

SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 12, 2015

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Mazzairelli, Acosta, Moskowitz, DeGrasse, JJ.

14358- Index 113665/09
14359 Excelsior 57th Corp., 591175/09
Plaintiff-Respondent-Appellant/Respondent,

-against-

Excel Associates,
Defendant-Appellant-Respondent/Appellant.

[And a Third-Party Action]

Michael B. Kramer & Associates, New York (Michael B. Kramer of counsel), for appellant-respondent/appellant.

Kurzman Eisenberg Corbin & Lever, LLP, White Plains (Stuart Berg of counsel), for respondent-appellant/respondent.

Order and judgment (one paper), Supreme Court, New York County (George J. Silver, J.), entered November 4, 2013, which, to the extent appealed from as limited by the briefs, granted plaintiff landlord's motion for summary judgment on its causes of action and declared that defendant tenant is responsible, at its sole cost and expense, for structural repairs to the parking garage at issue, and denied defendant's cross motion for summary judgment dismissing the complaint, unanimously modified, on the

law, to deny plaintiff's motion and vacate the declaration, and otherwise affirmed, without costs. Order, same court and Justice, entered on or about July 10, 2014, which, among other things, granted defendant's motion to renew, unanimously reversed, on the law, without costs, and the motion denied.

This appeal calls for an interpretation of a lease provision that obligates defendant to "make all non-structural repairs to and upon the demised premises, and all structural repairs thereto which are caused by the negligence of the Tenant, Tenant's sub-tenant or any of its servants, employees or agents." The focal issue before us is whether, under the foregoing lease provision, defendant is required to bear the cost of repairs that consist of the restoration of spalled concrete on floor slabs located within the interior of the garage, the replacement of certain steel reinforcing bars within the interior floor slabs, and the coating of the restored concrete with a weight-bearing waterproof membrane to prevent moisture and salt from again penetrating the surface. The motion court erred in finding that defendant breached its maintenance obligation by failing to install a membrane system. Contrary to the motion court's finding, such an installation is an improvement to the garage, rather than a non-structural repair or part of the simple or routine upkeep and

maintenance required of the tenant under the lease (see generally *Matter of Ally & Gargano v Biderman*, 126 AD2d 354, 360 [1st Dept 1987], *lv denied* 70 NY2d 601 [1987]). The court, however, correctly found that the remaining contemplated repairs to the concrete slab are structural in nature. Nevertheless, neither party is entitled to summary judgment, as issues of fact exist as to whether defendant or its sublessee was negligent and, if so, whether such negligence necessitated the aforementioned structural repairs. We find that the motion court improvidently granted defendant's motion to renew on the basis of an estoppel certificate. Defendant has not demonstrated a reasonable excuse for not presenting the estoppel certificate earlier (see *Sullivan v Harnisch*, 100 AD3d 513, 514 [1st Dept 2012]). Defendant has made no showing that the estoppel certificate, which was kept in its files, could not have been found by the use of due diligence

(see *Hausmann v Wolf*, 187 AD2d 371, 373 [1st Dept 1992]).

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

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

ENTERED: MARCH 12, 2015

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CLERK

Gonzalez, P.J., Tom, Richter, Manzanet-Daniels, Kapnick, JJ.

14473 Sunbelt Rentals, Inc., Index 152106/12
Plaintiff-Appellant,

-against-

New York Renaissance, et al.,
Defendants-Respondents,

Goldman Sachs Headquarters LLC, et al.,
Defendants.

Forchelli, Curto, Deegan, Schwartz, Mineo & Terrana, LLP,
Uniondale (Joseph P. Asselta of counsel), for appellant.

Adelman Matz P.C., New York (Sarah M. Matz of counsel), for New
York Renaissance and Dan Pirvulescu, respondents.

Carl D. Simoni, New York, for Joshua Dolan, respondent.

Order, Supreme Court, New York County (Carol R. Edmead, J.),
entered December 19, 2013, which denied plaintiff's motion for
summary judgment on its claims for breach of contract, quantum
meruit, and account stated against defendant New York Renaissance
(NYR), and on its claims to enforce personal guaranties against
defendants Joshua Dolan and Dan Pirvulescu, unanimously affirmed,
without costs.

Plaintiff alleges that NYR breached a contract for rental of
equipment and services, and failed to pay invoices addressed to
it in the total amount of \$36,148.78. Defendant NYR denies that

it was a party to any agreement with plaintiff, and asserts that a related company, now in bankruptcy, rented the equipment.

Plaintiff failed to make a prima facie showing of a binding agreement with NYR (*Allied Sheet Metal Works v Kerby Saunders, Inc.*, 206 AD2d 166, 169 [1st Dept 1994]; see also *Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). The documents submitted by plaintiff do not show an agreement with NYR, nor does plaintiff allege any definite terms of an agreement (see *Allied Sheet Metal Works*, 206 AD2d at 169-170).

Plaintiff failed to sufficiently address on appeal its claims for quantum meruit and account stated, and we decline to consider those claims.

The court correctly denied summary judgment on plaintiff's personal guaranty claims against Dolan and Pirvulescu, as plaintiff failed to show that any underlying debt is actually owed by NYR (see *Davimos v Halle*, 35 AD3d 270, 272 [1st Dept 2006]).

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CLERK

Gonzalez, P.J., Tom, Richter, Manzanet-Daniels, Kapnick, JJ.

14474 Elena Strujan, Index 400526/11
Plaintiff-Respondent,

-against-

State Farm Insurances,
Defendant-Appellant,

John/Jane Doe,
Defendant.

Rivkin Radler LLP, Uniondale (Brian L. Bank of counsel), for
appellant.

Elena Strujan, respondent pro se.

Order, Supreme Court, New York County (Richard F. Braun,
J.), entered February 13, 2014, which, insofar as appealed from,
denied defendant State Farm Insurances' motion for summary
judgment dismissing the complaint, unanimously affirmed, without
costs.

The record on appeal comports with the requirements of CPLR
5526, as it includes the documents specifically required
thereunder. The documents the pro se plaintiff references that
are missing pertain primarily to her prior motions and were not
before the motion court in deciding the subject motion for
summary judgment.

