SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 31, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Friedman, J.P., Andrias, Gische, Kapnick, JJ.

16417 Asbestos Workers Philadelphia Pension Fund,
Plaintiff,

Mark Svechin, etc.,
Plaintiff-Appellant,

-against-

James A. Bell, et al.,
Defendants-Respondents,

William H. Gary, III,
Defendant,

JPMorgan Chase & Company,
Nominal Defendant-Respondent.

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Barrack, Rodos, & Bacine, New York (Alexander Arnold Gershon of counsel), for appellant.

Shearman & Sterling LLP, New York (Stuart J. Baskin of counsel), for James A. Bell, Crandall C. Bowles, Stephen B. Burke, David M. Cote, James S. Crown, Ellen V. Futter, Laban P. Jackson, Jr., David C. Novak, Lee R. Raymond, and William C. Weldon, respondents.

Debevoise & Plimpton LLP, New York (Gary W. Kubek of counsel), for James Dimon, Michael J. Cavanagh, Ina R. Drew and JPMorgan Chase & Company, respondents.

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Judgment, Supreme Court, New York County (Charles E. Ramos, J.), entered June 13, 2014, dismissing the complaint, unanimously affirmed, with costs.

This derivative action was brought by both an institutional and an individual shareholder of JP Morgan Chase & Co. (JPMorgan), without any pre-suit demand having been made. The named defendants are 11 current and former members of JPMorgan's Board of Directors and two former officers. The claims arise out of JPMorgan's securitization and sale of its subprime and other troubled residential mortgages. Plaintiffs' claims are mainly based on allegations that defendants were aware that these mortgages would fail and that they authorized the sale of securities holding these mortgages (RMBS) as a means of removing toxic assets from JPMorgan's balance sheet without sufficiently accounting for reserves. Plaintiffs allege that the board's actions were intended to make JP Morgan appear more financially secure than it actually was in the short run, all the while knowing that the substantial losses (in the billions of dollars) would subsequently be realized by JPMorgan, based upon repurchase obligations and other lawsuits by the government and RMBS investors. Plaintiffs also claim that in January 2007 the board improperly abdicated its obligation of board oversight by

authorizing a management committee to sell off JPMorgan's toxic RMBS without any further action by the board. That authorization was subsequently extended two additional times.

On this appeal the only issue is whether Supreme Court correctly dismissed the action on the ground that plaintiffs neither made a pre-suit demand on the board nor pleaded facts sufficient to support a claim of demand futility. For the reasons set forth below, we find that the motion court correctly determined that plaintiff was not excused from making a pre-suit demand on the board and, consequently, that the complaint was properly dismissed.

Preliminarily we reject plaintiffs' argument that to the extent their claims are premised on an abdication of responsibility, it is a direct claim for which no pre-suit demand is required. Here, because plaintiffs could not prevail on their claims without also showing injury to the corporation, the claims are derivative not direct, implicating the law of pre-suit demands (*see Tooley v Donaldson Lufkin & Jenrette, Inc.*, 845 A2d 1031 [Del 2004]).

Since JPMorgan is incorporated under Delaware law, Delaware law applies to plaintiff's claims and the issue of demand futility (Del Ch Ct rul 23.1; *Wandel v Dimon*, 135 AD3d 515 [1st Dept 2016]; *see e.g. Siegel v J.P. Morgan Chase & Co.*, 103 AD3d

598 [1st Dept 2013], *lv denied* 21 NY3d 856 [2013]; *In re Citigroup Inc. Shareholder Derivative Litig.*, 964 A2d 106, 120 [Del Ch 2009]). In Delaware, as a condition precedent to a plaintiff bringing a shareholder derivative action on behalf of a corporation, the plaintiff must make a pre-suit demand that the board pursue the contemplated action (*see e.g. Simon v Becherer*, 7 AD3d 66 [1st Dept 2004]). A pre-suit demand upon a board may be excused, however, if such a demand would have been "futile." Where the underlying lawsuit seeks to challenge affirmative board action, a two prong test is applied in assessing the futility of such a demand (*Aronson v Lewis*, 473 A2d 805, 814 [Del 1984], *overruled in part on other grounds Brehm v Eisner*, 746 A2d 244 [Del 2000]). The *Aronson* test is "whether, under the particularized facts alleged, a reasonable doubt is created that: (1) the directors are disinterested and independent [or] (2) the challenged transaction was otherwise the product of a valid exercise of business judgment" (*Aronson v Lewis*, 473 A2d at 814). Since this test is in the disjunctive, if either prong is satisfied, pre-suit demand is excused (*Brehm v Eisner*, 746 A2d at 256). On the other hand, where a complaint alleges board inaction, demand futility can be established by particularized facts creating a reasonable doubt that at the time the complaint was filed, the board could not have properly exercised its

independent and disinterested business judgment in responding to the demand (*In re Goldman Sachs Group, Inc. Shareholder Litig.*, 2011 WL 4826104, 2011 Del Ch LEXIS 151 [Del Ch 2011], *affd sub nom. Southeastern Penn. Transp. Auth. v Blankfein*, 44 A3d 922 [Del 2012]; *Rales v Blasband*, 634 A2d 927 [Del 1993])(Rales test). Under either standard, plaintiffs have not satisfied the requirements of demand futility.

Plaintiffs did not plead with particularity facts establishing that a majority of the board at the time they commenced this action was interested or lacked independence. With the exception of Dimon, who was both a director and officer of JPMorgan, the board members were all outside directors. Independence requires that a director's decision be based on the merits of the subject before the board rather than extraneous considerations or influences *(see In re JP Morgan Chase & Co. Shareholder Litig.,* 906 A2d 808, 821 [Del Ch Ct 2005], *affd* 906 A2d 766 [Del 2006]). No claim is made that any of the outside directors stood on both sides of the transactions at issue or that any of them stood to receive any personal financial gain. Rather the claim that the individual board members lack independence is based on plaintiffs' argument that they will likely face individual liability for their acts. The fact that a director will be called upon to consider whether to sue himself

or herself does not, in itself, warrant a conclusion that he or she lacks independence (*see e.g. Rales v Blasband*, 634 A2d at 936). The alleged facts must, instead, support a conclusion that the potential for liability rises to the level of substantial likelihood (*In re Citigroup Inc. Shareholder Derivative Litig.*, 964 A2d at 121). Where, as here, the corporate charter provides that directors are exculpated from liability to the extent authorized by Delaware Code Annotated, title 8, § 102(b)(7), the likelihood of liability is significantly lessened (*Wandel v Dimon*, 135 AD3d at 516-517). Liability ensues only for fraudulent, illegal or bad faith conduct and demand futility requires particularized allegations that the board actions were made with scienter, that is with actual knowledge that its conduct was legally improper (*see In re Goldman Sachs Group, Inc. Shareholder Litig.*, 2011 WL 4826104, *18, 2011 Del Ch LEXIS 151, *58-59 ; *Security Police & Fire Professionals of Amer. Retirement Fund v Mack*, 93 AD3d 562 [1st Dept 2012]). Although plaintiffs state that the board's actions were made in bad faith, the facts pleaded do not support such a conclusion. In fact, Delaware courts have rejected similar arguments in connection with demand futility on claims involving alleged improprieties in connection with subprime mortgages and financial institutions (*see In re Goldman Sachs Group, Inc. Shareholder Litig.*, 2011 WL

4826104, *19-20, 2011 Del Ch LEXIS 151, *64-67; *In re Citigroup Inc. Shareholder Derivative Litig.*, 964 A2d at 130-13; *see Wandel v Dimon*, 135 AD3d at 517-518). We likewise reject plaintiffs' argument.

The second prong of *Aronson*, requiring particularized allegations creating reasonable doubt that the challenged transaction was not the product of a valid exercise of business judgment, also was not satisfied by plaintiffs. Plaintiffs contend that the board's action, including the adoption of the January 2007 resolution delegating authority to a management committee, was not a valid exercise of business judgment. However, this factual assertion examines the board's course of action in hindsight and hinges on certain warning signs that plaintiff alleges the board failed to heed, including some losses that reverted back to JPMorgan's balance sheet by September 2008. Delaware law presumes that in making a business decision the board of directors acts in good faith and in the honest belief that the action is taken in the best interests of the company (*In re Walt Disney Co. Derivative Litig.*, 906 A2d 27, 52 [Del 2006]). In order to satisfy the second prong of the *Aronson* test, plaintiffs are required to plead particularized facts sufficient to raise a reason to doubt that [1] the action was taken honestly and in good faith or [2] the board was adequately informed in

making the decision (*JP Morgan Chase & Co., Shareholder Litig.*, 906 A2d at 824). These facts do not rebut the presumption of regularity of the board's decision making process (*Brehm v Eisner*, 746 A2d at 259). Although risky, the conduct plaintiff challenges, the board's authorization of the securitization and sale of investments, involves "legal business decisions that were firmly within management's judgment to pursue" (*Goldman Sachs Group, Inc. Shareholder Litig.*, 2011 WL 4826104 at *20, 2011 Del Ch LEXIS 151 at *65; *see e.g. J.P. Morgan*, at 820, 824). The fact that investors later sued or made repurchase demands does not raise a reasonable doubt that the decision to engage in such transactions was not a valid exercise of business judgment (*see In re Goldman Sachs* Group Shareholder Litig., 2011 WL 4826104 *20, 2011 Del Ch LEXIS 151 *66). The Delaware courts have rejected similar allegations involving subprime mortgages and resulting losses (*see In re Goldman Sach Group Shareholder Litig*, 2011 WL 4826104, *19-20, 2011 Del Ch LEXIS 151, *64-67; *In re Citigroup Inc. Shareholder Deriv. Litig.*, 964 A2d at 130-132). Thus, neither prong of the *Aronson* test is satisfied and the failure to make a pre-suit demand is not excusable on that basis.

Even if plaintiffs' claims regarding the board abdication constitute board inaction, implicating application of the alternative *Rales* test for demand futility, it fails. Where the

claim is that the board directors consciously disregarded a known duty to act, in dereliction of their duties, the burden on the plaintiff to plead particularized and provable facts is even greater. This claim, sometimes referred to as "a breach of duty of care" or a "lack of oversight" claim is "possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment" (*see In re Caremark Intl., Inc. Derivative Litig.*, 698 A2d 959, 967 [Del Ch 1996]) The test of whether a pre-suit demand is excused in these situations is whether, at of the time the complaint was filed, the board of directors could not have properly exercised its independent and disinterested business judgment in responding to a demand to act (*Wandel v Dimon*, 135 AD3d at 517, citing *Rales v Blasband*, 634 A2d at 934).

To adequately plead a lack of oversight claim, a plaintiff must set forth particularized facts that there was a "sustained or systematic failure" by the board to exercise oversight, demonstrating "the lack of good faith that is a necessary condition to liability" (*In re Caremark*, at 971). Plaintiffs' claim that the individual directors are responsible for corporate losses because they failed to monitor corporate operations is insufficient. As under the *Aronson* test, the allegations must be that a majority of the board lacked independence due to a

"substantial likelihood," not just a "mere threat" of individual liability (*Wandel v Dimon*, 135 AD2d at 517). Thus, plaintiffs' allegations regarding the potential of board member personal liability fails for the same reason it fails under the *Aronson* test.

Under these circumstances, a pre-suit demand is not excusable and Supreme Court was correct in granting defendants' motion to dismiss the complaint.

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

ENTERED: MARCH 31, 2016

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Acosta, J.P., Renwick, Andrias, Moskowitz, JJ.

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Aozora Bank, Ltd.,
Plaintiff-Appellant,

-against-

Deutsche Bank Securities Inc.,
et al.,
Defendants-Respondents.

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Kirby McInerney LLP, New York (Andrew M. McNeela of counsel), for appellant.

Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (Jessica S. Carey of counsel), for respondents.

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Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered January 21, 2015, which, to the extent appealed from as limited by the briefs, granted defendants' motion to dismiss the fraud claims, and order, same court and Justice, entered March 31, 2015, which, to the extent appealed from, denied plaintiff's motion for leave to file an amended complaint, unanimously affirmed.

This case is yet another action arising from the worldwide financial crisis that began in 2007. Plaintiff Aozora Bank, Ltd. is a Japanese commercial bank with its principal offices in

Tokyo.[1] Aozora invested in complex financial products backed by mortgages, including collateralized debt obligations (CDOs).[2]

In December 2006, Aozora invested in a CDO called Blue Edge, a $1.25 billion CDO that included residential mortgage-backed securities (RMBS). Defendants Deutsche Bank Securities Inc. and Deutsche Bank AG (together, Deutsche Bank or defendants) structured and sold the CDO; Aozora bought $30 million of the CDO's Class A-3 tranche. Aozora alleges that although Deutsche Bank selected the RMBS that were to be included in the CDO, Deutsche Bank actually held negative views about those securities.

