SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 19, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Mazzarelli, J.P., Acosta, Renwick, Richter, JJ.

14060 The People of the State of New York, Ind. 5871/10
Respondent,

-against-

Lasean Sykes,
Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Joseph M. Nursey of counsel) and Devoise & Plimpton LLP, New York (Jared Kagan of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Manu K. Balachandran of counsel), for respondent.

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Judgment, Supreme Court, New York County (Ruth Pickholz, J.), rendered April 5, 2012, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of three years, unanimously affirmed.

Since defendant's claim under *People v O'Rama* (78 NY2d 270 [1991]) involves a jury note that the court read into the record in full before responding, thereby providing counsel with notice

of its specific contents, defendant's claim is not exempt from preservation requirements (*see People v Nealon*, 26 NY3d 152 [2015]); *People v Williams*, 21 NY3d 932, 934-935 [2013]; *compare People v Silva*, 24 NY3d 294 [2014] [nondisclosures of notes were mode of proceedings errors]). We decline to review this unpreserved claim in the interest of justice. As an alternative holding, we find that defendant was not prejudiced by the lack of full compliance with the *O'Rama* procedures.

The evidence at a *Hinton* hearing established an overriding interest that warranted a limited closure of the courtroom (*see Waller v Georgia*, 467 US 39 [1984]). An undercover officer's testimony that, among other things, he was still working undercover in the vicinity of defendant's arrest, was the type of showing that has consistently been held to demonstrate a substantial probability that the officer's undercover status and safety would be jeopardized by testifying in an open courtroom (*see People v Echevarria*, 21 NY3d 1, 12-14 [2013]). Although the court did not explicitly discuss on the record alternatives to closing the courtroom, the record sufficiently demonstrates that

the court fulfilled its obligation under *Waller* to consider such alternatives, and it can be implied that the court determined that no lesser alternative would suffice (*see Echevarria*, 21 NY3d at 14-19 [2013]).

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

ENTERED: JANUARY 19, 2016

CLERK

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

14837 Kyle Connaughton, Index 115106/13
Plaintiff-Appellant,

-against-

Chipotle Mexican Grill, Inc.,
Defendants-Respondents.

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Kaiser Saurborn & Mair, P.C., New York (Daniel J. Kaiser of counsel), for appellant.

Messner Reeves LLP, New York (Jean-Claude Mazzola of counsel), for respondents.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered January 29, 2014, which granted defendants Chipotle Mexican Grill, Inc. and Steven Ells's motion to dismiss the complaint asserting claims for fraudulent inducement and unjust enrichment, affirmed, without costs.

Plaintiff, a well-known chef, alleges that in 2010 he sold his concept of a fast food restaurant chain serving ramen cuisine to defendants Chipotle Mexican Grill, Inc., and its founder and CEO, Steven Ells.[1] Plaintiff was then hired as an at-will employee to bring the concept to fruition. He was compensated through an employment contract providing a base salary and the

[1] All factual allegations are taken from the complaint unless otherwise noted.

promise that after working with defendants for three years on the project, he would receive a substantial amount of equity in the form of company stock. By its terms, plaintiff was restricted from working on ramen-related projects other than with defendants.

The complaint indicates that a considerable amount of work was done over the next year and a half. At the end of his first year, plaintiff received a full annual bonus and additional stock grants. Defendants informed him that the plan was to open the new restaurants in 2012. A lease was signed in September 2012 for a Manhattan-based flagship store.

In October 2012 plaintiff claims he learned from other Chipotle executives that in 2008 Ells had entered into a confidential agreement with David Chang, the owner of Momofuku Noodle Bar, to develop a ramen restaurant concept. Chang worked on the design for what ultimately became defendants' Washington D.C. flagship ramen cuisine restaurant called ShopHouse. However, the Chang-Ells agreement, containing nondisclosure provisions that have remained in force, fell apart when the parties were unable to agree on financial terms. Although Chang never agreed that his design work could be used for ShopHouse, according to the Chipotle executives, Ells "simply converted"

Chang's work, without payment, to open ShopHouse. The Chipotle executives stated that Momofuku would sue Chipotle once Ells opened the ramen restaurant that plaintiff had developed.

Plaintiff confronted Ells with this information. Ells did not deny the previous business dealings. Instead, he "stunned" plaintiff by ordering him to proceed with the ramen concept, even knowing "it would end in litigation." Shortly thereafter, in November 2012, defendants terminated plaintiff's employment. Officially, he was terminated on the ground that he was engaged in outside work, which plaintiff disputes, and because Ells had lost confidence in the ramen project.

The complaint alleges two causes of action against defendants: fraudulent inducement and unjust enrichment. In sum, it alleges that defendants fraudulently induced plaintiff to work with them by purposefully withholding the existence of the nondisclosure agreement and earlier business agreement with Momofuku, material facts which defendants had a duty to reveal. According to the complaint, had plaintiff known of the defendants' prior dealings with Chang, plaintiff would never have accepted employment with Chipotle because the Momofuku agreement "substantially impacted [plaintiff's] ability to implement his own ramen concept with Mr. Ells." The complaint supposes that

during the back and forth discussions with defendants during the development of the concept, the Chipotle staff must have communicated information and ideas that had originally come from Momofuku, thus violating the nondisclosure agreement, and also creating the appearance that plaintiff had stolen Momofuku's ramen concept. It also alleges that defendants received the benefit of his ramen concept without compensating him for it, as he did not receive the promised company stock. Plaintiff seeks compensatory damages in the form of a sum equal to his claimed Chipotle equity and his lost business opportunities. He also seeks punitive damages.

Plaintiff now appeals the dismissal of his complaint pursuant to CPLR 3211(a)(7).

To state a legally cognizable claim of fraudulent inducement based on a misrepresentation or omission, the complaint must allege that the defendant intentionally made a material misrepresentation of fact in order to defraud or mislead the plaintiff, and that the plaintiff reasonably relied on the misrepresentation and suffered damages as a result (*see Oxbow Calcining USA Inc. v American Indus. Partners*, 96 AD3d 646, 650 [1st Dept 2012]; *see also Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]).

Unlike our dissenting colleagues, we conclude that the motion court properly dismissed the claim for fraudulent inducement. Curiously, plaintiff's complaint posits what would be his defense to any potential litigation brought by Chang had he gone forward with defendants' plans and fully carried out the ramen restaurant concept. In particular, it reveals that plaintiff has not been accused of stealing Chang's and Momofuku's ramen concept and that his professional reputation has not been tarnished. Plaintiff does not dispute that he received his agreed-upon salary and an annual bonus. He received what he contracted for in the employment agreement and has no ground to allege wrongful termination.

The facts alleged, even when viewed in a light most favorable to plaintiff, do not give rise to a reasonable inference that he sustained calculable damages based on defendants' actions. Plaintiff's employment was at will, and he has no claim of reasonable reliance on representations concerning continued employment (*see Meyercord v Curry*, 38 AD3d 315, 316-317 [1st Dept 2007]; *Tannehill v Paul Stuart, Inc.*, 226 AD2d 117 [1st Dept 1996]). Any claim that he was deprived of the promised Chipotle stock cannot succeed, given that is undisputed that the express terms of the parties' agreement required him to be an

employee for three years. Nor can he seek damages based on the alleged profits that would have been realized had there been no fraud. When a claim sounds in fraud, the measure of damages is governed by the "out-of-pocket" rule, which states that the measure of damages is "indemnity for the actual pecuniary loss sustained as the direct result of the wrong" (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]; *see Rather v CBS Corp.*, 68 AD3d 49, 58 [1st Dept 2009], *lv denied* 13 NY3d 715 [2010] [explaining that under *Lama Holding Co.*, plaintiff Rather was "required to plead that he had something of value, was defrauded by CBS into relinquishing it for something of lesser value, and that the difference between the two constituted [his] pecuniary loss"]). In other words, damages are calculated to compensate plaintiffs for what they lost because of the fraud, not for what they might have gained in the absence of fraud (*Lama Holding Co.* at 421). Additionally, plaintiff's claim that he would have received better remuneration had he partnered with a different entity is inherently speculative and would require any factfinder to engage in conjecture (*see Geary v Hunton & Williams*, 257 AD2d 482, 482 [1st Dept 1999]).

The dissent suggests that the pleadings sufficiently support a reasonable inference that defendants' conduct *may* cause

plaintiff compensable damages, in particular, that plaintiff *may* suffer injury to his professional reputation, and incur future legal expenses defending himself. However, "[t]he true measure of damage is indemnity for the actual pecuniary loss *sustained* as the direct result of the wrong" (*Lama Holding Co. v Smith Barney*, at 421 [quotation marks and citation omitted; emphasis added]). The loss is computed by ascertaining the "difference between the value of the bargain which a plaintiff was induced by fraud to make and the amount or *value of the consideration exacted* as the price of the bargain" (*Lama Holding Co.* at 421, quotation marks and citation omitted; emphasis added). There are no allegations here that lead to the inference that plaintiff's reputation has been damaged, or that he has accrued defense-related legal fees, or has endured any other type of compensable injury.

For instance, in *Caruso, Caruso & Branda, P.C. v Hirsch* (41 AD3d 407 [2d Dept 2007]), cited by the dissent, the proposed counterclaim complaint alleged that in the underlying matrimonial action, the law firm should have filed a notice of pendency as to several properties that the matrimonial court had directed be transferred from the husband into the wife's name, when also directing that judgment in the divorce action was to be settled. Before judgment was entered, the properties became subject to

bankruptcy proceedings brought by the husband and a family trust; the bankruptcy court held that the wife's interest in the properties never vested. The Second Department ruled that the wife's proposed amended counterclaim complaint sufficiently suggested that she had suffered damages attributable to the law firm's alleged malpractice (41 AD3d at 409-410).

Here, in contrast, the allegations at best suggest that, depending on the future actions of Chang and Momufuko, plaintiff might suffer injury. Not only is there no suggestion or indication that actual pecuniary damages were sustained (*see Hanlon v MacFadden Publs.*, 302 NY 502, 510 [1951] [a claim of actual injury or damage is an essential element in a claim of fraud]), but the complaint does not allege facts from which actual damages can be inferred (*cf. Black v Chittenden*, 69 NY2d 665, 668 [1986] [elements of fraud claim were sufficiently pleaded, and damages could be inferred by allegations of deterioration to the bowling alleys and the need for extensive repairs, despite assurances that the lanes were in good shape, and the damage was not visible to an untrained eye]).

The dissent posits that plaintiff should be entitled to pursue nominal damages. We note that plaintiff himself made no such claim in his complaint and did not advance such an argument

either in the motion court or on appeal. Nor do we agree that plaintiff is or would be entitled to nominal damages (*see Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 95, 96 [1993] [declining to "import[]" the legal fiction of nominal damages from contract law into a tort claim, because "[i]n tort . . . there is no enforceable right until there is loss," and a claim of nominal damages when no loss has accrued "wrest[s] the cause of action [in tort] from its traditional purposes – the compensation of *losses* – and [uses it] . . . to vindicate nonexistent or amorphous inchoate rights"]). To the extent *Clearview Concrete Prods. Corp. v S. Charles Gherardi, Inc.* (88 AD2d 461, 470 [2d Dept 1982]), cited by our dissenting colleagues, holds otherwise, we choose not to follow it. To the extent the nineteenth century cases, *Pryor v Foster* (130 NY 171, 178 [1891]) and *Northrop v Hill* (57 NY 351, 354 [1874]), hold otherwise, we believe the current rule is that voiced in *Kronos*.

Plaintiff only alleges that he will suffer injury in the future. This is "undeterminable and speculative," and such claims are not compensable (*Lama Holding Co.* at 422, citing *Dress Shirt Sales v Hotel Martinique Assoc.*, 12 NY2d 339, 344 [1963]; *see Goldsmith v Fight for Sight, Inc.*, 251 AD2d 120, 120 [1st Dept 1998]).

Because plaintiff has not sufficiently alleged damages, we need not address the dissent's analysis of whether the alleged facts satisfy the "superior knowledge" exception to the general rule that when one alleges fraud based on an omission, the complaint must also allege the existence of a fiduciary relationship requiring disclosure of the unknown facts, here the existence of the nondisclosure agreement with Chang (*see Cobalt Partners, L.P. v GSC Capital Corp.*, 97 AD3d 35, 42-43 [1st Dept 2012]; *Dembeck v 220 Cent. Park S., LLC*, 33 AD3d 491, 492 [1st Dept 2006]). In short, plaintiff's failure to adequately plead actual damages is fatal to his cause of action sounding in fraudulent inducement.

The court properly dismissed the unjust enrichment claim because the parties had a written contract (*Pappas v Tzolis*, 20 NY3d 228, 234 [2012]), and plaintiff has received compensation

and bonuses for the period he was employed pursuant to the contract (*see Meghan Beard, Inc. v Fadina*, 82 AD3d 591 [1st Dept 2011]).

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

SAXE, J. (dissenting in part)

This case illustrates the consequences of getting ensnared in a web of deceit by embarking upon a business relationship with parties who possess important information that they do not share with regard to risks of the enterprise. This appeal raises the issues of whether plaintiff's status as an at-will employee precludes him, as a matter of law, from bringing a claim against defendants for fraudulent inducement, and exactly what must be alleged to support an inference of damages.

Defendant Chipotle Mexican Grill, Inc. franchises chain Mexican restaurants across the nation; codefendant Steven Ells is its founder and CEO. Plaintiff Kyle Connaughton, who was employed by Chipotle, appeals from an order granting defendants' motion pursuant to CPLR 3211 to dismiss his complaint for fraudulent inducement and unjust enrichment.

For purposes of this appeal, we must accept as true the facts as alleged in the complaint, accord the plaintiff the benefit of every possible favorable inference, and determine whether the alleged facts fit within any cognizable legal theory (*see Gabriel v Therapists Unlimited*, 218 AD2d 614, 615 [1st Dept 1995]). According to the complaint, plaintiff is a well-known chef who has worked for some of the most prestigious restaurants in the

world. In 2010, plaintiff conceived of and began developing an idea for a fast food restaurant chain that would serve ramen noodle products. Chipotle expressed interest in the concept, and in November 2010 plaintiff met with Ells. During their initial meeting, plaintiff described his ramen restaurant concept to Ells, who expressed significant interest in the idea. In the following weeks, plaintiff prepared a confidential business plan under the registered domain name "Ramen Yokocho," conceived around the existing service platform of the Chipotle Mexican Grill restaurants: fast food restaurants that serve high-quality food. On November 20, 2010, plaintiff submitted his plan to Ells.

Between November 2010 and January 2011, plaintiff and Ells met and discussed the menu, the service platform, and plaintiff's ideas generally regarding a ramen restaurant, and on January 2, 2011, Ells formally extended an exclusive offer by which Chipotle would proceed with plaintiff's ramen concept. Plaintiff obtained counsel to represent him in the ensuing negotiations.

The proposal Ells conveyed was that plaintiff would be compensated for the concept through an employment contract in which he would be paid a base salary as well as equity in the form of Chipotle company stock, to be paid out annually pursuant

to a set schedule over his years there, as long as plaintiff remained employed by Chipotle on the ramen project. Although initially plaintiff was not interested in that proposal, when Ells told him that the contemplated stock grants required that he be an employee, plaintiff agreed. Plaintiff signed the employment contract in February 2011.

A letter from Ells to plaintiff dated January 24, 2011 provides details of the employment agreement; it states that plaintiff's employment with Chipotle was at will and that both parties retained the option of ending the employment at any time, with or without notice or cause. A "Restricted Stock Units Agreement" signed in February 2011 states that the granting of stock to plaintiff "shall not be construed as granting to [plaintiff] any right with respect to continuance of employment with the Company" and that "the right of the Company to terminate plaintiff's employment with it at any time (whether by dismissal, discharge, retirement or otherwise) is specifically reserved by the Company and acknowledged by plaintiff." Plaintiff was given the title of "Culinary Director," a new position. His name and likeness were used in marketing materials for both Chipotle and the ShopHouse brand, the name given to the anticipated ramen noodle restaurant.

Plaintiff continued developing the ramen concept for Chipotle throughout 2011. In December 2011, he and a development team toured Japan to visit ramen restaurants and ingredient suppliers to prepare for the project. In February 2012, plaintiff received his first annual review from Ells, which was "entirely positive." He received his full bonus, and additional stock grants. Ells told plaintiff that this was the year to open the ramen restaurants. In May 2012, plaintiff returned to Japan, along with the development team and Ells, to visit ramen restaurants and suppliers. Upon his return to the U.S., plaintiff began working more intensively on the ramen concept. In September 2012, a lease was executed for a potential flagship ramen noodle restaurant to be located on 12th Street at University Place in Manhattan.

Plaintiff alleges that in October 2012, he first learned that Chipotle had a prior business relationship with David Chang, the owner of a restaurant called Momofuku Noodle Bar, concerning a similar ramen concept. Specifically, plaintiff alleges, some time that month he had dinner at Momofuku Noodle Bar with Mark Crumpacker, Chief Marketing Officer of Chipotle, and Tim Wildin, Chipotle's New Concept Development Director, to taste food and meet Momofuku's outgoing head chef, whom plaintiff had proposed

as a possible hire for Chipotle's ramen restaurants. During that dinner, Crumpacker confided in plaintiff that Chipotle would not hire any former Momofuku employees, and that Momofuku would sue Chipotle when it opened the ramen restaurant, but that Ells had decided to proceed with plaintiff's concept anyway.