Defendant failed to meet its prima facie burden of

establishing that plaintiff's personal property loss resulted from a cause other than a named peril under the policy (see *Garnar v New York Cent. Mut. Fire Ins. Co.*, 96 AD3d 715 [2d Dept 2012]). An "Explosion" is a named peril under the policy, and the record supports the conclusion that a steam explosion took place in plaintiff's building, which released toxic gas into her apartment. That plaintiff may have subsequently abandoned or donated damaged property does not satisfy defendant's initial burden.

It is noted, however, that as the motion court found, plaintiff is not entitled to any further additional living expenses under the renter's policy.

We have considered the remaining contentions and find them unavailing.

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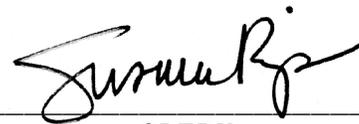
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wanted to plead guilty. Defense counsel then waived "further allocution," and the court imposed sentence.

The People's reliance on *People v Perez* (116 AD3d 511 [1st Dept 2014], *lv granted* 24 NY3d 1004 [2014]), where this Court upheld a waiver of "formal allocution" regarding a plea to disorderly conduct resulting in a fine, is misplaced. Unlike disorderly conduct, driving while intoxicated is not a petty offense. Such a conviction is a misdemeanor rather than a traffic infraction, it affects a defendant's driving privileges, and it can be the basis for elevating a subsequent similar charge to a felony. Furthermore, in *Perez* there was more in the record than here to show consultation with counsel concerning the plea.

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CLERK

Gonzalez, P.J., Tom, Richter, Manzanet-Daniels, Kapnick, JJ.

14476 Samaad Bishop, Index 250742/11
Plaintiff-Appellant,

-against-

Henry Modell & Company,
Inc., etc., et al.,
Defendants-Respondents,

City of New York, et al.,
Defendants.

Samaad Bishop, appellant pro se.

Wilson Elser Moskowitz Edelman & Dicker LLP, White Plains (Joanna M. Topping of counsel), for respondents.

Order, Supreme Court, Bronx County (John A. Barone, J.),
entered July 23, 2012, which, insofar as appealed from as limited
by the briefs, granted the motion of defendants-respondents
(Modell's) to dismiss the claims of fraud and negligent
misrepresentation as against them, unanimously affirmed, without
costs.

The record shows that after purchasing a pair of sneakers,
plaintiff was asked to show the receipt before exiting Modell's.
Store security advised him that it was store policy to check
customers' receipts and he would not be permitted to leave

without complying. Plaintiff refused and contacted the police. The police arrived and instructed plaintiff to produce the receipt and when he did, he was permitted to leave the store.

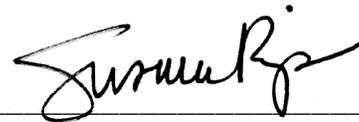
Plaintiff commenced this action and asserted causes of action for, *inter alia*, fraud and negligent misrepresentation. He alleged that Modell's knowingly made a materially false statement that it was store policy for customers to show their receipts before departing the store. Plaintiff stated that Modell's personnel made the statement to induce him to rely upon it and surrender his rights not to present the receipt.

Under the circumstances presented, plaintiff does not have a viable claim for fraud because he refused to show his receipt to store employees, offering it only to the police when they arrived and directed him to produce it. Thus, a necessary element of a claim of fraud, namely, justifiably reliance upon a false statement, has been negated (*see generally Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]). The negligent misrepresentation claim fails because plaintiff did not plead any

special duty owed by Modell's to him, a necessary element of a claim for negligent misrepresentation (see *J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 [2007]).

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CLERK

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.

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CLERK

puncture.

Although defendants made a prima facie showing that there was no departure from the standard of care and no causation, plaintiff raised an issue of fact by submitting expert affirmations opining that the catheter was inserted into the femoral artery in an incorrect position, as demonstrated by ultrasound imaging, and that there was evidence of retroperitoneal bleeding on CT scans resulting from the improper puncture (*see Cuevas v St. Luke's Roosevelt Hosp. Ctr.*, 95 AD3d 580, 580 [1st Dept 2012]). Plaintiff's experts further opined that Dr. Moses's failure to document the site of the puncture substantially contributed to plaintiff's resulting injuries by delaying appropriate vascular surgery that would have prevented the eventual femoral compression.

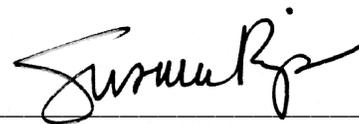
Defendants do not dispute that Lenox Hill may be vicariously liable for Daantje's negligence, and plaintiff raised issues of fact with respect to whether Lenox Hill is vicariously liable for the acts of Dr. Moses and the other employees of his professional corporation who treated plaintiff after Dr. Moses completed the catheterization procedure (*see Finnin v St. Barnabas Hosp.*, 306 AD2d 189 [1st Dept 2003]).

Defendants failed to make a prima facie showing that Dr.

Moses sufficiently disclosed to plaintiff the risks, benefits, and alternatives of the procedure. The consent forms are missing the name of the physician who was to perform the procedure, and plaintiff and Dr. Moses offer differing descriptions of the type of catheter insertion plaintiff was to receive (see *Estate of Lawler v Mount Sinai Med. Ctr., Inc.*, 115 AD3d 620, 622 [1st Dept 2014]; see also Public Health Law § 2805-d[1], [3]). Given plaintiff's testimony that she told the nurse who was prepping plaintiff's groin for the procedure that access was to be through the radial artery at the wrist, and given plaintiff's claim that the disclosure form was insufficient, plaintiff also raised an issue of fact as to whether Lenox Hill should have known that informed consent was not obtained for the performed procedure (see *Salandy v Bryk*, 55 AD3d 147, 152 [2d Dept 2008]).

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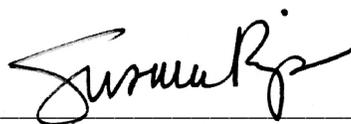
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CLERK

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.

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CLERK

Gonzalez, P.J., Tom, Richter, Manzanet-Daniels, Kapnick, JJ.