For example, Aozora alleges, Deutsche Bank's global head of CDOs, Greg Lippmann, made numerous disparaging comments internally about the RMBS included in Blue Edge, referring to them as, among other things, "weak" and "horrible." Similarly, defendants' internal emails allegedly show that Lippman and other Deutsche Bank insiders knew, and were sometimes pressured, not to disclose their negative views on RMBS in order to promote client

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[1] The facts are taken from the complaint, which must be accepted as true for the purposes of the CPLR 3211 motion.

[2] According to statements by Aozora's counsel at oral argument, Azora had a total of $430 million in CDO investments by the end of 2007.

interest in defendants' CDO products. The underlying assets included in Blue Edge were subject to Deutsche Bank's approval, and Deutsche Bank generally approved third-party collateral manager selections for Deutsche Bank-arranged CDOs, even where they included the very same RMBS that defendants internally disparaged.

Beginning in late 2005, Deutsche Bank began accumulating a short position with respect to subprime RMBS in Blue Edge, and urged some of its non-CDO investor clients to do the same. According to Aozora, Deutsche Bank sold credit default swap protection on RMBS to their hedge fund clients so as to hedge those clients' exposure to the underperforming RMBS, while shifting the long position – in this case, the riskier position – to Deutsche Bank-arranged CDOs such as Blue Edge.

In connection with marketing, selling, and offering Blue Edge to investors, Deutsche Bank created, drafted, and disseminated various marketing and offering documents; these documents allegedly contained material misrepresentations, misleading statements, and omissions. Specifically, Aozora alleges, the marketing and offering documents did not disclose defendants' negative views of Blue Edge's underlying RMBS assets. The marketing and offering documents also indicated that Deutsche

Bank would hold Blue Edge's collateral portfolio on its own books until closing of the CDO, thereby ensuring Deutsche Bank's selection of top-quality collateral. However, Deutsche Bank was allegedly engaged in decreasing its own RMBS exposure at the same time it was encouraging clients to invest in CDOs. Further, the marketing and offering documents indicate that at least 66.7% of Blue Edge's collateral portfolio would be prime RMBS (that is, lower risk), and less than 10% would consist of subprime RMBS (that is, higher risk). However, Aozora alleges that Blue Edge's asset pool was far riskier than Deutsche Bank represented, and that only 27% of the collateral assets were prime RMBS, while 47.6% of the portfolio consisted of riskier subprime, "midprime," and "Alt-A" RMBS.

Aozora filed a summons with notice on June 18, 2013. In its complaint, filed January 7, 2014, Aozora asserted causes of action for common law fraud, aiding and abetting fraud, breach of the implied covenant of good faith and fair dealing, negligent misrepresentation, and unjust enrichment.

With respect to the claims for common law fraud and negligent misrepresentation, Aozora asserted that it reasonably relied on Deutsche Bank's misrepresentations and omissions. Specifically, Aozora alleged, it conducted its own due diligence

and risk analysis, scrutinizing, among other things, Blue Edge's collateral portfolio and its structural protections against collateral losses. Aozora stated that it also reviewed the marketing materials and concluded that the investment, as represented by Deutsche Bank, was appropriate. However, Aozora insisted, it did not know, and could not have known, that the marketing materials and offering documents contained material misrepresentations and omissions, that Blue Edge's portfolio was filled with RMBS that defendants internally disparaged, or that Deutsche Bank had understated the degree to which Blue Edge was collateralized by higher-risk, lower-quality assets. Aozora alleged that absent Deutsche Bank's misconduct, it never would have made its investment in Blue Edge, and that Deutsche Bank's misconduct caused Aozora to suffer a 100% principal loss on its investment.

Deutsche Bank moved to dismiss the complaint under CPLR 3211(a)(5) and (7). On the motion, Deutsche Bank argued, among other things, that all of Aozora's claims were time-barred because Aozora filed its action more than six years after it bought Blue Edge and more than two years after it should have discovered the alleged fraud in the exercise of reasonable diligence. To support this argument, Deutsche Bank attached

details of numerous publications, testimony, and lawsuits regarding the financial crisis; the earliest of this material was dated from March 2007 – nearly seven years before Aozora commenced this action in January 2014. Indeed, Deutsche Bank noted, beginning in early 2008 it was well publicized that banks, including Deutsche Bank, were under investigation for their involvement in creating defective mortgage products. Deutsche Bank also attached excerpts from an April 13, 2011 report of the Permanent Subcommittee on Investigations of the United States Senate entitled "Wall Street and the Financial Crisis: Anatomy of a Financial Collapse" (Senate Report). Finally, Deutsche Bank attached proof that Moody's had downgraded Blue Edge to junk status in June 2008. All this information, Deutsche Bank asserted, put Aozora on notice of its claims years before it commenced this action.

In opposition to the motion to dismiss, Aozora submitted the affidavit of the general manager of its international division in Tokyo, Justin Hirsch (Hirsch affidavit). In his affidavit, Hirsch noted that his averments were not based on his personal knowledge, but on his review of Aozora's files and records. Hirsch stated that Aozora did not arrange, originate, or structure any CDOs, but rather, invested in CDOs in the United

States. Moreover, Hirsch noted, plaintiff's office in New York was small, with never more than four employees during the relevant period. The New York office primarily facilitated client services in the United States; its employees were not structured finance professionals, and were not involved in plaintiff's decision to invest in structured finance products.

According to Hirsch, when Aozora began to experience CDO losses, it believed those losses were the result of the United States subprime mortgage crisis. However, in September 2012, a former employee of Aozora contacted the bank, stating that several other banks had recently brought successful claims against structured finance arrangers and inquiring whether Aozora wanted its portfolio reviewed to determine whether it might have viable claims.

Thereafter, Hirsch stated, as part of Aozora's due diligence efforts in November and December 2012, it spoke with several United States-based law firms regarding its potential claims; in March 2013, Aozora retained its current counsel. After reviewing Aozora's investments, counsel informed Aozora that Deutsche Bank had been discussed in the April 2011 Senate Report. While the Senate Report did not mention the Blue Edge CDO by name, Hirsch asserted that Aozora's counsel "analyzed the Blue Edge CDO's

asset portfolio, discovering that certain of the [RMBS] that were contained in the Blue Edge CDO portfolio were mentioned in the Senate Report." According to Hirsch, it was then that Aozora realized that it might have actionable claims against defendants, and commenced this action.

The IAS court found that Aozora's fraud claims were untimely under the two-year discovery rule. In so doing, the court concluded that Aozora was on inquiry notice of the alleged fraud by no later than April 2011, when the Senate Report was released. Indeed, the court noted, the Senate investigation of the financial crisis began in April 2010.

Further, the court found, Aozora failed to raise an issue of fact as to whether it had exercised reasonable diligence in an effort to discover its fraud claims. In that regard, the court noted that the information publicly available by 2010 should have alerted Aozora that something was amiss with its investment. Thus, the court concluded, Aozora should have begun an investigation well before it actually did. The court also specifically noted that the Hirsch affidavit failed to raise a triable issue of fact as to whether, given the circumstances surrounding the investment and the financial crisis, Aozora had

engaged in reasonable diligence.[3]

The parties do not dispute that plaintiff's fraud causes of action were not timely under New York's six-year limitations period and, to be timely, must have been commenced within two years from the time plaintiff discovered the fraud, or with reasonable diligence could have discovered it (CPLR 213[8]).

As this Court has held, "Where the circumstances are such as to suggest to a person of ordinary intelligence the probability that he has been defrauded, a duty of inquiry arises, and if he omits that inquiry when it would have developed the truth, and shuts his eyes to the facts which call for investigation, knowledge of the fraud will be imputed to him" (*CIFG Assur. N. Am., Inc. v Credit Suisse Sec. (USA) LLC*, 128 AD3d 607, 608 [1st Dept 2015] [internal quotation marks omitted]*; see also Gutkin v Siegal*, 85 AD3d 687, 688 [1st Dept 2011]["[t]he test as to when fraud should with reasonable diligence have been discovered is an objective one"] [internal quotation marks omitted]). Thus, public reports and lawsuits of alleged fraud are sufficient to put a plaintiff on inquiry notice of fraud (*see CIFG Assur. N.*

[3] On February 17, 2015, Aozora moved to reargue the IAS court's dismissal of its fraud claims, or for leave to file an amended complaint. On March 31, 2015, the IAS court denied that motion.

Am., 128 AD3d at 608; *Aldrich v Marsh & McLennan Cos., Inc.*, 52 AD3d 435, 436 [1st Dept 2008], *lv denied* 11 NY3d 716 [2009]). Similarly, losses that a plaintiff sustains may put it on notice of possible fraud (*see Ghandour v Shearson Lehman Bros.*, 213 AD2d 304, 306 [1st Dept 1995], *lv denied* 86 NY2d 710 [1995]).

Accordingly, Deutsche Bank made a prima facie case that Aozora was on inquiry notice of its fraud claims before June 18, 2011 (that is, two years before it filed the summons with notice). The burden then shifted to Aozora to establish that, even if it had exercised reasonable diligence, it could not have discovered the basis for its claims before that date.

But Aozora failed to carry its burden, as there was a wealth of public information that should have put it on inquiry notice of the alleged fraud. First, in 2008, Blue Edge was downgraded to junk status and plaintiff incurred substantial losses on its investment. Second, there was considerable publicity about the subprime mortgage crisis from news reports, investor lawsuits, and government investigations well before June 2011. Indeed, by April 2011, defendants had been sued multiple times in connection with RMBS and CDOs, including in connection with a Deutsche Bank CDO known as Gemstone, which plaintiff discusses in its complaint as involving wrongdoing by defendants "identical" to that

involved with respect to Blue Edge (*see Ghandour*, 213 AD2d at 304, 306 [the plaintiff was on notice where his brother made the same investments and commenced a timely fraud action six years earlier]).

Third, one of the most significant sources of public information putting plaintiff on notice of its fraud claims is the Senate Report and its associated emails, which actually form the centerpiece of plaintiff's complaint. In fact, the Senate Report contains a 45-page section on Deutsche Bank entitled "Running the CDO Machine: Case Study of Deutsche Bank." Taken with all the other information available in the public domain, the Senate Report is more than sufficient to have placed Aozora on inquiry notice of possible fraud by April 2011 at the latest (*see Aldrich*, 52 AD3d at 436; *cf. CSAM Capital, Inc. v Lauder*, 67 AD3d 149 [1st Dept 2009]). That Blue Edge was not mentioned by name in the Senate Report does not change this result. Aozora had more than $430 million invested in Blue Edge and other CDOs; it could have, and should have, considered whether Blue Edge's underlying assets fell within the Senate Report's ambit.

Also significant is that Aozora's counsel actually did investigate Aozora's potential claims in 2012 or 2013. However, Aozora provides no explanation for why it could not have

performed that same investigation before June 18, 2011, when losses from the subprime mortgage crisis were receiving considerable attention in the press (*see CIFG Assur. N. Am.*, 128 AD3d at 608).

The proposed amended complaint does not cure the statute of limitations defects in the original complaint, as it does not gainsay that Aozora was on inquiry notice of alleged fraud more than two years before it filed the summons with notice (*see K-Bay Plaza, LLC v Kmart Corp.*, 132 AD3d 584, 590 [1st Dept 2015]; *Meimeteas v Carter Ledyard & Milburn LLP*, 105 AD3d 643 [1st Dept 2013]).

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

ENTERED: MARCH 31, 2016

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Sweeny, J.P., Richter, Manzanet-Daniels, Gische, JJ.

487 Sydney Stutterheim, Index 154537/12
Plaintiff,

-against-

First Shot Productions, et al.,
Defendants-Respondents,

Shane Sigler, Inc.,
Defendant,

Exit Creative Company, LLC,
Defendant-Appellant.

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Carroll, McNulty & Kull LLC, New York (Sean T. Burns of counsel), for appellant.

Faust Goetz Schenker & Blee LLP, New York (Kristina Milone of counsel), for First Shot Productions, respondent.

Lester Schwab Katz & Dwyer, LLP, New York (Daniel S. Kotler of counsel), for Jenny Gage and Tom Betterton, Inc., respondents.

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Order, Supreme Court, New York County (Anil C. Singh, J.), entered March 6, 2015, which denied defendant Exit Creative Company, LLC's (Exit) motion for summary judgment dismissing the complaint and all cross claims against it, unanimously modified, on the law, to dismiss defendant First Shot Productions' contractual indemnification cross claim as against defendant Exit, and otherwise affirmed, without costs.

The motion court properly denied Exit's motion for summary

judgment because there is an issue of fact as to whether Exit maintained a degree of control over the commercial filming on which plaintiff was injured. Exit and its principal and executive director, Damian Totman, are alleged to have conceived of the idea for the commercial, to have chosen the site for the commercial, and to have been present at the filming for the commercial. On the set, Totman is alleged to have had some authority over the entire production, and to have been involved in deciding which persons would ride the skateboard and the final location of the shot. Further, the record raises a question as to whether it was part of Totman's responsibility to make sure the talent in the filming was going to be safe. Plaintiff testified that originally she was to skateboard alone on a flat surface, and decisions were made on set to have her ride downhill together with a stunt double instead.

