of action, and otherwise affirmed, without costs.

Plaintiff was not prohibited from amending her amended complaint, and plaintiff's mere lateness in moving to amend is not a barrier to amendment (*Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983]). Nor have defendants shown that they were prejudiced by plaintiff's delay (*see id.*). Defendants' alleged expenditure of $200,000 in legal fees so far does not constitute prejudice (*see e.g. Jacobson v McNeil Consumer & Specialty Pharms.*, 68 AD3d 652, 654-655 [1st Dept 2009]).

However, some of plaintiff's proposed claims are "palpably insufficient or patently devoid of merit" (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 499 [1st Dept 2010]). Indeed, although plaintiff's first cause of action, which alleges that individual board members violated the subject condominium's bylaws, is not time-barred (*see Brasseur v Speranza*, 21 AD3d 297, 297-298 [1st Dept 2005]), it is insufficient. The violation of bylaws is akin to a breach of contract (*see Schoninger v Yardarm*

Beach Homeowners' Assn., 134 AD2d 1, 6 [2d Dept 1987]), and the "participation in a breach of contract will typically not give rise to individual director liability" (*Fletcher v Dakota, Inc.*, 99 AD3d 43, 47 [1st Dept 2012]; *see also Hixon v 12-14 E. 64th Owners Corp.*, 107 AD3d 546, 547 [1st Dept 2013], *lv denied* 22 NY3d 862 [2014]). For the same reasons, leave to amend should have been denied as to the eighth cause of action, and as to the tenth, eleventh, and twelfth causes of action insofar as they allege violations of the bylaws as against individual board members.

To the extent the twelfth cause of action alleges that the board violated the bylaws by failing to "muster[] a quorum" of unit owners for the annual election of board members, that claim is insufficient, as plaintiff cites no authority actually imposing such a duty on the board.

The eighth cause of action is also barred by the business judgment rule. The business judgment rule, which applies to the board of directors of a condominium (*see Perlbinder v Board of Mgrs. of 411 E. 53rd St. Condominium*, 65 AD3d 985, 989 [1st Dept 2009]), provides that a court should defer to the board's determination so long as the board acts in good faith, within the scope of its authority under the bylaws, and to further a

legitimate interest of the condominium (*see id.*; *see also 40 W. 67th St. v Pullman*, 100 NY2d 147, 153 [2003]). Whether the board acted within the scope of its authority under the bylaws is a necessary threshold issue (*see Perlbinder*, 65 AD3d at 989). In the eighth cause of action, plaintiff alleges that the board acted outside the scope of its authority under the bylaws because it failed to get approval from unit owners of an improvement costing more than $10,000. However, the bylaw provision on which plaintiff relies is not applicable to the elevator project at issue, because the project did not constitute an improvement; rather, it merely involved "the replacement of existing building components that had fallen into a state of disrepair" (*Gennis v Pomona Park Bd. of Mgrs.*, 36 AD3d 661, 663 [2d Dept 2007]).

The business judgment rule also bars the seventeenth cause of action, which alleges that the board acted in bad faith and for an improper purpose by wasting the condominium's funds on unnecessary litigation with the Sponsor. The bylaws give the board the power to negotiate and settle "all claims and actions relating to the Condominium." The issues of how aggressive the board should be toward the Sponsor, and whether it should discontinue a lawsuit against the Sponsor, are matters of business judgment.

The tenth and eleventh causes of action as against the board and its members, alleging an improper assessment in violation of the bylaws, are barred by the business judgment rule (*see Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 537-538 [1990]).

The thirteenth and fifteenth causes of action, seeking to inspect certain documents, are a permissible repleading of causes of action in the original complaint.

Although a nonclient may sue an attorney for aiding and abetting misconduct (*see Joel v Weber*, 197 AD2d 396, 397 [1st Dept 1993]), the motion court properly denied leave to add the second, fourth, sixth, and ninth causes of action. The second and ninth causes of action, alleging that Braverman and his firm aided and abetted violations of the bylaws, are insufficient. As noted above, violating a bylaw is akin to breaching a contract, and no cause of action exists for aiding and abetting a breach of contract (*see Purvi Enters., LLC v City of New York*, 62 AD3d 508, 509 [1st Dept 2009]).