14483 Sharay Hayes, Index 104217/11
Plaintiff-Respondent,

-against-

Assets Recovery Center
Investments, LLC, et al.,
Defendants-Appellants,

John Olsen, et al.,
Defendants.

Stim & Warmuth, P.C., Farmingville (Glenn P. Warmuth of counsel),
for appellants.

Davis Ndanusa Ikhlas & Saleem, LLP, Brooklyn (Mustapha Ndanusa of
counsel), for respondent.

Order, Supreme Court, New York County (Paul Wooten, J.),
entered on or about November 29, 2013, which, to the extent
appealed from, denied in part defendants' motion to dismiss and
for summary judgment, unanimously reversed, on the law, without
costs, the motion granted, and the first, second, sixth, seventh
and eighth causes of action dismissed. The Clerk is directed to
enter judgment dismissing the complaint.

Defendants definitively showed that they were the holders of
the mortgage loan at the time plaintiff entered into the release
through the MERS Milestones printout (*see generally Matter of
MERSCORP, Inc. v Romaine*, 8 NY3d 90 [2006]). Plaintiff failed to

show that the bringing of a foreclosure action was a breach of the parties' mutual release, where that release expressly reserved defendants' right to bring such a proceeding. Finally, defendant 1M's bringing a holdover proceeding against plaintiff's subtenant, which it withdrew in the face of the subtenant's motion to dismiss, was not a breach of the release's promise that 1M would negotiate a one year lease with plaintiff. In light of these findings, plaintiff's claims for fraud in the inducement and breach of the release should have been dismissed. This necessitated the dismissal of the alter ego and conspiracy claims as well.

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CLERK

Gonzalez, P.J., Tom, Richter, Manzanet-Daniels, Kapnick, JJ.

14484 Nir Ronen, et al., Index 650847/13
Plaintiffs-Appellants,

-against-

Uriel Cohen, et al.,
Defendants-Respondents.

- - - - -

Uri Miron,
Intervenor-Appellant.

Sher Tremonte LLP, New York (Michael Tremonte of counsel), for appellants.

Litman Asche & Gioiella, LLP, New York (Richard M. Asche of counsel), for respondents.

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered August 28, 2014, which denied appellant Uri Miron's motion to intervene, and denied without prejudice plaintiffs' motion to enforce a settlement agreement, unanimously modified, on the law, to grant Miron's motion, and order a hearing on the matters raised therein, and to grant plaintiffs' motion to the extent of ordering a hearing on (1) whether defendants paid \$21,940 to Ronen, (2) plaintiffs' damages from defendants' failures to turn over the Bullseye intellectual property (IP) in its entirety on the effective date, divide the physical assets of the Bullseye entities within four weeks from the execution date,

and relinquish all right, title, and interest in the name "Bullseye" to Ronen, and (3) plaintiffs' claims that equipment was missing, incorrect, damaged, etc., and otherwise affirmed, without costs.

The motion court found, *sua sponte*, that it lacked jurisdiction over the escrow agreement. However, the escrow agreement was an exhibit to the settlement agreement over which the court retained jurisdiction. In addition, at least two terms in the settlement agreement were defined by reference to the escrow agreement, and the settlement agreement and the escrow agreement were executed at or around the same time as part of a single transaction (execution of the settlement agreement). Accordingly, the court had jurisdiction over the escrow agreement.

Defendants did not preserve their argument that Miron failed to submit a proposed pleading as required by CPLR 1014. Were we to consider this unpreserved argument, we would find that, under the circumstances, a proposed pleading was not required (see *Ryder v Travelers Ins. Co.*, 37 AD2d 797 [4th Dept 1971]).

The court found that the dispute between Miron and defendants under the escrow agreement was completely separate and distinct from the dispute between plaintiffs and defendants under

the settlement agreement. However, the dispute between Miron and defendants is about certain algorithms, and the dispute between plaintiffs and defendants also includes algorithms. Thus, there is a common question of fact (see CPLR 1013).

Since there is a factual dispute as to whether Miron turned over an up-to-date version of the intellectual property described in exhibit C to the escrow agreement, we remand for a hearing (see *288/98 W. End Tenants Corp. v Mosesson*, 144 AD2d 305 [1st Dept 1988]; see also *Teitelbaum Holdings v Gold*, 48 NY2d 51, 56 & n 2 [1979]).

The motion court properly denied that portion of plaintiffs' motion that is based on the claim that defendants violated the settlement agreement by employing four named employees because those employees are not employed by a defendant. However, it should have held a hearing on the remaining issues including whether defendants failed to pay Ronen \$21,940 as they were required to under the settlement agreement since there is an issue of fact as to whether or not the payment was made raised by the affidavits submitted by the parties.

Second, the settlement agreement states, "A copy of the Bullseye IP shall be transferred *in its entirety* to Ronen on the *Effective Date*" (emphasis added). It is undisputed that the

Bullseye IP was not transferred in its entirety to Ronen on October 26, 2013. However, there is an issue of fact as to whether the delay was caused, in part, by plaintiffs and whether plaintiffs were damaged by defendants' failure to transfer the Bullseye IP in its entirety on October 26, 2013.

It is undisputed that defendants failed to turn over trading algorithms and source code developed by nonparty Avi Kohn (an employee of one of the defendants, as defendants admitted in their verified answer). Again, however, a hearing is required to determine if plaintiffs were damaged by defendants' failure to turn over this information and, if so, in what amount.

Contrary to the motion court's finding, Ronen's allegations that he failed to receive a complete copy of the Bullseye IP were not "wholly conclusory."

Although, as the motion court pointed out, the settlement agreement did not specify any remedy for breaches, a settlement agreement is a contract, and "in actions for breach of contract, the nonbreaching party may recover general damages which are the natural and probable consequences of the breach" (*Kenford Co. v County of Erie*, 73 NY2d 312, 319 [1989]). Defendants, high-speed securities traders who use algorithms, should have foreseen that plaintiffs would be damaged if they did not receive all of the

algorithms necessary for trading.