Specifically, plaintiff learned from Crumpacker that in 2008, Ells had entered into a confidential business deal with David Chang, under which Chang agreed to develop a ramen restaurant concept like the one plaintiff was developing. In conjunction with that deal, Ells had signed a nondisclosure agreement which required him to maintain as confidential the details of Chang's ramen concept, including menus and other business development ideas. Further, Chang had worked on the design for a Dupont Circle property that later became a flagship ShopHouse restaurant, the name Chipotle gave to its ramen noodle restaurant. According to plaintiff, he was informed by Crumpacker that Chang never consented to the use of his design work for the opening of ShopHouse, and did not authorize the use of any of his confidential work with Chipotle for the purpose of opening a ramen restaurant, but that Chipotle nevertheless converted Chang's work for its own use.

After learning the foregoing information in October 2012,

plaintiff confronted Ells concerning Chipotle's prior agreement with Chang. Ells did not deny the preexisting business dealings, but simply ordered plaintiff to proceed with the ramen concept. Plaintiff was concerned that by continuing to work with Chipotle to open the ramen restaurant, he would become a party to a lawsuit that would be brought by David Chang and Momofuku. On November 17, 2012, Ells terminated plaintiff's employment, and this action followed.

The crux of plaintiff's fraudulent inducement claim against defendants is that by failing to disclose to plaintiff Chipotle's prior business relationship with Chang before plaintiff and Ells entered into their business relationship, Ells omitted a material fact that would substantially impact plaintiff's ability to successfully implement his ramen concept. Plaintiff reasons that Ells and other Chipotle staff, while exchanging information and ideas with him during the collaborative process, had conveyed information to him that had been communicated to them by David Chang. Therefore, any implementation by plaintiff of his ramen concept while employed by Chipotle would make plaintiff an active participant in the violation of the nondisclosure agreement between Chipotle and Momofuku. Further, if plaintiff implemented his ramen concept at Chipotle despite its prior business dealings

with Chang, his professional reputation would be ruined, and he could never escape the accusation that he had stolen Chang's ramen concepts.

It is plaintiff's position that if Chipotle's prior business dealings with Momofuku had been disclosed, plaintiff could have properly weighed the offered business opportunity and decided whether he could realistically pursue his ramen proposal to a successful conclusion with Chipotle. He asserts that he "would never have accepted employment with Chipotle" if defendants had disclosed the material fact of their prior dealings with Chang.

As to his unjust enrichment claim, plaintiff alleged that Chipotle had been unjustly enriched, as it had "received the benefit of plaintiff's ramen concept and has not compensated him for it."

Defendants' motion to dismiss the complaint pursuant to CPLR 3211 was granted, on the ground that plaintiff's status as an "at will" employee precluded the claims, and that plaintiff's claimed damages were speculative. The majority here agrees.

With respect to plaintiff's cause of action for unjust enrichment, I agree. The doctrine of unjust enrichment does not apply where a contract governs the subject matter (*Pappas v Tzolis*, 20 NY3d 228, 234 [2012]). Inasmuch as plaintiff had a

contract with defendants providing for compensation for his work, which compensation he received for the period in which he worked for them, no cause of action for unjust enrichment lies (*see Meghan Beard, Inc. v Fadina*, 82 AD3d 591 [1st Dept 2011]; *Mackie v La Salle Indus.*, 92 AD2d 821 [1st Dept 1983]).

However, as to the claim for fraudulent inducement, I reject defendants' argument that it is deficient; the absence of either an affirmative misrepresentation or a fiduciary duty does not absolutely foreclose such a claim in this instance.

To state a claim for fraudulent inducement, a plaintiff must allege "a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]). If fraud is claimed based on an omission, as opposed to affirmative misrepresentation of material fact, the complaint must normally allege the existence of a fiduciary or confidential relationship (*see Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 179 [2011]; *Cobalt Partners, L.P. v GSC Capital Corp.*, 97 AD3d 35, 42-43 [1st Dept 2012]).

However, this Court has recognized the existence of an

alternative basis for allowing fraud claims to proceed based on omissions, even in arm's length transactions in the absence of a fiduciary or confidential relationship, "where one party's superior knowledge of essential facts renders a transaction without disclosure inherently unfair" (*see e.g. PT Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d 373, 378 [1st Dept 2003]), when the party with special knowledge knows that the other party would act differently if possessed of that knowledge (*see Swersky v Dreyer & Traub*, 219 AD2d 321 [1st Dept 1996]). For instance, in *Swersky*, the plaintiffs alleged that they had purchased shares of stock of QMAX Technology Group, following negotiations between Swersky and defendant Howard Morse on behalf of QMAX, but that Morse had failed to inform Swersky during their negotiations that QMAX had granted Morse an option for 100,000 of the type of ESOP shares Swersky sought but Morse said were unavailable. This Court reinstated the plaintiffs' fraudulent concealment claim based on those allegations.

The allegations here are sufficient to support a claim that defendants possessed "superior knowledge" with regard to material information regarding Chipotle's prior business dealings with Chang, including the existence of a nondisclosure agreement, and withheld such information in order to induce plaintiff to accept

the offered position with Chipotle.

Defendants rely on the argument that the superior knowledge doctrine is inapplicable where the undisclosed material information was discoverable by the plaintiff through the "exercise of ordinary intelligence" (*Jana L. v West 129th St. Realty Corp.*, 22 AD3d 274, 278 [1st Dept 2005] [internal quotation marks omitted]); they contend that plaintiff could have discovered the truth through the simple expedient of asking defendants whether they had a previous agreement with anyone else. This argument does not warrant dismissal at this juncture. While it may seem, in hindsight, as if it would be commonplace to pose such a question, there is an issue of fact as to whether, in this context, such a question would be expected of a person in plaintiff's position entering into such an agreement (*see Black v Chittenden*, 69 NY2d 665, 669 [1986]).

Plaintiff's at-will employment status does not preclude a claim for fraudulent inducement, since he is not claiming a violation of his employment contract, or seeking damages arising from his termination.

A litigant with a fraud claim may seek damages consisting of the "actual pecuniary loss sustained as a direct result of the wrong" (*Lama Holding*, 88 NY2d at 421). However, damages for

fraud cannot be used to compensate a plaintiff for "profits which would have been realized in the absence of fraud" (*id.*). That is, "[d]amages are to be calculated to compensate plaintiffs for what they lost because of the fraud, not to compensate them for what they might have gained" (*id.*). Therefore, plaintiff may not obtain damages based on the amount he could have realized had he followed through to completion the creation of the ramen restaurant plan with some other, unencumbered restaurant group, rather than accepting the Chipotle offer; that theory of damages amounts to an impermissible claim for profits that would have been realized in the absence of fraud.

However, damages need not be demonstrated at the pleading stage as long as the possibility of damages may reasonably be inferred (*see Caruso, Caruso & Branda, P.C. v Hirsch*, 41 AD3d 407, 410 [2d Dept 2007]). CPLR 3016(b) only requires that "the circumstances constituting the wrong shall be stated in detail"; it does not require that a plaintiff's damages be stated in detail. In *Lama Holding*, it was clear from the pleadings that the plaintiff could not have suffered losses from the alleged fraud (88 NY2d at 422). Here, unlike in *Lama Holding*, we cannot pronounce with certainty at this stage of the litigation that plaintiff will suffer no compensable losses as a result of

defendants' alleged fraud. A reasonable inference of general damages may be "implicit by the facts alleged" and does *not* need to be explicitly stated (see *Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 97 [1993]; *see also Caruso*, *supra*). Here, it is implicit from the allegations contained in the pleaded complaint, which must, according to law, be construed liberally, that the position in which plaintiff was placed due to defendant's conduct may cause him, or may have already caused him, compensable damages, particularly the possibility of damage to his reputation, and perhaps even future legal expenses. By conceding that the allegations of the complaint allow an inference of *future* injury, and yet definitively asserting that those same allegations do not allow an inference of present injury, the majority fails to construe the complaint liberally and accord plaintiff every possible favorable inference as we are required to do (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]).

In addition, "when a party to a contract perpetrates a fraud he commits a wrong for which he is liable to the defrauded party in at least nominal damages, even though no actual damages be shown" (*Pryor v Foster*, 130 NY 171, 178 [1891]; *Northrop v Hill*, 57 NY 351, 354 [1874]). Notwithstanding the conclusion in *Kronos*

v AVX (81 NY2d at 95) that nominal damages are not available for tort claims, if a fraud plaintiff establishes at trial that he was defrauded, he may be entitled to nominal damages even if he is unable to establish that he was financially injured by the fraud (*see Clearview Concrete Prods. Corp. v S. Charles Gherardi, Inc.*, 88 AD2d 461, 470 [2d Dept 1982]). Notably, the Court in *Kronos* carved out an exception allowing nominal damages for fraud claims "when needed to protect an 'important technical right'" (81 NY2d at 95, 97), and that exception was used to award nominal damages on a fraud claim in *Imaging Intl. v Hell Graphic Sys., Inc.*, 17 Misc 3d 1123[A] [Sup Ct, NY County 2007], *affd* 60 AD3d 450 [1st Dept 2009]). While this possibility does not eliminate the need to plead damages, it should encourage us to construe the allegations of the complaint as liberally as possible when considering whether plaintiff sufficiently pleaded damages.

Should plaintiff be unable to establish his damages claim at trial or on a summary judgment motion, that issue can be

addressed at that juncture. But his allegations suffice to establish the possibility of damages for the present purposes. I would therefore modify in order to deny defendants' motion to dismiss the cause of action for fraudulent inducement.

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

ENTERED: JANUARY 19, 2016

CLERK

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

15790 James L. Melcher, Index 650188/07
Plaintiff-Respondent,

-against-

Greenberg Traurig LLP, et al.,
Defendants-Appellants.

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Simpson Thacher & Bartlett LLP, New York (Thomas C. Rice of counsel), for appellants.

Jeffrey A. Jannuzzo, New York, for respondent.

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Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered May 19, 2015, which, insofar as appealed from, denied defendants' cross motion for summary judgment dismissing the complaint alleging a violation of Judiciary Law § 487, unanimously affirmed, with costs.

This action involves a claim that defendants Greenberg Traurig, LLP (GT) and Leslie D. Corwin, a GT partner, engaged in deceit while representing their clients in an action entitled *Melcher v Apollo Medical Fund Management L.L.C. and Brandon Fradd*, (NY County, index No. 604047/03)(the *Apollo* action). Issues involving the *Apollo* action have come before us numerous times in various iterations; on this appeal, plaintiff James L. Melcher seeks treble damages for attorney deceit under Judiciary

Law § 487.

Background

The background to the *Apollo* action bears repeating here. In 1995, Brandon Fradd founded Apollo Medical Partners (Apollo), a hedge fund focusing on the biotechnology industry. Fradd also founded Apollo Medical Fund Management, L.L.C. (Apollo Management) to manage investor money on behalf of the hedge fund. After the hedge fund suffered extensive losses in late 1997, Fradd decided to bring in Melcher, an experienced investment manager, as a member and manager of Apollo Management.

Melcher and Fradd, along with one other member of Apollo Management, signed an operating agreement, dated January 8, 1998, setting forth a formula to divide profits among them.[2] Under the agreement, Melcher and Fradd were to share equally the net profits realized from new investment assets brought into the hedge fund after Melcher became a member of Apollo Management. Melcher maintains that he complained to Fradd in January 2001 about the amounts he was receiving under the operating agreement, and that he met with Fradd over the next two years in the hope

[2] The other member of Apollo Management, who is not a party either to this action or the *Apollo* action, was removed from his position in May 1998.

that they could resolve the matter amicably. Fradd asserts that no such meetings took place, and that Melcher never complained about the division of net profits. When Fradd and Melcher were unable to come to an agreement, Melcher commenced the *Apollo* action in 2003, asserting, among other things, that Fradd and Apollo Management had breached the operating agreement by failing to pay the amounts due to Melcher under that agreement.

In December 2003, Fradd produced a document that he maintained was a May 1998 amendment to the parties' operating agreement (the disputed amendment). According to the disputed amendment, Melcher and Fradd had changed the formula for dividing profits so that Melcher was entitled only to certain compensation for money that he brought into the fund, not on all money that came in after January 1998. Melcher, however, insisted that no amendment ever existed, asserting that Fradd had forged and backdated the document only after the dispute arose, and only after Fradd's corporate counsel had informed him that a defense based on an oral amendment to the operating agreement had no more than a 50-50 chance of surviving a summary judgment motion.

At a January 27, 2004 meeting with Fradd and his counsel, Corwin stated that he had confirmed the disputed amendment's authenticity with Jack Governale, Apollo's former corporate

counsel, who had purportedly drafted it. Melcher's counsel asked Corwin to turn over the original disputed amendment so that Melcher could determine, through forensic testing of the ink, whether Fradd had actually signed the document in May 1998.

However, before Melcher could send the disputed amendment for forensic testing, the document was damaged in a fire. According to Fradd, the day after the January 27 meeting, he brought the disputed amendment with him into the kitchen while he was making tea, and he set it on a counter next to the stove. When he went to answer the doorbell, Fradd said, the amendment caught fire and the first page was destroyed despite his efforts to put the fire out with water. Fradd stated that the portion of the second page that bore his signature was singed in the fire, and he dried it in the microwave oven to avoid smudging the ink. On February 1, 2004, Fradd informed Corwin via email of the incident. Melcher, however, did not learn of the alleged burning until March 18, 2004.

In mid-2007, Melcher, asserting that Fradd had engaged in spoliation of evidence, sought discovery from GT under the crime-fraud exception to the attorney-client privilege. The trial court granted GT's motion to quash the discovery request. Melcher also moved to strike the defendants' pleadings because

they were deceitful, and to disqualify GT and Corwin as the defendants' counsel on the same basis, and the court denied those motions. On appeal, this Court affirmed the trial court's orders. In so doing, this Court held that Melcher had not "conclusively demonstrated" deceit with respect to the disputed amendment, and that the matter presented an issue for the trier of fact (*Melcher v Apollo Med. Fund Mgt. L.L.C.*, 52 AD3d 244, 245 [1st Dept 2008]).

The *Apollo* action then proceeded to a jury trial in May 2009. Before trial began, the defendants decided to proceed on a theory of oral amendment of the operating agreement and accordingly, informed the court that they would not rely either on the disputed amendment or on Fradd's sworn assertion that the document was genuine. The trial court (Donna M. Mills, J.), granted the defendants' motion to withdraw the disputed amendment as a proposed trial exhibit, provided that Melcher was precluded from offering any evidence purporting to show that the disputed amendment was a backdated forgery (except in rebuttal if the defendants raised the issue).

At trial, the jury rejected Fradd's claim that the operating agreement had been orally amended and also found that Fradd had breached the operating agreement. However, the jury also found

that Melcher was equitably estopped from asserting that the defendants had breached the operating agreement because he had initially accepted without objection the amounts that the defendants had paid to him under the operating agreement. In February 2010, the IAS court (Melvin L. Schweitzer, J.), entered a judgment in accord with the jury verdict.

In January 2013, this Court reversed the judgment entered after the trial in the *Apollo* action, setting aside the estoppel verdict, reinstating the breach of contract claim, and granting judgment as to liability in Melcher's favor on his breach of contract claim (*Melcher v Apollo Med. Fund Mgt. L.L.C.*, 105 AD3d 15, 29 [1st Dept 2013]).[3] We further directed that the matter be remitted for a hearing on Melcher's allegations that Fradd had "fabricated, backdated and intentionally burned" the disputed amendment (*id.* at 23, 25, 29). We noted that, although striking defendants' pleadings would have been an inappropriate sanction at that stage of the proceedings, we were "troubled that the allegations of fraud and deceit remain[ed] unaddressed" (*id.* at

[3] This Court initially dismissed Melcher's appeal because of his failure to timely perfect (2010 NY Slip Op 84265[U] [1st Dept 2011]). However, on Melcher's appeal, the Court of Appeals reinstated the appeal and remitted the matter (18 NY3d 915 [2012]).

25).

In January 2014, Melcher and Fradd negotiated a settlement agreement in the *Apollo* action. The agreement explicitly carved out from the general releases Melcher's pending claims against GT and its "shareholders [and] partners," and specifically reserved Melcher's rights and remedies in the action underlying this appeal. The settlement agreement also provided that no amount paid under it was "in regard to any liability of [GT] or Leslie D. Corwin pursuant to Judiciary Law Section 487, whether asserted in the [action underlying this appeal] or otherwise."

The Current Action

In July 2007, at about the same time that he moved to strike the pleadings in the *Apollo* action, Melcher commenced the action underlying this appeal, alleging that defendants had engaged in deceitful and collusive conduct during their representation of Fradd and Apollo Management in the *Apollo* action and asserting an action for treble damages under Judiciary Law § 487. Melcher asserted that Fradd deliberately burned the disputed amendment so that Melcher would not be able to determine through forensic testing when the document had been signed.[4] Melcher further

[4] Melcher stated that his forensic expert examined the original document and concluded that the exposure of the document

alleged that as a result of defendants' actions, he incurred damages from excess legal fees, to be trebled under section 487, and lost use of money for more than three years.

