SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 3, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Friedman, J.P., Kahn, Gesmer, Kern, Moulton, JJ.

5200 Barry Fox, et al., Index 154841/14
Plaintiffs-Appellants-Respondents,

-against-

12 East 88th LLC, et al.,
Defendants-Respondents-Appellants.

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Emery Celli Brinckerhoff & Abady LLP, New York (Richard D. Emery of counsel), for appellants-respondents.

Rose & Rose, New York (Paul Coppe of counsel), for respondents-appellants.

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Order, Supreme Court, New York County (Paul Wooten, J.), entered October 18, 2016, which, to the extent appealed from as limited by the briefs, denied defendants' motion for summary judgment declaring that the subject apartment was deregulated by the 2008 lease renewal, granted plaintiffs' motion for summary judgment declaring in their favor, and declared that the apartment is subject to rent stabilization, denied plaintiffs' motion as to the application of the default formula for determining the regulated rent and calculating overcharge damages, granted defendants' motion for a declaration that the default formula for determining the regulated rent is not

applicable, and set the base rent for calculating overcharge damages as the market rate rent being charged in May 2010, denied plaintiffs' motion as to attorneys' fees, and sub silentio denied plaintiffs' motion as to treble damages, reversed, on the law, without costs, as to the declaration that the apartment was not deregulated in 2008, and it is declared that the apartment was deregulated in 2008, and the appeal therefrom otherwise dismissed, as academic.

In 1975, plaintiff Barry Fox leased a rent-stabilized penthouse apartment from defendant Nostra Realty Corp. In 1996, when the neighboring rent-stabilized penthouse apartment became vacant, Fox agreed with Nostra to combine the two units, at his expense, and to enter into a market rate lease. Unbeknownst to Fox, Nostra was receiving J-51 tax benefits in connection with the building at the time the units were combined and purportedly deregulated (*see Roberts v Tishman Speyer Props., L.P.*, 13 NY3d 270 [2009]).

In 2008, at Fox's suggestion, a renewal lease was entered into by plaintiff MBE Ltd., an entity wholly owned by Fox, with the understanding that Fox would continue to occupy the apartment; MBE executed renewal leases for the apartment in 2010 and 2012. Fox has continued to live in the apartment since MBE became the tenant of record. In 2014, defendant 12 East 88th LLC

purchased the building and informed Fox that the lease would not be renewed.

Because the 2008 lease, and the subsequent lease renewals, named MBE as the sole tenant and did not identify as the occupant of the apartment a particular individual with a right to demand a renewal lease, Fox is not entitled to the renewal of the lease (*see Manocherian v Lenox Hill Hosp.*, 229 AD2d 197, 205 [1st Dept 1997], *lv denied* 90 NY2d 835 [1997]; *accord 501 E. 87th St. Realty Co. v Ole Pa Enters.*, 304 AD2d 310 [1st Dept 2003]; *Avon Bard Co. v Aquarian Found.*, 260 AD2d 207 [1st Dept 1999], *appeal dismissed* 93 NY2d 998 [1999]).

In *Manocherian*, this Court established that "a corporation is entitled to a renewal lease where the lease specifies a particular individual as the occupant *and* no perpetual tenancy is possible" (*Manocherian v Lenox Hill Hosp.*, 229 AD2d at 205). Our subsequent cases have construed the first requirement strictly, denying rent stabilization protections to individual occupants who are not actually identified in an entity's rent stabilized lease (*see* Avon *Bard Co. v Aquarian Found.*, 260 AD2d at 211 [even where a corporation's rent stabilized lease is "manifestly for the benefit of" an individual occupant, the individual is not protected by the Rent Stabilization Law if her or she is not designated in the lease [internal quotation marks omitted]; *501*

E. 87th St. Realty Co. v Ole Pa Enters., 304 AD2d at 310-311 [same holding, despite individual tenant's residence in the subject apartment for more than 20 years]). Here, Fox is neither a party to nor identified as a tenant in the 2008 lease, and thus ceased to be a tenant under Rent Stabilization Code (RSC) (9 NYCCR) § 2520.6(d) at that time. Further, he was not identified as an individual occupant in the 2010 or 2012 lease, as required under *Manocherian*, and is therefore barred from rent stabilization protection under their terms, as well.

Our dissenting colleague's reliance on our decision in *Herald Towers LLC v Sun Lord Int.* (302 AD2d 306 [1st Dept 2003]) and similar cases (*see e.g. WM Wellington, LLC v Grafstein Diamond, Inc.* 22 Misc 3d 1123[A], 2009 NY Slip Op 50255[U] [Civ Ct, NY County 2009]) to support an examination of extrinsic evidence showing that the individual tenant not named in the corporate entity's lease was the actual and intended occupant of the apartment, is misplaced. In such cases, summary judgment was denied because there was record evidence that it had been the landlord, and not the individual tenant, who had initiated the change to tenancy by the corporate tenant. Here, however, it is uncontroverted that the substitution of MBE as tenant of record was undertaken at Fox's own instance.

With respect to the second *Manocherian* requirement, plaintiffs urge that there is no risk of perpetual tenancy because the 2008 tenant information sheet identifies Fox as the "tenant" of the apartment, Fox submitted pet forms to the owner in conjunction with the 2010 and 2012 lease renewals, and it is undisputed that Fox never vacated the apartment. Whether or not these facts are sufficient to satisfy *Manocherian*'s second requirement (*cf. 501 East 87th St. Realty Co.,* 304 AD2d 310 [fact that individual was president of corporate tenant and had occupied apartment for two decades held insufficient]; *Avon Bard Co.*, 260 AD2d 207 [fact that individual was pastor of the church listed as tenant held insufficient]), the fact remains that under our settled precedent, the corporate tenant is only entitled to the protections of rent stabilization if an individual tenant is named in the lease *and* no perpetual tenancy is created. Thus, the apartment was deregulated in 2008, and plaintiffs have no right to renew the lease.

Plaintiffs are not aided by their reliance on *Roberts v Tishman Speyer Props L.P.* (13 NY3d 270 [2009], *supra*). Although a tenant cannot waive rent stabilization coverage where, as here, a building is receiving J-51 tax abatement benefits (*id.*; RSC § 2520.13), the apartment was no longer subject to rent stabilization protections upon the signing of the 2008 lease.

As we explained in *Gersten v 56 7th Ave. LLC* (88 AD3d 189 [1st Dept 2011], *appeal withdrawn* 18 NY3d 954 [2012]), "[t]he rent-regulated status of an apartment is a continuous circumstance that remains *until different facts or events occur that change the status of the apartment*" (*id.* at 199 [emphasis added]). Here, precisely such an event occurred to change the status of the apartment, in accordance with *Manocherian*: a high-rent vacancy deregulation occurred when, on May 19, 2008, at Fox's request, a market rate renewal lease was entered into by MBE at $25,000 per month, without Fox being a signatory to the lease. Fox was thereby deemed to have vacated the apartment (*see 501 E. 87th St. Realty Co.*, 304 AD2d at 310-311). From that time onward, Fox ceased being a tenant and no longer had any of the rights to which a rent-stabilized tenant is entitled, and therefore could not have waived them. Thus, the dissent's position that Fox, an attorney, effected an unknowing, and impermissible, waiver of such rights is without basis.

For the same reason, Fox is not entitled to pursue his overcharge claim in this action (*see* Taylor *v 72A Realty Assoc., L.P.*) (151 AD3d 95, 102 [1st Dept 2017] ["challenges to the level

of rent charged must be made within [the] four-year limitations period . . . immediately preceding the filing of a complaint"].