There are also factual issues regarding the computer equipment requiring a hearing. According to the settlement agreement, the physical assets of the Bullseye Entities were to have been divided between Ronen and Cohn within four weeks from the execution date of the agreement, i.e., by November 14, 2013. It is undisputed that defendants did not timely ship the equipment and plaintiffs claim that some of the equipment was not sent at all, and that some of it was received damaged and/or missing components, operating systems and software. There are issues of fact regarding the condition of the equipment and the damages suffered by plaintiff due to defendants' failure to ship it in a timely manner.

The fourth issue that requires a hearing is defendants' failure to relinquish the Bullseye domain name as required by the settlement agreement which states that defendant Uriel Cohen's election to assume exclusive ownership of Bullseye Central, Ltd. shall not become effective unless he relinquishes all right, title, and interest in the Bullseye name to Ronen. Cohen elected to assume exclusive ownership of Bullseye Central, Ltd. but he did not relinquish the domain name. Even if defendants took down the Bullseye website, that is not the same as relinquishing all

right, title, and interest in the Bullseye name to Ronen.
Moreover, Ronen submitted an affidavit saying that taking down
the website resulted in an interruption that impaired the value
of the domain and the Bullseye brand.

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

ENTERED: MARCH 12, 2015

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CLERK

Gonzalez, P.J., Tom, Richter, Manzanet-Daniels, Kapnick, JJ.

14486 In re Jason G., and Others,

Children Under the Age of
Eighteen Years, etc.,

Pamela G.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

Law Office of Lewis S. Calderon, Jamaica (Lewis S. Calderon of
counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Ellen Ravitch
of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Patricia
Colella of counsel), attorney for the child Jason G.

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of
counsel), attorney for the child Jasmine G.

Douglas H. Reiniger, New York, attorney for the child Jackie B.

Order of fact-finding, Family Court, New York County (Clark
V. Richardson, J.), entered on or about July 15, 2013, which,
after a hearing, determined that respondent mother had neglected
her son by failing to provide for his shelter and care, and
thereby derivatively neglected her daughters, unanimously
affirmed, without costs.

The determination that the mother neglected her son was supported by a preponderance of the evidence, which showed that she intentionally deprived the child of shelter and care, and emotionally rejected him (see *Matter of Shawntay S. [Stephanie R.]*, 114 AD3d 502, 502 [1st Dept 2014]; *Matter of Stephanie M. [Miguel R.]*, 122 AD3d 508 [1st Dept 2014]). Contrary to the mother's argument, the evidence established that she refused to bring her then 16-year old son home from the hospital, had him arrested without basis upon his return and refused to go to Criminal Court to pick him up, which resulted in the issuance of an order of protection and a stay-away order, and effectively rendered him homeless. Her refusal to allow her son back into her home and her failure to otherwise plan for his care manifested an intention to abdicate her parental responsibilities, which placed the child at imminent risk of impairment (see *Matter of Shawntay S.* at 502).

This conduct demonstrated such a flawed understanding of her

parental responsibilities as to support the derivative findings of neglect with respect to her daughters (see *Matter of Vincent M.*, 193 AD2d 398 [1st Dept 1993]).

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CLERK

Gonzalez, P.J., Tom, Richter, Manzanet-Daniels, Kapnick, JJ.

14489 Bayswater Development LLC, et al., Index 105001/10
 Plaintiffs-Appellants-Respondents,

-against-

Admiral Insurance Company, et al.,
Defendants-Respondents-Appellants.

Melito & Adolfsen P.C., New York (Louis G. Adolfsen of counsel),
for appellants-respondents.

Coughlin Duffy LLP, New York (Justin N. Kinney of counsel), for
Admiral Insurance Company, respondent-appellant.

L'Abbate Balkan Colavita & Contini, LLP, Garden City (John D.
McKenna of counsel), for American Empire Surplus Lines Insurance
Company, respondent-appellant.

Order, Supreme Court, New York County (Joan M. Kenney, J.),
entered October 22, 2013, which denied plaintiffs' motion for
summary judgment declaring that the defendant insurers owe them a
duty to defend and indemnify, granted the portions of defendants'
motions for summary judgment that seek declarations that the
pollution exclusions should be interpreted in accordance with
Florida substantive law, denied the portion of defendants' cross
motions that seek a declaration that plaintiffs Bayswater
Brokerage Florida LLC and Bayswater Development Florida LLC are
not named insureds or additional insureds under the policies, and
granted the portion of defendant Admiral's cross motion that

seeks dismissal of the other plaintiffs' causes of action on default and as moot, unanimously modified, on the law, to declare that the defendant insurers have no duty to defend or indemnify plaintiffs, pursuant to the policies' pollution exclusion, and that defendants' disclaimers were timely as to plaintiffs Bayswater Brokerage Florida LLC and Bayswater Development Florida LLC, and otherwise affirmed, without costs. The Clerk is directed to enter judgment accordingly.

In this action seeking a declaration that defendants Admiral and American Empire are obligated to defend and indemnify plaintiffs in connection with claims arising out of damage purportedly caused by the use of "Chinese Drywall" at various residences located in Florida, New York's choice-of-law analysis applies (*see Lerner v Prince*, 119 AD3d 122, 127 [1st Dept 2014]). Under the insurance policies at issue, the insured risks are not national in scope, as the insured homes, alleged damages, resulting claims, and pending litigation are all Florida-based. On a balancing of the relevant factors, Florida has a more significant relationship to this matter than New York, and the motion court's conclusion that Florida is the state "with the most significant contacts with the matter in dispute," such that Florida law controls, was correct (*see Zurich Ins. Co. v Shearson*

Lehman Hutton, 84 NY2d 309, 317 [1994]).

Courts in Florida have consistently held that pollution exclusions, such as those contained in the Admiral and American Empire policies, preclude coverage for damage caused by "Chinese Drywall" claims (see e.g. *Deni Assocs. of Florida, Inc. v State Farm Fire & Cas. Ins. Co.*, 711 So2d 1135, 1136-1140 [Fla 1998]; *General Fidelity Ins. Co. v Foster*, 808 F Supp 2d 1315, 1319-1321 [SD Fla 2011]).