In support of his claim, Melcher pleaded that as of February 2004, Corwin had learned that Governale had neither any recollection nor any record of drafting the disputed amendment, and that nothing in Governale's law firm's files or time records suggested that Melcher and Fradd had amended their operating agreement. Indeed, Melcher noted, Governale sent Corwin an email in which he noted that the disputed amendment did not bear a footer even though documents emanating from his law firm generally bore footers. Nevertheless, Melcher alleged, Corwin continued to rely on the disputed amendment, allowing Fradd to submit sworn statements attesting to its legitimacy, and making untrue statements under oath regarding availability of corporate counsel for deposition.

Melcher later filed an amended complaint in this action, and defendants moved to dismiss under CPLR 3711(a) on the ground that the Judiciary Law § 487 claim was barred by the three-year

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to high heat made it impossible to determine the date of Fradd's signature. The expert also opined that the location of the scorching suggested something other than chance or accident.

statute of limitations. The statute of limitations issue was litigated up to the Court of Appeals, which held that the section 487 claim was governed by the six-year statute of limitations in CPLR 213(1), and that this action was therefore timely commenced (*Melcher v Greenberg Traurig, LLP*, 2011 NY Slip Op 34074[U] [Sup Ct, NY County 2011], *revd* 102 AD3d 497 [1st Dept 2013], *revd* 23 NY3d 10 [2014], *rearg denied* 23 NY3d 998 [2014]).

Melcher then moved for partial summary judgment on liability. Defendants opposed the motion and also cross-moved for summary judgment, arguing that a section 487 action could not be interposed as a plenary action, but rather, had to be raised in the proceeding in which the alleged misconduct occurred. Further, at oral argument on the motion, defendants argued that the deceit issue had been litigated in multiple motions in the prior action and therefore "claim splitting" and "collateral estoppel" were involved, because the facts regarding the alleged deceit "were not only known but they were raised" in the prior action.

The IAS court denied both Melcher's motion for summary judgment as to liability and defendants' cross motion for summary judgment dismissing the complaint. Defendants now appeal from so much of the order that denied their cross motion for summary

judgment.

Analysis

To begin, defendants waived their right to seek dismissal of the case on collateral estoppel grounds when they failed to raise the issue in their motion to dismiss on statute of limitations grounds. Defendants fully litigated their motion to dismiss, up to and including an appeal to the Court of Appeals, which found that Melcher's action was not time-barred. Now, after that motion has been fully resolved, defendants premise their summary judgment motion on their conclusion that dismissal is warranted on claim-splitting and collateral estoppel grounds. But because they failed to raise those defenses on their motion to dismiss, defendants cannot now be heard to say that the trial court should have dismissed this action under those defenses (CPLR 3211[a][5]; [e]). This conclusion holds especially true because both defenses are supported entirely by facts that defendants knew when they interposed their first motion.[5]

[5] In his opposition brief, Melcher argues that defendants' prior motion to dismiss on statute of limitations grounds and this cross motion for summary judgment were each, in effect, motions for summary judgment made after service of the answer, and thus are improper successive summary judgment motions. We reject this argument; as noted above, defendants' prior motion was, in fact, a motion to dismiss, not a motion for summary judgment.

Turning now to defendants' Judiciary Law § 487 argument, we find that under the circumstances presented, it was proper for Melcher to assert a Judiciary Law § 487 claim in a separate action, rather than seeking leave to assert a claim against the attorney defendants in the *Apollo* action.

Judiciary Law § 487(1) provides, among other things, that an attorney who is "guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party . . . forfeits to the party injured treble damages, to be recovered in a civil action." A plaintiff may bring an action to recover damages for attorney deceit regardless of whether the attorney's deceit was successful (*Amalfitano v Rosenberg*, 12 NY3d 8 [2009]). Further, the plaintiff in a section 487 case may recover the legal expenses incurred as a proximate result of a material misrepresentation in a prior action (*see Pomerance v McGrath*, 124 AD3d 481, 485 [1st Dept 2015], *lv dismissed* 25 NY3d 1038 [2015]).

First of all, we do not credit defendants' argument that because Melcher raised the same claims in his motions in the *Apollo* action, he is now precluded from asserting a section 487 claim in this action – that is, that Melcher is improperly engaging in "claim splitting." A party invoking the narrow

doctrine against splitting a cause of action must show that the challenged claim raised in the second action is based upon the same liability in the prior action, and that the claim was ascertainable when the prior action was commenced (*see Murray, Hollander, Sullivan & Bass v HEM Research*, 111 AD2d 63, 66 [1st Dept 1985]; *Solow v Avon Prods.*, 56 AD2d 785 [1st Dept 1977], *affd* 44 NY2d 711 [1978]). However, if the liabilities or claims alleged in the two actions arise from different sources, instruments, or agreements, the claim splitting doctrine does not apply (*see Murray, Hollander, Sullivan & Bass*, 111 AD2d at 66-67; *see also 1050 Tenants Corp. v Lapidus*, 118 AD3d 560, 560-561 [1st Dept 2014]).

Here, Melcher alleged in the *Apollo* action that Apollo Management and Fradd breached a contract and engaged in fraud by preventing him from receiving partnership profits. The basis for Melcher's attorney deceit claim against GT and Corwin did not arise until *after* Fradd had burned the amendment, while the *Apollo* action was pending. Therefore, the claims asserted against Fradd and Apollo Management in the *Apollo* action did not arise from the same nucleus of facts as the section 487 claim in this action. On the contrary, the remedy sought against the defendant attorneys in this case is entirely distinct from the

remedy sought against their former clients in the *Apollo* action. Indeed, the Judiciary Law claim did not even exist when plaintiff commenced the *Apollo* action (*see 1050 Tenants*, 118 AD3d at 560-561). Accordingly, plaintiff is not claim splitting when he brings section 487 claims against GT and Corwin in this action.

Nor is plaintiff collaterally estopped from litigating the issue of the alleged deceit in this action, as that issue was never fully litigated and decided in the *Apollo* action (*see Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 455-456 [1985]; *Americorp Fin., L.L.C. v Venkany, Inc.*, 102 AD3d 516, 516 [1st Dept 2013]). To be sure, Melcher made a motion to strike defendants' pleadings in the *Apollo* action on the basis that the disputed amendment was a fabrication (*see Melcher v Apollo Med. Fund Mgt. L.L.C.*, 52 AD3d 244, 245 [1st Dept 2008]). However, a motion is not a cause of action, but rather, is a request for relief; the complaint in the *Apollo* action never contained a cause of action alleging that the defendants had relied on a fabricated document (*see Melcher*, 105 AD3d at 19). Moreover, this Court explicitly found on the postverdict appeal that plaintiff's "allegations of fraud and deceit remain[ed] unaddressed" because the defendants had decided not to rely on the allegedly fabricated document (*id.* at 25). The matter was therefore remitted for an evidentiary hearing on

those issues. But before the hearing could take place, Melcher reached a settlement with Fradd, specifically excluding the pending Judiciary Law § 487 claim against defendants here.

Similarly, it is true that Melcher, in the *Apollo* action, moved to disqualify GT and Corwin for their alleged fraud on the court. Nonetheless, Melcher never amended his complaint in that action to include "fraud on the court" claims predicated upon section 487. Defendants also never sought to consolidate this action with the *Apollo* action while they were both pending, even though they were before the same judge. Under these circumstances, defendants cannot advance a credible argument that the matter has already been fully litigated and decided.

Finally, defendants argue that according to our case law, a Judiciary Law § 487 claim brought in a separate action must be dismissed because a plaintiff's remedy lies exclusively in the underlying lawsuit itself. Hence, defendants argue, Melcher should have moved under CPLR 5015 to vacate the civil judgment in the *Apollo* action on the ground of fraud, rather than beginning a second plenary action collaterally attacking the judgment in the *Apollo* action.

We reject this argument. In contrast to the situations in the cases on which defendants rely, Melcher does not, in fact,

seek by this action to collaterally attack any prior adverse judgment or order on the ground that it was procured by fraud; if that were the case, the appropriate remedy generally would be to seek vacatur under CPLR 5015 (*see e.g. Yalkowsky v Century Apts. Assoc.*, 215 AD2d 214, 215 [1st Dept 1995] [plaintiff alleged that the defendant's attorney in a Civil Court proceeding had made a misrepresentation to the Civil Court, resulting in dismissal of the plaintiff's constructive eviction claim]; *see also Melnitzky v Owen*, 19 AD3d 201 [1st Dept 2005] [section 487 claim properly dismissed where the plaintiff claimed that the defendant deceived Civil Court, which was hearing his malicious prosecution claim, by concealing rulings by Supreme Court]). Instead, plaintiff here seeks to recover lost time value of money and the excess legal expenses incurred in the *Apollo* action as a proximate result of defendants' alleged deceit; this course of action is permissible in a separate action under the Judiciary Law (*Amalfitano*, 12 NY3d at 15).

The language of section 487 supports this conclusion, because that section does not require that the claim be asserted in the same action in which the violation occurred. Rather, the section simply provides that an attorney who has practiced a deception will be liable for treble damages "to be recovered in a

civil action" (*see Four Star Stage Light. v Merrick*, 56 AD2d 767, 768 [1st Dept 1977] [holding that a section 487 claim brought in a second action should survive a motion to dismiss because it was adequately pleaded]; *see also Pomerance v McGrath*, 124 AD3d at 485 [finding that "it was not improper for plaintiff to bring a Judiciary Law § 487 claim in this action even though it is based on alleged deceit in a prior action," but denying leave to add this claim on other grounds]; *Armstrong v Blank Rome LLP*, 126 AD3d 427 [1st Dept 2015] [section 487 claim brought in a second action alleging an undisclosed conflict of interest for an attorney who represented a litigant in divorce proceedings was adequately pleaded and should survive a motion to dismiss]). In fact, a court may not grant a motion for leave to amend a complaint to add a section 487 claim in the action in which the violation occurs, particularly if adding that claim would "require the disqualification of counsel and prejudice [the defendant's] right to be represented by attorneys of its choice" (*360 W. 11th LLC v ACG Credit Co. II, LLC*, 90 AD3d 552, 554 [1st Dept 2011]). Those very concerns would, in fact, have been present in this case.

Our decision in *Zimmerman v Kohn* (125 AD3d 413 [1st Dept 2015], *lv denied* 25 NY3d 907 [2015]) does not compel a different

result. In that case, the IAS court dismissed the section 487 claim on the basis that the plaintiffs' remedy for a violation of that section lay exclusively in the underlying federal action, not in a separate plenary action (*Zimmerman v Kohn*, 2014 WL 1490936, *2-3 [Sup Ct, NY County, April 11, 2014, No. 652826113]). However, on appeal, this Court did not address that issue at all. Instead, we held only that dismissal of the section 487 claim was warranted because the plaintiffs, after settling the prior action, paid their counsel based on a contingency fee arrangement, and therefore could not show that the defendants' misrepresentations proximately caused them any injury (*Zimmerman*, 125 AD3d at 414).

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

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

ENTERED: JANUARY 19, 2016

CLERK

Friedman, J.P., Acosta, Andrias, Richter, JJ.

16477 Jose Villa-Capellan, Index 308638/12
Plaintiff-Appellant,

-against-

Rigoberto Cristobal Mendoza,
Defendant,

U-Haul Company of Arizona,
Defendant-Respondent.

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Louis A. Badolato, Roslyn Harbor, for appellant.

Nicoletti Gonson Spinner LLP, New York (Kevin Pinter of counsel), for respondent.

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Order, Supreme Court, Bronx County (Sharon A. M. Aarons, J.), entered January 13, 2015, which granted defendant U-Haul Company of Arizona's (U-Haul) motion for summary judgment, unanimously affirmed, without costs.

On November 27, 2010, a vehicle owned by U-Haul and operated by defendant Mendoza collided with a vehicle owned and operated by plaintiff. Mendoza had rented the U-Haul vehicle on November 27, 2010, and returned it the following day.

Under the Graves Amendment, the owner of a leased or rented motor vehicle cannot be held vicariously liable "for harm to persons or property that results or arises out of the use, operation, or possession of the vehicle during the period of the

rental or lease, if-- (1) the owner (or an affiliate of the owner) is engaged in the trade or business of renting or leasing motor vehicles; and (2) there is no negligence or criminal wrongdoing on the part of the owner (or an affiliate of the owner)" (49 USC 30106[a]; *see Jones v Bill*, 10 NY3d 550, 553 [2008], *cert dismissed* 555 US 1028 [2008]). U-Haul sufficiently established that the accident was not the result of any negligent maintenance of the vehicle on its part through, inter alia, evidence that Mendoza intentionally caused the collision as part of a scheme in which he was offered a cash payment to participate in the accident. In opposition, plaintiff, who was the unwitting victim of Mendoza's scheme, offered only speculation that the vehicle had been negligently maintained by U-Haul. Accordingly, U-Haul was entitled to summary judgment dismissal under the Graves Amendment.

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

ENTERED: JANUARY 19, 2016

CLERK

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

16661- Ind. 4602/10
16662 4604/10
16663 The People of the State of New York, 491/12
Respondent,

-against-

DeSean Owens,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Paul B. Hershan of counsel), for respondent.

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Appeals having been taken to this Court by the above-named appellant from judgments of the Supreme Court, Bronx County (Dominic R. Massaro, J.), rendered on or about May 21, 2013,

Said appeals 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 judgments so appealed from be and the same are hereby affirmed.

ENTERED: JANUARY 19, 2016

CLERK

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

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

16664 In re 175 West 107th LLC, Index 100428/14
Petitioner-Appellant,

-against-

State of New York Division of
Housing and Community Renewal,
Respondent-Respondent,

Bridget M. Lydia,
Intervenor-Respondent-Respondent.

_____

The Price Law Firm, LLC, New York (Joshua C. Price of counsel), for appellant.

Adam H. Schuman, New York (Jack Kuttner of counsel), for State of New York Division of Housing and Community Renewal, respondent.

Cornicello, Tendler & Baumel-Cornicello, LLP, New York (Jay H. Berg of counsel), for Bridget M. Lydia, respondent.

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Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered October 8, 2014, which, inter alia, denied the petition to annul a determination of respondent, New York State Division of Housing and Community Renewal (DHCR), dated February 21, 2014, affirming an order of the Rent Administrator, dated April 7, 2011, which found that the subject apartment remained governed by rent control and that petitioner landlord was not entitled to a rent increase for certain renovations, unanimously affirmed, without costs.

DHCR's determination was rationally based in the administrative record and not arbitrary and capricious or contrary to law (*see Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 425, 428 [1st Dept 2007], *affd* 11 NY3d 859 [2008]*; Matter of Tockwotten Assoc. v New York State Div. of Hous. & Community Renewal*, 7 AD3d 453, 454 [1st Dept 2004]). The tenant was unlawfully evicted and therefore never lawfully out of possession. When she was restored to possession of the apartment following the Appellate Term's reversal of the Civil Court judgment ending her tenancy, she simply resumed the tenancy upon its former terms (*see Doomes v Best Tr. Corp.*, 126 AD3d 629, 630 [1st Dept 2015] ["(W)hen an appellate court reverses a judgment, the rights of the parties are left wholly unaffected by any previous adjudication"] [internal quotation marks omitted]).

While the tenant was out of possession and an appeal was pending with successive stays in effect barring the landlord from reletting the apartment, the landlord made extensive renovations to the apartment. The landlord assumed the risk of an adverse appellate ruling and performed those renovations at its peril.

The landlord's reliance on *Sorkin v Salazar* (6 Misc 3d 129[A], 2000 NY Slip Op 50005[U] [App Term, 1st Dept 2000]) is

misplaced, since, among other distinguishing factors, the tenant in that case had been lawfully and properly evicted before the landlord made improvements and before being restored to possession by an exercise of Civil Court's discretion.

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

ENTERED: JANUARY 19, 2016

CLERK

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

16665 & M-5634 In re Joyesha J.,
Petitioner-Appellant,

-against-

Oscar S.
Respondent-Respondent.

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George E. Reed, Jr., White Plains, for appellant.

Law Offices of Susan Barrie, New York (Susan Barrie of counsel), for respondent.

Leslie S. Lowenstein, Woodmere, attorney for the children.

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Order, Family Court, New York County (Marva A. Burnett, Referee), entered on or about April 30, 2014, which, after a fact-finding hearing, dismissed the petition seeking an order of protection on behalf of petitioner and her children against respondent father, unanimously affirmed, without costs.

The Referee properly determined that petitioner did not establish a family offense by a fair preponderance of the evidence (Family Court Act § 832). Petitioner's allegations that the father improperly touched one or more of the children were unsupported by admissible evidence, but only by inadmissible hearsay testimony by petitioner and her mother (*see Matter of Imani B.*, 27 AD3d 645, 646 [2d Dept 2006]; *see also* Family Court

Act § 834). There is no basis to disturb the Referee's determination that their testimony, and the testimony of the children's maternal great aunt concerning an incident that she observed four years earlier, was not credible (*see e.g. Matter of Sarah McL. v Clarence L.*, 111 AD3d 446 [1st Dept 2013]).