Unlike the cases cited by Exit (*see e.g. Raben v Conde Nast Publs.*, 2 AD3d 117 [1st Dept 2003]; *Smith v Pizza Hut of Am.*, 289 AD2d 48 [1st Dept 2001]), here the record presents an issue of fact regarding whether Exit exercised more than general supervisory control. Thus, dismissal of the complaint against Exit would be inappropriate (*see generally Crespo v City of New York*, 303 AD2d 166 [1st Dept 2003]; *Wright v Gorman-Multimedia*

Communications, 268 AD2d 218 [1st Dept 2000]).

However, as no contract exists between Exit and First Shot and First Short fails to address the issue on appeal, defendant First Shot's contractual indemnification claim as against defendant Exit is dismissed.

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

ENTERED: MARCH 31, 2016

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Tom, J.P., Acosta, Renwick, Moskowitz, JJ.

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Anthony Balzano,
Plaintiff-Respondent,

-against-

BTM Development Partners, LLC,
Defendant,

Target Corporation,
Defendant-Respondent,

Plaza Construction Corp.,
Defendant-Appellant.

- - - - -

Target Corporation,
Third-Party Plaintiff-Respondent,

-against-

Certified Multi-Media Solutions, Ltd.,
Third-Party Defendant-Appellant.

- - - - -

[And Another Third-Party Action]

- - - - -

Plaza Construction Corp.,
Third Third-Party Plaintiff-Appellant,

-against-

Getronics, USA, Inc.,
Third Third-Party Defendant-Respondent.

- - - - -

Getronics, USA, Inc.,
Fourth Third-Party Plaintiff-Respondent,

-against-

Certified Multi-Media Solutions Ltd.,
Fourth Third-Party Defendant-Appellant.

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Mauro Lilling Naparty LLP, Woodbury (Anthony F. Destefano of counsel), for Plaza Construction Corp., appellant/respondent.

Gartner + Bloom, P.C., New York (Anne E. Armstrong of counsel), for Certified Multi-Media Solutions, Ltd, appellant-respondent/appellant.

Silberstein, Awad & Miklos, PC, Garden City (James E. Baker of counsel), for Anthony Balzano, respondent.

Mead, Hecht, Conklin & Gallagher, LLP, White Plains (Elizabeth M. Hecht of counsel), for Target Corporation, respondent.

Rende, Ryan & Downes, LLP, White Plains (Roland T. Koke of counsel), for Getronics USA, Inc., respondent.

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Judgment, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered November 7, 2014, bringing up for review, an order, same court and Justice, entered October 30, 2014, which, inter alia, granted plaintiff's motion fo partial summary judgment on his Labor Law § 240(1) claim against defendant Plaza Construction Corporation, denied Plaza's cross motion for summary judgment dismissing plaintiff's claims and defendant Target Corporation's cross claim for contractual indemnification against it, and granted the motion of third third-party defendant, fourth

third-party plaintiff Getronics, USA, Inc., for summary judgment dismissing Plaza's complaint against it, granted Target's cross motion for contractual indemnification against Getronics, and granted Getronics's cross motion for summary judgment on its claim for contractual indemnification against fourth third-party defendant Certified Multi-Media Solutions Ltd., unanimously modified, on the law, to deny plaintiff's motion for partial summary judgment as against Plaza, and to reinstate Plaza's third third-party claims against Getronics, USA, Inc., and otherwise affirmed, without costs. Certified's notice of a appeal from the October 30, 2014 order deemed timely notice of appeal from the judgment (*see* CPLR 5520[c]).

When plaintiff fell from a scissor lift, he was working for Certified pursuant to its subcontract with Getronics, which had contracted directly with tenant/store owner Target. Plaza, which was the general contractor for the build-out of a retail store being undertaken by Target, asserts that it was not the general contractor for the purposes of Labor Law liability for Target's contract with Getronics and the subcontract with Certified. Plaza claims that the work of Getronics and Certified was specifically carved out of its contract with Target, and that Plaza had no supervisory responsibility for Getronics and

Certified. However, other evidence, namely Article 10 ("PROTECTION OF PERSONS AND PROPERTY") Section 10.2.8 of the contract between Plaza and Target, and the testimony of Target's representative, suggests that Plaza exercised actual supervisory control over the entire premises. Contrary to Plaza's allegations, the fact that in Target's particular contract with Plaza, Target retained the right to enter into separate agreements for other work not to be performed by Plaza does not eliminate issues of fact as to whether Plaza exercised supervisory control over the entire premises. The features of the separate agreement relate mainly to the relationship between Target and Getronics. We are only concerned with the existence and the extent of the control and supervision over the premises exercised by Plaza. The aforementioned provisions of the contract and the testimony of Target's representative raise an issue of fact as to whether Plaza was charged with the legal duty usually resting upon a general contractor, to use reasonable care to furnish a safe place to work for the employees of all contractors performing work on the job (*see Moracho v Open Door Family Med. Ctr., Inc.*, 74 AD3d 657, 658 [1st Dept 2010] [where the plaintiff's employer, an asbestos removal company, was prime contractor directly hired by owner, and general contractor was

purportedly restricted from area where plaintiff was working at time of accident, general contractor could still be held liable under Scaffold Law because general contractor "was contractually responsible for preventing accidents at the site and for taking reasonable precautions to prevent injury to employees on the job"]).

The motion court properly granted the contractual indemnification claims of Target and Getronics. The claims are encompassed by the language of the indemnification agreements, which do not run afoul of General Obligations Law § 5-322.1.

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

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

ENTERED: MARCH 31, 2016

CLERK

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

650 The People of the State of New York, Ind. 2487/13
Respondent,

-against-

Zachary Clemons,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Marcy L. Kahn, J.), rendered April 25, 2014, convicting defendant, after a jury trial, of robbery in the third degree and grand larceny in the fourth degree, and sentencing him, as a second felony offender, to an aggregate term of three to six years, unanimously affirmed.

The verdict was supported by legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 349 [2007]). The testimony of the victim, an additional witness, and a police officer provided ample evidence of defendant's guilt.

Defendant was not deprived of effective assistance of counsel regarding his pro se CPL 330.30 motion to set aside the verdict when newly assigned counsel, who had been substituted for

the purpose of avoiding any conflict of interest, advised the court that he was not adopting the motion because, in his judgment, it lacked any valid basis. Defendant was not prejudiced, because the court was not obligated to entertain a motion not adopted by counsel (*see People v Rodriguez*, 95 NY2d 497, 501-503 [2000]), and because defendant does not assert on appeal that the motion contained any ground that would be a basis for reversal (*see People v Malave*, 106 AD3d 657 [1st Dept 2013], *lv denied* 21 NY3d 1044 [2013] [defendant not prejudiced by counsel's accurate concession that part of pro se motion was meritless]).

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 31, 2016

CLERK

Mazzarelli, J.P., Renwick, Moskowitz, Kapnick, Kahn, JJ.

651 David Landes, et al., Index 155096/14
Plaintiffs-Respondents,

-against-

Provident Realty Partners II, L.P., et al.,
Defendants,

PRP II Corp., et al.,
Defendants-Appellants.

_____

Smith, Gambrell & Russell, LLP, New York (Victor M. Metsch of counsel), for appellants.

Ira Daniel Tokayer, New York, for respondents.

_____

Order, Supreme Court, New York County (Anil C. Singh, J.), entered December 4, 2015, which, to the extent appealed from as limited by the briefs, denied defendants PRP II Corp., BRG Gramercy Units LLC, and Daniel Benedict's motion to dismiss the complaint pursuant to CPLR 3211, unanimously affirmed, with costs.

Given that defendants had the full opportunity to raise their current CPLR 3211(a) arguments on their original CPLR 3211(a) motion to dismiss, the IAS court correctly denied the motion as violative of the "single motion rule" of CPLR 3211(e) (*Barbarito v Zahavi*, 107 AD3d 416, 420 [1st Dept 2013]).

Were we to reach the merits, we would also find that the

motion was properly denied. On a motion to dismiss based on documentary evidence, defendants had to show that the documents, here the agreements, dispositively refuted plaintiffs' allegations, as a matter of law (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). It is true that the parties were free to limit their duties, including fiduciary duties to one another (*see Bailey v Fish & Neave*, 8 NY3d 523, 529 [2007]. Here, however, defendants failed to show that PRP's exercise of Provident's right to consent or veto any sale of the Imico interest for its own benefit was expressly permitted by the limited partnership agreement (*see Renz v Beeman*, 589 F2d 735, 745 [2d Cir 1978], *cert denied* 444 US 834 [1979]). Nor is there any question that the purchase of the Imico interest was a corporate opportunity, given the relationship of the parties and

Provident's control over any sale of that interest (*see Lee v Manchester Real Estate & Constr., LLC*, 118 AD3d 627 [1st Dept 2014]).

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

ENTERED: MARCH 31, 2016

CLERK

Mazzarelli, J.P., Renwick, Moskowitz, Kapnick, Kahn, JJ.

652 In re Nairen McI.,
Petitioner-Appellant,

-against-

Cindy J.,
Respondent-Respondent.

_____

Geoffrey P. Berman, Larchmont, for appellant.

Tennille M. Tatum-Evans, New York, for respondent.

Karen P. Simmons, The Children's Law Center, Brooklyn (Susan M. Cordaro of counsel), attorney for the child.

_____

Order, Family Court, Bronx County (Ruben A. Martino, J.), entered on or about October 18, 2014, which, after a hearing, denied petitioner father's petition to, among other things, modify a final custody order to require that the parties' child live in New York State, and granted respondent mother's petition to, among other things, permit her and the child to relocate to Tennessee, unanimously modified, on the law and the facts, to grant the father expanded parenting time with the child to the extent indicated in this decision, and otherwise affirmed, without costs.

Family Court's relocation determination has a sound and substantial basis in the record, as the mother established, by a

preponderance of the evidence, that relocation to Tennessee would serve the best interests of the child (*Matter of Tropea v Tropea*, 87 NY2d 727, 739, 741 [1996]). The mother testified regarding the improvement in the child's academic performance in her Tennessee school, compared to her performance in her former Bronx school; the improvement in, and reduced cost of, healthcare in Tennessee for the mother's younger daughter; and the general improvement in the family's quality of life, including the lower cost of living and housing, and the mother's ability to obtain employment in Tennessee (*see Matter of Kevin McK. v Elizabeth A.E.*, 111 AD3d 124, 130-131 [1st Dept 2013]). In addition, the child prefers to remain in Tennessee with her mother (*Matter of Aliyah B.* [*Denise J.*], 87 AD3d 943, 944 [1st Dept 2011]). Moreover, the father's failure to pay child support is a factor in support of relocation (*Matter of Kevin McK.*, 111 AD3d at 128, 131, 133). There is no basis to disturb Family Court's credibility determinations.

In accordance with the child's request, Family Court's order should be modified to increase the father's parenting time with the child to the extent of permitting the child to spend all school recesses during the school year of longer than four days with the father. According to the child's school calender, those

recesses currently consist of "Fall Break," "Winter Break," and "Spring Break & Good Friday." In addition, the summer recess shall be equally split between the parents.

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

ENTERED: MARCH 31, 2016

CLERK

Mazzarelli, J.P., Renwick, Moskowitz, Kapnick, Kahn, JJ.

653 Mayan Nakamura, Index 308409/12
Plaintiff-Appellant,

-against-

Isabel Montalvo, et al.,
Defendants-Respondents.

_____

Cannon & Acosta, LLP, Huntington Station (June Redeker of counsel), for appellant.

Russo, Apoznanski & Tambasco, Melville (Susan J. Mitola of counsel), for Montalvo, respondents.

Havkins Rosenfeld Ritzert & Varriale, LLP, Mineola (Gail L. Ritzert of counsel), for Jean C. Ramos and Help PSI, Inc., respondent.

Katz & Associates, Brooklyn (Anthony Grisanti of counsel), for Janis M. Denardis, respondent.

_____

Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered June 11, 2015, which granted defendants' motions for summary judgment dismissing the complaint based on the lack of a serious injury within the meaning of Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendants made a prima facie showing that plaintiff did not suffer a permanent or significant limitation in use of her cervical or lumbar spine as a result of the 2012 motor vehicle accident at issue. Defendant submitted an orthopedic surgeon's

report finding normal range of motion in each part, as well as plaintiff's own deposition testimony and medical records, which showed that she was previously treated for injuries to her cervical and lumbar spine following a motor vehicle accident in 2006 (*see Alvarez v NYLL Mgt. Ltd.*, 120 AD3d 1043, 1044 [1st Dept 2014], *affd* 24 NY3d 1191 [2015]; *Acosta v Vidal*, 119 AD3d 408, 408 [1st Dept 2014]). The medical records relied on by defendants included a report by plaintiff's chiropractor, who stated that a report of an MRI of the lumbar spine taken after the 2012 accident correlated with the findings of a 2006 MRI (*see Mitrotti v Elia*, 91 AD3d 449, 450 [1st Dept 2012]).