Even if issues of fact exist as to whether Bayswater Brokerage Florida and Bayswater Development Florida should have been added as named insureds to the policies, the April 9, 2010 coverage letter provided by American Empire and the April 12, 2010 coverage letter provided by Admiral provided notice of the insurers' coverage positions (see Fla Stat Ann § 627.426[2][a]; *Lazzara Oil Co. v Columbia Cas. Co.*, 683 F Supp 777, 783 [MD Fla 1988], *affd* 868 F2d 1274 [11th Cir 1989]).

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

ENTERED: MARCH 12, 2015



CLERK

Gonzalez, P.J., Tom, Richter, Kapnick, JJ.

14490N Doris Pupiales,
Plaintiff-Appellant,

Index 158098/12

-against-

BLDG Management Co., Inc., et al.,
Defendants-Respondents.

David J. Hernandez & Associates, Brooklyn (David J. Hernandez of
counsel), for appellant.

Littler Mendelson, P.C., New York (Joel L. Finger of counsel),
for respondents.

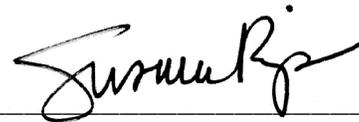
Order, Supreme Court, New York County (Anil C. Singh, J.),
entered on or about January 22, 2014, which, insofar as appealed
from as limited by the briefs, granted defendants' motion to
compel arbitration and to stay this action pending arbitration
proceedings, and denied plaintiff's motion for an order
compelling defendant Rishi Patraju to submit to oral swab DNA
testing, unanimously affirmed, without costs.

Plaintiff waived any objection to arbitration in light of
her union's commencement of the arbitration proceedings on her
behalf (see *Matter of National Cash Register Co. [Wilson]*, 8 NY2d
377, 382-383 [1960]; *Matter of RRN Assoc. [DAK Elec. Contr.
Corp.]*, 224 AD2d 250 [1st Dept 1996]).

In light of its order compelling arbitration, the motion court providently exercised its discretion in denying plaintiff's application to compel DNA testing of Patraju.

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

ENTERED: MARCH 12, 2015

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CLERK

Tom, J.P., Sweeny, Saxe, Clark, JJ.

10724 In re Veronica P., etc.,
Petitioner-Respondent,

-against-

Radcliff A.,
Respondent-Appellant.

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

Dora M. Lassinger, East Rockaway, for respondent.

Order, Family Court, New York County (Ivy I. Cook, Referee), entered on or about February 4, 2011, which after a hearing, determined that appellant had committed acts that constituted harassment in the second degree (Penal Law § 240.26), and granted petitioner a two-year order of protection directing appellant to, inter alia, stay away from her home, unanimously affirmed, without costs.

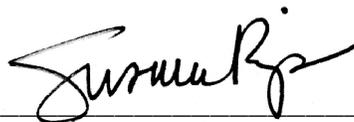
A fair preponderance of the evidence (Family Court Act § 832) supports the referee's finding that appellant committed acts constituting the family offense of harassment in the second degree (see Penal Law § 240.26), warranting the issuance of an order of protection (see Family Court Act §§ 812[1]; 842). The evidence demonstrates that, following an argument, appellant pushed petitioner, an 87-year-old woman, and then threatened her,

and we find no basis for disturbing the referee's credibility determinations (see *Matter of F.B. v W.B.*, 248 AD2d 119 [1st Dept 1998]).

There is no merit to appellant's claim that the referee improperly assumed the role of advocate for the petitioner. Rather, the referee properly asked questions throughout the proceedings that "advance[d] the goals of truth and clarity" (see *People v Arnold*, 98 NY2d 63, 68 [2002]).

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

ENTERED: MARCH 12, 2015

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Tom, J.P., Friedman, Andrias, DeGrasse, Gische, JJ.

14169 Franco Belli Plumbing Index 107725/11
& Heating & Sons, Inc.,
Plaintiff-Appellant-Respondent.

-against-

Citnalta Construction Corp., et al.,
Defendants-Respondents-Appellants,

New York City School
Construction Authority,
Defendant.

- - - - -

Associated General Contractors of NYS,
LLC, Surety and Fidelity Association of
America, and The General Contractors
Association of New York, Inc.,
Amici Curiae.

Kane & O'Connor, PLLC, Bronx (Terrence J. O'Connor of counsel),
for appellant-respondent.

Thomas D. Czik, Roslyn, for respondents-appellants.

Couch White, LLP, Albany (Jennifer K. Harvey of counsel), for
amici curiae.

Order, Supreme Court, New York County (Eileen Bransten, J.),
entered March 6, 2014, which denied defendants Citnalta
Construction Corp. and Travelers Casualty and Surety Company of
America's motion for summary judgment dismissing the claim for
acceleration costs, and denied plaintiff's cross motion for
partial summary judgment against Travelers, unanimously affirmed,

with costs.

Citnalta, the New York City School Construction Authority's (SCA) general contractor for a school construction project, hired plaintiff as its plumbing subcontractor. Travelers Casualty, Citnalta's surety, pursuant to a bond, guaranteed payment for labor and materials. Plaintiff has sued Citnalta for breach of contract; it has also sued Travelers on the bond.

Pursuant to paragraph 8.2 of its May 2007 subcontract with Citnalta, plaintiff waived all "rights to additional payment and time extensions beyond the subcontract amount, except to the extent that [Citnalta] may receive additional funds or extensions of time on Subcontractor's behalf for Change Orders as extra work from the Owner . . ." Schedule A to the subcontract, however, provides that "the duration allowed for this project is extremely aggressive and time sensitive . . . as necessary to achieve SUBSTANTIAL COMPLETION" by July 25, 2008. According to plaintiff's letter proposal, which is incorporated by reference in the subcontract, overtime and allowances are exclusions to the subcontract.

Paragraph 21 of the subcontract characterizes amounts over and above the contract price as "extras," stating that the subcontract amount "represents the full consideration to be paid

for the said work and in no event shall there be any claims for 'extras' against [Citnalta] unless [Citnalta] agrees in writing to pay an extra amount . . ." Consequently, the contract price Citnalta and plaintiff agreed to in the subcontract reflects payment for all the work necessary to meet the completion deadline set by the owner of the project.