The Referee providently determined that it would not consider statements made by the children during in camera interviews, at which the parties and their counsel were not present, in this article 8 proceeding, because the parties' due process rights would be compromised (*see Matter of Doreen L. v Dhaneswar R.*, 29 Misc 3d 462, 464-465 [Family Ct, Bronx County 2010], *affd* 89 AD3d 428 [1st Dept 2011]).

M-5634 - *Joyesha J. v Oscar S.*

Motion to strike portion of brief that sets forth matters dehors the record granted.

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

ENTERED: JANUARY 19, 2016

CLERK

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

16666 Rivereast Apartments Investors LLC, Plaintiff-Appellant, Index 158199/14

-against-

Robert Gladstone, Defendant-Respondent.

Mitofsky, Shapiro, Neville & Hazen LLP, New York (M. David Fonseca of counsel), for appellant.

Davidoff Hutcher & Citron LLP, New York (Joshua Krakowsky of counsel), for respondent.

Order, Supreme Court, New York County (Donna M. Mills, J.), entered April 7, 2015, which granted defendant guarantor's motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7), unanimously reversed, on the law, without costs, and the motion denied.

"An interpretation that gives effect to all terms of an agreement is preferable to one that ignores terms or accords them an unreasonable interpretation" (*Ruttenberg v Davadge Data Sys. Corp.*, 215 AD2d 191, 196 [1st Dept 1995] [citations omitted]). Here, the guaranty specifically references the term "landlord" with its successors and assigns, thus the predecessor landlord's assignment to plaintiff was permissible. Nevertheless, paragraph

15 of the guaranty, the anti-assignment provision, states that: "The obligations of Guarantor hereunder and/or this Guaranty may not be assigned or transferred." While plaintiff reconciles this provision with the entire agreement to restrict assignment only by the guarantor, defendant maintains that the plain language of the second part of paragraph 15 means that the guaranty cannot be assigned, and the assignment at issue is void.

Based on these conflicting interpretations, and examining both the "entire contract and consider[ing] the relation of the parties and the circumstances under which it was executed" (*Goldman Sachs Group, Inc. v Almah LLC*, 85 AD3d 424, 426 [1st Dept 2011] [internal quotation marks and citations omitted], *lv dismissed* 18 NY3d 877 [2012]), the motion court properly found the guaranty to be ambiguous.

In the face of ambiguity, "the conduct of the parties is the best evidence as to their meaning" (*Barbour v Knecht*, 296 AD2d 218, 224 [1st Dept 2002]). Thus, inasmuch as the guaranty was incorporated by reference into the lease, the signatory on behalf

of the tenant was its "substantial" owner, the defendant guarantor, and the lease was further amended after assignment, discovery is warranted.

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

ENTERED: JANUARY 19, 2016

CLERK

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

16667 The People of the State of New York, Ind. 2123/12
Respondent,

-against-

Yekatrina Pusepa,
Defendant-Appellant.

_____

Center for Appellate Litigation, New York (Robert S. Dean of counsel), and Kaye Scholer LLP, New York (Candice A. Andalia of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (John T. Hughes of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Marcy L. Kahn, J.), rendered January 9, 2014, convicting defendant, after a jury trial, of attempted murder in the second degree and assault in the first degree, and sentencing her to concurrent terms of 8½ years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The evidence, including both defendant's act and the surrounding circumstances, supports a reasonable inference that defendant acted with homicidal intent

when she stabbed the victim in the heart (*see generally People v Getch*, 50 NY2d 456, 465 [1980]). The evidence also refuted defendant's justification defense.

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 19, 2016

CLERK

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

16668-
16669-
16670 Index 651378/14

Vista Developers Corp., etc.,
Plaintiff-Appellant,

-against-

The Board of Managers of the Diocesan Missionary and Church Extensions Society of the Protestant Episcopal Church in the Diocese of New York,
Defendant-Respondent.

_____

Rosenberg Calica & Birney LLP, Garden City (Edward M. Ross of counsel), for appellant.

Brill & Meisel, New York (Allen H. Brill of counsel), for respondent.

_____

Order, Supreme Court, New York County (Melvin L. Schweitzer, Court Referee), entered March 25, 2015, which granted defendant's motion for summary judgment dismissing the complaint and for summary judgment on its counterclaims, declared that, among other things, plaintiff defaulted under a contract to purchase real property, entitling defendant to retain the down payment paid thereunder as liquidated damages, and dismissed, as moot, plaintiff's motion for summary judgment, and orders, same court (Jeffrey K. Oing, J.), entered May 12, 2014, which, among other things, denied plaintiff's motion for a preliminary injunction,

unanimously affirmed, with costs.

This action arises from a failed contract for the purchase of a multifamily property owned by defendant. Plaintiff buyer refused to close without prior court approval of the sale. The motion court correctly determined that defendant was not required to obtain such approval.

Defendant is a not-for-profit corporation created by a special act of the Legislature in 1912 (L 1912, ch 153, as amended). While the Special Act limits defendant's ability to purchase real property, it places no limit on its ability to sell or otherwise dispose of the property (*see id.*). "Under familiar principles of statutory construction, the general provisions of section 12 of the Religious Corporations Law," which require, among other things, that court approval be obtained prior to the sale of real property owned by a religious corporation (*see* Religious Corporations Law § 12[1]), "must yield to the provisions of the special act whereby the [defendant] came into corporate existence" (*Bush v Bush*, 91 Misc 2d 389, 391 [Sup Ct, Rockland County 1977]; *see also Diocese of Buffalo v McCarthy*, 91 AD2d 213, 217 [4th Dept 1983], *lv denied* 59 NY2d 605 [1983]). Accordingly, even assuming, without deciding, that defendant is a "religious corporation" within the meaning of the Religious

Corporations Law (*see* Religious Corporations Law § 2), the motion court correctly determined that it is not subject to the law's mandate that it obtain leave of court before selling its real property.

Nor was prior court approval for the sale required by Not-For-Profit Corporation Law § 510, as defendant established, via the submission of financial statements and affidavits from its secretary and certified public accountant, that the premises did not compromise "all, or substantially all," of its assets (N-PCL 510[a]).

Nor did the parties' contract require prior court approval for the sale. The rider to the contract made the sale "contingent upon [defendant] obtaining [court] approval, pursuant to the Religious Corporations Law and the Not-For-Profit Corporation Law . . . *if required*" (¶ 25 [emphasis added]). As noted, plaintiff failed to show that court approval was required by those laws. Nor did he show that court approval was required to obtain insurable and marketable title.

Given the foregoing determination, plaintiff had no lawful excuse for failing to close on the scheduled time-of-the-essence closing date. Accordingly, the motion court correctly determined

that plaintiff had defaulted under the terms of the contract, entitling defendant, which appeared ready, willing and able to close at the scheduled time, to retain the down payment as liquidated damages.

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

ENTERED: JANUARY 19, 2016

CLERK

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

16671 The People of the State of New York, Ind. 3780/13
Respondent,

-against-

Albert Samuels,
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 (Philip Morrow 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 (Richard D. Carruthers, J.), rendered on or about January 29, 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: JANUARY 19, 2016

CLERK

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

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

16672 Credit Agricole Corporate, et al., Plaintiffs-Respondents, Index 651989/10

-against-

BDC Finance, LLC, et al., Defendants-Appellants.

_____

Joseph Hage Aaronson LLC, New York (Gregory P. Joseph of counsel), for appellants.

White & Case LLP, New York (John Christopher Shore of counsel), for respondents.

_____

Order, Supreme Court, New York County (Barbara Jaffe, J.), entered July 21, 2014, which, to the extent appealed from as limited by the briefs, denied defendants-appellants' motion to dismiss plaintiffs' causes of action for breach of the implied covenant of good faith and fair dealing, unanimously affirmed, with costs.

In this intercreditor dispute, the motion court correctly found that plaintiffs' causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing are not duplicative. Plaintiffs allege that defendants failed to share collateral ratably, in breach of the express agreements at issue. They also allege that, even if none of the provisions of

the agreements were violated, defendants breached the implied covenant of good faith and fair dealing by deliberately manipulating and depressing the bids of other bidders during the auction of the debtor's assets, thereby acquiring all of the debtor's assets and depriving plaintiffs of the benefit of their bargain (*see Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 [1995]). These claims are sufficiently distinct.

Plaintiffs' implied covenant claim against defendant agent is not barred by, or inconsistent with, the express terms of the agreements (*see e.g. SNS Bank v Citibank*, 7 AD3d 352, 354-355 [1st Dept 2004]).

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: JANUARY 19, 2016

CLERK

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

16673-
16674 Emma O. Asante,
Plaintiff-Appellant-Respondent,

-against-

Prince Asante,
Defendant-Respondent-Appellant,

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

Index 403318/10

_____

Hoberman & Trepp, PC, Bronx (Adam F. Raclaw of counsel), for appellant-respondent.

Burns & Nallan, New York (Vanessa A. Gomez of counsel), for respondent-appellant.

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

_____

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered November 12, 2013, which granted the New York City defendants reargument of their motion for summary judgment dismissing the complaint as against them and, upon reargument, granted the motion, unanimously affirmed, without costs.

The City defendants established prima facie entitlement to summary judgment dismissing plaintiff's personal injury action against them based upon: (1) Officer Gil's uncontradicted deposition testimony that she was responding to a "10-85" radio

call of an officer in need of assistance when the police vehicle she was driving collided with appellants' motor vehicle (*see generally* Vehicle & Traffic Law [VTL] § 114-b; *Criscione v City of New York*, 97 NY2d 152 [2001]); (2) deposition testimony offered by Officer Gil that the light was red against her when she attempted to get through the intersection, combined with appellants' deposition testimony that they had a green light in their favor at the time of the accident, which supported Officer Gil's position that her conduct was privileged under Vehicle & Traffic Law § 1104(b), entitling her to the "reckless disregard" standard (*see* VTL 1104[e]; *see generally Kabir v County of Monroe*, 16 NY3d 217, 227 (2011); *Tatishev v City of New York*, 84 AD3d 656 (1st Dept 2011); and (3) Officer Gil's testimony that upon reaching the intersection, she observed appellants' vehicle, stopped the police vehicle and waited for appellants' vehicle to also stop prior to attempting to go around the front of that vehicle; however, both vehicles moved forward at the same time resulting in the accident (*see generally Frezzell v City of New York*, 24 NY3d 213 [2014]; *Szczerbiak v Pilat*, 90 NY2d 553 [1997]).

The burden on the motion having shifted, appellants failed to offer evidence that raised a triable issue of fact (*see Frezzell*, 24 NY3d 218).

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

ENTERED: JANUARY 19, 2016

CLERK

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

16675 The People of the State of New York, Ind. 3963/11
Respondent,

-against-

Kaleb Gladden,
Defendant-Appellant.

_____

Cardozo Appeals Clinic, New York (Stanley Neustadter of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Renee A. White, J. at suppression hearing; Daniel P. FitzGerald, J. at jury trial and sentencing), rendered May 4, 2012, convicting defendant of two counts of burglary in the second degree, and sentencing him, as a second violent felony offender, to concurrent terms of 10 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). There is no basis for disturbing the jury's credibility determinations. While the facts of the crime may have been unusual, we do not find that the victim's testimony was implausible. We note that the victim's account was corroborated by, among other things, the recovery of his keys

from the police car in which defendant was transported after being arrested.

Although the search of defendant's backpack was not justified as a search incident to arrest or as an inventory search, any error in receiving the items recovered from the backpack was harmless (*see People v Crimmins*, 36 NY2d 230, 235 [1975]).

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

ENTERED: JANUARY 19, 2016

CLERK

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

16676-
16677 In re George S., and Another,

Children Under Eighteen Years of Age,
etc.,

Hilton A.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Law Office of Thomas R Villecco, P.C., Jericho (Thomas R. Villecco of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Jason Anton of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Diane Pazar of counsel), attorney for the children.

_____

Order of disposition, Family Court, Bronx County (Robert D. Hettleman, J.), entered on or about May 23, 2014, insofar as it brings up for review a fact-finding order, same court (Marcelle Z. Brandes, J.), entered on or about December 23, 2013, which, to the extent appealed from as limited by the briefs, found that respondent father had derivatively severely abused the younger subject child, unanimously affirmed, without costs. Appeal from fact-finding order unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

Family Court's determination that the father had severely derivatively abused his biological son is supported by clear and convincing evidence (Family Ct Act § 1051[e]; *Matter of Marino S.*, 100 NY2d 361, 374 [2003], *cert denied* 540 US 1059 [2003]). The record amply supports Family Court's finding that the father was the primary caregiver for his son and his son's two half siblings, and that he abused one of those children, a three-year-old girl, in a manner so severe that it ultimately caused her death. The court credited the medical examiner's testimony that the girl's death was a homicide, caused by a blow to her abdomen powerful enough to rip her bowel, and that she had numerous patterned abrasions on her body indicative of child abuse. The agency thus established a prima facie case of severe abuse (*see* Social Services Law § 384-b[8][a][i]), which creates a "presumption" of culpability extending to the child's caregivers, and shifted the "burden of explanation or of going [forward]" to the father, who offered no evidence and did not testify (*Matter of Philip M.*, 82 NY2d 238, 244 [1993] [internal quotation marks omitted]; *see Matter of Dashawn W.* [*Antoine N.*], 21 NY3d 36, 49 [2013]).

Based on the finding of severe abuse of the girl, Family Court correctly determined that the father's son was severely

derivatively abused, even without direct evidence of injuries sustained by that child (*Matter of Marino S.*, 100 NY2d at 374).

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

ENTERED: JANUARY 19, 2016

CLERK

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

16678 Harmit Realties LLC, Index 651931/13
Plaintiff-Respondent,

-against-

835 Avenue of the Americas, L.P.,
et al.,
Defendants-Appellants,

"XYZ CORPS 1-5," etc.,
Defendants.

- - - - -

835 Avenue of the Americas, L.P., et al.,
Counterclaim Plaintiffs-Appellants,

-against-

Harmit Realties LLC, et al.,
Counterclaim Defendants-Respondents.

_____

Kasowitz Benson Torres & Friedman LLP, New York (Jed I. Bergman of counsel), for appellants.

Pryor Cashman LLP, New York (Todd E. Soloway, Eric D. Sherman and Jared D. Newman of counsel), for respondents.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered June 3, 2015, which, to the extent appealed from, granted plaintiff/counterclaim defendant Harmit Realties LLC's and counterclaim defendant Harvey Drucker's motion to dismiss defendants' counterclaims for fraud, negligent misrepresentation, reformation, and breach of contract, unanimously affirmed, with costs.

The motion court correctly determined that the counterclaims for fraud, negligent misrepresentation, and reformation are precluded by the subject agreements' express disclaimers stating that Harmit made no representations concerning the amount of its utilized development rights and excess development rights, where defendants had the means to discover the correct amounts before they entered into the agreements (*see Danann Realty Corp. v Harris*, 5 NY2d 317, 320-322 [1959]; *B&C Realty, Co. v 159 Emmut Props. LLC*, 106 AD3d 653, 655 [1st Dept 2013]; *Arfa v Zamir*, 76 AD3d 56, 59-60 [1st Dept 2010], *affd* 17 NY3d 737 [2011]). Drucker, as Harmit's managing member, may invoke the contractual disclaimers as a defense to the counterclaims (*see Katz v Image Innovations Holdings, Inc.*, 2008 WL 4840880, *7, 2008 US Dist LEXIS 91449, *24 [SD NY, Nov. 5, 2008, No. 06-Civ-3707(JGK)], citing *Vesey Assoc. v Regime Realty Corp.*, 35 Misc 2d 353 [Sup Ct, NY County 1961]).

The motion court correctly determined that counterclaim

plaintiffs failed to properly allege a breach of the Zoning Lot Development Agreement, because they did not indicate how the alleged unlawfully oversized mezzanine or inaccurate certificate of occupancy adversely affected their rights or property.

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

ENTERED: JANUARY 19, 2016

CLERK

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

16679 The People of the State of New York, Respondent, Ind. 542/07 543/07

-against-

Phillip Washington, Defendant-Appellant.

_____

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

Phillip Washington, appellant pro se.

Robert T. Johnson, District Attorney, Bronx (Ramandeep Singh of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Ann M. Donnelly, J.), rendered February 10, 2011, convicting defendant, after a jury trial, of criminal sale of a firearm in the third degree and criminal sale of marihuana in the first degree, and sentencing him, as a second felony offender, to an aggregate term of 13 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342 [2007]). There is no basis for disturbing the jury's credibility determinations. Any inconsistencies in the undercover officer's testimony were minor and did not detract from his clear account of the events, which

was corroborated by other evidence.

We perceive no basis for reducing the sentence.

We have considered and rejected defendant's pro se claims.