All concur except Gesmer, J. who dissents in a memorandum as follows:

GESMER, J. (dissenting)

As the majority implicitly finds, plaintiff Barry Fox did not know in 2008 that he was entitled to the protections of rent stabilization. Consequently, he did not know that his execution of a renewal lease in 2008, which was in his corporation's name and did not designate him as the sole occupant, would make him ineligible to receive a subsequent rent stabilized lease renewal. Therefore, I cannot agree with the majority that Fox's execution of a lease in his corporate name at a time when he did not know he was entitled to the protections of the rent stabilization law constitutes a waiver of those rights, and I respectfully dissent.

I agree with the majority's implicit finding that Fox continued to be a rent stabilized tenant after 1996. When he signed that lease, his apartment was subject to rent stabilization because his landlord was receiving J-51 benefits (*Roberts v Tishman Speyer Props., L.P.*, 13 NY3d 270 [2009]). Accordingly, the language purporting to effectuate a waiver, found in the 1996 lease and his subsequent leases, is ineffective, since a tenant cannot waive rent stabilization coverage (Rent Stabilization Code [9 NYCRR] § 2520.13; *see also Drucker v Mauro*, 30 AD3d 37 [1st Dept 2006] [agreement waiving rent stabilization void, even where beneficial to tenant], *lv dismissed*, 7 NY3d 844 [2006]), and we have previously found this

legislative mandate to be "sacrosanct" (*Gersten v 56 7th Ave. LLC*, 88 AD3d 189, 199 [1st Dept 2011], *appeal withdrawn*, 18 NY3d 954 [2012]).

Because Fox did not know in 2008 that his landlord was receiving J-51 benefits, which rendered the waiver provision in the 1996 lease ineffective, he did not know that he was entitled to the protections of rent stabilization.[1] Had he known that, he would have had the opportunity to consult with a lawyer before executing a renewal lease in his corporate name. Had he done so, he would probably have been advised that he would be jeopardizing his rent stabilization rights unless the lease specifically stated that he would be the sole occupant (*see Manocherian v Lenox Hill Hosp.*, 229 AD2d 197, 205 [1st Dept 1997] [a corporation is entitled to a renewal lease where it "specifies a particular individual as the occupant *and* no perpetual tenancy is possible"], *lv denied*, 90 NY2d 835 [1997]). Consequently, I would find that the 2008 lease should not operate to prohibit the

[1]It is undisputed that Fox did not learn that the landlord was receiving J-51 benefits until in or about 2013 when he consulted counsel after the current owner advised him that it would not renew his lease. The majority notes that Fox is an attorney. However, there is no suggestion that he had any expertise in landlord-tenant law, much less the highly specialized area of rent stabilization. Moreover, even if he had such expertise, without this crucial information, his legal skills would have been of little use.

issuance of a renewal lease, either in Fox's name or in the name of his corporation and naming him as the intended occupant, because where, as here, a tenant has been led to believe, erroneously, that his apartment is no longer covered by rent stabilization, he should not be penalized for acting on that improper belief. More specifically, it is unfair to find that, by executing a lease in the name of his corporation, he waived rent stabilization protections he did not even know he had at the time. If his rent stabilized tenancy is now terminated solely by reason of his having signed the 2008 lease on behalf of the corporation of which he was the sole member and with the unwritten understanding with his landlord that he was the intended occupant of the apartment, we are permitting him to waive the protections of rent stabilization based on his mistaken belief that rent stabilization no longer applied. Without the knowledge that it did, he was denied the options to which he was entitled under rent stabilization. I am concerned that the majority ruling in this case essentially finds that the rule established in *Manocherian* trumps the Rent Stabilization Code's heretofore "sacrosanct" mandate prohibiting waiver of rent stabilization, and I therefore cannot join it.

Manocherian and its progeny cited by defendants in their appellate brief (*501 E. 87th St. Realty Co., LLC v Ole Pa*

Enters., 304 AD2d 310 [1st Dept 2003]; *Avon Bard Co. v Aquarian Found.*, 260 AD2d 207 [1st Dept 1999], *appeal dismissed* 93 NY2d 998 [1999]) are distinguishable from this case in two respects. First, those cases did not involve a tenant who was unaware of the rent stabilized status of the apartment and elected to enter into a free market renewal lease in a corporate name without expressly identifying an intended occupant.

Second, here, unlike in those cases, there is no dispute that it was the intent of both parties to the 2008 lease that MBE could only be the tenant for so long as Fox was the sole member and he continued to reside there, fulfilling both *Manocherian* requirements of an intended occupant and a non-perpetual tenancy. Indeed, the affidavit by defendant Nostra's co-president, Gaby Lehrer, in support of defendants' summary judgment motion, explicitly states that "no promises or representations" were made outside of the terms of the 1996 written lease, but makes no such representation as to the 2008 lease.[2] Defendants also do not dispute that, prior to entering into the 2008 lease, the landlord required that Fox provide proof that he was MBE's sole member, that Fox was listed as the tenant on the tenant information

[2]Defendants did not submit an affidavit by a person with knowledge of the relevant facts in reply on their motion, or in opposition to plaintiffs' cross motion for summary judgment.

sheets completed in conjunction with the lease, that letters enclosing the 2008 and subsequent leases were addressed to Fox personally, and that the pet riders to the 2010 and 2012 leases listed Fox's dogs.

While defendants argue that *Manocherian* prohibits courts from looking at extrinsic evidence to determine the existence of an intended occupant, in fact this Court has previously declined to grant summary judgment where, as here, facts extrinsic to the lease raise a question as to whether the corporate officer occupying the apartment leased in the name of a corporation was entitled to independent tenancy rights in the rent stabilized apartment (*see Herald Towers LLC v Sun Lord Intl.*, 302 AD2d 306 [1st Dept 2003]; *see also WM Wellington, LLC v Grafstein Diamond, Inc.*, 22 Misc 3d 1123[A], 2009 NY Slip Op 50255[u] [Civ Ct, NY County 2009]). My colleagues in the majority would distinguish those cases because the landlord initiated the change from an individual to a corporate tenancy. In my view, Fox's landlord's having withheld the crucial information from him that could have put him on notice that he was entitled to rent stabilization coverage at least raises a question of fact as to whether the landlord effectively initiated the lease change in this case.

Accordingly, I would affirm the motion court's holding that plaintiffs are entitled to a declaration that the apartment is

subject to rent stabilization.

In addition, I would find that further proceedings are necessary to determine plaintiffs' overcharge claim. The motion court improperly used the market rate rent charged four years prior to the commencement of this action, citing *East W. Renovating Co. v New York State Div. of Hous. & Community Renewal* (16 AD3d 166 [1st Dept 2005]). However, this Court recently held, in accordance with our earlier holdings, that where an apartment has been improperly deregulated during a time when the owner was receiving J-51 benefits, the landlord is required to prove what the legally regulated rent should have been on the base date four years prior to the tenant's overcharge claim (*see Taylor v 72A Realty Assoc., L.P.*, 151 AD3d 95, 105-106 [1st Dept 2017]). Accordingly, I would remand for further proceedings to establish the amount of any overcharge pursuant to *Taylor*.

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

ENTERED: APRIL 3, 2018

CLERK

Webber, J.P., Oing, Singh, Moulton, JJ.

5242 BGC Partners, Inc., et al., Index 652669/12
Plaintiffs-Appellants-Respondents,

-against-

Avison Young (Canada) Inc., et al.,
Defendants-Respondents-Appellants.

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Emily Milligan, New York, for appellants-respondents.

Kirkland & Ellis LLP, New York (Nathaniel J. Kritzer of counsel), for respondents-appellants.