In June 2007, the SCA directed Citnalta to accelerate the foundation work, which had become delayed due to large rocks and boulders that were discovered in the area being excavated, but not depicted on the project drawings. This directive was conveyed to the subcontractors, including plaintiff. In response to SCA's request for a proposal for the costs associated with this acceleration, Citnalta submitted a proposed change work order to SCA in July 2007 that included plaintiff's anticipated costs. During the project, SCA issued other acceleration orders and Citnalta provided SCA with proposals for estimated acceleration costs that included plaintiff's proposals for such extra work. Payments were made by SCA for a portion of plaintiff's proposals for extra work. Plaintiff seeks payment for extra work not paid for by SCA.

In an email exchange with Citnalta's project manager dated October 29, 2007, plaintiff's vice president stated that

plaintiff is "beginning to work 2 hours over-time everyday to further accelerate the schedule. Franco Belli told me that last week you [Citnalta's project manager] stated that Citnalta would pay for these additional premium hours. Please confirm."

Citnalta's project manager responded by email, "Yes."

"[A]bsent a contractual commitment to the contrary, a prime contractor is not responsible for delays that its subcontractors incur[,] unless those delays are caused by some agency or circumstances under the prime contractor's direct control" (*Bovis Lend Lease LMB v GCT Venture*, 285 AD2d 68, 71 [1st Dept 2001]). Plaintiff relies on the October 29, 2007 email exchange to support its claim that Citnalta made a separate contractual commitment to pay for all of its overtime costs on the project and seeks partial summary judgment on the issue of liability. Citnalta does not deny the email exchange, but claims that its agreement to pay overtime was limited to particular work which was defined in subsequent work orders, all of which have been paid. Citnalta seeks summary judgment dismissing the complaint.

It is unclear from the October 29, 2007 email exchange whether Citnalta's approval of overtime and an additional foreman was, as it claims, limited to the work necessary to address the delays in the underground portion of the project up to that point

or, as plaintiff claims, an ongoing, nondurational authorization for all overtime costs on the project, with a concomitant promise to pay for them. Although Citnalta acknowledges that plaintiff worked overtime throughout the duration of the project, Citnalta argues that plaintiff did not have written authorization pursuant to paragraph 21 of the subcontract to be paid additional monies, despite the increased cost. There are a number of written additional work authorizations signed by Citnalta's project manager approving payment for plaintiff's overtime; some of these written authorizations are proximately close in time to the October 29, 2007 email exchange.

The parties' dispute about the nature and scope of the agreement made pursuant to the October 29, 2007 email exchange cannot be resolved by motion and the motion court correctly denied summary judgment to both Citnalta and plaintiff.

The motion court decided that paragraph 8.2 of the subcontract constitutes an unenforceable pay-when-paid provision (see *West-Fair Elec. Contrs. v Aetna Cas. & Sur. Co.*, 87 NY2d 148, 158 [1995]). This paragraph, along with paragraphs 8 and 8.1, merely establish an orderly procedure whereby Citnalta, the general contractor, can submit claims for increased costs, including those made on plaintiff's behalf, to SCA, when

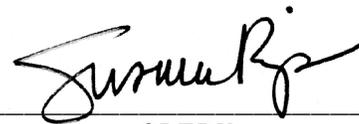
appropriate. We find they have no application to plaintiff's claim, which is against Citnalta, not SCA, and we, therefore, do not reach the issue of whether they are otherwise unenforceable.

Plaintiff's motion for summary judgment on its claim against Travelers was also properly denied because there are disputed issues on both liability and damages between Citnalta and plaintiff.

Arguments by the parties about whether plaintiff is seeking delay or acceleration damages are without merit; regardless of the nomenclature used, plaintiff's claim is for its increased costs (see *Corinno Civetta Constr. Corp. v City of New York*, 67 NY2d 297, 313-314 [1986]).

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

ENTERED: MARCH 12, 2015



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Acosta, J.P., Andrias, Saxe, DeGrasse, Richter, JJ.

14404 Ronald Reid, etc., Index 13383/04
Plaintiff-Respondent,

-against-

Stephen Bharucha, M.D.,
Defendant,

Montefiore Medical Center,
Defendant-Appellant.

Shaub, Ahmuty, Citrin & Spratt, LLP, Lake Success (Christopher Simone of counsel), for appellant.

Pollack, Pollack, Isaac & De Cicco, LLP, New York (Brian J. Isaac of counsel), for respondent.

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered May 27, 2014, which, to the extent appealed from as limited by the briefs, denied defendant Montefiore Medical Center's motion to vacate the liability verdict and direct a verdict or dismiss the complaint, or vacate the award for pain and suffering, or allocate certain of the decedent's medical expenses, unanimously modified, on the facts, the award for pain and suffering vacated, and the matter remanded for a new trial solely on the issue of damages for future pain and suffering, unless plaintiff stipulates, within 30 days of service of a copy of this order with notice of entry, to reduce that

award to \$2,000,000, and to the entry of an amended judgment in accordance therewith, and otherwise affirmed, without costs.

Plaintiff's decedent was diagnosed with lymphoma in December of 2002. Cancerous masses were located on her liver and spleen, and the disease had reached her bone marrow. Defendant Montefiore Hospital had provided medical care to the decedent, including treating her for swollen lymph nodes in the neck in the summer of 2002.

The jury's verdict that defendant's employees were negligent in not diagnosing the decedent's lymphoma until after November 15, 2002, and that such negligence was a substantial factor in causing decedent's injury, was supported by legally sufficient evidence and was not against the weight of the evidence (see generally *McDermott v Coffee Beanery, Ltd.*, 9 AD3d 195, 205-206 [1st Dept 2004]). The testimony of plaintiff's expert on causation that if the physicians at Montefiore had performed a biopsy during the July 28, 2002 admission and thereafter followed the decedent closely for lymphoma, the cancer could have been detected sooner, was neither speculative nor contrary to the evidence (see *Carnovali v Sher*, 121 AD3d 552 [1st Dept 2014]; *Feldman v Levine*, 90 AD3d 477 [1st Dept 2011]). The experts' competing opinions on causation and the progression of the

disease present an issue of fact for the jury to decide (see *Polanco v Reed*, 105 AD3d 438, 441 [1st Dept 2013]).