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

ENTERED: JANUARY 19, 2016

CLERK

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

16680 The People of the State of New York, Ind. 2148/11
Respondent,

-against-

Robert Cody,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Steven J. Miraglia of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sheryl Feldman 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 (Bonnie Wittner, J.), rendered on or about November 15, 2011,

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

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

ENTERED: JANUARY 19, 2016

CLERK

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

Mazzarelli, J.P., Andrias, Moskowitz, Gische, JJ.

16681 City of Roseville Employees' Retirement System, etc., Plaintiff-Appellant, Index 650294/12

-against-

James Dimon, et al., Defendants-Respondents,

JPMorgan Chase & Co., Nominal Defendant-Respondent.

_____

Paradis Law Group, PLLC, New York (Gina M. Tufaro of counsel), for appellant.

Debevoise & Plimpton LLP, New York (Gary W. Kubek of counsel), for respondents.

_____

Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered January 16, 2015, which granted defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

The motion court correctly determined that plaintiff failed to adequately plead demand futility based on defendants' lack of disinterest or breach of the duty of loyalty (*see Rales v Blasband*, 634 A2d 927, 936 [Del 1993]). The complaint fails to allege particularized facts showing the substantial likelihood of defendants' personal liability as a result of any intentional misconduct, that they consciously failed to implement any sort of

risk monitoring system or that, having implemented such a system, they consciously disregarded red flags (*see e.g. Security Police & Fire Professionals of Am. Retirement Fund v Mack*, 93 AD3d 562 [1st Dept 2012]).

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

ENTERED: JANUARY 19, 2016

CLERK

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

16682 The People of the State of New York, Dkt. 9412/11
Respondent,

-against-

Crystal Figueroa,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Harold V. Ferguson Jr. of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (James Wen of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Carol Feinman, J.), rendered February 17, 2011, convicting defendant, upon her plea of guilty, of loitering for the purpose of engaging in a prostitution offense, and sentencing her to a conditional discharge, and judgment of resentence, same court (George R. Villegas, J.), rendered February 1, 2012, resentencing defendant to time served, unanimously reversed, on the law, and the accusatory instrument dismissed in the interest of justice.

The record fails to support the conclusion that defendant's guilty plea was knowing, intelligent and voluntary, because the court accepted the plea at arraignment without addressing any of the rights defendant was waiving, and there are no circumstances

reflecting her consultation with counsel (*see People v Conceicao*, ___ NY3d ___ , NY Slip Op 08615, *4-5 [2015]). Further, we dismiss the accusatory instrument in the interest of justice.

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

ENTERED: JANUARY 19, 2016

CLERK

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

16683 Francisco Pineda, Index 301512/09
Plaintiff-Respondent,

-against-

1741 Hone Realty Corp.,
Defendant-Appellant.

_____

Gannon, Rosenfarb & Drossman, New York (Lisa L. Gokhulsingh of counsel), for appellant.

Jacoby & Meyers, LLC, New Burgh (Andrew L. Spitz of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Sharon A.M. Aarons J.), entered September 24, 2014, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff alleges that as he was descending an interior stairway leading from the second floor to the first floor in defendant's building, he slipped on rain water and fell through a glass door panel, causing him to sustain injuries.

Defendant failed to establish that, as a matter of law, it did not have constructive notice of the tracked-in rain water that accumulated on the stairs where plaintiff fell. Defendant failed to proffer any evidence that it took any measures to address the possibility of tracked-in water from accumulating on

the stairs earlier in the day when it was raining, and failed to show when the stairs were last inspected or cleaned before plaintiff fell (*see Ross v Betty G. Revocable Trust*, 86 AD3d 419, 421 [1st Dept 2011]).

Defendant demonstrated that the glass plate which plaintiff fell through after he slipped was not required to be shatterproof under any applicable provisions of the New York City Building Code, since defendant's building was constructed prior to that requirement (*see Katz v Blank Rome Tenzer Greenblatt*, 100 AD3d 407, 407 [1st Dept 2012]). Defendant nonetheless had a common-law duty "to maintain the staircase in a reasonably safe condition, in view of all the circumstances, including 'the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk'" (*Branch v SDC Discount Store, Inc.*, 127 AD3d 547, 547 [1st Dept 2015] [citation omitted]). Issues of fact exist as to whether defendant was

negligent by failing to install shatterproof glass, or to take measures to guard the glass panes, which were about four feet away from the bottom of the stairs where plaintiff fell, to protect against foreseeable injury.

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

ENTERED: JANUARY 19, 2016

CLERK

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

16684 The People of the State of New York, Ind. 2320/12
Respondent,

-against-

Alexander Tineo,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Paul Hershan of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Troy K. Webber, J.), rendered October 4, 2013, convicting defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree, and sentencing him to a term of three years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the prison term to two years, and otherwise affirmed.

We do not find that defendant made a valid waiver of his right to appeal, and we find the sentence excessive to the extent indicated.

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

ENTERED: JANUARY 19, 2016

CLERK

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

16685 In re The People of the State of New York ex rel. Devar Hurd, Petitioner-Appellant, -against- Warden, G.R.V.C., Riker's Island, Respondent-Respondent. Index 400919/14

Devar Hurd, appellant pro se.

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

Appeal from judgment (denominated an order), Supreme Court, New York County (Anthony J. Ferrara, J.), entered on or about August 7, 2014, denying the petition for a writ of habeas corpus and dismissing the proceeding brought pursuant to CPLR article 70, unanimously dismissed, without costs, as moot.

This appeal challenging the legality of petitioner's pretrial detention is moot, since he is currently incarcerated as the result of his conviction and sentencing (*seePeople ex rel. Macgiollabhui v Schriro*, 123 AD3d 633 [1st Dept 2014]), and no

exception to the mootness doctrine applies (*see Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]).

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

ENTERED: JANUARY 19, 2016

CLERK

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

16686 The People of the State of New York, Ind. 5862/10
Respondent,

-against-

Reynaldo Quinones,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Thomas M. Nosewicz of counsel), for appellant.

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Edward J. McLaughlin, J.), rendered on or about August 9, 2011,

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

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

ENTERED: JANUARY 19, 2016

CLERK

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

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

16687-
16688N Gregorio Brito, Index 309362/11
Plaintiff-Appellant,

-against-

Allstate Insurance Company,
Defendant-Respondent.

_____

Linda T. Ziatz, P.C., Forrest Hills (Linda T. Ziatz of counsel), for appellant.

Law Offices of Michael A. Barnett, Garden City (Jay M. Weinstein of counsel), for respondent.

_____

Appeal from order, Supreme Court, Bronx County (Laura G. Douglas, J.), entered on or about April 9, 2015, which denied plaintiff's motion for reargument, denominated as a motion to vacate the order, same court and Justice, entered on or about June 24, 2014, dismissing the complaint for failure to comply with discovery orders, unanimously dismissed, without costs, as taken from a nonappealable paper. Appeal from order, same court and Justice, entered March 25, 2014, which, inter alia, directed plaintiff to provide certain outstanding discovery, unanimously dismissed, without costs, as moot.

In his motion to vacate the June 2014 order, which dismissed the complaint, plaintiff argued that he was not required to

provide the discovery he had been directed to provide, because, in an action brought pursuant to Insurance Law § 3420(a)(2), the insurer is limited to disclaiming coverage against the insured, and the discovery demanded by defendant concerned the defenses that would have been available to its insured, if the insured had not defaulted, in the underlying action. However, plaintiff had made this argument before, and the motion court had correctly rejected it in the March 25, 2014 order (*see Jimenez v New York Cent. Mut. Fire Ins. Co.*, 71 AD3d 637, 639 [2d Dept 2010]), which directed plaintiff to provide the discovery that the court had previously directed him to provide in orders with which plaintiff had failed to comply. The court dismissed the complaint after plaintiff failed to comply with the March 25, 2014 order. Instead of appealing from the dismissal order, plaintiff moved to vacate it. Since he advanced the same arguments as the court had rejected in the March 25, 2014 order, the motion to vacate was, in fact, an untimely motion to reargue. The denial of a motion

to reargue is not appealable (*Lopez v Post Mgt. LLC*, 68 AD3d 671 [1st Dept 2009]). The order dismissing the complaint remains in effect, and the appeal from the March 25, 2014 order directing plaintiff to provide discovery is moot.

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

ENTERED: JANUARY 19, 2016

CLERK

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

16689 In re State of New York, ex rel., Index 43/15
[M-5801] Samuel L. Buoscio,
Petitioner,

-against-

Hon. Clerk of New York, etc.,
Respondent.

_____

Samuel L. Buoscio, petitioner pro se.

John W. McConnell, Office of Court Administration, New York (Sharon Kerby of counsel), for respondent.

_____

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: JANUARY 19, 2016

CLERK

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

16690 The People of the State of New York, Ind. 1933/11
Respondent,

-against-

Edward Staton,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Margaret E. Knight of counsel), for appellant.

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Gregory Carro, J.), rendered on or about August 1, 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: JANUARY 19, 2016

CLERK

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

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

16691 Janet Neufeld, Index 300870/11
Plaintiff-Respondent,

-against-

Richard Neufeld,
Defendant-Appellant.

_____

Law Office of William S. Beslow, New York (William S. Beslow of counsel), for appellant.

Julie Hyman, P.C., Bronx (Julie Hyman of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Doris M. Gonzalez, J.), entered August 13, 2014, which, to the extent appealed from as limited by the briefs, denied defendant's motion for a downward modification of maintenance, unanimously affirmed, without costs.

Defendant failed to submit either a paycheck or his most recently filed tax return in support of his motion for a downward

modification of maintenance (*see* Domestic Relations Law § 236[B][4][a]; 22 NYCRR 202.16[b], [k][2]). The denial of the motion is without prejudice to renewal upon submission of the requisite documentation (22 NYCRR 202.16[k][5][ii]).

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

ENTERED: JANUARY 19, 2016

CLERK

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

16692-
16693 In Re Boris Jonathan D.,

A Person Alleged to
be a Juvenile Delinquent,
Appellant.
- - - - -
Presentment Agency

_____

Tamara A. Steckler, The Legal Aid Society, New York (Judith Waksberg of counsel), and Bart M. Schwartz, New York, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Ronald E. Sternberg of counsel), for respondent.

_____

Amended order of disposition, Family Court, Bronx County (Peter J. Passidomo, J.), entered on or about January 23, 2015, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of attempted assault in the first degree, attempted gang assault in the first degree, assault in the second degree, and attempted assault in the second degree,, and placed him on probation for a period of 18 months, unanimously affirmed, without costs. Appeal from order of disposition, same court and justice, entered on or about June 24, 2014, unanimously dismissed, without costs, as subsumed in the appeal from the amended order of disposition.

The court's finding was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's determinations concerning credibility and identification.

The court properly exercised its discretion in excluding a surveillance videotape that, according to appellant, undermined the victim's credibility by proving the alibi of another youth whom the victim identified as one of his assailants. The record supports the court's conclusion that appellant failed to lay a sufficient foundation. In any event, appellant was permitted to introduce testimony supporting the other youth's alibi, the video did not conclusively establish the youth's whereabouts for the entire night in question, and any error was harmless.

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

ENTERED: JANUARY 19, 2016

CLERK

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

16695-
16696 The People of the State of New York,
Respondent,

-against-

Keither Rickerson,
Defendant-Appellant.

Ind. 2775/09

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

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

Judgment, Supreme Court, New York County (Jill Konviser, J.), rendered December 20, 2010, convicting defendant, after a jury trial, of manslaughter in the first degree, and sentencing him to a term of 14 years; and order, same court and Justice, entered on or about January 23, 2015, which denied defendant's CPL 440.10 motion to vacate the judgment, unanimously affirmed.

The court properly denied defendant's CPL 440.10 motion, based on his claim that his counsel rendered ineffective assistance by failing to request submission of the lesser included offense of second-degree manslaughter. Even assuming that trial counsel's failure to request the submission was inadvertent, defendant has not shown that such failure was

objectively unreasonable, that he was entitled to such submission, or that there is a reasonable possibility that such submission would have affected the outcome of the case (*see People v Benevento*, 91 NY2d 708 [1998]; *Strickland v Washington*, 466 US 668 [1984]). There is no reasonable view of the evidence, viewed in the light most favorable to defendant, that defendant acted with mere recklessness (*see People v Rivera*, 23 NY3d 112, 123-124 [2014]; *People v Lopez*, 72 AD3d 593 [1st Dept 2010], *lv denied* 15 NY3d 807 [2010]). The fatal wound could only have been inflicted by deliberately thrusting a knife deep into the victim's heart, and there was no reason to believe defendant's mental state was anything less than an intent to cause serious physical injury.

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 19, 2016

CLERK

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

16697 Tracy Domaszowec, etc., Index 310564/08
Plaintiff-Respondent-Appellant,

-against-

Residential Management Group LLC
doing business as Douglas Elliman
Property Management, et al.,
Defendants-Appellants-Respondents,

Panorama Windows, Ltd., et al.,
Defendant-Respondent-Appellant,

Veronica Bulgari, et al.,
Defendants-Respondents.

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Lester Schwab Katz & Dwyer, LLP, New York (Harry Steinberg of counsel), for Residential Management Group LLC and 40 Fifth Avenue Corporation, appellants-respondents.

Kelner and Kelner, New York (Gail S. Kelner of counsel), for Tracy Domaszowec, respondent-appellant.

Camacho Mauro Mulholland, LLP, New York (Andrea Sacco Camacho of counsel), for Panorama Windows, Ltd., respondent-appellant.

Law Office Of James J. Toomey, New York (Eric P. Tosca and Evy Kazansky of counsel), for Veronica Bulgari and Stephen Haimo, respondents.

Perry, Van Etten, Rozanski & Primavera, LLP, Melville (Elizabeth Gelfand Kastner of counsel), for T&L Contracting of N.Y., Inc., respondent.

Jacobson & Schwartz, LLP, Jericho (Paul Goodovitch of counsel), for Greenpoint Woodworking Inc., respondent.

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Order, Supreme Court, Bronx County (Kenneth L. Thompson,

Jr., J.), entered December 23, 2013, which, insofar as appealed from, denied defendants Residential Management Group d/b/a Douglas Elliman Property Management and 40 Fifth Avenue Corporation's (collectively, 40 Fifth defendants) motion for summary judgment dismissing the common-law negligence and Labor Law § 202 claims as against them, denied plaintiff's motion for partial summary judgment on her Labor Law § 240(1) claim as against 40 Fifth defendants, her Labor Law § 202 claim as against 40 Fifth Avenue defendants and defendants Bulgari and Haimo, and her negligence claims as against defendants Panorama Windows, Ltd., T&L Contracting of N.Y., Inc., and Greenpoint Woodworking Inc., granted T&L's and Greenpoint's motions for summary judgment dismissing the negligence claims as against them, denied the part of Panorama's motion for summary judgment that sought to dismiss the common-law negligence claims as against it and granted the part of the motion that sought to dismiss the punitive damages claim as against it, unanimously modified, on the law, to grant plaintiff's motion for partial summary judgment on her Labor Law § 240(1) claim as against 40 Fifth defendants, and otherwise affirmed, without costs. Appeal by 40 Fifth defendants from so much of the order as granted Bulgari and Haimo's motion for summary judgment dismissing the Labor Law § 202 claim as against

them, unanimously dismissed, without costs, as taken by a nonaggrieved party.

The record demonstrates that plaintiff, whose decedent fell to his death while cleaning a window on the 13th floor of an apartment building, is entitled to summary judgment on her Labor Law § 240(1) claim as against 40 Fifth defendants, the owner and manager of the building. The decedent was hired by two shareholders of the residential cooperative, and had a long-standing arrangement with the building to clean its windows. Thus, contrary to the motion court's finding, he was engaged in "commercial window washing," involving "heightened elevation-related risks," as opposed to "routine, household window washing" (*Soto v J. Crew Inc.*, 21 NY3d 562, 568 [2013] [internal quotation marks omitted]; *see Swiderska v New York Univ.*, 10 NY3d 792 [2008]).

Since we are granting partial summary judgment on the Labor Law § 240(1) claim as against 40 Fifth defendants, we do not reach the Labor Law § 202 claim or the common-law negligence claims as against them (*see Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 12 [1st Dept 2011]).

The court correctly dismissed the Labor Law § 202 claim as against Bulgari and Haimo, the proprietary tenants, since it is

undisputed that they did not have exclusive control of the subject window (*see Schneier v Owen Realty Co.*, 271 App Div 983 [2d Dept 1947]; *see also Durham v Metropolitan Elec. Protective Assn.*, 18 NY2d 433, 437 [1966]).