In opposition, plaintiff failed to raise a triable issue of fact. Plaintiff submitted the affirmed reports prepared by her radiologist in 2012, who found that the 2012 MRIs of plaintiff's lumbar spine and cervical spine correlated with the findings of the 2006 MRIs, showing "again" the same bulging and herniated discs. Plaintiff's chiropractor provided only a conclusory opinion that plaintiff's injuries were caused by the 2012 accident, without addressing the preexisting conditions documented in plaintiff's own medical records, or explaining why her current reported symptoms were not related to the preexisting conditions (*see Pommells v Perez*, 4 NY3d 566 [2005]; *Alvarez*, 120

AD3d at 1044; *Dawkins v Cartwright*, 111 AD3d 559 [1st Dept 2013]). Further, upon a recent examination, plaintiff's doctor found only minor limitations in lumbar range of motion and no limitations in cervical range of motion, which is insufficient to demonstrate a serious injury involving significant or permanent limitations in use (*see Mayo v Kim*, 135 AD3d 624, 625-626 [1st Dept 2016]).

Defendants established that plaintiff did not suffer a 90/180-day claim by relying on her bill of particulars stating that she was confined to bed for one day following the accident and was confined to home for one week following the accident, her testimony that she missed less than two weeks of work, and her chiropractor's certification that she was ready to return to regular duty one week after the accident (*see Streeter v Stanley*, 128 AD3d 477, 478 [1st Dept 2015]; *Frias v Son Tien Liu*, 104 AD3d 589, 590 [1st Dept 2013]). The absence of evidence of a causal connection between the 2012 accident and plaintiff's injuries

also requires dismissal of this claim (*see Rampersaud v Eljamali*, 100 AD3d 508, 509 [1st Dept 2012]).

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

ENTERED: MARCH 31, 2016

CLERK

Mazzarelli, J.P., Renwick, Moskowitz, Kapnick, Kahn, JJ.

655 Louis Serrante, Index 109014/11
Plaintiff-Appellant,

-against-

Moses & Singer LLP, et al.,
Defendants-Respondents.

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Zisholtz & Zisholtz, LLP, Mineola (Meng Cheng of counsel), for appellant.

Moses & Singer, LLP, New York (Shari Alexander of counsel), for respondents.

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Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered December 24, 2014, which, insofar as appealed from as limited by the briefs, granted defendants' motion to dismiss the complaint, unanimously affirmed, with costs.

Plaintiff seeks compensatory and punitive damages resulting from an alleged scheme by defendants to defraud the court in a prior action between plaintiff and defendant GJF (*Serrante v GJF Constr. Corp.*, 72 AD3d 543 [1st Dept 2010], *lv denied* 15 NY3d 704 [2010]), and related enforcement proceedings, in which defendant Moses & Singer represented GJF. Defendants' motion to dismiss was properly granted since the action is barred by the "ancient rule that the courts of this State will not entertain civil actions for damages arising from alleged subornation of perjury

in a prior civil proceeding" (*Newin Corp. v Hartford Acc. & Indem. Co.*, 37 NY2d 211, 217 [1975]).

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

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

ENTERED: MARCH 31, 2016

CLERK

Mazzarelli, J.P., Renwick, Moskowitz, Kapnick, Kahn, JJ.

658- Index 310389/10
659 Marco Battistella,
Plaintiff-Appellant,

-against-

Marnie Ann Joyce,
Defendant-Respondent.

_____

Marco Battistella, appellant pro se.

Dimitri Maisonet, New York, for respondent.

Steven N. Feinman, White Plains, attorney for the children.

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Judgment, Supreme Court, New York County (Laura E. Drager, J.), entered May 13, 2014, to the extent appealed from as limited by the briefs, awarding primary residential custody of the parties' children to defendant wife, with liberal visitation to plaintiff husband, awarding defendant child support, and directing plaintiff to pay a portion of the rent arrears on the former marital apartment, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered on or about September 19, 2013, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The record belies plaintiff's claim that he was not given sufficient opportunity to present evidence and cross-examine

witnesses and to reserve arguments as to disclosure. Moreover, plaintiff had ample opportunity to review and digest the forensic evaluation report before trial. The record also shows that it was plaintiff's choice to proceed pro se (*see Mastrandrea v Mastrandrea*, 268 AD2d 293 [1st Dept 2000]).

The court properly granted primary residential custody of the children with final decision-making authority to defendant and liberal visitation to plaintiff pursuant to a parenting time schedule (*see Eschbach v Eschbach*, 56 NY2d 167, 173-174 [1982]).

The court properly awarded child support to defendant based upon evidence of the parties' respective incomes (*see e.g. Matter of Cassano v Cassano*, 85 NY2d 649 [1995]).

The court properly determined that plaintiff was responsible for rent arrears accumulated before he moved out of the marital residence.

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

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

ENTERED: MARCH 31, 2016

CLERK

Mazzarelli, J.P., Renwick, Moskowitz, Kapnick, Kahn, JJ.

660 In re Michael P. Thomas Index 100563/14
Petitioner-Appellant,

-against-

New York City Department
of Education, etc., et al.,
Respondents-Respondents.

_____

Michael P. Thomas, appellant pro se.

Zachary W. Carter, Corporation Counsel, New York (Elizabeth S. Natrella of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Cynthia S. Kern, J.), entered December 9, 2014, denying the petition to direct respondents to disclose certain records pursuant to the Freedom of Information Law, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Petitioner seeks disclosure of materials pertaining to the investigation of his allegations that certain students improperly received mathematics credits or diplomas in violation of Department of Education (DOE) policies. As Supreme Court determined, DOE acted properly in finding that the intra-agency documents at issue were exempt from disclosure pursuant to Public Officers Law § 87(2)(g), since the documents constituted, among other things, pre-decisional materials prepared to assist DOE in

making its final decision (*see e.g. Matter of McAulay v Board of Educ. of City of N.Y.*, 61 AD2d 1048 [2d Dept 1978], *affd* 48 NY2d 659 [1979]).

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

ENTERED: MARCH 31, 2016

CLERK

Mazzarelli, J.P., Renwick, Moskowitz, Kapnick, Kahn, JJ.

661 The People of the State of New York, Ind. 4272/13
Respondent,

-against-

John Thomas,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered January 9, 2014, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the first degree, and sentencing him, as a second felony drug offender, to a term of 12 years, unanimously affirmed.

The court properly denied defendant's motion to suppress evidence obtained as a result of eavesdropping warrants. The detailed warrant applications established that while normal investigative procedures had yielded significant results, they had not led to the necessary evidence, and that use of the same or other noneavesdropping techniques reasonably appeared to be unlikely to succeed, counterproductive or too dangerous to employ (*see* CPL 700.15[4]; *People v Rabb*, 16 NY3d 145, 152 [2011]).

The court properly denied defendant's motion to suppress the physical evidence recovered from his car. The intercepted phone calls, along with police observations, warranted a strong inference that a drug transaction was in progress and that defendant's car would contain drugs or related evidence. Accordingly, the police had probable cause (*see generally Brinegar v United States*, 338 US 160, 175 [1949]; *People v Bigelow*, 66 NY2d 417, 423 [1985]) to stop the car and search it under the automobile exception to the warrant requirement (*see generally People v Galak*, 81 NY2d 463, 467 [1993]).

The court also properly denied suppression of statements defendant made to police. The evidence established that defendant was aware of and understood his *Miranda* rights, and that he willingly made statements during interrogation (*see People v Sirno*, 76 NY2d 967 [1990]).

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

ENTERED: MARCH 31, 2016

CLERK

Mazzarelli, J.P., Renwick, Moskowitz, Kapnick, Kahn, JJ.

662-
663 Kaplin Rice LLP, Index 653986/14
Plaintiff-Appellant,

-against-

Oxbridge Capital Management, LLC,
Defendent-Respondent.
- - - - -
[And a Third-Party Action]

_____

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Eileen A. Rakower, J.), entered on or about June 18, 2015,

And said appeal having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated March 8, 2016,

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

ENTERED: MARCH 31, 2016

CLERK

Mazzarelli, J.P., Renwick, Moskowitz, Kapnick, Kahn, JJ.

664 In re Carlos S.,
Petitioner-Respondent,

-against-

Ana S.,
Respondent-Appellant.

_____

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

Andrew J. Baer, New York, for respondent.

Karen P. Simmons, The Children's Law Center, Brooklyn (Susan M. Cordaro of counsel), attorney for the children.

_____

Order, Family Court, Bronx County (Sue Levy, Referee), entered on or about June 26, 2014, which, after a fact-finding hearing, inter alia, awarded sole custody and decision-making authority with respect to the subject children to petitioner father with extensive visitation to respondent mother, unanimously affirmed, without costs.

The court's determination has a sound and substantial basis in the record (*see Matter of Ernestine L. v New York City Admin. for Children's Servs.*, 71 AD3d 510 [1st Dept 2010]). Given the children's special needs, the record amply supports the finding that the father is better equipped to oversee their care (*see Matter of Xiomara M. v Robert M.*, 102 AD3d 581 [1st Dept 2013]).

There exists no basis to disturb the credibility determinations of the Referee (*see Matter of Mildred S.G. v Mark G.*, 62 AD3d 460 [1st Dept 2009]).

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

ENTERED: MARCH 31, 2016

CLERK

Mazzarelli, J.P., Renwick, Moskowitz, Kapnick, Kahn, JJ.

665 The People of the State of New York, Ind. 229/14
Respondent,

-against-

Alex LaForest,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Diane N. Princ 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 (Patricia Nunez, J.), rendered August 21, 2014,

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: MARCH 31, 2016

CLERK

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

Mazzarelli, J.P., Renwick, Moskowitz, Kapnick, Kahn, JJ.

669 The People of the State of New York, Ind. 713/13
Respondent,

-against-

Sandra Servat,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Laura Ward, J. at plea and A. Kirke Bartley at sentencing), rendered June 24, 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: MARCH 31, 2016

CLERK

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

Mazzarelli, J.P., Renwick, Moskowitz, Kapnick, Kahn, JJ.

670 40 Rector Owner LLC, Index 652926/12
Plaintiff-Appellant-Respondent,

-against-

The City of New York, etc.,
Defendant-Respondent-Appellant.

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Rivkin Radler, LLP, Uniondale (Merril Biscone of counsel), for appellant-respondent.

Zachary W. Carter, Corporation Counsel, New York (Devin Slack of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered on or about May 11, 2015, which denied plaintiff's motion for summary judgment as to liability, and granted defendant's cross motion for summary judgment to the extent of dismissing the first, second, and fourth causes of action and denied the motion as to the third cause of action, unanimously modified, on the law, to deny the cross motion with respect to so much of the first and second causes of action as addresses periods through May 31, 2011, and otherwise affirmed, without costs.

From 1994 through July 23, 2010, defendant was a tenant under a multi-year lease with plaintiff or its predecessor; defendant was obliged to pay, and did pay, both fixed rent and additional rent. Additional rent included such items as real

estate tax escalations and operating expense escalations.

From July 24, 2010 through May 31, 2011, defendant was a month-to-month tenant of certain portions of plaintiff's building (*see* Real Property Law § 232-c) with plaintiff's consent. Since the law implies that a tenant that holds over "does so upon the same terms and conditions as under his previous tenancy" (*Rossinski Realty Co. v Farrell*, 135 AD2d 465, 467 [1st Dept 1987]), from July 24, 2010 through May 31, 2011, defendant was obliged to pay both fixed rent and additional rent.

On April 11, 2011, plaintiff sent defendant a notice saying it was terminating the latter's month-to-month tenancy effective May 31, 2011. After defendant failed to vacate all of the spaces it had been occupying by that deadline, plaintiff commenced a holdover proceeding in June 2011. Thus, defendant owed use and occupancy from June 1, 2011 (*see e.g. South St. Ltd. Partnership v Jade Sea Rest.*, 187 AD2d 397 [1st Dept 1992]).

The motion court correctly dismissed so much of the first and second causes of action as sought use and occupancy for the fifth, eighth, and ninth floors from June 1, 2011 through February 28, 2012. Defendant vacated the ninth floor on or before September 30, 2010, and the fifth and eighth floors on April 28, 2011. It was not obliged to pay use and occupancy (as

opposed to holdover month-to-month rent, which will be discussed below) after it had quit those premises (*see Peat v Dorilas*, 22 Misc 3d 142[A], 2009 NY Slip Op 50457[U] [Appellate Term, 2d Dept 2009]). It would be unjust to force defendant to pay for space it did not use (*see Carlyle, LLC v Beekman Garage LLC*, 133 AD3d 510, 511 [1st Dept 2015]). The case at bar is unlike *1113 Bldg. Corp. v Ketchum Communications* (224 AD2d 336 [1st Dept 1996], *lv denied* 89 NY2d 816 [1997]), where a subtenant held over without either the landlord's or the tenant/sublandlord's permission, causing the tenant to be unable to deliver possession to the landlord of all of the floors it had leased. In the instant action, there is no indication that plaintiff wanted to re-let any of the space occupied by defendant.