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Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered July 18, 2016, which granted defendants' motion to dismiss the causes of action for tortious interference with contractual relations and prospective business relations, conspiracy, aiding and abetting breach of fiduciary duty, and unjust enrichment, and denied the motion to dismiss the causes of action for aiding and abetting breach of the duty of fidelity, theft of trade secrets, and injunctive relief, unanimously modified, on the law, to grant the motion as to the theft of trade secrets, aiding and abetting breach of the duty of fidelity and injunctive relief causes of action, and otherwise affirmed, the Court is directed the enter judgment accordingly, without costs.

The cause of action for tortious interference with the

Nevada and South Carolina agreements was correctly dismissed since plaintiffs' allegation of "but for" causation is conclusory (*see Cantor Fitzgerald Assoc. v Tradition N. Am.*, 299 AD2d 204 [1st Dept 2002], *lv denied* 99 NY2d 508 [2003]). In support of the cause of action for tortious interference with the broker agreements and the cause of action for tortious interference with prospective business relations, plaintiffs failed to allege interference by wrongful means (*see Guard-Life Corp. v Parker Hardware Mfg. Corp.*, 50 NY2d 183, 193-194 [1980]). Plaintiffs' arguments addressed to the cause of action for aiding and abetting breach of fiduciary duty are unpreserved and in any event unavailing, since no fiduciary relationship arises from an employment relationship (*see Wilson v Dantas*, 29 NY3d 1051, 1064 [2017]). The relationship between the parties is too attenuated to support a claim for unjust enrichment (*see Sperry v Crompton Corp.*, 8 NY3d 204, 215-216 [2007]).

The cause of action for theft of trade secrets should be dismissed since in the circumstances the means by which defendants allegedly lured the brokers away from nonparty Grubb & Ellis, i.e., offering them competitive compensation, are not wrongful or improper (*cf. Schroeder v Pinterest Inc.*, 133 AD3d 12, 28 [1st Dept 2015] [company officer gave confidential and proprietary information to competitor]; *Guard-Life Corp.*, 50 NY2d

at 191 [wrongful means include "fraud or misrepresentation, ... and some degrees of economic pressure; they do not, however, include persuasion alone although it is knowingly directed at interference with the contract"]).

Since the offer of competitive compensation is not wrongful or improper, we also dismiss plaintiffs cause of action for aiding and abetting breach of the duty of fidelity (*Kaufman v Cohen*, 307 AD2d 113, 125-126 [1st Dept 2003] [A party may be held liable for aiding and abetting only when they provide substantial assistance to the primary violator. "Substantial assistance occurs when a defendant affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur"]). Plaintiffs have not alleged any other means in which defendants substantially assisted the breach other than by offering competitive compensation.

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

> The Decision and Order of this Court entered herein on December 14, 2017 (156 AD3d 531 [1st Dept 2017]) is hereby recalled and vacated (*see* M-257 decided simultaneously herewith).

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

ENTERED: APRIL 3, 2018

CLERK

Manzanet-Daniels, J.P., Tom, Gesmer, Singh, JJ.

5528 The People of the State of New York, Respondent, Ind. 1744/12

-against-

Christopher Simono, Defendant-Appellant.

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

Darcel D. Clark, District Attorney, Bronx (Samuel L. Yellen of counsel), for respondent.

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Order, Supreme Court, Bronx County (Ralph Fabrizio, J.), entered on or about June 10, 2014, which adjudicated defendant a level two sexually violent sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly assessed points under risk factors 9 and 10, relating to defendant's prior criminal history, based on a burglary case in which defendant pleaded guilty to a felony, then committed the underlying sex crime, and then received youthful offender (YO) treatment on the burglary (*People v Francis*, – NY3d –, 2018 NY Slip Op 01017 [2018]). New York's Sex Offender Registration Act (SORA) requires the State Board of Examiners of Sex Offenders to assess an offender's risk of reoffense. In making this determination, the Board has access to an offender's

full criminal background, including defendant's YO-related records. SORA "thereby grants the Board access to the documents, which are available under the CPL if 'specifically required or permitted by statute'" (*id.* at *7). Additionally, members of the Board have "access to YO-related records 'for the purpose of carrying out duties specifically authorized by law'" (*id.*, quoting CPL 720.35[2]). Therefore, "SORA's directives both provide the statutory 'require[ment] or permi[ssion]' to release the YO records under one provision of the YO statute, and describe 'the duties specifically authorized by law' to allow for their release under another" (*id.* at *7, quoting CPL 720.35[2])).

Accordingly, the CPL specifically provides the Board with access to YO-related documents (*id.* at *8). As the Board's inclusion of defendant's YO adjudication "in assessing the risk of reoffense was based on the Board's expertise and experience," it is entitled to judicial deference (*id.* at *5). As neither SORA nor the CPL "prohibit[s] the Board's consideration of YO adjudications for the limited public safety purpose of accurately assessing an offender's risk level," Supreme Court appropriately

assessed points under risk factors 9 and 10, relating to defendant's prior YO adjudication (*id.* at *1).

We have considered and rejected defendant's sequentiality argument.

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

ENTERED: APRIL 3, 2018

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Andrias, Gesmer, JJ.

5754 Steven M. Knobel, et al., Index 152752/15
Plaintiffs-Appellants,

-against-

Wei Group, LLP, et al.,
Defendants-Respondents,

Demba Wei, LLP,
Defendant.

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Shaw & Binder, P.C., New York (Daniel S. LoPresti of counsel), for appellants.

The Kritzer Law Group, Smithtown (Karl Zamurs of counsel), for Wei Group, LLP and Eric S. Wei, respondents.

The Law Offices of James F. Valentino, P.C., New York (James F. Valentino of counsel), for Daniel S. Demba, respondent.

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Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered April 14, 2016, which, to the extent appealed from as limited by the briefs, dismissed the causes of action for legal malpractice and fraud, unanimously affirmed, without costs.

The motion court correctly dismissed, as a nullity, the claims of the corporate plaintiff, because the corporate plaintiff lacked representation by a licensed attorney when it brought the claims (*see* CPLR 321[a]; *Jimenez v Brenillee Corp.*, 48 AD3d 351, 352 [1st Dept 2008]).

The motion court correctly dismissed the claims against defendant Wei Group, LLP, as personal service of process was not

properly effectuated with respect to this limited liability partnership (*see* CPLR 310-a).

Plaintiffs failed to state a cause of action for fraud, as they never alleged that they paid the allegedly fraudulent bills and suffered injury as a result (*see Small v Lorillard Tobacco Co.*, 94 NY2d 43, 57 [1999]).

The motion court correctly determined that the legal malpractice claim is barred by the three-year statute of limitations (*see* CPLR 214[6]). No triable issue of fact exists as to whether the doctrine of continuous representation tolled the statute of limitations. It is undisputed that on March 12, 2012, plantiff Steven M. Knobel sent defendant Eric Wei an email directing Wei "to cease all [ ] work" and that shortly thereafter, Knobel sent an email to the court indicating his desire to appear pro se. Contrary to plaintiffs' contention, there is no indication of "an ongoing, continuous, developing and dependent relationship between the client and the attorney" or a "mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim" after March 12, 2012 (*Matter of Merker*, 18 AD3d 332, 332-333 [1st Dept 2005] [internal quotation marks omitted]).

Plaintiffs' argument that the billing invoices show that defendants continued to represent them up until and after March

19, 2012 is unpersuasive. The invoices in the record do not indicate that after March 12, 2012 defendants performed any substantive legal work or provided any legal advice on the matters which plaintiffs allege defendants committed malpractice (*see Shumsky v Eisenstein*, 96 NY2d 164, 168 [2001]). Rather, the invoices show that plaintiffs were billed for work pertaining to communications with the court, client, and subsequent counsel, which did not toll the statute of limitations (*see Rupolo v Fish*, 87 AD3d 684, 685 [2d Dept 2011]).