The award of \$2,400,000 for pain and suffering for one year of additional cancer treatment deviates materially from reasonable compensation to the extent indicated (CPLR 5501[c]).

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notified.

The lack of *Miranda* warnings did not warrant suppression of defendant's statements to the arresting officer in Queens. The officer's expressions of disbelief did not constitute the functional equivalent of interrogation (see *People v Rivers*, 56 NY2d 476, 480 [1982]; *People v Lynes*, 49 NY2d 286, 294-295 [1980]).

In any event, the statements defendant made after *Miranda* warnings were attenuated from the statements to the arresting officer, as well as from certain statements made to Queens detectives, which the court suppressed (see *People v White*, 10 NY3d 286, 291 [2008], cert denied 555 US 897 [2008]; *People v Paulman*, 5 NY3d 122, 130-131 [2005]). To the extent there was a chain of events, it clearly began with defendant's insistence on boasting of a murder, to an unwilling listener. Furthermore, there was a pronounced break between defendant's statements in Queens, and his later statements to Manhattan detectives and to an Assistant District Attorney. There was a passage of more than two hours, and the questioning was conducted by different interrogators at a different location.

We have considered defendant's remaining contentions and find them to be without merit.

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

ENTERED: MARCH 12, 2015

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CLERK

Mazzarelli, J.P., Andrias, Saxe, Feinman, Clark, JJ.

14493N Anna Pezhman, Index 104778/11
Plaintiff-Appellant,

-against-

Chanel, Inc.,
Defendant-Respondent,

Debbie Dayton, et al.,
Defendants.

Anna Pezhman, appellant pro se.

Proskauer Rose LLP, New York (Robert S. Schwartz of counsel), for
respondent.

Order, Supreme Court, New York County (Shlomo S. Hagler,
J.), entered May 7, 2014, which, to the extent appealed from as
limited by the briefs, granted plaintiff's motion to reargue and,
upon reargument, adhered to a prior order, same court and
Justice, entered April 8, 2013, which granted defendant Chanel,
Inc.'s motion to dismiss the claim for tortious interference with
prospective employment, unanimously affirmed, without costs.

Plaintiff's motion, which was denominated as one for renewal
and reargument, was solely one for reargument and was treated as
such by the motion court (see *Williams v City of New York*, 19
AD3d 251 [1st Dept 2005]). Although the court's order "denied"

the motion to reargue, it addressed the merits, and in so doing, effectively granted reargument. Accordingly, the order is appealable (see *Jackson v Leung*, 99 AD3d 489 [1st Dept 2012]; *Premier Capital v Damon Realty Corp.*, 299 AD2d 158 [1st Dept 2002]).

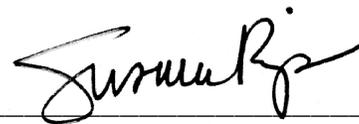
Plaintiff failed to demonstrate that there are "matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion" (CPLR 2221[d][2]). In any event, dismissal of the claim was warranted pursuant to CPLR 3211(a)(7), since plaintiff, a seasonal at-will employee at Lord & Taylor, failed to allege the existence of a firm offer of employment (see *Mattesich v Hayground Cove Asset Mgt., LLC*, 61 AD3d 487, 487-88 [1st Dept 2009]; *Murphy v City of New York*, 59 AD3d 301 [1st Dept 2009]). Even if she had, there can be no tortious interference with prospective at-will employment (see *Sullivan v Harnisch*, 81 AD3d 117, 125 [1st Dept 2010], *affd* 19 NY3d 259 [2012]). Moreover, there are no allegations in the complaint that defendant Chanel engaged in any conduct "for the sole purpose of inflicting intentional harm on plaintiff[]"

(*Carvel Corp v Noonan*, 3 NY3d 182 [2004]).

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

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MARCH 12, 2015

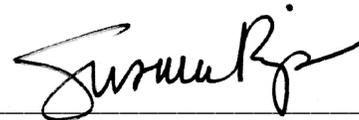
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failed to eliminate all issues of fact, including whether remnants of ice and snow from the prior, recent snowfalls had contributed to the subject hazardous condition (see *Ndiaye v NEP W. 119th St. LP*, AD3d , 2015 NY Slip Op 00279 [1st Dept 2015]; *Womble v NYU Hosps. Ctr.*, 123 AD3d 469 [1st Dept 2014])

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claims, denied defendants' motion for summary judgment on their contractual indemnification claim against third-party defendant Five Star Electric Corp. (Five Star), and denied Five Star's motion for summary judgment dismissing defendants' third-party complaint against it, unanimously modified, on the law, to conditionally grant defendants' motion for summary judgment on their contractual indemnification claim against Five Star, and to grant Five Star's motion for summary judgment dismissing defendants' claims for breach of contract and common-law indemnification and contribution, and otherwise affirmed, without costs.

The court properly granted partial summary judgment in favor of plaintiffs' Labor Law § 240(1) claim. According to the injured plaintiff's testimony, he and a coworker were allegedly each using both hands to guide a heavy reel of wire covered in cardboard down a plywood ramp with an incline starting at four feet. Plaintiff slowly walked backwards in front of the reel, while his coworker slowly walked forwards behind it. Plaintiff slipped and fell on a two-foot circular patch of ice on the ramp, landing on the ramp, causing his coworker to lose control of the reel, which consequently rolled over plaintiff's shoulder and neck. By submitting this undisputed account, plaintiff

established that his accident was a “direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential” (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]). Plaintiff also met his burden to “establish that there is a safety device of the kind enumerated in section 240(1) that could have prevented his fall” (*Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 340 [2011]), by pointing to the abundant evidence that no such devices, including pulleys or ropes, were used (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 523 [1985]). “Rather than using plaintiff [and his coworker] as the securing device contemplated by the statute, he should have been provided with one instead” (*Luongo v City of New York*, 72 AD3d 609, 611 [1st Dept 2010]). The fact that plaintiff’s injuries resulted in part from slipping on ice on the ramp on which he was working does not preclude summary judgment in favor of his Labor Law § 240(1) claim, since his injuries were also proximately caused by the lack of any safety devices to prevent him from being struck by heavy equipment falling from a significant elevation above him (see *Gove v Pavarini McGovern, LLC*, 110 AD3d 601 [1st Dept 2013]). Contrary to defendants’ argument, their witnesses’ testimony that safety devices were neither used nor required to

be used to perform plaintiff's task is irrelevant to defendants' liability pursuant to Labor Law § 240(1), since the statute imposes an "unvarying standard" independent of any "external considerations such as . . . custom and usage" (*Zimmer*, 65 NY2d at 523). The conflicting testimony as to whether the reel weighed about 200 to 300 pounds or about 1,000 pounds does not raise a triable issue of fact, since plaintiff is entitled to partial summary judgment in either event.