Contrary to plaintiff's contentions based on the Surrender of Tenancy and Occupancy Agreement between the parties, since the lease had already expired on July 23, 2010, surrender is the wrong analytical concept (*see e.g. Stahl Assoc. Co. v Mapes*, 111 AD2d 626, 628 [1st Dept 1985]). Moreover, plaintiff's fact-based argument that defendant should be estopped from denying that February 28, 2012 was the surrender date is improperly raised for the first time on appeal (*see e.g. Recovery Consultants v Shih-Hsieh*, 141 AD2d 272, 276 [1st Dept 1988]).

As for the first and second causes of action to the extent they deal with the period from October 1, 2010 (for the ninth floor) or May 1, 2011 (for the fifth and eighth floors) through May 31, 2011, neither party established its entitlement to summary judgment. On the current record, we cannot tell if the original 1994 lease (as amended in 1996 and 1997) for multiple floors was divisible. If it was, then defendant's month-to-month tenancy for the ninth floor ended on September 30, 2010, and its month-to-month tenancy for the fifth and eighth floors ended on April 28, 2011. However, if the lease was not divisible, then defendant's month-to-month tenancy continued through May 31, 2011, and defendant was obliged to pay both rent and additional rent for all of the space covered by the lease.

Defendant contends that plaintiff has no right to seek use and occupancy for the fifth, eighth, and ninth floors for the period before June 1, 2011, because it had already received rent during the month-to-month tenancies. However, plaintiff did *not* receive rent *for the disputed spaces* (the fifth, eighth, and ninth floors); defendant withheld payment for those spaces.

As to the third cause of action, plaintiff made a prima facie case that defendant owed $260,819.22, and defendant submitted an affidavit by a person with knowledge, setting forth

a different calculation and concluding that defendant owed plaintiff nothing.

To be sure, plaintiff is not entitled to "use and occupation" for the "period prior to the unauthorized holdover" (*Parkview Constr. Co. v Romanovsky*, NYLJ, Sept. 21, 1994, at 21, col 2, at col 3 [Appellate Term, 1st Dept]). Defendant did not hold over in an unauthorized manner until June 1, 2011. However, while the third cause of action seeks "use and occupancy" rather than unpaid rent for the month-to-month tenancy (for spaces other than the fifth, eighth, and ninth floors), instead of dismissing it with leave to replead, we deem it to be a cause of action for unpaid rent (*see* CPLR 2001).

As to the fourth cause of action, to the extent plaintiff sought attorneys' fees under the lease, it was entitled to them only in connection with re-letting the premises, and there is no indication that plaintiff incurred any attorneys' fees in that connection.

Although plaintiff did not rely on the attorneys' fees provision of the Surrender of Tenancy and Occupancy Agreement in its complaint, it relied on it in its summary judgment motion, and defendant had the opportunity to present its arguments in opposition. Hence, we will consider this argument (*see Rogoff v*

San Juan Racing Assn., 54 NY2d 883 [1981]). However, on the merits, it is unavailing. The Surrender Agreement provides for defendant to pay plaintiff's attorneys' fees if plaintiff "is required to commence litigation[] to enforce its rights hereunder" and is "the prevailing party." The instant action is not one to enforce plaintiff's rights under the Surrender Agreement. For example, plaintiff does not allege that defendant failed to make the payments (for use and occupancy from June 1, 2011 through December 31, 2013) required by section 7 of that agreement, or that it wrongfully remained at plaintiff's building after December 31, 2013. Defendant's refusal to pay the amounts that were disputed in the Limited Release and Indemnification is not a breach of the Surrender Agreement; on the contrary, the latter specifically ratified and reaffirmed the former. Nor is plaintiff, at the current stage of the proceedings, the prevailing party.

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

ENTERED: MARCH 31, 2016

CLERK

Mazzarelli, J.P., Renwick, Moskowitz, Kapnick, Kahn, JJ.

671 Donald Brown, et al., Index 154315/12
Plaintiffs-Respondents,

-against-

44 Street Development, LLC, et al.,
Defendants-Appellants.

_____

Ropers Majeski Kohn & Bentley, New York (Jason L. Beckerman of counsel), for appellants.

Rimland & Associates, P.C., New York (Robert Elan of counsel), respondents.

_____

Order, Supreme Court, New York County (Anil C. Singh, J.), entered March 23, 2015, which, insofar as appealed from, denied defendants' motion for summary judgment dismissing plaintiffs' claim pursuant to Labor Law § 240(1), and granted plaintiffs' motion for partial summary judgment on the issue of liability on that claim, unanimously affirmed, without costs.

Plaintiff was injured when, while carrying wood planks, he fell through an opening in a latticework rebar deck to a plywood form that was 12 to 18 inches below. "There is no bright-line minimum height differential that determines whether an elevation hazard exists" (*Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 9 [1st Dept 2011]), and here, the record establishes that plaintiff's fall was the result of exposure to an elevation

related hazard (*see Arrasti v HRH Constr. LLC*, 60 AD3d 582 [1st Dept 2009]). We have considered defendants' remaining arguments and find them unavailing.

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

ENTERED: MARCH 31, 2016

CLERK

Mazzarelli, J.P., Renwick, Moskowitz, Kapnick, Kahn, JJ.

672-
673 The People of the State of New York, Respondent,

-against-

George Moore,
Defendant-Appellant.

Ind. 4911/10
SCI 1032/13

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

Cyrus R. Vance, Jr., District Attorney, New York (Diane N. Princ of counsel), for respondent.

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Judgment, Supreme Court, New York County (Jill Konviser, J.), rendered March 13, 2013, convicting defendant, upon his plea of guilty, of attempted rape in the third degree, and sentencing him to time served, and judgment, same court (Lewis Bart Stone, J. at suppression hearing; Jill Konviser, J. at plea and sentencing), rendered April 12, 2013, convicting defendant of murder in the second degree, and sentencing him to a term of 25 years to life, unanimously affirmed.

Defendant made a valid waiver of his right to appeal. The court's colloquy "was sufficient because the right to appeal was adequately described without lumping it into the panoply of rights normally forfeited upon a guilty plea" (*People v Sanders*,

25 NY3d 337, 341 [2015]). Moreover, defendant signed a written waiver that he had first reviewed with his counsel. The valid appeal waiver precludes review of defendant's suppression and excessive sentence claims. As an alternative holding, we reject them on the merits.

Defendant's waiver of indictment and prosecution by superior court information, under which he pleaded guilty to a misdemeanor and received time served, was not jurisdictionally defective, where the entire waiver colloquy took place in open court, even if the nearly contemporaneous physical signing of the waiver may have actually occurred in the vicinity of the courtroom (*see e.g. People v Badden*, 13 AD3d 463 [2d Dept 2004], *lv denied* 4 NY3d 796 [2005] [discussing analogous "open court" requirement for jury waiver]).

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

ENTERED: MARCH 31, 2016

CLERK

Mazzarelli, J.P., Renwick, Moskowitz, Kapnick, Kahn, JJ.

674 Jeannette Barba, Index 305647/13
Plaintiff-Respondent,

-against-

William T. Stewart, et al.,
Defendants-Appellants.

_____

Lester Schwab Katz & Dwyer, LLP, New York (Daniel S. Kotler of counsel), for appellants.

William Schwitzer & Associates, New York (Stephen J. Smith of counsel), for respondent.

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Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered June 16, 2015, which granted plaintiff's motion for partial summary judgment on the issue of liability, unanimously reversed, on the law, without costs, and the motion denied.

In support of her motion, plaintiff submitted an affidavit, in which she asserted that she was stopped at a red light, when defendant driver was waved through the light by a traffic officer, moved his tour bus into her lane in violation of Vehicle and Traffic Law § 1128, and hit the front of her car. In opposition, defendants presented the affidavit of defendant driver, who stated that after his bus became stopped halfway into an intersection, he moved the bus forward in compliance with a lawful instruction of a traffic officer (Vehicle and Traffic Law

§ 1102), and that the bus was then hit in the rear side by plaintiff's car. These conflicting versions of the accident raise triable issues of fact precluding summary judgment (*see Robles v City of New York*, 106 AD3d 571 [1st Dept 2013]).

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

ENTERED: MARCH 31, 2016

CLERK

Mazzarelli, J.P., Renwick, Moskowitz, Kapnick, Kahn, JJ.

675N In re Alexis Virella, Index 261044/14
Petitioner-Appellant,

-against-

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

_____

Mitchell Dranow, Sea Cliff, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Emma Grunberg of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Elizabeth A. Taylor, J.), entered March 31, 2015, which, to the extent appealed from as limited by the briefs, denied petitioner's motion for leave to serve a late notice of claim nunc pro tunc upon respondent City of New York, unanimously affirmed, without costs.

The court providently exercised its discretion in denying petitioner leave to serve a late notice of claim. Petitioner, who alleges that he was assaulted by a fellow inmate while in the custody of the Department of Corrections (DOC), failed to meet any of the criteria necessary to warrant the exercise of this Court's discretion (*see Caminero v New York City Health & Hosps. Corp. [Bronx Mun. Hosp. Ctr.]*, 21 AD3d 330, 332 [1st Dept 2005]; General Municipal Law § 50-e[5]).

While petitioner's absence of an acceptable excuse would not, standing alone, necessarily be fatal to his application, he also failed to establish that respondent had actual notice of the essential facts of the claim within 90 days after it arose, or a reasonable time thereafter, and he failed to demonstrate that respondent was not prejudiced by the delay. That the DOC may have filed an injury report regarding the assault on petitioner does not constitute notice of an intention to file a civil suit based on claims of negligence and intentional torts (*see Zapata v New York City Hous. Auth.*, 115 AD3d 606 [1st Dept 2014]; *Matter of Rivera v New York City Hous. Auth.*, 25 AD3d 450 [1st Dept 2006]). "The municipality must have notice or knowledge of the specific claim and not general knowledge that a wrong has been committed" (*Matter of Sica v Board of Educ. Of City of N.Y.*, 226 AD2d 542, 543 [2d Dept 1996]). Accordingly, respondent was prejudiced, since it could not conduct a prompt investigation

despite the fact that a little over five months had passed since the occurrence (*see Matter of Vargas v New York City Hous. Auth.*, 232 AD2d 263 [1st Dept 1996], *lv denied* 89 NY2d 817 [1997]).

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

ENTERED: MARCH 31, 2016

CLERK

Tom, J.P., Sweeny, Manzanet-Daniels, Gische, Gesmer, JJ.

676 The People of the State of New York, Ind. 1200/13
Respondent,

-against-

Emma Williams,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered May 22, 2013, convicting defendant, upon her plea of guilty, of burglary in the third degree, and sentencing her to a term of 6 months, unanimously affirmed.

Defendant's challenges to the court's discussion of her rights under *Boykin v Alabama* (395 US 238 [1969]) do not fall within the narrow exception to the preservation requirement (*see People v Conceicao*, 26 NY3d 375, 382 [2015]), and we decline to review these unpreserved claims in the interest of justice. As an alternative holding, we find no basis for reversal. The plea was knowing, intelligent and voluntary (*see People v Tyrell*, 22 NY3d 359, 365 [2013]; *People v Harris*, 61 NY2d 9, 16-19 [1983]). The court sufficiently advised defendant of the rights she was giving up by pleading guilty, notwithstanding that it omitted the

word "jury" from its reference to giving up the right to a trial (*see People v Gillens*, 134 AD3d 655 [1st Dept 2015]; *People v Terrell*, 134 AD3d 651, 651-52 [1st Dept 2015]).

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

ENTERED: MARCH 31, 2016

CLERK

Tom, J.P., Sweeny, Manzanet-Daniels, Gische, Gesmer, JJ.

678 In re John S.,

A Child Under Eighteen Years of Age,
etc.,

Milica S., also known as Millica S.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Dora M. Lassinger, East Rockaway, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Victoria Scalzo of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Michelle R. Duprey of counsel), attorney for the child.

_____

Order, Family Court, New York County (Stewart H. Weinstein, J.), entered on or about February 19, 2015, which, after a fact-finding hearing, found that respondent mother neglected the subject child, unanimously affirmed, without costs.

Petitioner agency satisfied its burden of proving, by a preponderance of the evidence, that respondent neglected the child (*see* Family Court Act §§ 1012[f][i][B]; 1046[b][i]). There are no grounds for disturbing the court's credibility determinations (*see Matter of Fernando S.*, 63 AD3d 610 [1st Dept 2009]). Respondent placed the child in imminent danger after she

became intoxicated on the night of December 15, 2013, assaulted the child's father in the child's presence, and assaulted the child (*see Matter of Raima W.*, 59 AD3d 633 [2d Dept 2009]). Her participation in and completion of 12 weeks of intensive outpatient treatment after the instant neglect petition was filed against her, while positive, does not warrant a diffrent disposition on the issue of neglect (*see Matter of Elijah J. [Yvonda M.]*, 105 AD3d 449, 450 [1st Dept 2013]; Family Court Act § 1046[a][iii]).