The court correctly denied both plaintiff's motion for partial summary judgment on her common-law negligence claims as against Panorama and Panorama's motion for summary judgment dismissing those claims, in light of conflicting evidence as to whether Panorama cut the bolts of the anchor attached to the building, to which the decedent apparently attempted to attach his safety belt. Plaintiff's expert professional engineer concluded, based on multiple site inspections, that saw marks in the window frame must have been created by a certain type of reciprocating saw used by Panorama and not by the other two contractors working on the project, and this opinion was corroborated by experts of 40 Fifth defendants and T&L who found the marks consistent with that type of saw. However, Panorama's crew leader denied that any of the Panorama workers cut the bolts. Although the evidence establishes that cutting the bolts on the subject window would have been unnecessary, it cannot be assumed as a matter of law that the Panorama workers did not do so, since they were instructed to cut bolts on nine other windows

in this project as well as any bolts that were in their way. The court properly considered plaintiff's expert affidavits, notwithstanding plaintiff's allegedly untimely disclosure of the experts (*see Lebron v SML Veteran Leather, LLC*, 109 AD3d 431, 436 n 3 [1st Dept 2013], *affd* 22 NY3d 1119 [2014]; CPLR 3101[d][1]).

The court correctly dismissed the common-law negligence claims as against T&L and Greenpoint, since plaintiff failed to establish the applicability of any exception to the rule that "a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party," here, the decedent (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138 [2002]).

The court correctly denied plaintiff's motion for partial summary judgment on her negligence claims as against Panorama, T&L, and Greenpoint pursuant to the doctrine of res ipsa loquitur. The doctrine, which allows a jury to infer negligence from circumstantial evidence, is inapplicable to T&L and Greenpoint because the court correctly dismissed the negligence claim as against them (*see Morejon v Rais Constr. Co.*, 7 NY3d 203 [2006]), and issues of fact as to the decedent's comparative negligence preclude summary judgment as against Panorama (*see id.* at 209).

Plaintiff's objection to the court's dismissal of her claim for punitive damages against Panorama is stated only conclusorily in her main brief, and we do not consider the arguments she raises on this issue for the first time in her reply brief.

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

ENTERED: JANUARY 19, 2016

CLERK

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

16698 The People of the State of New York, Ind. 933/13
Respondent,

-against-

Thomas Bullock,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Luis Morales 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 (Charles Solomon, J.), rendered on or about June 14, 2013,

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

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

ENTERED: JANUARY 19, 2016

CLERK

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

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

16699- Index 650832/12
16700 Sven Grasshoff,
Plaintiff-Respondent,

-against-

Aaron Etra,
Defendant-Appellant.

_____

William M. Pinzler, New York, for appellant.

Lax & Neville LLP, New York (Raquel Kraus of counsel), for respondent.

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Judgment, Supreme Court, New York County (Eileen Bransten, J.), entered October 30, 2014, in favor of plaintiff, in the total amount of $192,895.60, pursuant to an order, same court and Justice, which, to the extent appealed from, granted plaintiff's motion for summary judgment on his conversion cause of action, unanimously affirmed, without costs. Appeal from aforesaid order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff established his prima facie entitlement to summary judgment on his conversion claim by submitting deposition testimony, financial transfer documents and correspondences showing that he transferred his personal funds into an apparent escrow account maintained by defendant, that defendant

intentionally retransferred those funds to a different individual without plaintiff's permission, and that the transfer effectively deprived plaintiff of the funds, which were never recovered (*see State of New York v Seventh Regiment Fund*, 98 NY2d 249, 259-260 [2002]; *Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 [2006]). In opposition, defendant failed to raise a triable issue of fact.

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

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

ENTERED: JANUARY 19, 2016

CLERK

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

16701 The People of the State of New York, Ind. 5162/10
Respondent,

-against-

Luis Gaston,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Eunice C. Lee of counsel), and Jones Day, New York (Laura Jean Eichten of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Natalia Bedoya-McGinn of counsel), for respondent.

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Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered October 26, 2011, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender previously convicted of a violent felony, to a term of 7½ years, unanimously affirmed.

The verdict, which rejected defendant's agency defense, was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. Even under the version of the facts reflected in defendant's testimony, the evidence supports the conclusion that the heroin defendant received was not an

"incidental benefit" for performing a "favor," (*People v Lam Lek Chong*, 45 NY2d 64, 75 [1978], *cert denied* 439 US 935 [1978]), but was defendant's primary motivation for obtaining heroin for the undercover purchaser (*see e.g. People v Abdallah*, 112 AD3d 415 [1st Dept 2013], *lv denied* 22 NY3d 1086 [2014]; *People v Sanchez*, 35 AD3d 161 [1st Dept 2006], *lv denied* 8 NY3d 949 [2007]).

Defendant was not prejudiced by a remark in the prosecutor's opening statement that allegedly asserted a theory that was at variance with the indictment. Even assuming, without deciding, the existence of such a variance, it did not deprive defendant of a fair trial. Although defendant asserts that the allegedly improper theory "pervaded" the case, we conclude that the trial evidence, the prosecutor's summation, the court's charge, and the jury's verdict were all consistent with the theory of the indictment as defendant interprets it (*see People v Davis*, 256 AD2d 200, 201-202 [1st Dept 1998], *lv denied* 93 NY2d 898 [1999]).

Defendant was not deprived of a fair trial by the People's summation. The prosecutor did not shift the burden of proof by commenting on the lack of evidence to corroborate defendant's testimony (*see e.g. People v Williams*, 103 AD3d 442 [1st Dept 2013], *lv denied* 21 NY3d 915 [2013]). The other remarks at issue were fair comments on the evidence and appropriate responses to

the defense summation (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1998]).

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

ENTERED: JANUARY 19, 2016

CLERK

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

16702- Index 650632/09
16703- 101615/09
16704- 101616/09
16705- 650633/09
16706-
16707 Donna M. McBride, individually
and derivatively on behalf of
Beacon Associates LLC II,
Plaintiff-Appellant,

-against-

KPMG International et al.,
Defendants-Respondents,

Beacon Associates Management Corp. et al.,
Defendants,

Paul Konigsberg,
Defendant-Respondent.

- - - - -

Jay Wexler, individually and
derivatively on behalf of Rye
Select Broad Market Prime Fund, L.P.,
Plaintiff-Appellant,

-against-

KPMG LLP, et al.,
Defendants,

KPMG UK, et al.,
Defendants-Respondents.

- - - - -

Daniel Ryan, et al.,
Plaintiffs-Appellants,

-against-

Friehling & Horowitz, P.C., et al.,
Defendants,

KPMG UK, et al.,
Defendants-Respondents.

- - - - -

Matthew Greenberg, et al.,
Plaintiffs-Appellants,

-against-

Friehling & Horowitz, P.C., et al.,
Defendants,

KPMG UK, et al.,
Defendants-Respondents.

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Cotchett, Pitre & McCarthy, LLP, New York (Alexander E. Barnett of counsel), for appellants.

Linklaters LLP, New York (James R. Warnot Jr. of counsel), for KPMG International, respondent.

Hogan Lovells US LLP, New York (Ira M. Feinberg of counsel), for KPMG UK, respondent.

Wachtell, Lipton, Rosen & Katz, New York (Emil Kleinhaus of counsel), for JPMorgan Chase & Co., respondent.

Cleary Gottlieb Steen & Hamilton LLP, Washington DC (Nowell D. Bamberger of the bar of the State of Maryland, and the bar of the District of Columbia, admitted pro hac vice, of counsel), for the Bank of New York Mellon Corporation, respondent.

Ballard Spahr LLP, New York (Scott M. Himes of counsel), for Paul Konigsberg, respondent.

Fishkin Lucks LLP, New York (Zachary W. Silverman of counsel), for Frank Avellino, respondent.

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Judgment, Supreme Court, New York County (Richard B. Lowe, III, J.), entered September 5, 2014, dismissing plaintiff Donna

M. McBride's complaint as against Paul Konigsberg, KPMG UK, and KPMG International, unanimously affirmed without costs.

Judgment, same court and Justice, entered September 5, 2014, dismissing plaintiff Jay Wexler's first amended complaint as against Konigsberg, KPMG UK, and KPMG International, unanimously affirmed, without costs. Judgment, same court and Justice, entered September 5, 2014, dismissing the Ryan plaintiffs' first amended complaint against Konigsberg, KPMG UK, KPMG International, and Frank Avellino, unanimously affirmed, without costs. Judgment, same court and Justice, entered September 5, 2014, dismissing the Greenberg plaintiffs' complaint against Konigsberg, KPMG UK, and KPMG International, unanimously affirmed, without costs. Order, same court and Justice, entered on or about August 18, 2014, which, insofar as appealed from as limited by the briefs, granted defendants JP Morgan Chase & Co. and The Bank of New York Mellon's (BNY) motions to dismiss the claims for (1) aiding and abetting fraud, fraud in the inducement, and breach of fiduciary duty, (2) conversion, and (3) unjust enrichment, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered on or about July 28, 2014, unanimously dismissed, without costs, as subsumed in the appeals from the judgments.

The motion court correctly found that New York lacks personal jurisdiction over KPMG UK pursuant to CPLR 302(a)(3)(ii). While plaintiffs allege that KPMG UK committed a tort outside the state (negligently auditing nonparty Madoff Securities International, Ltd. [MSIL] in the United Kingdom), and their causes of action arise out of that tort, KPMG UK's act did not cause injury to a person or property within the state. "[T]he situs of commercial injury is where the original critical events associated with the action or dispute took place, not where any financial loss or damages occurred" (*CRT Invs., Ltd. v BDO Seidman, LLP*, 85 AD3d 470, 471-472 [1st Dept 2011]).

The court providently exercised its discretion in denying plaintiffs' request for jurisdictional discovery since plaintiffs failed to submit affidavits specifying facts that might exist but could not then be stated that would support the exercise of personal jurisdiction over KPMG UK (CPLR 3211[d]; *see de Capriles v Lugo*, 293 AD2d 405, 406 [1st Dept 2002], *lv dismissed in part, denied in part* 98 NY2d 717 [2002]).

Plaintiffs base their claims against KPMG International on the contention that KPMG International is vicariously liable for KPMG UK'S alleged misconduct. However, plaintiffs' allegations, even if true, would not establish a basis for imposing vicarious

liability on KPMG International for KPMG UK'S acts, either on a theory that an actual principal-agent relationship existed or on a theory of apparent authority. Accordingly, the claims against KPMG International were correctly dismissed.

In April 2014, the court dismissed Wexler's claim against the Tremont defendants for fraudulently inducing him into investing in nominal defendant/derivative plaintiff Rye Select Broad Market Prime Fund L.P. Wexler appealed but withdrew his appeal with prejudice. Without an underlying fraudulent inducement claim, Wexler's claim that JPMorgan, BNY, and Konigsberg aided and abetted fraudulent inducement necessarily fails (*see Kleinerman v 245 E. 87 Tenants Corp.*, 74 AD3d 448, 449 [1st Dept 2010]).

Like Wexler, McBride invested in a feeder fund. She became a member of nominal defendant/derivative plaintiff Beacon Associates LLC II (Beacon Fund), which is managed by defendant Beacon Associates Management Corp. (Beacon Associates). Beacon Associates "invested" most of the Beacon Fund's assets with nonparty Bernard L. Madoff Investment Securities LLC (BMIS). McBride alleges that Beacon Associates fraudulently induced her into becoming a member of the Beacon Fund by, for example, failing to disclose that the Beacon Fund's assets would be

invested with BMIS. She alleges that JPMorgan, BNY, and Konigsberg aided and abetted Beacon Associates in this fraudulent inducement. However, McBride makes only conclusory allegations that the aiders and abettors knew about and substantially assisted Beacon Associates' fraud; all of her specific allegations deal with aiding and abetting *Madoff's/BMIS's* fraud. Hence, her aiding and abetting claim fails (*see CRT Invs., Ltd. v Merkin*, 29 Misc 3d 1218[A], 2010 NY Slip Op 51868[U], *15 [Sup Ct, NY County 2010], *affd* 85 AD3d 470 [1st Dept 2011]).

The Ryans and the Greenbergs did not invest in feeder funds; they invested directly in BMIS. Their claim that Konigsberg and BNY aided and abetted the fraud of BMIS insiders Frank DiPascali and Annette Bongiorno fails for lack of allegations of substantial assistance by the alleged aiders and abettors (*see Stanfield Offshore Leveraged Assets, Ltd. v Metropolitan Life Ins. Co.*, 64 AD3d 472, 476 [1st Dept], *lv denied* 13 NY3d 709 [2009]). The Ryans and the Greenbergs allege that Konigsberg's firm, nonparty Konigsberg Wolf & Co., P.C. (KWC), "signed off" on Madoff's family investment books, which substantially assisted the continuation of the BMIS fraud. However, they fail to show why KWC's corporate veil should be pierced to reach Konigsberg (*see Weinberg v Mendelow*, 113 AD3d 485 [1st Dept 2014]). In any

event, they do not explain how signing off on accounting statements for entities other than BMIS substantially assisted BMIS's fraud. For example, they do not allege that, when they decided to invest in BMIS, they relied on the fact that Madoff's family investment books were in order (*see National Westminster Bank v Weksel*, 124 AD2d 144, 149 [1st Dept 1987], *lv denied* 70 NY2d 604 [1987]; *see Stanfield*, 64 AD3d at 476).

BMIS had both a fraudulent side (the investment advisory side) and a legitimate side (the proprietary trading and market making side). BMIS maintained an account for its brokerage business (i.e., the legitimate business) with BNY and an account for its fraudulent business with JPMorgan. Madoff moved funds from BMIS's account at JPMorgan to MSIL's bank account in London to BMIS's account at BNY; he then removed funds from the BNY account. The Ryans and the Greenbergs allege that BNY provided substantial assistance to the BMIS fraud by allowing Madoff to transfer funds between the BNY account and London. However, substantial assistance "means more than just performing routine business services for the alleged fraudster" (*CRT*, 85 AD3d at 472). A bank's allowing its customer to transfer money from its account is a routine business service (*see MLSMK Inv. Co. v JP Morgan Chase & Co.*, 431 Fed Appx 17, 20 [2d Cir 2011]).

The Ryans and the Greenbergs allege that, as BMIS officers, Peter Madoff, Mark Madoff, Andrew Madoff, DiPascali, and Bongiorno (the individual BMIS defendants) owed fiduciary duties to BMIS investors. They further allege that BNY and Konigsberg aided and abetted the individual BMIS defendants' breach of fiduciary duty. The Ryans additionally allege that Avellino aided and abetted the individual BMIS defendants' breach of fiduciary duty.

The claims against BNY and Konigsberg for aiding and abetting breach of fiduciary duty fail for the same reason the claims against them for aiding and abetting fraud fail, i.e., for lack of allegations of substantial assistance (*see Kaufman v Cohen*, 307 AD2d 113, 126 [1st Dept 2003]).

The Ryans' claim against Avellino for aiding and abetting fiduciary duty fails because there was no underlying breach of fiduciary duty (*see OFSI Fund II, LLC v Canadian Imperial Bank of Commerce*, 82 AD3d 537, 540 [1st Dept 2011], *lv denied* 17 NY3d 702 [2011]). While officers of a corporation owe fiduciary duties to the *corporation (see e.g. Limmer v Medallion Group*, 75 AD2d 299, 303 [1st Dept 1980]), the Ryans cite no authority for the proposition that a corporation's officers owe fiduciary duties to people who give the corporation money to invest.

In its April 2014 order, the court found that Wexler's claims for conversion and unjust enrichment were derivative, not direct. As noted, Wexler appealed from this order but withdrew his appeal. Hence, he may not relitigate the nature of those claims (*see generally Buechel v Bain*, 97 NY2d 295, 303 [2001], *cert denied* 535 US 1096 [2002]).

Even if McBride's claims for conversion and unjust enrichment are direct, they nonetheless fail to state a cause of action, as do the Ryans' and the Greenbergs' claims. Where, as here, a plaintiff alleges that a defendant converted money, the money "must be specifically identifiable and be subject to an obligation to be returned or to be otherwise treated in a particular manner" (*Republic of Haiti v Duvalier*, 211 AD2d 379, 384 [1st Dept 1995]). McBride sent her money to Beacon Associates, which sent it to Madoff, who deposited it at JPMorgan. Even if, arguendo, McBride's money was specifically identifiable when she sent it to Beacon Associates, there is no indication that Beacon Associates segregated it when it sent investors' money to Madoff. By the time Madoff deposited investors' money at JPMorgan, McBride's investments would not have been specifically identifiable. The Ryans and the Greenbergs assert conversion claims against BNY, not JPMorgan.

JPMorgan sent money to MSIL in London; in turn, MSIL sent money to BNY. By the time BNY got the money, the Ryans' and the Greenbergs' investments would not have been specifically identifiable.

Even if, arguendo, plaintiffs' money were specifically identifiable, their conversion claims would fail because they had no possessory right or interest in the allegedly converted property (*see Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 50 [2006]). Plaintiffs had no possessory right or interest in BMIS's accounts at JPMorgan and BNY; rather, *BMIS* had the right and interest in those accounts (*see Calisch Assoc. v Manufacturers Hanover Trust Co.*, 151 AD2d 446, 448 [1st Dept 1989]).

In support of their unjust enrichment claims, McBride fails to allege a "sufficiently close relationship" with JPMorgan, and the Ryans and the Greenbergs fail to allege a "sufficiently close relationship" with BNY (*see Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 [2012]).

The Ryans' claim against Avellino for negligent misrepresentation was correctly dismissed for the simple reason that it fails to allege that Avellino made any misrepresentation (*see Eurycleia Partners, LP v Seward & Kissel, LLP*, 46 AD3d 400,

402 [1st Dept 2007], *affd* 12 NY3d 553 [2009]).