The fourth cause of action is time-barred. This claim alleges that Braverman and his firm aided and abetted the board's violation of Real Property Law § 339-bb, which requires the board to give unit owners written notice of any termination of the

condominium's insurance. Plaintiff alleges that the termination occurred in or around October 2008. She moved to add claims against Braverman and his firm in August 2013. "A claim that a person aided and abetted a tort is governed by the same statute of limitations that is applicable to the underlying tort allegedly aided and abetted" (*Hudson v Delta Kew Holding Corp.*, 43 Misc 3d 1223[A], 2014 NY Slip Op 50756[U], *4 [Sup Ct, Suffolk County 2014]). The three-year statute of limitations under CPLR 214(2), as opposed to the six-year statute of limitations under CPLR 213(1), applies to the underlying statutory violation at issue (*see Hartnett v New York City Tr. Auth.*, 86 NY2d 438, 443-444 [1995]). Accordingly, the fourth cause of action is untimely. For similar reasons, the third cause of action, alleging a violation of Real Property Law § 339-bb, is time-barred.

The fifth cause of action, ostensibly for fraud, does not state a viable claim for fraud. Rather, this cause of action, brought more than four months after the election in question, amounts to a time-barred attack on the results of that election (*see* CPLR 217[1]; CPLR 7801). Moreover, plaintiff's arguments that more candid communications from defendants would have led to the election of a new board, and that this hypothetical new board

would have averted the alleged losses, are too speculative to support a claim for damages.

Plaintiff's sixth cause of action, alleging that Braverman and his firm aided and abetted the board's allegedly fraudulent conduct, is insufficient. A plaintiff alleging an aiding-and-abetting fraud claim must allege, among other things, that the defendant substantially assisted in the underlying fraud (*Oster v Kirschner*, 77 AD3d 51, 55 [1st Dept 2010]). Plaintiff merely alleges that Braverman and his firm failed to act. "[T]he mere inaction of an alleged aider and abettor constitutes substantial assistance only if the defendant owes a fiduciary duty directly to the plaintiff" (*Kaufman v Cohen*, 307 AD2d 113, 126 [1st Dept 2003]). "[T]he fiduciary duties owed by a limited partnership's attorney to that entity do not extend to the limited partners" (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 561 [2009]). Hence, Braverman and his firm — the attorneys for the condominium, an unincorporated association — do not owe a fiduciary duty to plaintiff, a unit owner and member of the association.

While it was not improper for plaintiff to bring a Judiciary Law § 487 claim in this action even though it is based on alleged deceit in a prior action (*see Newin Corp. v Hartford Acc. &*

Indem. Co., 37 NY2d 211, 217 [1975]; *Specialized Indus. Servs. Corp. v Carter*, 68 AD3d 750, 752 [2d Dept 2009]), the motion court properly denied leave to add this claim -- the seventh cause of action -- due to a failure to allege "a chronic and extreme pattern of legal delinquency" (*Kaminsky v Herrick, Feinstein LLP*, 59 AD3d 1, 13 [1st Dept 2008] [internal quotation marks omitted], *lv denied* 12 NY3d 715 [2009]).

Since leave to amend was properly granted, at least in part, the motion court correctly declined to reach defendants' summary judgment motion, which addressed the prior complaint (*see Schoenborn v Kinderhill Corp.*, 98 AD2d 831, 832 [3d Dept 1983]; *see also Plaza PH2001 LLC v Plaza Residential Owner LP*, 98 AD3d 89, 99 [1st Dept 2012]).

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

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

ENTERED: JANUARY 20, 2015

CLERK

Tom, J.P., Saxe, Feinman, Clark, Kapnick, JJ.

13972 The People of the State of New York, Ind. 30215/11
Respondent,

-against-

Daniel Baisley,
Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (Nancy E. Little of counsel), for appellant.

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

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Order, Supreme Court, New York County (Daniel McCullough, J.), entered on or about May 23, 2012, which adjudicated defendant a level three sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). The underlying offense was committed against two 13-year-old girls, and defendant has not established that his alleged good behavior in the years following his release from

prison warrants a downward departure. In any event, while defendant was not convicted of any sex offenses after his release, he was convicted of a weapon offense. We have considered and rejected defendant's argument that there was an overassessment of points under certain risk factors.

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

ENTERED: JANUARY 20, 2015

CLERK

Tom, J.P., Saxe, Feinman, Clark, Kapnick, JJ.

13973 Windy Minella, Index 21343/13
Plaintiff-Respondent,

-against-

Richard J. Restifo, M.D.,
Defendant-Appellant.

_____

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

Law Offices of Frank N. Peluso, Pelham (Frank N. Peluso of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Stanley Green, J.), entered September 16, 2013, which, in this medical malpractice action, denied defendant's motion to dismiss the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint.