Respondent failed to preserve her argument that the petition should have been dismissed pursuant to Family Court Act § 1051(c), and we decline to consider it (*see Matter of Cherish C. [Shanikwa C.]*, 102 AD3d 597 [1st Dept 2013]). Were we to consider it, we would reject it.

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

ENTERED: MARCH 31, 2016

CLERK

Tom, J.P., Sweeny, Manzanet-Daniels, Gische, Gesmer, JJ.

680 The People of the State of New York, Ind. 1203/13
Respondent,

-against-

Luis Cabrera,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered May 1, 2014, convicting defendant, after a nonjury trial, of burglary in the second degree, and sentencing him to a term of 3½ years, unanimously affirmed.

The People laid a sufficient foundation for the admission of a video disc consisting of a compilation of portions of footage drawn from numerous police surveillance cameras in a Housing Authority building. Authentication was provided by a competent police witness (*see People v Patterson*, 93 NY2d 80, 84 [1999]), who testified in detail about the videotaping and compilation process. She explained that she viewed several hours of videotape and created a 30-minute disc that included all the footage that was relevant to the case, that is, all views of any

persons involved in this case entering and leaving the building. There is no basis for disturbing the court's credibility determinations, and no reason to believe that the compilation was incomplete or otherwise unsatisfactory.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). To the extent the court's verdict may have rested on the theory of accomplice liability, this was entirely proper notwithstanding that the court never announced that it would "charge itself" on that theory. While there may be situations where the court in a nonjury trial should inform the parties that it is considering certain matters, such as lesser included offenses, there is generally no requirement that a judge, who is presumed to decide a case "based upon appropriate legal criteria" (*People v Moreno*, 70 NY2d 403, 406 [1987]), formally "charge" or announce the applicability of any particular legal principles.

Defendant has not established that he was prejudiced by the People's midtrial disclosure of impeachment material to which defendant was entitled under *Brady v Maryland* (373 US 83 [1963]). Defendant received a sufficient opportunity to cross-examine the witness using this evidence (*see People v Brown*, 67 NY2d 555, 559 [1986], *cert denied* 479 US 1093 [1987]). The People had not

originally intended to call the witness at issue, and they disclosed the impeachment material immediately after learning that this witness's testimony was necessary to authenticate the videotape. The court provided a suitable remedy when it offered defendant an adjournment to prepare for cross-examination, a remedy that could have readily been implemented in a nonjury trial, but that offer was declined.

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

ENTERED: MARCH 31, 2016

CLERK

Tom, J.P., Sweeny, Manzanet-Daniels, Gische, Gesmer, JJ.

681-
682 Index 115054/08

Anthony Garguilo,
Plaintiff-Appellant,

-against-

Port Authority of New York & New Jersey,
et al.,
Defendants-Respondents.

_____

Hofmann & Schweitzer, New York (Paul T. Hofmann of counsel), for appellant.

Segal McCambridge Singer & Mahoney, New York (Christian H. Gannon of counsel), for respondents.

_____

Orders, Supreme Court, New York County (Eileen A. Rakower, J.), entered June 10, 2015, which granted defendants' motion to dismiss the complaint, and denied plaintiff's motion to strike the answer, unanimously affirmed, without costs.

"Leave to amend pleadings, including a bill of particulars, is to be freely given, absent prejudice or surprise" (*Cherebin v Empress Ambulance Serv., Inc.*, 43 AD3d 364, 365 [1st Dept 2007]). However, "[w]hen an amendment to a pleading or a bill of particulars is sought at or on the eve of trial, judicial discretion in allowing such amendment should be discreet, circumspect, prudent and cautious" *(Kassis v Teachers Ins. & Annuity Assn.*, 258 AD2d 271, 272 [1st Dept 1999] [internal

quotation marks omitted]).

Here, plaintiff was not entitled to amend the bill of particulars on the eve of trial, after approximately seven years of litigation, since the photographs serving as the basis for the amendment were not newly available to plaintiff. Moreover, the proposed amendment, including changing the date of the accident, would have resulted in prejudice to defendants (*see Lopez v City of New York*, 80 AD3d 432 [1st Dept 2011]; *Baby Togs v Faleck & Margolies*, 239 AD2d 278 [1st Dept 1997]). Accordingly, the court properly granted defendants' motion to dismiss the complaint since photographic evidence proves, and plaintiff acknowledges, that the compressor that was allegedly involved in plaintiff's accident was not even at the job site on the day alleged.

Plaintiff's motion to strike the answer was properly denied, because plaintiff did not demonstrate that defendants failed to

comply with discovery (*compare Elias v City of New York*, 87 AD3d 513 [1st Dept 2011]).

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

ENTERED: MARCH 31, 2016

CLERK

Tom, J.P., Sweeny, Manzanet-Daniels, Gische, Gesmer, JJ.

684 In re Wade Whitfield, Index 100002/14
Petitioner,

-against-

New York State Division of Human Rights, et al.,
Respondents.

_____

Wade Whitfield, petitioner pro se.

Zachary W. Carter, Corporation Counsel, New York (Dona B. Morris of counsel), for respondents.

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Order of respondent State Division of Human Rights (DHR), dated November 4, 2013, which adopted the recommended order of an Administrative Law Judge (ALJ), dismissing petitioner's disability discrimination complaint against respondent Department of Education (DOE), unanimously confirmed, the petition denied, and the proceeding (transferred to this Court by order of Supreme Court, New York County [Carol E. Huff, J.], entered July 17, 2014), dismissed, without costs.

Substantial evidence supports DHR's determination that petitioner did not suffer from a disability for purposes of his claim under the New York State Human Rights Law (State HRL) (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-181 [1978]). The orthopedist who examined

petitioner opined that the most petitioner could lift was 40 pounds. In his hearing testimony, however, petitioner acknowledged that most students in District 75, where he was employed as a paraprofessional, weighed more than 40 pounds. DOE witnesses testified that, due to the fact that all students in District 75 were disabled, there were no District 75 paraprofessional positions that did not require an ability to lift more than 40 pounds. The ALJ credited this testimony and those factual determination are entitled to "substantial deference" (*Matter of State Div. of Human Rights v County of Onondaga Sheriff's Dept.*, 71 NY2d 623, 630 [1988]). Furthermore, given petitioner's medically prescribed weight limitations, the DHR properly determined that there was no "reasonable accommodation that would have enabled [petitioner] to perform the essential functions of his or her position" (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 838 [2014]; *see* Executive Law § 292[21]).

The record further demonstrates that DOE did attempt to accommodate petitioner by encouraging him to apply for an extension of his leave of absence. The principal of the school where petitioner was employed testified that petitioner's medical limitations would have qualified him for an extended leave of

absence, and his application would have been approved, had he applied. Petitioner inexplicably refused to apply for an extended leave of absence, however, despite being repeatedly urged to do so by the principal and other DOE representatives.

Plaintiff's proposed disability discrimination claims under the Americans with Disabilities Act (ADA) are similarly unavailing, since "ADA claims 'are governed by the same legal standards' as disability discrimination claims under the State HRL" (*Garcia v City Univ. of N.Y.*, __AD3d__, 2016 NY Slip Op 01271, *1 [1st Dept 2016], quoting *Pimentel v Citibank, N.A.*, 29 AD3d 141, 147 n 2 [1st Dept 2006], *lv denied* 7 NY3d 707 [2006]).

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

ENTERED: MARCH 31, 2016

CLERK

Tom, J.P., Sweeny, Manzanet-Daniels, Gische, Gesmer, JJ.

686 Aleksandar Pilipovic, et al., Index 653459/13
Plaintiffs-Respondents-Appellants,

-against-

Laight Cooperative Corp., etc., et al.,
Defendants-Appellants-Respondents.

_____

Braverman Greenspun, P.C., New York (Jon Kolbrener of counsel), for appellants-respondents.

Pryor Cashman, LLP, New York (Eric D. Sherman and Andrew M. Goldstein of counsel), for respondents-appellants.

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Order, Supreme Court, New York County (Anil C. Singh, J.), entered March 30, 2015, which, to the extent appealed from, denied defendants' motion insofar as it sought to dismiss the first, second, third, and fourth causes of action, and granted the motion insofar as it sought to dismiss the fifth and sixth causes of action, unanimously modified, on the law, to deny the motion as to the fifth and sixth causes of action, and otherwise affirmed, with costs against defendants.

Plaintiffs, tenant/shareholders of defendant Laight Cooperative Corp., sought consent from defendant Board of Directors to make alterations to the loading dock adjacent to their ground-floor apartment for reasons of safety and aesthetics. The motion court correctly determined that

plaintiffs' application was required to be considered under paragraph 21(a) of the proprietary lease, which provides that consent for alterations shall not be unreasonably withheld or delayed (*see Silver v Murray Hill Owners Corp.*, 2013 NY Slip Op 33133[U] [Sup Ct, NY County 2013], *affd* 126 AD3d 655 [1st Dept 2015]). Defendants' contention that the alterations provision of the lease applies only when a lessee seeks to make alterations to areas under his or her exclusive ownership, and not to common areas, is without merit, since the provision unambiguously states that it applies to proposed alterations to the "apartment or building." As amplified by plaintiffs' submissions in opposition to defendants' motion, the complaint raises issues as to whether defendants' action in denying plaintiffs' application was unreasonable. Thus, the first and second causes of action, which seek a judgment declaring that the Coop and the Board breached their obligations under the lease by unreasonably withholding consent to the alterations application and that the application meets all reasonable criteria for Board approval, were correctly sustained.

The fourth cause of action, alleging breach of fiduciary duty against the Board and defendant Marshad, its president, was correctly sustained. Plaintiffs' have alleged sufficient facts

to raise issues as to whether the Board and its president acted in good faith and for the purposes of the cooperative in denying the alterations application or were motivated by personal animus (*see 40 W. 67th St. v Pullman*, 100 NY2d 147, 153 [2003]; *see Smolinsky v 46 Rampasture Owners*, 230 AD2d 620, 622 [1st Dept 1996]).

The third cause of action, alleging a violation of Business Corporation Law § 501(c), which requires parity of rights granted to shareholders by the lease or bylaws, is adequately pleaded to the extent plaintiffs allege that, as a result of defendants' conduct, they were the only shareholders whose apartment has only one safe mode of egress (*see Spiegel v 1065 Park Ave. Corp.*, 305 AD2d 204 [1st Dept 2003]; *Wapnick v Seven Park Ave. Corp.*, 240 AD2d 245 [1st Dept 1997]; *510 East 84th St. Corp. v Genitrini*, 2011 NY Slip Op 50202[U] [Sup Ct, NY County 2011]).

As to the fifth and sixth causes of action, alleging discrimination under the State and City Human Rights Laws (*see* Executive Law § 296[5][a][2]; Administrative Code of the City of NY § 8-107[5][a][2]), plaintiffs have alleged sufficient facts to raise issues as to whether defendants made the determination to deny the alterations application on account of plaintiffs' race or national origin. In particular, plaintiffs point to email

exchanges between the board president and the former building manager, including one that could be construed as referring to plaintiff Chantay Pilipovic's race in a derogatory manner and another apparently ridiculing plaintiff Alexsandar Pilipovic's Eastern-European nickname.

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

ENTERED: MARCH 31, 2016

CLERK

Tom, J.P., Sweeny, Manzanet-Daniels, Gische, Gesmer, JJ.

687 Hermitage Insurance Company, Index 107777/11
Plaintiff-Respondent,

-against-

Skyview & Son Construction Corp., et al.,
Defendants,

Aspen Insurance UK Limited,
Defendant-Respondent,

Stalin Ivan Diaz,
Defendant-Appellant.

_____

Sullivan Papain Block McGrath & Cannavo P.C., New York (Susan M. Jaffe of counsel), for appellant.

Carroll McNulty & Kull, LLC, New York (Max W. Gershweir of counsel), for Hermitage Insurance Company, respondent.

Herzfeld & Rubin, P.C., New York (Linda M. Brown of counsel), for Aspen Insurance UK Limited, respondent.

_____

Order, Supreme Court, New York County (Paul Wooten, J.), entered November 12, 2014, which granted plaintiff's motion for summary judgment declaring that it has no duty to defend or indemnify defendants Suzana Mirzo, Muhamet Mirzo, and Skyview Construction Corp. in the underlying personal injury action, and so declared, and granted defendant Aspen Insurance UK Limited's cross motion for summary judgment declaring that it has no duty to defend or indemnify the Mirzos and Skyview in that action, and

so declared, unanimously affirmed, without costs.

Defendant Stalin Ivan Diaz was injured while working for defendant 786 Iron Works Corporation on a project rehabilitating premises owned by defendants Muhamet Mirzo and Suzana Mirzo. Defendant Skyview & Son Construction Corp., operated by the Mirzos' son, acted as the general contractor for the project and hired Iron Works as a framing subcontractor. Diaz's injury occurred outside the premises when a steel metal rolling gate fell on him.