The court providently exercised its discretion in denying plaintiffs leave to amend since plaintiffs failed to submit "appropriate substantiation" (*see Guzman v Mike's Pipe Yard*, 35 AD3d 266, 266 [1st Dept 2006] [internal quotation marks omitted]). Even before the amendment to CPLR 3025(b) took effect on January 1, 2012, we required a "proposed pleading accompanied by an affidavit of merit" (*see Fletcher v Boies, Schiller & Flexner, LLP*, 75 AD3d 469, 470 [1st Dept 2010]).

We have considered plaintiffs' remaining arguments (for example, that the court should have taken judicial notice of certain developments) and find them unavailing.

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

ENTERED: JANUARY 19, 2016

CLERK

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

16708-
16709 In re Naveah P., and Another,

Children Under the Age of Eighteen Years, etc.,

Saquan P., et al.,
Respondents-Appellants,

The Administration for Children's Services,
Petitioner-Respondent.

_____

Steven N. Feinman, White Plains, for Saquan P., appellant.

Neal D. Futeras, White Plains, for Amanda B., appellant.

Zachary W. Carter, Corporation Counsel, New York (Tahirih M. Sadrieh of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Claire V. Merkine of counsel), attorney for the children.

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Orders of fact-finding and disposition, Family Court, New York County (Clark V. Richardson, J.), entered on or about June 30, 2014 and October 15, 2014, respectively, insofar as they determined that respondent parents neglected the subject children, unanimously affirmed, without costs.

The findings of neglect are supported by a preponderance of the competent evidence (see Family Ct Act § 1046[b][i], [iii]; *see also Matter of Daphne G.*, 308 AD2d 132, 135 [1st Dept 2003]). The record shows that the children were subject to actual or

imminent danger of injury or impairment of their emotional and mental condition from exposure to repeated incidents of domestic violence occurring in respondents' one-room home, in close proximity to the two young children (*see Matter of Carmine G. [Franklin G.]*, 115 AD3d 594 [1st Dept 2014]; *Matter of Angie G. [Jose D.G.]*, 111 AD3d 404, 404-405 [1st Dept 2013]). Family Court's credibility determinations are entitled to deference on appeal (*see Matter of Irene O.*, 38 NY2d 776, 777-778 [1975]; *Matter of Aaron C. [Grace C.]*, 105 AD3d 548 [1st Dept 2013]). The out-of-court statements made by the father in front of the police officers who had been summoned were properly admitted under the excited utterance exception to the hearsay rule (*see People v Edwards*, 47 NY2d 493, 497 [1979]). Moreover, his statements were corroborated by, among other things, the parents' certified hospital records, which showed that the father suffered

a stab wound and the mother had bruise marks and human bite marks.

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

ENTERED: JANUARY 19, 2016

CLERK

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

16710 The People of the State of New York, Ind. 2377N/12
Respondent,

-against-

Elvis Marte,
Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Jahaan Shaheed of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Lindsey Richards 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 (Melissa Jackson, J.), rendered June 17, 2013,

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

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

ENTERED: JANUARY 19, 2016

CLERK

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

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

16711-
16712-
16712A

Index 652427/13

Citizens Defending Libraries, et al.,
Plaintiffs-Appellants,

-against-

Dr. Anthony W. Marx, et al.,
Defendants-Respondents,

Robert Silman Associates P.C., et al.,
Defendants,

State of New York, et al.,
Nominal Defendants.

Hiller, PC, New York (Michael S. Hiller of counsel), for appellants.

Akerman LLP, New York (Richard G. Leland of counsel), for Dr. Anthony W. Marx, Neil L. Rudenstine, Board of Trustees of the New York Public Library, New York Public Library and Astor, Lenox and Tilden Foundations, respondents.

Zachary W. Carter, Corporation Counsel, New York (Jeremy W. Shweder of counsel), for City respondents.

Judgment, Supreme Court, New York County (Paul Wooten, J.), entered July 10, 2014, dismissing the complaint, with costs to defendants, unanimously affirmed, without costs. Appeals from order, same court and Justice, entered June 3, 2014, which, inter alia, granted defendants' cross motions to dismiss, and order, same court and Justice, entered April 20, 2015, which denied

plaintiffs' motion to renew defendants' cross motions, and, upon reargument, adhered to the determination on the original motions, unanimously dismissed, without costs, as subsumed in the appeal from the aforesaid judgment.

The motion court correctly determined that, at the time it granted defendants' motions to dismiss the complaint, this action was not moot and thus that vacatur of the June 3, 2014 order was not warranted. The decision of defendant New York Public Library (NYPL) to reconsider its plan for renovations of its Central Branch did not resolve all the issues raised in the complaint.

The court also correctly determined that plaintiffs did not have standing to maintain a cause of action for public nuisance, because they did not suffer a special injury beyond that suffered by the community at large (*see 532 Madison Ave. Gourmet Foods v Finlandia Ctr.*, 96 NY2d 280, 292 [2001]). Nor were plaintiffs third-party beneficiaries of any agreements between NYPL and the other defendants, NYPL's Charters or Acts of Consolidation, or other historic documents establishing its underlying entities, and thus had no standing to sue for any alleged breach of the

terms of those agreements (*see Alicea v City of New York*, 145 AD2d 315 [1st Dept 1988]).

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

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

ENTERED: JANUARY 19, 2016

CLERK

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

16713 Bernadette Boggs, etc., Index 105017/08
Plaintiff-Respondent,

-against-

The City of New York,
Defendant-Appellant.

_____

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

Rappaport, Glass, Levine & Zullo, LLP, New York (Alexander J. Wulick of counsel), for respondent.

_____

Order, Supreme Court, New York County (Michael D. Stallman, J.), entered April 9, 2015, which, in this action alleging, inter alia, violation of Labor Law § 241(6), denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The record presents triable issues of fact as to where the accident happened and whether there was adequate lighting at the subject work area in accordance with Industrial Code (12 NYCRR) § 23-1.30. The decedent's coworker, who was with decedent at the time he was struck and killed by a train, testified that the banker lights from the express southbound track and the lights from the subway station were approximately 50 feet away from the accident location, and that the ambient lighting at the accident

location did not provide enough light to read a standard newspaper (*see Hernandez v Columbus Ctr., LLC*, 50 AD3d 597, 598 [1st Dept 2008]). The coworker's affidavit cannot be regarded as merely a self-serving allegation, because it can be reconciled with his prior testimony (*see e.g. Kalt v Ritman*, 21 AD3d 321, 323 [1st Dept 2005]). Contrary to defendant's contention, 12 NYCRR 23-1.30 is applicable, since this section requires lighting that provides a minimum of 10 foot-candles of illumination in any area where persons are required to work, and there is no dispute that the accident occurred where construction work was being performed (*see Lucas v KD Dev. Constr. Corp.*, 300 AD2d 634 [2d Dept 2002]).

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

ENTERED: JANUARY 19, 2016

CLERK

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

16714 The People of the State of New York, Case 99026/14
Respondent,

-against-

Miguel Perez,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Shera Knight of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Raymond L. Bruce, J.), entered on or about September 24, 2014, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). The factors cited by defendant, including his expert's report, do not warrant a different conclusion, especially in

light of defendant's pattern of escalating sexual misconduct toward the victim.

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

ENTERED: JANUARY 19, 2016

CLERK

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

16715 Rumaldo Castro, Index 309844/11
Plaintiff-Appellant,

-against-

Celania Peguero,
Defendant-Respondent.

_____

Sacco & Fillas, LLP, Astoria (Brad S. Levin of counsel), for appellant.

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

_____

Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered August 20, 2014, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff was injured while performing repair work on defendant's house when the ladder he was using, which was provided by his employer, fell over. Plaintiff testified that he did not place the ladder on any defective condition in the driveway and placed pieces of wood under one foot of the ladder to keep it level. Although he knew it was important to have somebody hold the bottom of the ladder because it could slip or move, he started to descend without any assistance and the ladder then slipped and quickly fell. Defendant witnessed the accident

and described it the same way.

There is no dispute that defendant, as the owner of a single family residence who was not directing the repair work on her house, is exempt from liability under Labor Law § 240. Defendant may be held responsible under the common law of negligence only if plaintiff can show that she breached her duty to maintain the house in reasonably safe condition, and that her breach of duty was a proximate cause of his injuries (*see Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980]*; Basso v Miller*, 40 NY2d 233, 241 [1976]).

Plaintiff does not contend that the natural inclination or slope of the driveway where he placed the ladder is a defective condition (*see Stylianou v Ansonia Condominium*, 49 AD3d 399 [1st Dept 2008]), but contends that there was some other crack or defect in the surface of the driveway. Assuming arguendo that the record raises issues of fact concerning the existence of such a defect, there is no basis for a factfinder to conclude that any defect in the driveway was a proximate cause of plaintiff's accident, since he clearly testified that the ladder was not placed on any defect (*see Acunia v New York City Dept. of Educ.*, 68 AD3d 631, 631-632 [1st Dept 2009]; *Stylianou,* 49 AD3d at 399).

Plaintiff's affidavit, stating that the bottom of the ladder

came into contact with a "cracked and unlevel" part of the driveway directly contradicts his deposition testimony, without any explanation for the disparity, and thus "creates only a feigned issue of fact," which is insufficient to defeat defendant's motion for summary judgment (*Telfeyan v City of New York*, 40 AD3d 372, 373 [1st Dept 2007]).

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

ENTERED: JANUARY 19, 2016

CLERK

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

16721 The People of the State of New York, Ind. 5765/11
Respondent,

-against-

Alice Ryan,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Jonathan Garelick 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 (Renee White, J.), rendered on or about April 16, 2013,

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

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

ENTERED: JANUARY 19, 2016

CLERK

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

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

16722N In re Best Payphones, Inc., Index 107645/11
Petitioner-Appellant,

-against-

Guzov Ofsink, LLC,
Respondent-Respondent.

_____

Law Offices of George M. Gilmer, Brooklyn (George M. Gilmer of counsel), for appellant.

Guzov Ofsink, LLC, New York (Stephanie A. Prince of counsel), for respondent.

_____

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered October 2, 2014, which denied plaintiff's motion to compel the deposition of defendant's principal, Debra Guzov, unanimously reversed, on the law, without costs, and the motion granted.

This action arises from an alleged breach of a retainer agreement entered into by plaintiff client and defendant law firm whereby the law firm agreed to provide legal services in connection with an appeal of a bankruptcy order. After one month of work, the law firm withdrew as counsel and refused to refund the flat fee of $32,000, claiming that the client had been unreasonably difficult and that it had already incurred more than $31,000 in legal fees. The law firm designated a former

associate, who had worked on the bankruptcy appeal, as its deponent. Following the associate's deposition, plaintiff moved to compel the law firm to produce the partner in charge of the case for deposition.

Under the circumstances, plaintiff made a sufficiently "detailed showing" of the necessity for taking the additional deposition of the partner, in that it has demonstrated that the already deposed associate had insufficient information concerning relevant issues, including the negotiation of the retainer and the work purportedly performed, and there was a substantial likelihood that the partner in charge possesses information necessary and material to the prosecution of the case (*see Alexopoulos v Metropolitan Transp. Auth.*, 37 AD3d 232, 233 [1st Dept 2007]; *Hayden v City of New York*, 26 AD3d 262 [1st Dept 2006]).

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

ENTERED: JANUARY 19, 2016

CLERK

Tom, J.P., Andrias, Saxe, Manzanet-Daniels, Kapnick, JJ.

14662 Mark Srikishun, Index 303104/07
Plaintiff-Appellant,

-against-

Michael Edye, M.D., et al.,
Defendants,

Montefiore Medical Center,
Defendant-Respondent.

_____

Law Offices of Lawrence P. Biondi, Garden City (Lisa M. Comeau of counsel), for appellant.

Carroll McNulty & Kull, LLC, New York (Frank J. Wenick of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered July 24, 2013, reversed, on the law and the facts and in the exercise of discretion, without costs, the motion granted, and the matter remitted for a new trial as to all issues against defendant Montefiore Medical Center.

Tom, J.P. concurs in a separate Opinion; Andrias and Kapnick, JJ. concur in a separate Opinion by Kapnick, J.; Saxe and Manzanet-Daniels, JJ. concur in a separate Opinion by Saxe, J.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Richard T. Andrias
David B. Saxe
Sallie Manzanet-Daniels
Barbara R. Kapnick, JJ.

14662
Index 303104/07

_____x

Mark Srikishun,
Plaintiff-Appellant,

-against-

Michael Edye, M.D., et al.,
Defendants,

Montefiore Medical Center,
Defendant-Respondent.

_____x

Plaintiff appeals from the order of the Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered July 24, 2013, which denied his motion to set aside the verdict of no proximate cause as to defendant Montefiore Medical Center.

Law Offices of Lawrence P. Biondi, Garden City (Lawrence P. Biondi and Lisa M. Comeau of counsel), for appellant.

Carroll McNulty & Kull, LLC, New York (Frank J. Wenick of counsel), for respondent.

The order of the Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered July 24, 2013, which denied plaintiff's motion to set aside the verdict of no proximate cause as to defendant Montefiore Medical Center, should be reversed, on the law and the facts and in the exercise of descreation, without costs, the motion granted, and the matter remitted for a new trial as to all issues against Montefiore.

Tom, J.P. concurs in a separate Opinion;
Andrias and Kapnick, JJ. concur in a separate Opinion by Kapnick, J.; Saxe and Manzanet-Daniels, JJ. concur in a separate Opinion by Saxe, J.

TOM, J. (concurring)

Because the record indicates substantial confusion among the jurors in reaching their verdict, the verdict should have been set aside pursuant to CPLR 4404(a) and a new trial held against defendant Montefiore on liability and damages (*see e.g. Dinino v D.A.T. Constr. Corp.,* 267 AD2d 148, 149 [1st Dept 1999]).

The jury's finding that Montefiore's departure from good and accepted medical practice in allowing a knot pusher tip to remain in plaintiff's body was not a proximate cause of plaintiff's injuries was inconsistent with the jury note indicating that it believed that plaintiff should be compensated $50,000 for having to undergo a second surgery.

An examination of the record reveals that the special verdict sheet was "unclear and confusing" (*Wingate v Long Is. R. R.*, 92 AD2d 797, 798 [1st Dept 1983]), because it did not provide for an award of damages caused by the need to undergo a second surgery. The confusing and ambiguous wording of the verdict sheet caused the jurors to experience substantial confusion in reaching their verdict (*see Moore v Bohlsen Assoc.*, 141 AD2d 468, 468 [1st Dept 1988]). While "[t]he amgibuity had been brought to the attention of the trial Justice before the jury was discharged and

could have been corrected or at least clarified at that time" (*Wingate*, 92 AD2d at 798), the court did not do so and a new trial against Montefiore is required to prevent a miscarriage of justice.

KAPNICK, J. (concurring)

In 2007, then 30-year-old plaintiff, Mark Srikishun, agreed to donate a kidney to his father, who had been on dialysis. During the nephrectomy (the kidney retrieval surgery), which occurred on May 17, 2007, a foreign object known as a "knot pusher tip" was left inside plaintiff's body. As a result, plaintiff was required to undergo a second surgery five days later on May 22, 2007, under general anesthesia, to remove the foreign object. Plaintiff then commenced this action against Michael Edye, M.D., the attending physician, Montefiore Medical Center (Montefiore), where the surgery took place, and Montefiore's employees - Raphael Tare, M.D., S. Johnson, P.A., Olga Zimlin, M.D., E. Cherune, R.N., and D. Perez, S.T. - to recover damages for the injuries he sustained, inter alia, as a result of having to undergo the second surgery.

The case proceeded to a jury trial in January 2013, during which plaintiff testified that he "went through quite of a bit of a personal trauma with the second surgery" because of the risk associated with "going under anesthesia a second time," and because when he awoke in the operating room on the table there were still tubes in his mouth, he was strapped to the table and he could not move his arms or legs. He also testified that he was in a lot of pain and discomfort, yet he was told he couldn't

stay in the hospital and had to go home that same day.

On January 29, 2013 the jury rendered a unanimous verdict answering "Yes" to question No. 1 on the verdict sheet, which asked the following:

> "1. Did defendant Montefiore Medical Center, through the conduct of its health care professionals including nurses and surgical technicians, depart from good and accepted medical practice by causing and permitting the knot pusher tip to be and remain in plaintiff's body following the May 17, 2007 surgery?"

However, they answered "No" to question No. 2[1] which asked:

> "2. Was this departure in allowing the knot pusher tip to remain in plaintiff's body a substantial factor in causing and/or contributing to plaintiff's injuries?"