Personal jurisdiction does not exist pursuant to CPLR 302(a)(1), as there is insufficient evidence that defendant "transacts any business within [New York State]" or that he "contracts anywhere to supply goods or services in the state" (CPLR 302[a][1]). Indeed, it is uncontroverted that defendant is licensed to practice medicine in Connecticut, not New York. Although defendant is associated with a Connecticut facility

(Split Rock) whose website displays a New York office and telephone number, Split Rock and defendant maintain separate websites. Further, the listing of a New York office and telephone number on a website, without more, is insufficient to confer personal jurisdiction (*see Paterno v Laser Spine Inst.*, __ NY3d __, 2014 NY Slip Op 08054, *5-6 [2014]; *Arouh v Budget Leasing, Inc.*, 63 AD3d 506 [1st Dept 2009]). The Split Rock website "merely impart[s] information without permitting a business transaction" (*Paterno*, __ NY3d at __, 2014 NY Slip Op 08054, *6). Further, defendant averred without contradiction that the New York address and telephone number on the website refers to his associate Dr. Neil Gordon, who is licensed to (and does) practice medicine in New York. That defendant's associate is a licensed New York physician does not confer jurisdiction over defendant (*see Barrett v Toroyan*, 28 AD3d 331, 333 [1st Dept 2006]).

Personal jurisdiction does not exist pursuant to CPLR 302(a)(3)(i), as plaintiff was injured outside New York State. In a medical malpractice action, for the purposes of the long-arm statute, "the injury occurs where the malpractice took place" (*O'Brien v Hackensack Univ. Med. Ctr.*, 305 AD2d 199, 202 [1st Dept 2003]), and it is undisputed that the alleged malpractice

here occurred in Connecticut.

Discovery on the jurisdictional issue is not warranted, as plaintiff has failed to make a "sufficient start" in demonstrating the existence of long-arm jurisdiction over defendant (*cf. Peterson v Spartan Indus.*, 33 NY2d 463, 467 [1974]; *see SunLight Gen. Capital LLC v CJS Invs. Inc.*, 114 AD3d 521, 522 [1st Dept 2014]).

Based on the foregoing determination, it is unnecessary to determine whether New York is a convenient forum.

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

ENTERED: JANUARY 20, 2015

CLERK

Tom, J.P., Saxe, Feinman, Clark, Kapnick, JJ.

13974 Anonymous, Index 157590/13
Plaintiff-Appellant,

-against-

William Lerner,
Defendant-Respondent.

_____

Levine & Blit, PLLC, New York (Matthew J. Blit of counsel), for appellant.

Cohen Clair Lans Greifer & Thorpe LLP, New York (Robert S. Cohen of counsel), for respondent.

_____

Order, Supreme Court, New York County (Debra A. James, J.), entered March 12, 2014, which granted defendant's motion to compel plaintiff to be named in the action, unanimously affirmed, without costs.

While plaintiff's allegations concerning the negligent and fraudulent transmission of genital herpes, a sexually transmitted disease, implicates a substantial privacy right (*cf. "J. Doe No. 1" v CBS Broadcasting, Inc.*, 24 AD3d 215 [1st Dept 2005]), "the trial court should . . . exercise its discretion to limit the public nature of judicial proceedings 'sparingly' and 'then, only when unusual circumstances necessitate it'" (*Anonymous v Anonymous*, 27 AD3d 356, 361 [1st Dept 2006] [citation omitted]).

The determination of whether to allow a plaintiff to proceed

anonymously requires the court to "use its discretion in balancing plaintiffs privacy interest against the presumption in favor of open trials and against any potential prejudice to defendant" (*Stevens v Brown,* 2012 NY Slip Op 31823[U], **9 [Sup Ct, NY County 2012], citing *Doe v Szul Jewelry, Inc.*, 2008 NY Slip Op 31382[U], 15 [Sup Ct, NY County May 13, 2008]).

The trial court did not improvidently exercise its discretion in finding that plaintiff's privacy concerns were outweighed by, inter alia, the fact that the action was brought against an individual defendant, relates to his private life and reputation, and puts plaintiff's credibility at issue (*see Doe v Shakur*, 164 FRD 359, 361 at n 1 [SD NY 1996]; *cf. Doe v Szul Jewelry, Inc.,* 2008 NY Slip Op 31382[U][Sup Ct, NY County 2008]), and undermined by her reporting her story to the media before serving defendant with process (*see Doe v Kidd*, 19 Misc3d 782, 789 [Sup Ct, NY County 2008]). "[C]laims of public humiliation and embarrassment . . . are not sufficient grounds for allowing a

plaintiff . . . to proceed anonymously" (*Doe v Shakur*, 164 FRD at 362; *Doe v New York Univ.*, 6 Misc3d 866, 879 [Sup Ct, NY County 2004]; *cf. Doe v Kolko*, 242 FRD 193 [ED NY 2006]).