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

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

ENTERED: APRIL 3, 2018

CLERK

Friedman, J.P., Sweeny, Gesmer, Kern, Singh, JJ.

6168 Suzannah B. Troy, Index 101885/15
Plaintiff-Appellant,

-against-

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

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Suzannah B. Troy, appellant pro se.

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

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Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered on or about August 24, 2016, which, insofar as appealed from as limited by the briefs, denied plaintiff's motion for a default judgment, and granted defendants' cross motion to dismiss the complaint, unanimously affirmed, without costs.

Plaintiff's motion for a default judgment was properly denied. All of the named defendants appeared and answered the complaint with the exception of Sergeant Chen, and there is no proof that Chen was ever served with process.

The motion to dismiss was also properly granted. Plaintiff's federal claims are barred by the doctrine of res judicata, as they were dismissed on the merits in a prior federal action (*Troy v City of New York*, 2014 WL 4804479, 2014 US Dist LEXIS 136339 [SD NY 2014], *affd* 614 Fed Appx 32 [2d Cir 2015];

see Matter of Hunter, 4 NY3d 260, 269 [2005]).

Plaintiff also failed to state any valid state-law claims. Plaintiff's claims that are based upon a failure to investigate, were properly dismissed as it involved an exercise of discretion for which defendant cannot be held liable (*see Matter of Burtis v New York City Police Dept.*, 294 AD2d 315 [1st Dept 2002], *lv denied* 98 NY2d 612 [2002]). To the extent the claims are based upon negligent hiring, retention, supervision, or training, they were properly dismissed because where, as here, "an employee is acting within the scope of his or her employment, ... no claim may proceed against the employer for negligent hiring or retention" (*Karoon v New York City Tr. Auth.*, 241 AD2d 323, 324 [1st Dept 1997]).

Plaintiff's claim for intentional infliction of emotional distress must fail because she did not allege the requisite extreme and outrageous conduct (*see Howell v New York Post Co.*, 81 NY2d 115, 121-122 [1993]), and her claim for coercion in violation of Penal Law § 135.60 fails because coercion is a criminal offense that does not imply a private right of action (*see Minnelli v Soumayah*, 41 AD3d 388 [1st Dept 2007], *lv dismissed* 9 NY3d 1028 [2008]).

Furthermore, defendant New York City Police Department should be dismissed from the action on the independent ground

that it is a non-suable agency of the City (*see* New York City Charter § 396; *Matter of Carpenter v New York City Hous. Auth.*, 146 AD3d 674 [1st Dept 2017], *lv denied* 29 NY3d 911 [2017]).

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

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

ENTERED: APRIL 3, 2018

CLERK

Friedman, J.P., Sweeny, Gesmer, Kern, Singh, JJ.

6169 In re Elizabeth P.,
Petitioner-Appellant,

-against-

Joann C.,
Respondent-Respondent.

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Larry S. Bachner, New York, for appellant.

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

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Appeal from order, Family Court, Bronx County (Tracey A. Bing, J.,), entered on or about October 14, 2016, which granted respondent adoptive mother's motion to dismiss the guardianship petitions of petitioner birth mother Elizabeth P, unanimously dismissed with respect to the child Dennis, and the order otherwise affirmed, without costs. Assigned counsel's motion to withdraw is granted.

We have reviewed the record and agree with assigned counsel that there are no viable arguments to be raised on appeal (*Matter of Weems v Administration for Children's Servs.*, 73 AD3d 617 [1st Dept 2010]). With respect to the child Dennis, who has turned eighteen since the order was entered, the appeal is dismissed as academic (*Matter of Lozada v Pinto*, 7 AD3d 801, 801 [2d Dept 2004]). With respect to the child Cassandra, the birth

mother has no standing to seek guardianship of her, as she was legally adopted by the adoptive mother. The conditional surrender executed by the mother did not reserve any of the rights that she is currently seeking to enforce (*Matter of Gerald T.*, 211 AD2d 17, 21 [1st Dept 1995]). Nor are there any allegations that the adoptive mother was unfit or has abandoned the children such that the Family Court should have considered the child's need for a guardian.

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

ENTERED: APRIL 3, 2018

CLERK

Friedman, J.P., Sweeny, Gesmer, Kern, Singh, JJ.

6170 Wojciech Jarzabek, Index 151035/12
Plaintiff-Respondent, 590342/12
590274/13
-against- 590569/13

Schafer Mews Housing Development
Fund Corporation, et al.,
Defendants-Appellants,

Lantern Organization, Inc., et al.,
Defendants.
- - - - -
Mega Contracting, Inc.,
Third-Party Plaintiff,

-against-

Demand Electric, Inc.,
Third-Party Defendant.
- - - - -
Mega Contracting Group, LLC improperly
sued herein as Mega Contracting Inc., et al.,
Second Third-Party Plaintiffs-Appellants,

-against-

Rocky's Contracting, Inc.,
Second Third-Party Defendant-Respondent.
- - - - -
Mega Contracting Group, LLC improperly
sued herein as Mega Contracting Inc., et al.,
Third Third-Party Plaintiffs-Respondents,

-against-

Demand Electric, Inc.,
Third Third-Party Defendant-Appellant.

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Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Marcia K. Raicus of counsel), for Schafer Mews Housing Development Fund Corporation and Mega Contracting Inc., appellants/respondents.

Malapero & Prisco, LLP, New York (Carol R. Finocchio of counsel), for Demand Electric, Inc., appellant.

Pollack, Pollack, Isaac & DeCicco, LLP, New York (Brian J. Isaac of counsel), for Wojciech Jarzabek, respondent.

Weiner, Millo, Morgan & Bonanno, LLC, New York (Kristy D'Ambrosio of counsel), for Rocky's Contracting, Inc., respondent.

Order, Supreme Court, New York County (Debra A. James, J.), entered July 21, 2017, which, insofar as appealed from, granted plaintiff's motion for summary judgment on the issue of liability on his Labor Law § 240(1) claim, granted that part of defendants Mega Contracting Group LLC and Schafer Mews Housing Development Fund Corporation's (Owner Defendants) motion for summary judgment on their contractual indemnification claim against third third-party defendant Demand Electric Inc. (Demand) and denied the motion to the extent it sought summary judgment on the claims for common-law and contractual indemnification against second third-party defendant Rocky's Contracting Inc. (Rocky's), and granted Rocky's motion for summary judgment dismissing all claims, cross claims and counterclaims as against it, unanimously modified, on the law, Rocky's motion for summary judgment denied, and otherwise affirmed, without costs.

Plaintiff electrician was injured when he fell from a makeshift wooden ladder while negotiating the distance between the first-floor slab of the building under construction and the

ground about five feet below, as he was helping unload a delivery of supplies that was being unloaded from the truck on ground level and placed on the slab. Although plaintiff had been provided an A-frame ladder that morning which was in the basement of the building, the parties cite no evidence contradicting plaintiff's testimony that he could not use it to access the slab because the ground was covered in dirt, debris, and rocks. Plaintiff's decision to use the makeshift ladder that his coworkers were also allegedly using was not the sole proximate cause of the accident where he was never instructed not to use it (*see Nacewicz v Roman Catholic Church of the Holy Cross*, 105 AD3d 402, 403 [1st Dept 2013]; *Conklin v Triborough Bridge & Tunnel Auth.*, 49 AD3d 320 [1st Dept 2008]). Moreover, where no proper safety device was provided, the fact that his boots may have been untied or that he may have been descending the makeshift ladder backwards was not the sole proximate cause of his accident (*see Messina v City of New York*, 148 AD3d 493, 494 [1st Dept 2017]).