Following his injury, Diaz commenced an action against the Mirzos and Skyview in Queens County alleging negligence and Labor Law violations. Plaintiff provided coverage to the Mirzos and Skyview under two separate polices. Defendant Aspen Insurance UK Limited provided coverage to Iron Works.

The policies issued by plaintiff to the Mirzos and Skyview contain an exclusion for injuries arising from the work of independent contractors or subcontractors on the premises unless the contractors or subcontractors specifically agreed to make the Mirzos and Skyview additional insureds on their own policies. Subcontractor Iron Works was the named insured on a policy issued by Aspen that provided that Aspen would consider an entity to be an additional insured only if Iron Works agreed, in writing, to

make that entity an additional insured. There is no writing in the record before us in which Iron Works agreed to make the Mirzos or Skyview additional insureds under its policy (*see e.g. A.B. Green Gansevoort, LLC v Peter Scalamandre & Sons, Inc.*, 102 AD3d 425 [1st Dept 2013]).

Skyview's policy also limited its coverage to specific types of interior work. Diaz was working outside the building at the time of his accident.

The motion court correctly determined that plaintiff validly disclaimed coverage to Skyview based on late notice of the occurrence and that Aspen validly disclaimed coverage on that basis as to Skyview and the Mirzos (*see Argo Corp. v Greater N.Y. Mut. Inc. Co.*, 4 NY3d 332 [2005]).

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

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

ENTERED: MARCH 31, 2016

CLERK

Tom, J.P., Sweeny, Manzanet-Daniels, Gische, Gesmer, JJ.

688-
688A In re Amaury Alfonso N.,
Petitioner-Appellant,

-against-

Zaida Iris R.,
Respondent-Respondent.

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

Tennille M. Tatum-Evans, New York, for respondent.

Karen P. Simmons, The Children's Law Center, Brooklyn (Janet Neustaetter of counsel), attorney for the child.

Orders, Family Court, Bronx County (Llinet M. Rosado, J.), entered on or about October 9, 2014, which dismissed, without prejudice, the father's petition for an enforcement of an order of custody, and denied, without prejudice, his motion seeking, inter alia, an order directing that mental health consultants be involved in a child custody evaluation, unanimously affirmed, without costs.

Family Court properly dismissed the father's enforcement petition since he failed to comply with a prior court order requiring him to obtain prior written authorization from the court before filing any further proceedings in order to prevent

him from engaging in further vexatious litigation (*see Matter of Pignataro v Davis*, 8 AD3d 487, 489 [2d Dept 2004]*; Sassower v Signorelli*, 99 AD2d 358, 359 [2d Dept 1984]). The father did not appeal from that order, which was reaffirmed by the court three years later, and which he acknowledged on the record.

The court providently exercised its discretion in denying the father's motion seeking a mental or forensic evaluation of the mother without a hearing, as he presented no basis for ordering such an evaluation or for modifying the final order of custody (*Matter of James Joseph M. v Rosana R.*, 32 AD3d 725, 727 [1st Dept 2006], *lv denied* 7 NY3d 717 [2006]). The court was entitled to take judicial notice of its own prior proceedings (*see Matter of Anjoulic J.*, 18 AD3d 984, 986 [3rd Dept 2005]; *Matter of Claudina Paradise Damaris B.*, 227 AD2d 135 [1st Dept 1996]), and to consider the position of the child advocated by his attorney (22 NYCRR 7.2[d]; *Matter of Alfredo J.T. v Jodi D.*, 120 AD3d 1138 [1st Dept 2014]).

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

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

ENTERED: MARCH 31, 2016

CLERK

Tom, J.P., Sweeny, Manzanet-Daniels, Gische, Gesmer, JJ.

689 Audrey Smith, Index 401019/12
Plaintiff-Appellant,

-against-

New York City Housing Authority,
Defendant-Respondent.

_____

Audrey Smith, appellant pro se.

David Farber, New York City Housing Authority, New York (Ahbra L. Williams of counsel), for respondent.

_____

Order, Supreme Court, New York County (Lucy Billings, J.), entered March 2, 2015, which denied plaintiff's motion for summary judgment, unanimously affirmed, without costs.

Pro se plaintiff seeks summary judgment on her claims that were previously dismissed by Supreme Court in December 2013 (the dismissal order). Having failed to appeal from the dismissal order, plaintiff cannot now attack it (*see Dick v City of New York*, 11 AD3d 239 [1st Dept 2004]). Furthermore, although plaintiff's claim arising under 12 USC 1701u(c)(1) was dismissed on a conditional basis only, since she failed to comply with the

dismissal order's plain terms, plaintiff's sole remedy was to timely appeal from the dismissal order, which she failed to do (*id.*).

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

ENTERED: MARCH 31, 2016

CLERK

Tom, J.P., Sweeny, Manzanet-Daniels, Gische, Gesmer, JJ.

690-
691 Pedro Bautista,
Plaintiff-Appellant,

Index 109503/08
591070/08
590876/10

-against-

165 West End Avenue Associates, L.P.,
Defendant,

The 165 West End Avenue Condominium, et al.,
Defendants-Respondents.

- - - - -

The 165 West End Avenue Condominium, et al.,
Third-Party Plaintiffs-Respondents,

-against-

Lyn Blacksberg,
Third-Party Defendant-Respondent.

- - - - -

[And Another Third-Party Action]

_____

Gorayeb & Associates, P.C., New York (John M. Shaw of counsel), for appellant.

Fabiani Cohen & Hall, LLP, New York (John V. Fabiani, Jr. of counsel), for the 135 West End Avenue Condominium and 165 West End Avenue Owners Corp., respondents.

Mauro Lilling Naparty LLP, Woodbury (Anthony F. DeStefano of counsel), for Lyn Blacksberg, respondent.

_____

Judgment, Supreme Court, New York County (Debra A. James, J.), entered February 28, 2014, insofar as appealed from as limited by the briefs, dismissing the Labor Law § 241(6) claim as against defendant 165 West End Avenue Owners Corp. (Owners),

unanimously affirmed, without costs.

Plaintiff allegedly was injured when a screw that he was removing in the course of replacing window balances in a cooperative apartment unit "jumped" and struck him in the eye. Plaintiff is correct that his work replacing window balances constitutes "maintenance" pursuant to Industrial Code (12 NYCRR) § 23-1.4(b)(13). However, because plaintiff did not perform the work in the context of construction, demolition or excavation, his Labor Law § 241(6) claim was correctly dismissed (*see* *Esposito v New York City Indus. Dev. Agency*, 1 NY3d 526 [2003; *Martinez v Morris Ave. Equities*, 30 AD3d 264 [1st Dept 2006]).

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

ENTERED: MARCH 31, 2016

CLERK

Tom, J.P., Sweeny, Manzanet-Daniels, Gische, Gesmer, JJ.

692 Citibank, N.A., et al., Index 651075/12
Plaintiffs-Appellants,

-against-

Keenan Powers & Andrews PC, et al.,
Defendants,

Securetitle Agency, Inc.,
Defendant-Respondent.

_____

Bryan Cave LLP, New York (Courtney J. Peterson of counsel), for appellants.

David H. Eisenberg, Smithtown, for respondent.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered December 18, 2014, which, inter alia, denied plaintiffs' motion for summary judgment on their claims as against defendant Securetitle Agency, Inc. (Securetitle) and granted Securetitle's cross motion for summary judgment dismissing the complaint as against it, unanimously affirmed, with costs.

Where Securetitle's last act in connection with the alleged conversion and diversion of funds by codefendants occurred three months before codefendants even received the specifically identified fund at issue, such conduct did not constitute

substantial assistance of conversion or participation in the subsequent breach of fiduciary duty by codefendants (*see Rizer v Breen*, 2007 NY Slip Op 32325[U] [Sup Ct, NY County 2007]; *see also Kaufman v Cohen*, 307 AD2d 113, 125 [1st Dept 2003]). Nor could it constitute conversion of the subsequently obtained funds, as those other funds were the only specifically identified fund (*Thys v Fortis Sec. LLC*, 74 AD3d 546, 547 [1st Dept 2010]). Plaintiffs misconstrued the motion court's response to their argument on the alleged concealment of codefendants' bad acts. The court was correct that, to the extent plaintiffs were trying to argue fraudulent concealment, their opportunity to discover the alleged bad conduct was relevant (*see generally Deluca v DeLuca*, 48 AD3d 341 [1st Dept 2008]).

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

ENTERED: MARCH 31, 2016

CLERK

Tom, J.P., Sweeny, Manzanet-Daniels, Gische, Gesmer, JJ.

693 The People of the State of New York, Ind. 5465/10
Respondent,

-against-

Lawrence Elliot,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (David P. Stromes of counsel), for respondent.

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Judgment, Supreme Court, New York County (Melissa C. Jackson, J.), rendered July 10, 2013, as amended July 29, 2013, convicting defendant, upon his plea of guilty, of predatory sexual assault, and sentencing him to a term of 13 years to life, unanimously affirmed.

Defendant's contention that his plea was rendered involuntary by the court's allegedly coercive statements about his potential sentence is unpreserved because his remarks at sentencing neither clearly requested to withdraw the plea nor articulated the ground he raises on appeal (*see People Ali*, 96 NY2d 840 [2001]; *People v Tabares*, 52 AD3d 437 [1st Dept 2008], *lv denied* 11 NY3d 835 [2008]), and we decline to review defendant's contention in the interest of justice. As an

alternative holding, we find that the court's reference to a probable sentence upon conviction after trial, although ill-advised, did not render the plea involuntary (*see People v Cornelio*, 227 AD2d 248 [1996], *lv denied* 88 NY2d 982 [1996]; *see also Bordenkircher v Hayes*, 434 US 357, 364 [1978]).

Defendant made a valid waiver of his right to appeal, which forecloses review of his suppression claim (*see People v Lopez*, 6 NY3d 248, 256-257 [2006]). The court's colloquy adequately described the waiver of his right to appeal and did not "lump[] it into the panoply of rights normally forfeited upon a guilty plea" (*People v Sanders*, 25 NY3d 337, 341 [2015]). Moreover, defendant signed a written waiver, which he had discussed with counsel, that adequately supplemented the oral colloquy (*see People v Lewis*, 127 AD3d 569 [1st Dept 2015], *lv denied* 26 NY3d

931 [2015]). As an alternative holding, we find that defendant's suppression motion was properly denied for all of the reasons stated by the court.

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

ENTERED: MARCH 31, 2016

CLERK

Tom, J.P., Sweeny, Manzanet-Daniels, Gische, Gesmer, JJ.

694 The People of the State of New York, Ind. 5739/12
Respondent,

-against-

Marisol Perez-Pino,
Defendant-Appellant.

_____

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Michael Sonberg, J.), rendered July 23, 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: MARCH 31, 2016

CLERK

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

Tom, J.P., Sweeny, Manzanet-Daniels, Gische, Gesmer, JJ.

695 In re Alicia Davis, Index 101073/13
Petitioner-Appellant,

-against-

New York City Board/Department of Education,
Respondent-Respondent.

_____

Alicia Davis, appellant pro se.

Zachary W. Carter, Corporation Counsel, New York (Kathy Chang Park of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Carol E. Huff, J.), entered April 3, 2014, which denied the petition brought pursuant to CPLR article 75 to annul the Hearing Officer's award recommending termination of petitioner's employment as a tenured teacher, and granted respondent's cross motion to dismiss the petition, unanimously affirmed, without costs.

Education Law § 3020-a(5) limits judicial review of a hearing officer's determination to the grounds set forth in CPLR 7511. Where, as here, the parties are subject to compulsory arbitration, the award must also comport with due process and cannot be arbitrary and capricious (*see City School Dist. of the City of N.Y. v McGraham*, 17 NY3d 917, 919 [2011]; *Matter of Brito*

v Walcott, 115 AD3d 544, 545 [1st Dept 2014]).

The court properly found that the award was not arbitrary and capricious and was well supported by the evidence. The Hearing Officer engaged in a through analysis of the facts and circumstances, evaluated witnesses' credibility, and arrived at a reasoned conclusion. Petitioner's due process rights were not violated because she was provided with notice, an appropriate hearing, and the opportunity to present evidence and cross-examine witnesses *(see Matter of Ajeleye v New York City Dept. of Educ.*, 112 AD3d 425 [1st Dept 2013]).

Petitioner failed to sustain her burden of demonstrating bias or misconduct by the Hearing Officer, who did not exceed her powers *(see Batyreva v N.Y.C. Dept. of Educ.,* 95 AD3d 792 [1st Dept 2012]).