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

ENTERED: JANUARY 20, 2015

CLERK

Tom, J.P., Saxe, Feinman, Clark, Kapnick, JJ.

13975 The People of the State of New York, SCI. 2411/12
Respondent,

-against-

Mark A. Navarro,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Marianne Stracquadanio of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Barbara F. Newman, J.), rendered May 2, 2013, as amended June 11, 2013, convicting defendant, upon his plea of guilty, of attempted assault in the first degree, and sentencing him, as a second violent felony offender, to a term of seven years, unanimously affirmed.

The court properly permitted defendant to waive indictment after the grand jury had voted a true bill but before the indictment was filed (*see People v Floyd*, 177 AD2d 310, 312 [1st Dept 1991], *lv denied* 79 NY2d 947 [1992]).

The court properly exercised its discretion when, on the basis of the written submissions, it denied defendant's motion to withdraw his plea. "When a defendant moves to withdraw a guilty plea, the nature and extent of the fact-finding inquiry rest

largely in the discretion of the Judge to whom the motion is made and a hearing will be granted only in rare instances" (*People v Brown*, 14 NY3d 113, 116 [2010] [internal quotation marks omitted]). Neither defendant nor his counsel sought to amplify the written submissions, and no hearing was requested. The record establishes the voluntariness of the plea. Although defendant attacked the performance of his original retained counsel, he was represented by new counsel at the time he pleaded guilty, as well as on the plea withdrawal motion, and defendant has not established that the first attorney's alleged deficiencies impaired the voluntariness of the plea. Moreover, there is no reason to believe that the alleged pressure by the first attorney and by defendant's family members was anything more than sound advice to defendant to reduce his sentencing exposure.

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

ENTERED: JANUARY 20, 2015

CLERK

Tom, J.P., Saxe, Feinman, Clark, Kapnick, JJ.

13977 In re Jayden S.,

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

Kim C.,
Respondent-Appellant,

Edwin Gould Services for
Children and Families,
Petitioner-Respondent.

_____

Daniel R. Katz, New York, for appellant.

John R. Eyerman, New York, for respondent.

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

_____

Order, Family Court, New York County (Jane Pearl, J.), entered on or about September 30, 2013, which, upon a fact-finding determination that respondent mother had permanently neglected the subject child, terminated her parental rights and committed custody and guardianship of the child to petitioner agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

The finding of permanent neglect is supported by clear and convincing evidence of respondent's failure to overcome her long

term drug addiction. Although respondent participated in at least three detoxification programs, she repeatedly relapsed (*see Matter of Jaileen X.M. [Annette M.]*, 111 AD3d 502 [1st Dept 2013], *lv denied* 22 NY3d 859 [2014]). In addition, her addiction caused her to be drowsy at numerous visits with the child and her testimony establishes that she fails to appreciate how her addiction adversely affects him.

The court properly determined that it is in the child's best interests to terminate respondent's parental rights and free him for adoption (*Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). Since shortly after birth, he has resided in the home of his pre-adoptive foster parents, who love him and want to adopt him. The child has never lived with respondent, and after four years, he should not have to wait any longer to obtain permanency (*see Matter of Jenna Nicole B [Jennifer Nicole B.]*, 118 AD3d 628 [1st Dept 2014]).

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

ENTERED: JANUARY 20, 2015

CLERK

Tom J.P., Saxe, Feinman, Clark, Kapnick, JJ.

13978 The People of the State of New York, Ind. 1894/97
Respondent,

-against-

Larry Rodriguez,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Jordan K. Hummel of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Seth L. Marvin, J.), entered on or about November 20, 2013, which adjudicated defendant a level three sexually violent predicate sex offender, pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly exercised its discretion in declining to grant a downward departure (*see People v Gillotti*, 23 NY3d 841, 861 [2014]). The mitigating factors cited by defendant, including his age, did not warrant a departure when viewed in

light of defendant's extensive history of recidivism and the violent nature of the underlying crimes.