Plaintiff's accident arose from the means and methods of accessing the slab (*see Lombardi v Stout*, 80 NY2d 290, 294-295 [1992]). Since there is no dispute that plaintiff was supervised and directed solely by his employer, Demand, which provided him with materials and equipment, the Owner Defendants were not negligent in the happening of the accident (*see Cappabianca v*

Skanska USA Bldg. Inc., 99 AD3d 139, 144 [1st Dept 2012]), and thus, the motion court correctly granted summary judgment on their claim against Demand for contractual indemnification.

However, because issues of fact exist regarding whether Rocky's fabricated or was otherwise responsible for the makeshift ladder, the court erred in granting its motion seeking dismissal of all claims as against it.

We have considered the remaining arguments and find them unavailing.

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

ENTERED: APRIL 3, 2018

CLERK

Friedman, J.P., Sweeny, Gesmer, Kern, Singh, JJ.

6171 Amanda McBride, etc., et al., Index 7622/05
Plaintiffs-Appellants,

-against-

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

Joseph Cremin,
Defendant.

_____

Vaccaro Payne, LLP, Forest Hills (Steven R. Vaccaro of counsel), for appellants.

Zachary W. Carter, Corporation Counsel, New York (Aaron M. Bloom of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Mary Ann Brigantti, J.), entered May 4, 2016, which granted defendant Board of Education of the City of New York's (BOE) motion for summary judgment dismissing the complaint as against it, with prejudice, unanimously affirmed, without costs.

The motion court correctly found that, in opposition to BOE's prima facie showing that it did not negligently supervise or retain defendant Joseph Cremin, plaintiffs failed to raise an issue of fact as to whether school authorities should have had specific knowledge or notice of Cremin's propensity for sexual misconduct so that his sexual misconduct with the infant plaintiff could reasonably have been anticipated (*see Brandy B. v*

Eden Cent. School Dist., 15 NY3d 297, 302 [2010]). Until Cremin's arrest, BOE had received no complaints about him, other than that of alcohol abuse, for which he was terminated (three months before plaintiffs served their notice of claim alleging sexual misconduct). The complaints about alcohol abuse did not constitute notice of a propensity for sexual misconduct on Cremin's part (*see e.g. Coffey v City of New York*, 49 AD3d 449 [1st Dept 2008]). Nor is a propensity for sexual misconduct reasonably inferred from evidence that the infant plaintiff, a former student, was seen on school grounds by school personnel, that she once asked a security guard if she could see Cremin and ran away when the guard questioned her, or that the school principal may have told investigators after Cremin's arrest that Cremin had said "a girl like[d] him."

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: APRIL 3, 2018

CLERK

Friedman, J.P., Sweeny, Gesmer, Kern, Singh, JJ.

6172 The People of the State of New York, Ind. 4320/15
Respondent,

-against-

Robert Tarantola, et al.,
Defendants,

Carmelo Falcone,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Karen Schlossberg 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 (Arlene Goldberg, J.), rendered March 9, 2017,

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

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

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

ENTERED: APRIL 3, 2018

CLERK

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

Friedman, J.P., Sweeny, Gesmer, Kern, Singh, JJ.

6173- Index 158273/16
6173A In re Jonathan Corbett,
Petitioner-Appellant,

-against-

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

_____

Jonathan Corbett, appellant pro se.

Zachary W. Carter, Corporation Counsel, New York (Elina Druker of counsel), for respondents.

_____

Judgment (denominated an order) of Supreme Court, New York County (Carol R. Edmead, J.), entered February 7, 2017, insofar as it denied the petition and dismissed the proceeding seeking a judgment declaring the "proper cause" requirement of New York's firearms licensing law (Penal Law § 400.00[2][f]) to be facially unconstitutional "insofar as it is interpreted to mean that a citizen must demonstrate a greater need than that of the average citizen, and in combination with the state's blanket ban on open carry" of handguns; declaring three questions on the New York City Police Department's (NYPD) concealed carry license application, relating to applicants' discharge from employment, prior use of "narcotics or tranquilizers," and prior subpoena or testimony before any governmental hearing, to be arbitrary and capricious and violative of the US Constitution 2nd Amendment;

and directing respondents to issue petitioner a concealed carry handgun license, unanimously affirmed, without costs. Appeal from that portion of the judgment denying petitioner's request for an order directing NYPD to produce documents responsive to petitioner's request, under the Freedom of Information Law (FOIL), for documents demonstrating how NYPD evaluates concealed carry handgun license applications, unanimously dismissed, without costs, as moot.

The "proper cause" element of New York's handgun licensing scheme (*see* Penal Law § 400.00[2][f]) passes intermediate constitutional scrutiny, as it is substantially related to the state's important interest in protecting public safety (*see Kachalsky v County of Westchester*, 701 F3d 81, 96-97 [2d Cir 2012], *cert denied sub nom Kachalsky v Capace*, 569 US 918 [2013]; *see generally People v Hughes*, 22 NY3d 44, 52 [2013]; *Matter of Delgado v Kelly*, 127 AD3d 644 [1st Dept 2015}; *New York State Rifle & Pistol Assn. v City of New York*, __ F3d __, 2018 WL 1021310, *10-11, 2018 US App LEXIS 4513, at *33 [2d Cir Feb. 23, 2018]). Moreover, viewed as a whole, New York's handgun licensing scheme does not impose any blanket or near-total ban on gun ownership and possession (*see Kachalsky*, 701 F3d at 94-99).

In addition to the "proper cause" requirement specific to concealed carry licenses, the statute sets forth other

requirements, including that the applicant be "of good moral character" (Penal Law § 400.00[1][b]). The three questions on the handgun license application challenged by petitioner, which he refused to answer, relate to 1) whether he has been discharged from any employment; 2) past use, if any, of narcotics or tranquilizers, and 3) past testimony before any executive, legislative or judicial body. These questions are designed to elicit information that can assist the background investigation that is undertaken by the New York Police Department in connection with the application, and accordingly, are justified because they serve to promote the government's "substantial and legitimate interest . . . in insuring the safety of the general public from individuals who, by their conduct, have shown themselves to be lacking the essential temperament or character which should be present in one entrusted with a dangerous instrument" (*Matter of Warmouth v Zuckerman*, 138 AD3d 752, 753 [2d Dept 2016][internal quotation marks omitted]; see also *Matter of Delgado v Kelly*, 127 AD3d 644, *supra*).

Petitioner has not established that the denial of his application was the result of corruption or other impropriety (*see Matter of Hughes v Suffolk County Dept. of Civ. Serv.*, 74 NY2d 833, 834 [1989]; *Matter of Sunnen v Administrative Rev. Bd. for Professional Med. Conduct*, 244 AD2d 790, 791 [3d Dept 1997],

lv denied 92 NY2d 802 [1998]).

Respondents' production of responsive documents, albeit beyond the statutory 10-day limit and "subsequent to the commencement of this article 78 proceeding," mooted his challenge to the denial of his FOIL request, and we accordingly dismiss that portion of the appeal (*Matter of Alvarez v Vance*, 139 AD3d 459, 460 [1st Dept 2016]; *see Matter of Babi v David*, 35 AD3d 266, 267 [1st Dept 2006]). Even if the proceeding had not been mooted, the remedy for NYPD's failure to timely respond to the administrative appeal from the denial of the FOIL request would not have been an order directing full production, but rather a "remand for respondent to comply" (*Alvarez*, 139 AD3d at 460; *see Matter of Malloy v New York City Police Dept.*, 50 AD3d 98, 100 [1st Dept 2008]).

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

ENTERED: APRIL 3, 2018

CLERK

Friedman, J.P., Sweeny, Gesmer, Kern, Singh, JJ.

6174-
6175 Index 601987/09

James River Multi-Strategy Fund, L.P., et al.,
Plaintiffs-Appellants,

-against-

MotherRock, L.P., et al.,
Defendants-Respondents.