The penalty of termination is not excessive. The record demonstrates that respondent provided petitioner with assistance and numerous opportunities to improve her skills. The record supports the Hearing Officer's conclusion that petitioner was either unable or unwilling to adjust her teaching methods to comply with her supervisors' appropriate directives (*see e.g. Matter of Davies v New York City Dept. of Educ.*, 117 AD3d 446 [1st Dept 2014]; *Matter of Benjamin v New York City Bd./Dept. of*

Educ., 105 AD3d 677 [1st Dept 2013]).

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

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

ENTERED: MARCH 31, 2016

CLERK

Tom, J.P., Sweeny, Manzanet-Daniels, Gische, Gesmer, JJ.

696 Antoinette Hunter, Index 109154/11
Plaintiff-Appellant,

-against-

New York City Housing Authority,
Defendant-Respondent.

_____

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

Congdon, Flaherty, O'Callaghan, Reid, Donlon, Travis & Fishlinger, Uniondale (Christine Gasser of counsel), for respondent.

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Order, Supreme Court, New York County (Paul Wooten, J.), entered October 29, 2014, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant established entitlement to judgment as a matter of law in this action where plaintiff alleges that she was injured when her sock became caught on a broken tile, causing her to fall. Defendant presented evidence that the elevation differential between the broken tile on which plaintiff's sock was caught and the floor beneath was 1/10th of an inch. Defendant also submitted an expert affidavit showing that the condition of the floor did not violate any code, was not

defectively designed, constructed or maintained, and did not present a tripping hazard (*see Forrester v Riverbay Corp.*, 135 AD3d 448 [1st Dept 2016]).

In opposition, plaintiff failed to raise a triable issue of fact as to the size of the defect itself, whether "its intrinsic characteristics or the surrounding circumstances magnif[ied] the dangers it pose[d], so that it unreasonably imperil[ed] the safety of [plaintiff]," (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 78 [2015] [internal quotation marks omitted]), or "whether the defect was difficult for [plaintiff] to see or to identify as a hazard or difficult to pass over safely on foot in light of the surrounding circumstances" (*id.* at 80).

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

ENTERED: MARCH 31, 2016

CLERK

Tom, J.P., Sweeny, Manzanet-Daniels, Gische, Gesmer, JJ.

697 The People of the State of New York, Ind. 919/11
Respondent,

-against-

Johan Liranzo-Marte,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Alejandro B. Fernandez of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (John T. Hughes 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 (Ronald A. Zweibel, J.), rendered April 26, 2012,

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: MARCH 31, 2016

CLERK

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

Tom, J.P., Sweeny, Manzanet-Daniels, Gische, Gesmer, JJ.

699 In re Crystal Oliver-Vaughn Index 251613/15
[M-568] Petitioner,

-against-

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

_____

Crystal Oliver-Vaughn, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Michael A. Berg of counsel), for Hon. Mitchell J. Danziger, respondent.

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The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

Entered: MARCH 31, 2016

CLERK

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

16694 West Chelsea Building, LLC, Index 650968/14
Plaintiff-appellant,

-against-

Jack Guttman, et al.,
Defendants-Respondents.

_____

Jeffrey W. Toback, P.C., Long Beach (Jeffrey Toback of counsel), for appellant.

Harfenist Kraut & Perlstein, LLP, Lake Success (Steven J. Harfenist of counsel), for respondents.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered August 22, 2014, which granted the motion of defendants Jack Guttman, Young Woo & Assoc., Bass Associates LLC and Guttman Realty Fund 1 UC to dismiss the complaint as against them on statute of limitations grounds, affirmed, without costs.

Opinion by Tom, J.P. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
David Friedman
David Saxe
Barbara Kapnick, JJ.

16694
Index 650968/14

_____x

West Chelsea Building LLC,
Plaintiff-Appellant,

-against-

Jack Guttman, et al.,
Defendants-Respondents,

Board of Managers of the Chelsea
Arts Tower Condominium,
Defendant.

_____x

Plaintiff appeals from the order of the Supreme Court, New York County (Carol R. Edmead, J.), entered August 22, 2014, which granted defendants Jack Guttman, Young Woo & Assoc., LLC, Bass Associates, LLC and Guttman Realty Fund 1 UC's motion to dismiss the complaint as against them on statute of limitations grounds.

Jeffrey W. Toback, P.C., Long Beach (Jeffrey Toback of counsel), for appellant.

Harfenist Kraut & Perlstein, LLP, Lake Success (Steven J. Harfenist and Andrew C. Lang of counsel), for respondents.

TOM, J.

The issue raised on appeal is whether the three-year statue of limitations is tolled by defendants' failure to given written notice to plaintiff pursuant to Administrative Code of the City of New York § 27-860(c). We find that it is not and that plaintiff's action is time-barred.

Plaintiff West Chelsea Building LLC is the owner of a 10-story building located at 526 West 26th Street in Manhattan. On the building's roof is a chimney and ventilation system that services the building. Defendants Jack Guttman, Young Woo & Assoc., LLC (Young Woo), Bass Associates LLC, (Bass), and Guttman Realty Fund 1 LLC (Guttman Realty) are the owners of an adjacent building located at 543-545 West 25th Street. It is undisputed that the buildings are within 100 feet of each other.

Between 2005 and 2007, defendants converted their property into the Arts Tower Condominium, and increased the height of the structure to 21 stories, so that it extends higher than the chimney located atop plaintiff's building. Plaintiff alleges that conversion of the Arts Tower property rendered its chimney noncompliant with Administrative Code § 27-859, which requires that a building's chimney vent be at least as high, or in certain cases 20 feet higher, than the height of adjoining structures located within a certain distance.

In the underlying action, plaintiff seeks to recover the cost of modifying its chimney to become Code-compliant. Defendants moved to dismiss the complaint under CPLR 3211(a)(1) and (5), arguing that plaintiff's claim was barred by the applicable three year statute of limitations (CPLR 214[2]) because the construction of their building was substantially completed in January 2007 and this action was not commenced until 2014. Plaintiff opposed dismissal, arguing that the limitations period was tolled because it was never given written notification of the conversion of defendants' property into a 21-story structure, as required by Administrative Code § 27-860(c).

Supreme Court granted defendants' motion to dismiss, finding that defendants established via documentary evidence that the statute of limitations expired on or about January 22, 2010, and rejecting plaintiff's claim that the limitations period was tolled by virtue of defendants' failure to give written notification. We now affirm.

Administrative Code § 27-860(a) requires owners of buildings with increased or extended heights to be responsible for altering neighboring chimneys rendered noncompliant with Administrative Code § 27-859. Specifically, it provides that

> "[w]henever a building is erected, enlarged, or increased in height so that any portion of such building . . . extends higher than the

> top of any previously constructed chimneys within one hundred feet, the owner of such new or altered building shall have the responsibility of altering such chimneys to make them conform with the requirements of section 27-859 of this article."

In addition, Administrative Code § 27-860(c) provides that

> "[t]he owner of the new or altered building shall notify the owner of the building affected in writing at least forty-five days before starting the work required and request written consent to do such work. Such notice shall be accompanied by plans indicating the manner in which the proposed alterations are to be made."

Plaintiff alleges and defendants do not dispute that they failed to notify plaintiff of their plans to erect, enlarge or increase the height of their building, as required by Administrative Code § 27-860(c). In particular, in an affidavit made in opposition to defendants' dismissal motion, Mike Sosa, plaintiff's building manager, stated that although he was aware that defendants erected a taller adjacent building commencing in 2005 and continuing through 2007, defendants never gave written notice as required by the statute. Sosa averred that, had such written notice been given, plaintiff would have made sure that defendants fulfilled their obligation to alter plaintiff's chimney in accordance with the procedures set forth in Administrative Code § 27-860(f).

In *Mindel v Phoenix Owners Corp.* (17 AD3d 227, 228 [1st Dept 2005]) this Court held that a cause of action based on a violation of Administrative Code § 27-860 is subject to the three-year statute of limitations set forth in CPLR 214(2), which applies to "an action to recover upon a liability, penalty or forfeiture created or imposed by statute." Since the applicable limitations period is settled, the only question before us is the accrual date of plaintiff's cause of action.

"In general, a cause of action accrues, triggering commencement of the limitations period, when all of the factual circumstances necessary to establish a right of action have occurred, so that the plaintiff would be entitled to relief" (*Gaidon v Guardian Life Ins. Co. of Am.*, 96 NY2d 201, 210 [2001]). In an action to recover for a liability created or imposed by statute, the statutory language determines the elements of the claim that must exist before the action accrues (*Matter of Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 214, 221 [1996]).

Pursuant to the statutory language, plaintiff's claim accrued when defendants' building (1) was erected; (2) was sited within 100 feet of plaintiff's chimney; and (3) was increased in height so that it exceeded the height of plaintiff's chimney vent. Here, all the factual circumstances required to establish

a right of action occurred by January 2007, when the work on the building had been substantially completed. The January 22, 2007 temporary certificate of occupancy (CO), issued by the Department of Buildings (DOB), certified that defendants' building was 20 stories tall and "conform[ed] substantially to the approved plans and specifications[,] and to the requirements of all applicable laws, rules and regulations for the uses and occupancies specified" for the project. The approved condominium offering plan stated that the Arts Tower would consist of a cellar level and 20 additional stories. This documentary evidence is prima facie proof that as of January 20, 2007, the building was erected to a height that was 10 stories taller than plaintiff's chimney, and sited within 100 feet of the chimney, thus triggering the three-year limitations period on plaintiff's claim that defendants failed to comply with Administrative Code § 27-860(a). Moreover, plaintiff concedes that it was aware of the building's height by the time construction was substantially completed in 2007. Accordingly plaintiff's claim accrued on January 20, 2007, and this action, commenced in March 2014, is thus time-barred (*see* CPLR 214[2]; *Mindel v Phoenix Owners Corp.*, 17 AD3d at 228).

There is no merit to plaintiff's contention that the limitations period did not begin to run in 2007 because the DOB has issued 28 additional temporary COs since that time. The

issuance of the temporary CO in 2007 indicates that substantial completion occurred at that time. Indeed, "construction may be complete even though incidental matters relating to the project remain open" and "for [s]tatute of [l]imitations purposes the date of the final certificate is not controlling" (*State of New York v Lundin*, 60 NY 2d 987, 989 [1983]; *see also Verderame Contr. Co. v Talel*, 1997 WL 34849945 [Sup Ct, NY County, July 16, 1997, No. 1185641995]).

Plaintiff raises a valid concern by questioning why developers should feel compelled to comply with the notice requirement in Administrative Code § 27-860(c) unless there are consequences for noncompliance. While we do not condone defendants' noncompliance with the notice requirement, we conclude, particularly in light of plaintiff's admission that it was aware of the 21-story adjoining structure in 2007, that defendants' failure to provide written notice did not relieve plaintiff of the obligation to commence this action within the applicable three-year limitations period. Nor can plaintiff explain how defendants' failure to provide written notice prevented it from realizing that defendants' building had rendered its chimney noncompliant with the Administrative Code, or somehow hampered its ability to file the complaint within the three-year limitations period once construction was substantially

completed. Additionally, we note that the issue of an appropriate penalty for defendants' failure to provide written notice is not necessarily raised by the complaint, which only seeks to recover plaintiff's cost for making its chimney Code-compliant.

Moreover, plaintiff's analogy to cases in which written notice to a defendant was required by statute before liability could be imposed upon that defendant is unavailing (*see e.g. New York City Campaign Fin. Bd. v Ortiz*, 38 AD3d 75, 78 [1st Dept 2006] [party cannot be fined for violating campaign finance rules without first being given written notice of the charges]; *Bielecki v City of New York*, 14 AD3d 301 [1st Dept 2005] [City must receive written notice of an alleged sidewalk or roadway defect before it can be held liable for personal injuries resulting therefrom]).

Unlike those matters relied on by plaintiff, Administrative Code § 27-860 does not require written notice as a prerequisite to finding liability. Subdivision (c) of the section directs the owner of the new or altered building to notify the owner of the affected building in writing for the purpose of getting written consent to do the alteration work. It also directs the owner of the new or altered building to attach proposed plans as to how the affected chimney will be altered. Subdivision (d) provides

that such proposed plans are subject to the approval of the DOB Commissioner, and subdivision (e) permits the owner of the affected building to either grant or deny consent to the proposed alterations on its chimney. Therefore, a plain reading of the statute's various subdivisions reveals that the purpose of the written notice requirement is to provide the owner of the affected building an opportunity to either grant or deny consent to the proposed work on the affected chimney (*see* Administrative Code § 27-860[c], [d], [e]). Thus, there is no basis in the statute for finding that the statute of limitations is tolled until written notice is provided by the owner of the new or altered building. Nor has plaintiff provided any authority to support the assertion that failure to provide notice tolls the statute of limitations.

Accordingly, the order of the Supreme Court, New York County (Carol R. Edmead, J.), entered August 22, 2014, which granted defendants Guttman, Young Woo, Bass, and Guttman Realty's motion

to dismiss the complaint as against them on statute of limitations grounds, should be affirmed, without costs.

All concur.

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

ENTERED: MARCH 31, 2016

CLERK