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

ENTERED: JANUARY 20, 2015

CLERK

Tom, J.P., Saxe, Feinman, Clark, Kapnick, JJ.

13979 The People of the State of New York, Ind. 4903/12
Respondent,

-against-

Dario Wynerman,
Defendant-Appellant.

_____

Gary A. Farrell, New York, for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Dana Poole 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 (Edward J. McLaughlin, J.), rendered on or about June 25, 2013,

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 20, 2015

CLERK

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

Tom, J.P., Saxe, Feinman, Clark, Kapnick, JJ.

13980-
13981-
13982 CF HY LLC,
Plaintiff-Respondent,

-against-

Hudson Yards LLC, et al.,
Defendants,

Baruch Singer,
Defendant-Appellant.

Index 601579/08

_____

Katsky Korins, New York (Joel S. Weiss of counsel), for appellant.

Sills Cummis & Gross P.C., New York (Mitchell D. Haddad and Jessica R. Brand of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered July 10, 2014, in favor of plaintiff in the total amount of $25,764,306.96, unanimously affirmed, with costs. Appeals from orders, same court and Justice, entered on or about December 4, 2013 and January 14, 2014, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The court's determination of the mortgaged property's fair market value was within the range of the conflicting expert testimony and was otherwise supported by the evidence presented

at the hearing (*see generally Trustco Bank v Gardner*, 274 AD2d 873 [3d Dept 2000]). The court properly considered the purchase price of the property after the foreclosure sale (*see Plaza Hotel Assoc. v Wellington Assoc.*, 37 NY2d 273, 277 [1975]).

The court providently exercised its discretion in denying defendant-appellant's request for an adjournment of the hearing until after he testified as a party witness in a separate trial (*see Pezhman v Department of Educ. of the City of N.Y.*, 113 AD3d 417, 417 [1st Dept 2014], *lv denied* 22 NY3d 863 [2014], *cert denied* __ US __, 134 S Ct 2303 [2014]).

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

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

ENTERED: JANUARY 20, 2015

CLERK

Tom, J.P., Saxe, Feinman, Clark, Kapnick, JJ.

13983 The People of the State of New York, Ind. 3125/12
Respondent,

-against-

Matthew Miller,
Defendant-Appellant.

_____

Scott A. Rosenberg, The Legal Aid Society, New York (Jeffrey Dellheim of counsel), for appellant.

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

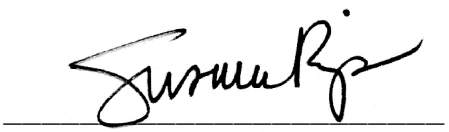
_____

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 on or about March 28, 2013,

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 20, 2015



CLERK

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

Tom, J.P., Saxe, Feinman, Clark, Kapnick, JJ.

13984 The People of the State of New York, Ind. 1050/07
Respondent,

-against-

Raymundo Garcia,
Defendant-Appellant.

_____

Scott A. Rosenberg, The Legal Aid Society, New York (Harold V. Ferguson, Jr. of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Jesse A. Townsend of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered April 29, 2011, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of eight years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility. Defendant responded to the undercover buyer's inquiry about purchasing drugs, ascertained the amount of drugs the buyer wanted, brought the buyer to the codefendant, vouched for the buyer, took cash from the buyer, transferred the cash to

the codefendant, obtained drugs from the codefendant and gave them to the buyer. Based on this evidence, the jury properly found that defendant participated in the drug sale, by, at the very least, acting as a steerer (*see e.g. People v Felix*, 277 AD3d 131 [1st Dept 2000], *lv denied* 96 NY2d 734 [2001]; *People v Williams*, 266 AD2d 97 [1st Dept 1999], *lv denied* 94 NY2d 879 [2000]), as well as by actually exchanging drugs for money. To the extent that defendant's weight of the evidence argument can be construed as raising an agency defense, we note that no such defense was raised at trial or submitted to the jury. This defense may not be raised for the first time on appeal (*People v Wright*, 288 AD2d 28 [1st Dept 2001], *lv denied* 97 NY2d 735 [2002]), and we find it unavailing in any event.

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 20, 2015

CLERK

Tom, J.P., Saxe, Feinman, Clark, Kapnick, JJ.

13985 The People of the State of New York, Dkt. 68075C/09
Respondent,

-against-

Jose Marin,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Frances A. Gallagher of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Lori Ann Farrington of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Colleen D. Duffy, J.), rendered April 12, 2012, convicting defendant, after a nonjury trial, of attempted assault in the third degree and harassment in the second degree, and sentencing him to a term of three months of intermittent imprisonment to be served on weekends, unanimously affirmed.