_____

Sidley Austin LLP, New York (Thomas K. Cauley, Jr. of counsel), for appellants.

Greenberg Traurig, LLP, New York (Mary-Olga Lovett of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Charles E. Ramos, J.), entered June 19, 2017, after a nonjury trial, dismissing the complaint, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered July 10, 2014, which granted defendants' summary judgment motion in part, unanimously dismissed, without costs, as abandoned.

A fair interpretation of the trial evidence supports the decision of the fact-finding court. Accordingly, the judgment

should be affirmed (*see Thoreson v Penthouse Intl.*, 80 NY2d 490, 495 [1992]; *see also 409-411 Sixth St., LLC v Mogi*, 22 NY3d 875, 876-877 [2013]).

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

ENTERED: APRIL 3, 2018

CLERK

Friedman, J.P., Sweeny, Gesmer, Kern, Singh, JJ.

6176 In re Rivka Jacobowitz, Index 100092/14
Petitioner-Appellant,

-against-

New York City Department of Housing Preservation and Development,
Respondent-Respondent.

_____

Rosenberg & Estis, P.C., New York (Jeffrey Turkel of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Max O. McCann of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Shlomo S. Hagler, J.), entered February 4, 2016, denying the petition to annul the determination of respondent, dated September 23, 2013, which denied petitioner succession rights to the subject Mitchell-Lama apartment, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The determination has a rational basis in the record and was made in accordance with lawful procedure (*see generally Matter of Pietropolo v New York City Dept. of Hous. Preserv. & Dev.*, 39 AD3d 406 [1st Dept 2007]; CPLR 7803[3]). Even assuming that petitioner's sister was the tenant of record for purposes of succession, petitioner failed to provide credible documentation establishing when she moved into the apartment, and when her

sister vacated, sufficient to establish entitlement to succession rights (28 RCNY 3-02[p][3]; *Yunayeva v Kings Bay Hous. Co., Inc.*, 94 AD3d 452, 453 [1st Dept 2012]). Petitioner only submitted her 2009 tax returns and did not submit any of the suggested proofs of primary residency, such as bank statements, voter registration statements, or bills addressed to her at the apartment (*see e.g. Matter of Horne v Wambua*, 143 AD3d 605 [1st Dept 2016]). Furthermore, the self-generated documents, as well as those documents prepared by her sister and brother-in-law, did not conclusively establish co-residency during the relevant time period (*see Matter of Hochhauser v City of N.Y. Dept. of Hous. Preserv. & Dev.*, 48 AD3d 288 [1st Dept 2008]).

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

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

ENTERED: APRIL 3, 2018

CLERK

Friedman, J.P., Sweeny, Gesmer, Kern, Singh, JJ.

6177 The People of the State of New York, Respondent, Ind. 1145/14

-against-

Anthony Yates, Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Andrew E. Seewald of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Abraham Clott, J.), rendered April 13, 2015, convicting defendant, after a jury trial, of assault in the first degree and criminal possession of a weapon in the third degree, and sentencing him, as a second violent felony offender, to an aggregate term of 20 years, unanimously affirmed.

At defense counsel's request, the court instructed the jury regarding justification based on a reasonable belief that the complainant was attempting to rob defendant (*see* Penal Law 35.15[2][b]). At the People's request, and over defense objection, the court also instructed the jury regarding justification based on a reasonable belief that the complainant was using, or was about to use, deadly physical force against defendant (*see* Penal Law 35.15[2][a]). While we agree with

defendant that the latter instruction was erroneously submitted to the jury because it was not supported by any reasonable view of the evidence (*see People v Padgett*, 60 NY2d 142, 144-45 [1983]), its submission, even assuming that the error was of constitutional magnitude, was harmless beyond a reasonable doubt in light of the record as a whole. While the errant instruction might have had the capacity, in some circumstances, to improperly interfere with the defense that deadly physical force was justified in response to a robbery, here that defense was so implausible, and the evidence in support of it so weak and self-contradictory, that we find no reasonable possibility that defendant would have secured an acquittal based on it if the court had not delivered the additional, erroneous justification charge (*see People v Crimmins*, 36 NY2d 230, 237 [1975]).

Defendant's contention that he was sentenced based on an inadequate presentence report is unpreserved and we decline to

review it in the interest of justice (*see People v Pinkston*, 138 AD3d 431 [1st Dept 2016], *lv denied* 27 NY3d 1137 [2016]). We perceive no basis for reducing the sentence.

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

ENTERED: APRIL 3, 2018

CLERK

Friedman, J.P., Sweeny, Gesmer, Kern, Singh, JJ.

6178 The People of the State of New York, Respondent, Ind. 4155/15

-against-

Audy Rodriguez, Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered January 19, 2016, unanimously affirmed.

Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: APRIL 3, 2018

CLERK

Friedman, J.P., Sweeny, Gesmer, Kern, Singh, JJ.

6179 The People of the State of New York, Respondent, Ind. 3362/16

-against-

Anthony Pastor, Defendant-Appellant.

_____

White & White, New York (Brendan White of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Robert M. Mandelbaum, J.), rendered May 31, 2017, as amended July 26, 2017, convicting defendant, after a jury trial, of aggravated cruelty to animals and overdriving, torturing, and injuring animals, and sentencing him to an aggregate term of two years, unanimously affirmed.

Defendant's legal sufficiency claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Moreover, we find that the evidence overwhelmingly established that defendant intentionally killed his girlfriend's dog, with aggravated cruelty (*see* Agriculture and Markets Law §§ 353, 353-a[1]). The

egregious circumstances of this case are briefly summarized in our per curiam opinion disbarring defendant (*Matter of Pastor*, 154 AD3d 184 [1st Dept 2017]). There is no basis for disturbing the jury's credibility determinations. The only rational explanation of the compelling circumstantial evidence is that the dog was killed by defendant, and not by his girlfriend, a stranger, or anyone else, and defendant's arguments to the contrary are without merit.

The court providently exercised its discretion in admitting, on the issues of identity and motive, evidence that defendant had previously beaten a former girlfriend's dog, and that this dog died under circumstances very similar to those of the charged crime (*see e.g. People v Walker*, 293 AD2d 411, 411-412 [1st Dept 2002] *lv denied* 98 NY2d 682 [2002]). Initially, we note that there was strong circumstantial evidence that defendant actually committed the uncharged crime, and we reject his claims to the contrary. The probative value of the uncharged crime outweighed any potential prejudice, which was minimized by the court's thorough and repeated limiting instructions. In any event, any error was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

To the extent defendant is challenging portions of the prosecutor's summation, those challenges are unpreserved, and in any event unavailing.

We perceive no basis for reducing the sentence.

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

ENTERED: APRIL 3, 2018

CLERK

Friedman, J.P., Sweeny, Gesmer, Kern, Singh, JJ.

6180-
6181 Index 260950/12

In re Adeyinka Adebiyi,
Petitioner-Respondent,

-against-

New York City Housing Authority,
et al.,
Respondents-Appellants.

_____

Weiss, Wexler & Wornow, P.C., New York (Cory I. Zimmerman of counsel), for appellants.

Gregory J. Cannata & Associates, LLP, New York (Gregory J. Cannata of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered August 5, 2015, which, upon reargument, inter alia, denied respondents' cross motion to compel petitioner to reimburse a workers' compensation lien, and referred the issues concerning petitioner's disability classification and extinguishment of any statutory lien under Workers Compensation Law (WCL) § 29 to the Workers' Compensation Board (WCB), unanimously reversed, on the law, without costs, and respondents' cross motion granted. Appeal from order, same court (Barry Salman, J.), entered August 19, 2016, which denied respondents' motion to renew and reargue, unanimously dismissed, without costs, as academic.