The jury sent three notes to the court. The first note asked for a readback of some of Dr. Edye's testimony, which was read back by the court reporter. At approximately 2:00 or 2:15 p.m., the jury returned from the lunch recess, and the court indicated that it had a note from the jury, "that's note two, saying, 'We reached a verdict'." After the clerk took the verdict, the court, in the presence of counsel and the jury stated as follows: "Let the record reflect that after a verdict was rendered, the jury sent me out a note." At the court's

[1] The jury also answered "No" to question No. 3, finding no departure on Dr. Edye's part, but that finding was not appealed.

request, the clerk then read the note, which was written at 1:29 p.m., less than an hour prior to the verdict being taken in the courtroom. The note stated as follows:

> "Although we've reached a verdict, we believe that Mr. Srikishun should be compensated due to the fact that he had to undergo a second surgery, which was not included in the agreement. He should be compensated $50,000 due to the hospital's negligence."

The court proceeded immediately, without any input from counsel, to advise the jury that this third note, "which you gave to me after you rendered a verdict, is surplusage" and "has no bearing in law." In response, plaintiff's counsel stated that the note implied that the jury thought question No. 2 did not cover the damages for the second surgery, that this was an error by the jury, and that they should be given the opportunity to answer that question again. Once the jury was excused, plaintiff argued that the court should have apprised counsel of the existence of the third note and read it to them before the court took the verdict so the court, with input from counsel, could correct any errors. Specifically, plaintiff's counsel requested that the court reinstruct the jury that they should consider the second surgery as an element of damages for which plaintiff could be compensated. Plaintiff's application was denied and the jury was then polled as to the verdict.

Subsequently, plaintiff moved on papers, pursuant to CPLR

4404(a), to set aside that portion of the jury's verdict which found no proximate cause on the part of Montefiore and direct a new trial solely on the issue of damages. In support of his motion, plaintiff argued that once the jury found that defendant Montefiore was negligent, damages had to be awarded to plaintiff for having to undergo the second surgery, even if the jury didn't credit plaintiff's other theory put forth during trial that he sustained neurological injuries due to an inflammatory response associated with the retention of the knot pusher tip. Plaintiff further argued that Dr. Edye acknowledged that there would be a certain amount of pain and discomfort that necessarily goes along with the second procedure, and that plaintiff had also testified as to both the physical and mental trauma associated with the actual performance of the second procedure. According to plaintiff, counsel for defendant Montefiore conceded in her closing that damages had to be awarded to plaintiff and suggested to the jury that plaintiff should be awarded $1000 for each minute of the 11-minute surgery. Plaintiff also argued that damages necessarily flow from the performance of a second surgery due to a retained foreign object as long as a departure is established in connection therewith, as was the case here. Finally, plaintiff argued that a trial court has the discretion to set aside a verdict which is clearly the product of

substantial confusion by the jury, and that the verdict was against the weight of the evidence.

In opposition, defendant Montefiore emphasized that the jury ratified its verdict in the courtroom *after* issuing the third note. Montefiore argued that the jury clearly understood that the law allowed them to award damages to plaintiff only if they found he had proved that Montefiore's negligence was a substantial factor in causing or contributing to his injuries, which they did not. Defendant also argued that the record contained examples of plaintiff's failure to testify candidly before the jury, and disputed plaintiff's characterization of the summation as a concession that plaintiff was entitled to damages.

The court denied plaintiff's motion and this appeal ensued.

We find that the trial court erred in failing to set aside the verdict in favor of Montefiore. Under CPLR 4404(a), a trial court has the discretion to set aside a verdict and grant a new trial, if the verdict is clearly the product of substantial confusion among the jurors (*see Rodriguez v Baker,* 91 AD2d 143, 147 [1st Dept 1983], *aff'd* 61 NY2d 804 [1984]; *Batal v Associated Univs., Inc.*, 18 AD3d 484, 486 [2d Dept 2005]). Such confusion is typically demonstrated when the answers to the questions on the verdict sheet are internally inconsistent (*Batal*, 18 AD3d at 486). Here, the answer to question No. 2 on the verdict sheet is

inconsistent with the third jury note, demonstrating substantial juror confusion. While this confusion could have been remedied had the note been disclosed to the attorneys prior to taking the verdict, and had the court resubmitted the issue to the jury for further deliberation after additional instructions on damages, that opportunity was missed and a new trial against Montefiore is now warranted.

While we certainly agree with our concurring colleagues (Saxe and Manzanet-Daniels, JJ.) that one of the functions of appellate review is to provide helpful guidance to the trial bench, we do not think it is necessary to go so far as to suggest the specific language to be used in the special verdict questions by the trial judge who presides over the next trial. Although we know what the case is about, the exact contents of the questions will depend on how the testimony, including evidence about the damage claims, is developed at the new trial. Therefore, the questions should not be drafted by us before the second trial even begins. Moreover, it appears to us that the trial attorneys and the trial judge will certainly be able to figure out how to reword the special verdict questions after reading our extensive discussions on the problems and confusion encountered by the jury during the first trial, as discerned from the contents of the jury notes. We believe our approach gives sufficient guidance to

the trial judge and the lawyers. We disagree with the concurrence's (Saxe, J.) suggestion that this approach will "dramatically increase[] the possibility of yet a third trial;" rather, we believe that writing out suggested questions to place on the verdict sheet gives very little credit to the legal acumen of the trial lawyers and the trial judge who will handle this case the next time around.

In light of our determination, it is unnecessary to address plaintiff's remaining argument that the verdict was against the weight of the evidence.

SAXE, J. (concurring)

In this medical malpractice action, the jury's confusion was established by contrasting the content of the jury's third note with its negative answer on the verdict sheet on the issue of Montefiore's proximate cause. It clearly, albeit incorrectly, concluded that plaintiff was only entitled to an award of damages for any physical pain he suffered as a result of defendants' negligence, and that having to undergo a second surgery to remove an item negligently left behind during the first surgery did not qualify under the available category of "pain and suffering" damages listed on the special verdict sheet. Particularly since a new trial against Montefiore is therefore necessary, the wording of the verdict sheet that likely contributed to the confusion should be reexamined to avoid such confusion in the future.

While we agree with our colleagues that a new trial against Montefiore on all issues is required, we depart from their failure to include, as we do, specific, suggested special verdict questions for inclusion on the next special verdict sheet upon retrial of this action. We believe that one of the functions of appellate review is to provide guidance to the trial bench, and that providing a step-by-step template for the retrial of this somewhat unusual case will enhance the likelihood that the next

jury will reach a proper verdict. By remitting this case back for retrial with no cautionary guidance -- clearly required by the confusion among the jury at the first trial -- there is likely to be a replay of the prior episode of jury confusion.

The inclusion of these suggested (not mandatory) questions is designed to offer assistance to the next trial judge. The PJI special verdict questions did not help here, and the lawyers were only of modest help in assisting the trial court in framing the special verdict sheet. Our review has given us the opportunity to think about the specific problems that sowed confusion in the minds of the jury and has prompted us to clarify the needed special verdict questions in order to avoid future confusion. Our suggestion of appropriate special verdict questions should not depend on whether the trial attorneys and the trial judge are able "to figure out how to reword the special verdict questions." We should not be turning this process into a guessing game. At the first trial, as it turned out, the court was caused to misstep because it was not aided as it should have been by the attorneys. We have now learned from experience, and that experience should inform our decision at this point. Justice Kapnick obscures the issue by stating that the exact contents of the questions will depend on how the testimony develops during the second trial. That is just not so. We now know exactly what

the case is about and what the damages claims are.

Special verdicts are uniquely helpful as an aid to juror understanding and to avoid retrial (*Schabe v Hampton Bays Union Free School Dist.*, 103 AD2d 418, 427 [2d Dept 1984]). It is respectfully pointed out that the approach taken by Justice Kapnick dramatically increases the possibility of yet a third trial; we believe that the approach we offer here eliminates that possibility and brings finality in a way that comports with the requirements of justice.

FACTS

Plaintiff Mark Srikishun agreed to donate a kidney to his father. During the surgery to remove his kidney, the attending physician, Michael Edye, M.D., left a "knot pusher tip" – an instrument used to tie off blood vessels – inside plaintiff's body, requiring a second surgery five days later, to remove the object. Plaintiff then commenced an action against Dr. Edye, Montefiore Medical Center and various Montefiore employees.

At trial, Dr. Edye described the knot pusher tip as "about an inch and a half in length and about an eighth of an inch in diameter." He asserted that the retained knot pusher tip would not have contributed to plaintiff's postoperative pain after the kidney surgery, and that the pain plaintiff experienced was the normal result of such surgery. Plaintiff testified that he

experienced "excruciating" pain after the surgery, and pain and numbness in his leg the following day. Indeed, it was based on these complaints that a CAT scan was performed, which disclosed the presence of the knot pusher tip.

The surgical procedure by which Dr. Edye removed the knot pusher tip was videotaped and shown to the jury. The surgery lasted 11 minutes and was performed under general anaesthesia. Dr. Edye asserted that plaintiff experienced no complications, and that the object had not damaged any of plaintiff's internal organs, created an abscess, or perforated any internal bodily structures. Plaintiff was sent home the same day, although according to his testimony, he was in a lot of pain and discomfort.

Plaintiff's contentions at trial regarding his damages included the claims that he sustained neurological injuries due to an inflammatory response associated with the retention of the knot pusher tip, but he also testified that he experienced pain, discomfort, distress and "personal trauma" as a result of having to undergo the second surgery and a second administration of anaesthesia. Montefiore focused on plaintiff's lack of "permanent irreversible damage as a consequence of the second surgery" and his merely "transient numbness," and suggested that since the second surgery only lasted eleven minutes, the jury

"might want to think about . . . whether compensating him for those eleven minutes at one thousand a minute is fair." Plaintiff objected to this measure of damages.

In instructing the jury with regard to damages, the court referred to "a sum of money which will justly and fairly compensate him for any injuries and conscious pain and suffering," and that it could "take into consideration the affect [sic] that the plaintiff's injuries have had on plaintiff's ability to enjoy life."

The verdict sheet provided to the jurors included these initial questions:

> "1. Did defendant Montefiore Medical Center, through the conduct of its health care professionals including nurses and surgical technicians, depart from good and accepted medical practice by causing and permitting the knot pusher tip to be and remain in plaintiff's body following the May 17, 2007 surgery?
>
> ___ Yes ___ No
>
> "If your answer to Question # 1 is "NO," please proceed to Question # 3.
>
> "If your answer to Question # 1 is "YES," please proceed to Question # 2.
>
> "2. Was this departure in allowing the knot pusher tip to remain in plaintiff's body a substantial factor in causing and/or contributing to plaintiff's injuries?
>
> ___ Yes ___ No
>
> "Please proceed to Question # 3.

"3. Did defendant Michael Edye, M.D., depart from good and accepted medical practice by causing and permitting the knot pusher tip to be and remain in plaintiff's body following the May 17, 2007 surgery?

___ Yes ___ No

"If your answer to Question # 3 is "NO," and you have answered "NO" to Question # 1 or Question # 2, Stop and report your verdict to the Court."

The jury submitted three notes to the court in the course of its deliberations. In its first note, it requested a readback of certain testimony of Dr. Edye. The second note stated that it had "reached a verdict." A third note, written at 1:29 p.m., and therefore in the court's possession before it took the verdict, read:

"Although we've reached a verdict, we believe that [plaintiff] should be compensated due to the fact that he had to undergo a second surgery, which was not included in the agreement. He should be compensated $50,000 due to the hospital's negligence."

After 2:00 p.m., the court took the jury verdict. The jury answered "Yes" to question 1, finding that Montefiore had departed from good and accepted medical practice by leaving the knot pusher in plaintiff's body following surgery, but "No" to question 2, finding that such departure was not a substantial factor in causing or contributing to plaintiff's injuries. It also answered "No" to the question of whether Dr. Edye was negligent.

Only after the verdict was rendered did the court advise the parties, in front of the jury, that the jury had sent the court the third note, but the court explained its view that this third note was surplusage once the jury had reached its verdict. Plaintiff requested that the jury be given the opportunity to reconsider question 2 because the "second surgery is part of the injuries." The court denied the request.

Plaintiff then made the underlying CPLR 4404(a) motion to set aside the verdict of no proximate cause, which the court denied.

DISCUSSION

The third jury note was not surplusage; it was an illustration of the jury's essential confusion regarding what constituted a compensable injury. The jury appears to have wrongly concluded that the only type of injury that could be considered proximately caused by Montefiore's negligence must involve physical bodily injury that caused physical pain, and that therefore, absent physical suffering, plaintiff's need to undergo a second surgery could not qualify as an injury proximately caused by the negligence.

Of course, this is incorrect. A person who has to undergo a second surgery, so that a foreign object negligently left behind during the first surgery can be retrieved, may not experience any

pain during or after the second procedure. However, distress, apprehension or worry could have been experienced before the second surgery, perhaps due to concerns about the ordinary risks of any surgery or due to the individual's own concerns. In addition, surgery will by its nature be likely to have at least some physiological impact on the patient's body, even in the absence of pain; the inherent bodily intrusion may leave its mark, internally, externally, or psychologically. Such consequences, like physical pain and suffering, should also be considered proximately caused by the negligence, so that plaintiff would be entitled to an award of damages for them.

It is very likely that the terminology and framing of the court's verdict sheet contributed to the jury's confusion. First, question 2, the proximate cause question, indicated that the proven negligence must have proximately caused "injuries," which must have been understood by the jury to mean physical injuries. Then, question 6 also indicated that the type of noneconomic damages for which plaintiff was entitled to compensation was limited to his experience of "pain" and "suffering." On the contrary, however, plaintiff's noneconomic damages included more than physical bodily injury causing pain; he also claimed that the distressing necessity to undergo a second surgery, with all the risks and the bodily insult it

entailed, itself constituted a compensable injury. Yet, the jury was asked to determine its award of damages only in the categories of past pain and suffering, future pain and suffering (along with the number of years), and lost earnings, without explanation of the term "pain and suffering." Although the jury did not reach that question, because it stopped with its "No" answer to questions 2 and 3, the use of the unexplained term "pain and suffering" to encompass the entire category of noneconomic damages, along with the unexplained use of the word "injuries" in question 2, could easily have contributed to the impression that plaintiff was only entitled to a damages award to the extent he felt physical pain or physically suffered.

Regardless of whether the jury reaches all the questions on a verdict sheet, the contents of those questions can have a major impact on the verdict. A verdict sheet has an extraordinary importance beyond the evidence, summations, and jury charge, because the verdict sheet is the touchstone to which the jurors repeatedly refer during the process of reaching their verdict. Scholars have argued that the narrower question formats of special verdict sheets "improve both the accuracy and the efficiency of the jury process" (Elizabeth G. Thornburg, *The Power and the Process: Instructions and the Civil Jury*, 66 Fordham L Rev 1837, 1866-1867 [Apr. 1998]). The more precise the

questions, the more accurate the jury verdict will be. If the verdict sheet obscures any of the fact issues the jury must address, there may be confusion in the resulting verdict (*see Pavlou v City of New York*, 21 AD3d 74, 77 [1st Dept 2005] [Saxe, J., dissenting], *affd on maj op* 8 NY3d 961 [2007]).

Here, the jury's confusion could have been avoided by a more particularized verdict sheet question regarding damages. Since plaintiff claimed both physical injury as a result of the second surgery, and the distress of unnecessarily having to undergo a second surgery, the verdict sheet's proximate cause question should have included a second part of question 2, such as the following:

> 2. (a) Was this departure in allowing the knot pusher tip to remain in plaintiff's body a substantial factor in causing and/or contributing to plaintiff's injuries?
>
> ___ Yes ___ No
>
> Go on to Question 2(b).
>
> (b) Was this departure in allowing the knot pusher tip to remain in plaintiff's body a substantial factor in causing and/or contributing to damages arising from the need for plaintiff to undergo the second surgery?
>
> ___ Yes ___ No
>
> If you answered Yes to either Question 2(a) or 2(b), or both, go on to Question 3. If you answered No to both question 2(a) and 2(b), stop here and report back to the court.

As for the damages question, rather than directing the jury only to state the dollar amount it awarded for "[p]laintiff's

past pain and suffering from the date of the accident up to your verdict," in view of the different forms of plaintiff's claimed injuries, the verdict sheet should have included a category for the amount of plaintiff's damages caused by the need to undergo a second surgery. The potential apprehension and worry, and the insult to his bodily integrity inherent in any surgery, may not constitute either "pain" or "suffering" or even "injury" as those words are commonly understood, but plaintiff is entitled to seek compensation for them as well.

It would be possible to ask the jury to award one total amount of damages for pain and suffering *and* the need to undergo a second surgery. However, in the interests of appellate review of the damages award, it would be advisable to list them as separate categories. Question 6 would therefore look something like this:

> 6. What amount do you award to compensate plaintiff for:
> (a) his past pain and suffering caused by the knot pusher tip having been left inside his body or caused by the surgery to remove the knot pusher tip
> $_____
>
> (b) his total future pain and suffering resulting from the knot pusher tip having been left in his body or caused by the surgery to remove the knot pusher tip
> $_____
>
> (Future pain and suffering is awarded for ___ years)
>
> (c) damages arising from the need to undergo a second surgery to remove the knot pusher tip $_____

(d) his lost earnings $_____.

Upon retrial, which will include the issues of proximate cause and damages, a verdict sheet approximating the foregoing form would be one way to avoid juror confusion.

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

ENTERED: JANUARY 19, 2016

CLERK