The verdict was supported by legally sufficient evidence and was not against the weight of the evidence (see *People v Danielson*, 9 NY3d 342, 348-349 [2007]). The court found that the

minor discrepancies in the testimony of a police witness did not undermine the officer's credibility, and we find no reason to disturb that determination. The evidence established the requisite intent for each conviction.

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

ENTERED: JANUARY 20, 2015

CLERK

Tom, J.P., Saxe, Feinman, Clark, Kapnick, JJ.

13987 The People of the State of New York, Ind. 3010/12
Respondent,

-against-

Travis Brown,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Allen J. Vickey 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 on or about March 27, 2013,

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 20, 2015

CLERK

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

Tom, J.P., Saxe, Feinman, Clark, Kapnick, JJ.

13988 Denise Coley, Index 305176/11
Plaintiff-Respondent,

-against-

New York City Housing Authority,
Defendant-Appellant.

_____

Cullen and Dykman, New York (Joseph C. Fegan of counsel), for appellant.

Segal & Lax, New York (Patrick D. Gatti of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about January 17, 2014 which, insofar as appealed from as limited by the briefs, denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant failed to establish its entitlement to judgment as a matter of law in this action where plaintiff was injured when she slipped and fell on ice in defendant's parking lot. Issues of fact exist concerning the sufficiency of defendant's snow and

ice removal efforts, whether such efforts could have created or exacerbated the icy condition that caused plaintiff's fall, and whether defendant had notice of the condition (*see Sprague v Profoods Rest. Supply, LLC*, 77 AD3d 585 [1st Dept 2010]; *Lebron v Napa Realty Corp.*, 65 AD3d 436 [1st Dept 2009])

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

ENTERED: JANUARY 20, 2015

CLERK

Tom, J.P., Saxe, Feinman, Clark, Kapnick, JJ.

13990 The People of the State of New York, Ind. 3971/08
Respondent,

-against-

Wayne B.,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (William B. Carney of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Lori Ann Farrington of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Barbara F. Newman, J.), rendered April 4, 2011, convicting defendant, after a jury trial, of assault in the third degree, adjudicating him a youthful offender, and sentencing him to a term of 45 days, concurrent with 3 years' probation, unanimously affirmed.

The verdict was based on legally sufficient evidence. The evidence supports an inference that the victim's injuries were more than mere "petty slaps, shoves, kicks and the like" (*Matter of Philip A.*, 49 NY2d 198, 200 [1980]), and that they caused "more than slight or trivial pain" (*People v Chiddick*, 8 NY3d 445, 447 [2007]; *see also People v Guidice*, 83 NY2d 630, 636 [1994]). The victim was punched in the head and face, causing pain and swelling to his left eyebrow and right cheek, which took

a week to subside, and required treatment with topical ointments (*see e.g. People v Mercado*, 94 AD3d 502 [1st Dept 2012], *lv denied* 19 NY3d 999 [2012]).

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

ENTERED: JANUARY 20, 2015

CLERK

Tom, J.P., Saxe, Feinman, Clark, Kapnick, JJ.

13991N Cheniecha S. Francis, Index 303268/13
Plaintiff-Appellant,

-against-

Midtown Express, LLC,
Defendant-Respondent,

Patrick E. Francis, et al.,
Defendants.

_____

Mitchell Dranow, Sea Cliff, for appellant.

Messner Reeves, LLP, New York (Deborah J. Denenberg of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered February 20, 2014, which granted defendant Midtown Express, LLC's motion to change venue to Westchester County pursuant to CPLR 510(3), unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff's designation of Bronx County as the venue for this action was proper based on the residence of defendant Francis, whose address is set forth on the face of the summons (CPLR 503[a]). Although the summons incorrectly states that venue is based on plaintiff's residence, which is in Westchester County, that technical mistake in complying with the requirements of CPLR 305(a) may be disregarded since the moving defendant made

no showing of prejudice (*see* CPLR 305[c]; CPLR 2101[f]; *Cruz v New York City Hous. Auth.*, 269 AD2d 108 [1st Dept 2000]). Nor did the moving defendant make a showing of the convenience of material witnesses that would warrant a discretionary change of venue (CPLR 510[3]; *see e.g. Seefeldt v Incledon*, 261 AD2d 925, 926 [4th Dept 1999]).

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

ENTERED: JANUARY 20, 2015

CLERK