Petitioner was injured on the job while in the employ of

respondent New York City Housing Authority, and received workers' compensation benefits after being classified by the WCB as permanently partially disabled. He commenced federal actions against the manufacturer and lessor of the ultra-high pressure washer that malfunctioned and caused his injuries. He settled with the lessor for $800,000 and obtained a jury verdict and judgment against the manufacturer in excess of $1.6 million. Due to a dispute concerning whether or not respondents had consented to the settlement of the federal action, petitioner moved for judicial approval of the settlement. Respondents cross-moved for a lien on the proceeds of the settlement, after deduction for the equitable share of the attorneys' fees and costs. In a December 2013 order, Supreme Court approved the settlement and granted respondents' cross motion for a lien in the amount of $222,049.27, after a credit to petitioner for litigation costs.

Petitioner moved for renewal and/or reargument, asserting that the amount of the lien should not be determined until the WCB decided whether or not to reclassify him as permanently totally disabled. Supreme Court granted the motion and, upon reargument, vacated its prior determination to the extent it granted respondents' cross motion. This was error.

Based on the language of WCL 29, the amount of respondents' lien on petitioner's third-party recovery should be ascertained

as of when the settlement was obtained, without consideration of a potential reclassification of petitioner's disability status by WCB. At the time of the settlement, the amount of past benefits paid to petitioner was easily quantifiable, and he does not dispute the figure claimed by respondents.

However, since petitioner was classified by WCB as partially, rather than totally disabled, at the time of the settlement, the value of the future benefits which respondents were relieved of paying due to the recovery was speculative (*see Burns v Varriale*, 9 NY3d 207, 215 [2007]). Thus, the court's December 2013 order correctly granted respondents' cross motion with respect to reimbursement of the lien for the past benefits that were paid at the time of the settlement. The court's deferral of the lien issue until WCB determined whether or not to reclassify petitioner's disability status was erroneous in that the only relevant factor was his disability status at the time of the settlement.

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

ENTERED: APRIL 3, 2018

CLERK

Sweeny, J.P., Gesmer, Kern, Singh, JJ.

6182 In re Jan Jan Realty Corp., Index 100050/15
Petitioner-Respondent,

-against-

NYC Environmental Control Board, etc., et al.,
Respondents-Appellants.

_____

Zachary W. Carter, Corporation Counsel, New York (Scott Shorr of counsel), for appellants.

Allen Schwartz, Brooklyn, for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Alice Schlesinger, J.), entered April 19, 2016, vacating the decision of respondent NYC Environmental Control Board, dated September 18, 2014, which upheld the fine against petitioner, unanimously reversed, on the law, the decision reinstated, and the proceeding brought pursuant to CPLR article 78, unanimously dismissed, without costs.

In 2013, respondent NYC Department of Buildings (DOB) issued a notice of violation (NOV) to petitioner, the owner of the property located at 209 Dyckman Street, for displaying on the building an outdoor advertising sign for "Kickstart" in a residential district in which such signs are prohibited under the New York City zoning resolutions (ZR). In a determination dated February 28, 2014, made after a hearing on the violation, an

administrative law judge (ALJ) sustained the notice of violation and imposed a fine, rejecting petitioner's argument that the advertising sign was a legal nonconforming-use under the ZR because such a sign had been displayed there since before 1961, without any break exceeding two years.

On March 27, 2014, petitioner filed a Zoning Resolution Determination Form (ZRD1) with DOB's Manhattan Borough Commissioner seeking a determination as to the legality of the sign (*see* New York City Charter § 645[b]), and on May 27, 2014, the Commissioner denied the application on the ground that the evidence failed to establish that gaps in the use of the sign did not exceed two years.

Petitioner then sought administrative review of the ALJ's determination by respondent NYC Environmental Control Board (ECB). In its request, petitioner did not mention the Commissioner's decision on its ZRD1 application, and DOB did not file any response to the ECB appeal. While that appeal was pending, petitioner made a further submission to the Commissioner, who, on July 31, 2014, reversed his prior ruling and approved petitioner's request to accept the sign as a lawful non-conforming use.

In a decision dated September 18, 2014, ECB affirmed the ALJ's determination that the sign was illegal. Neither

petitioner nor DOB had informed ECB of the decision on petitioner's ZRD1 application.

Petitioner then commenced this article 78 proceeding seeking to annul ECB's decision. Petitioner contends that ECB acted arbitrarily and capriciously in concluding that the evidence was insufficient to establish that the sign was a lawful pre-existing, non-conforming use, and argues that, despite the fact that it was outside the administrative record, the ZRD1 approval should be considered, given great weight, and applied retroactively to vacate the NOV.

Before it answered the petition, DOB revoked the ZRD1 approval, after questioning petitioner about the evidence of continuous use it had submitted; DOB determined that additional evidence was required to support a finding of a lawful nonconforming sign.

On May 8, 2015, respondents filed a verified answer, arguing that the ECB decision was rational, based on the evidence in the administrative record, that the ZRD1 proceedings should not be considered in this proceeding challenging the ECB ruling because they were not part of the record before ECB, and that the ZRD1 approval had in any event been revoked.

Upon petitioner's further evidentiary submissions, DOB issued a final ZRD1 determination finding the sign illegal.

The issue before the article 78 court was whether ECB's decision that petitioner had failed to establish its advertising sign as a lawful pre-existing, non-conforming use was arbitrary and capricious. However, the court did not confine its review of ECB's decision to the record adduced before ECB; citing "common sense" and the above-recited "factual background," it considered the ZRD1 proceedings. The court found that the ZRD1 approval in effect at the time ECB issued its determination effected an automatic vacatur of the NOV and the ECB decision, and concluded that DOB's subsequent determinations revoking the ZRD1 approval and finding the sign illegal were arbitrary and capricious.

The court found it troubling that DOB did not inform ECB of the ZRD1 approval in effect at the time the ECB decision was issued and that DOB took steps following the filing of the petition to have the ZRD1 approval revoked and the finding reversed. However, even assuming DOB should have advised ECB of the ZRD1 approval, the court erred in granting the petition. There is no basis for the conclusion that the ZRD1 determination had the legal effect of automatically vacating the NOV. Contrary to petitioner's contention, the ZRD1 approval was not a jurisdictional fact that allowed the court to review materials outside the administrative record. The court exceeded its jurisdiction by considering the ZRD1 determination (*see Matter of*

Featherstone v Franco, 95 NY2d 550, 554 [2000]). Upon review of the record before ECB, we conclude that ECB's affirmance of the ALJ decision was not arbitrary and capricious.

Moreover, petitioner was required to exhaust its administrative remedies before ECB prior to seeking judicial review of ECB's decision (*see Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57 [1978]). In the event the administrative remedies did not avail it, petitioner could have brought an article 78 petition for the vacatur of the decision on the ground that respondents acted arbitrarily in failing to withdraw the NOV in light of the ZRD1 approval (assuming that the approval had not subsequently been revoked and reversed).

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

ENTERED: APRIL 3, 2018

CLERK

Friedman, J.P., Sweeny, Gesmer, Kern, Singh, JJ.

6183 The People of the State of New York, Respondent, Ind. 5505/12

-against-

Keith Colon, Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (R. Jeannie Campbell-Urban of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Rena K. Uviller, J. at plea; Eduardo Padró, J. at sentencing), rendered December 16, 2015, convicting defendant of criminal possession of a controlled substance in the fifth degree, and sentencing him, as a second felony drug offender, to a term of two years followed by two years of post-release supervision, unanimously affirmed.

Defendant received a sentence in accordance with the court's ultimate sentence promise. The original promise was a term of 1½ years in the event that defendant was rejected by the judicial diversion program. Defendant was accepted by the program, and the new promise was that defendant could earn a misdemeanor, nonincarceratory disposition if he completed drug treatment and complied with other conditions, but would receive two years if he

failed to do so. After he violated the terms of this agreement and absconded from the drug program, the court, which was not bound by the original promise, properly sentenced him in accordance with the new agreement.

We perceive no basis for reducing the sentence, including the two-year term of post-release supervision.

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

ENTERED: APRIL 3, 2018

CLERK

Friedman, J.P., Sweeny, Gesmer, Kern, Singh, JJ.

6184 Paul Heth, Index 650379/15
Plaintiff-Respondent,

-against-

Satterlee Stephens Burke & Burke LLP, et al.,
Defendants-Appellants,

Chase Mellen III,
Defendant.

_____

Furman Kornfeld & Brennan, LLP, New York (A. Michael Furman of counsel), for appellants.

Kozberg & Bodell LLP, Los Angeles, CA (Joel Kozberg of the bar of the State of California, admitted pro hac vice, of counsel), for respondent.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered on or about November 10, 2015, which denied defendants Satterlee Stephens Burke & Burke LLP and Edwin Markham's motion to dismiss the complaint as against them, unanimously modified, on the law, to grant the motion as to the cause of action for breach of fiduciary duty, and otherwise affirmed, without costs.

Plaintiff alleges that defendants, representing him pursuant to an engagement letter while simultaneously representing others with conflicting interests, in drafting a December 2009 agreement, negligently failed to include a provision whereby the

obligations he owed to another party to the contract under a prior agreement would be superseded or released according to the alleged oral understanding between him and the other party, and that defendants negligently failed to advise him that the other party's oral promises were unenforceable due to a written modification requirement in the prior agreement. These allegations state a cause of action for legal malpractice (*see Brooks v Lewin*, 21 AD3d 731, 734 [1st Dept 2005], *lv denied* 6 NY3d 713 [2006]). The documentary evidence submitted by defendants does not utterly refute plaintiff's factual allegations (*see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]).

The breach of fiduciary duty cause of action should be dismissed as duplicative of the legal malpractice cause of action (*see Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 271 [1st Dept 2004]; *Alphas v Smith*, 147 AD3d 557, 558-559 [1st Dept 2017]).

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: APRIL 3, 2018

CLERK

Friedman, J.P., Sweeny, Gesmer, Kern, Singh, JJ.

6185 Jose Torres, Index 310119/10
Plaintiff-Appellant,

-against-

Alok Sharan, M.D., et al.,
Defendants-Respondents.

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Leonard Zack & Associates, New York (Leonard Zack of counsel), for appellant.

Gordon & Silber, P.C., New York (Patrick P. Mevs of counsel), for respondents.

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Order, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered on or about October 21, 2016, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff claims that defendant Alok Sharan, M.D., departed from accepted medical practice in performing cervical spine surgery on him after failing to properly read the pre-operative imaging studies, which would have revealed a Zenker's Diverticulum (ZD) on his spine, and that, after the surgery, the ZD caused him to experience severe dysphagia (difficulty swallowing), among other symptoms, necessitating surgical repair. Plaintiff also claims that, although he signed a consent form, no one explained to him that dysphagia was one of the risks of the surgery.

Defendants established prima facie that Dr. Sharan did not depart from good and accepted medical practice through an expert opinion that the imaging studies Dr. Sharan ordered before performing the surgery showed plaintiff's cervical spinal herniation, but no other abnormalities, and that Dr. Sharan did not depart from accepted medical practices in the performance of the surgery (*see Scalisi v Oberlander*, 96 AD3d 106, 120 [1st Dept 2012]). The expert opined that dysphagia is a common complication of cervical fusion surgery, that the surgery did not cause the ZD, and that, in any event, the ZD did not cause or contribute to plaintiff's dysphagia.

In opposition, plaintiff failed to raise an issue of fact, since his expert did not opine on any alleged act of malpractice with any degree of certainty, instead stating his conclusions in terms of possibilities (*see e.g. Brown v Bauman*, 42 AD3d 390, 392 [1st Dept 2007]).

Defendants established prima facie that plaintiff's consent to the surgery was informed, by submitting his signed consent form, which listed "recurrent laryngeal injury" as a risk of the surgery, and their expert's opinion that a reasonable patient with plaintiff's symptoms, having been informed of the possibility of laryngeal complication – a common risk of cervical fusion surgery – would have consented to the surgery (*see*

Shkolnik v Hospital for Joint Diseases Orthopaedic Inst., 211 AD2d 347, 350 [1st Dept 1995], *lv denied* 87 NY2d 895 [1995]).

Plaintiff failed to raise an issue of fact as to informed consent, since his expert's opinion was expressed with no more certainty on this issue than on the malpractice issue (*see e.g. Orphan v Pilnik*, 15 NY3d 907 [2010]). Furthermore, plaintiff testified that Dr. Sharan discussed the procedures with him, and that he had no questions after the discussion.

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

ENTERED: APRIL 3, 2018

CLERK

Friedman, J.P., Sweeny, Gesmer, Kern, Singh, JJ.

6186N Merav Dividu, Index 155532/16
Plaintiff-Respondent,

-against-

Mario Biaggi, Jr.,
Defendant-Appellant.

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Mario Biaggi, Jr., New York, appellant pro se.

Law Offices of Michael E. Talassazan, Rego Park (Michael E. Talassazan of counsel), for respondent.

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Order, Supreme Court, New York County (Joan M. Kenney, J.), entered on or about March 3, 2017, which denied defendant's motion to dismiss the complaint, stayed the action and ordered the parties to proceed to arbitration, unanimously reversed, on the law, and the motion to dismiss granted, without costs.

The documentary evidence and admissions of plaintiff establish that all of her claims against defendant are time-barred. Although the parties' agreement includes an arbitration clause, defendant did not move to compel arbitration, and

plaintiff affirmatively contends that the arbitration clause is unenforceable. We note that plaintiff is not precluded from filing a complaint based on these allegations with the Attorney Grievance Committee.

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

ENTERED: APRIL 3, 2018

CLERK

Friedman, J.P., Sweeny, Gesmer, Kern, Singh, JJ.

6188N Home Equity Mortgage Trust Series 2006-5, Plaintiff-Appellant, Index 653787/12

-against-

DLJ Mortgage Capital, Inc., et al., Defendants-Respondents.

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Quinn Emanuel Urquhart & Sullivan, LLP, New York (Philippe Z. Selendy of counsel), for appellant.

Orrick, Herrington & Sutcliffe LLP, New York (Richard A. Jacobsen of counsel), for respondents.

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Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered September 28, 2017, which, to the extent appealed from, granted defendants' motion to preclude plaintiff from relying on borrowers' employment and income information obtained from the borrowers' employers through Verification of Employment forms, unanimously affirmed, with costs.

Plaintiff presents no grounds on which to disturb the court's exercise of discretion in precluding it from relying on the information about borrowers' employment and income that it obtained from the borrowers' employers by means of a Verification of Employment (VOE) form. Whether or not the broader-form authorizations signed by certain borrowers in connection with their mortgage loan applications authorized plaintiff's requests

for some of the VOEs, plaintiff failed to show that every VOE at issue here correlates to a loan whose application contained such an authorization.

We reject plaintiff's argument that, in light of *Matter of Part 60 RMBS Put-Back Litigation* (2017 NY Slip Op 32161[U] [Sup Ct, NY County, Oct. 13, 2017]), the court's ruling creates a split within the Commercial Division. Here, the court did not, as plaintiff contends, hold employer verification discovery inadmissible per se. Rather as a sanction for the manner in which plaintiff obtained the information, the court appropriately exercised its discretion to suppress certain information.

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

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

ENTERED: APRIL 3, 2018

CLERK