The court properly declined to dismiss plaintiffs' common-law negligence and Labor Law § 200 claims. It is also undisputed that defendants Midtown West B GC, LLC, doing business as Rockrose GC MWB, LLC, Rockrose Construction Corp., and Rockrose Construction Projects, LLC (collectively, Rockrose) were responsible for maintaining the ramps. Defendants failed to meet their initial burden to demonstrate an absence of material issues of fact as to whether they had notice of the icy condition which caused plaintiff's accident, since they failed to present evidence of any cleaning or maintenance schedule with respect to the ramps. In any event, there are triable issues of fact as to whether defendants had notice of a recurring hazardous condition which went routinely unaddressed (see *Gomez v National Ctr. for Disability Servs.*, 306 AD2d 103 [1st Dept 2003]). The minutes of

Five Star's safety meetings, which were regularly provided to Rockrose, showed that slippery ice on ramps was repeatedly raised as a hazard for two months leading up to the accident. Although Rockrose's foreman stated that Rockrose used salt and calcium chloride as de-icing agents, he stated that they were used only when it was necessary to shovel snow, not in conditions of lighter snow or rain. The foreman's testimony to the effect that he had no notice of recurring ice on ramps merely raises a question of fact, in light of his testimony that Rockrose conducted regular walk-throughs of the site (see *Picaso v 345 E. 73 Owners Corp.*, 101 AD3d 511, 512 [1st Dept 2012]).

The indemnity provision of the subcontract between Rockrose and Five Star requires the latter to indemnify defendants for, among other things, any liability, damages, claims, or losses "which arise out of or are connected with, or are claimed to arise out of or be connected with, the performance of the Work," except insofar as resulting from defendants' own negligence. This broad provision was triggered by this action, in which plaintiff, a Five Star employee, seeks damages for injuries he sustained while performing Five Star's work (see *Fuger v Amsterdam House for Continuing Care Retirement Community, Inc.*, 117 AD3d 649, 650 [1st Dept 2014]). However, summary judgment on

the contractual indemnification claim must be granted conditionally rather than unconditionally, in light of the pending issues of fact as to defendants' negligence (*see id.*). It does not avail Five Star to argue that Rockrose was solely responsible for the cleaning and maintenance of the ramps; "the accident could not have been caused solely by [defendants'] negligence, because it was caused at least in part by [defendants'] violation of Labor Law § 240(1), which imposes absolute liability" (*see id.* at 650-651).

The court should have granted Five Star's motion for summary judgment dismissing defendants' claim seeking common-law indemnification and contribution from Five Star. Five Star met its initial burden to establish that plaintiff did not sustain a grave injury within the meaning of Workers' Compensation Law § 11, and defendants failed to raise an issue of fact as to whether plaintiff's brain injury constituted a grave injury. Although experts who examined plaintiff averred that the accident had caused various brain conditions including seizures, persistent headaches, and depression, defendants have not shown that plaintiff "is no longer employable in any capacity" (*Rubeis v Aqua Club, Inc.*, 3 NY3d 408, 413 [2004]).

As defendants do not dispute, the court should have granted

Five Star's motion for summary judgment dismissing defendants' breach of contract claim against it. Five Star met its initial burden by presenting evidence that it had satisfied the provision of its subcontract with Rockrose requiring Five Star to procure insurance for defendants. Defendants failed to raise an issue of fact. The court improperly denied the motion based on correspondence between the insurance carriers of defendants and Five Star concerning this action, which is irrelevant to whether Five Star purchased the required policy.

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

ENTERED: MARCH 12, 2015

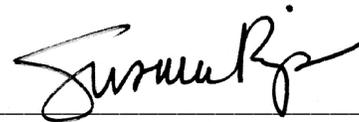


CLERK

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: MARCH 12, 2015

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5102[d]). Defendants submitted the affirmed report of an orthopedic surgeon who reviewed an MRI report indicating no findings of bulging or herniated discs, and who examined plaintiff, finding normal results on the orthopedic tests he performed, and recording range-of-motion measurements expressed in numerical degrees and the corresponding normal values. The orthopedic surgeon's finding of minor limitations in range-of-motion in two planes does not defeat defendants' showing that she did not have significant or permanent limitation in use of her back, and that any sprain/strain had resolved (see *Camilo v Villa Livery Corp.*, 118 AD3d 586 [1st Dept 2014]; *Tuberman v Hall*, 61 AD3d 441 [1st Dept 2009]).

In opposition, plaintiffs failed to raise a triable issue of fact. Although plaintiff's physician found limitations in some ranges of motion, plaintiff failed to provide any objective medical evidence of injury to her back (see *Komina v Gil*, 107 AD3d 596 [1st Dept 2013]). Furthermore, plaintiff failed to submit any medical records or other evidence reflecting that she made complaints or received treatment for claimed back injuries contemporaneous to or soon after the accident (see *Perl v Meher*, 18 NY3d 208, 217-218 [2011]; *Rosa v Mejia*, 95 AD3d 402, 403-404 [1st Dept 2012]). Although the affirmation of plaintiff's

physician shows some limitations in range of motion when he first examined her three months after the accident, without competent evidence in the record of any prior complaints or treatment, that is insufficient to raise a triable issue as to causation (see *Linton v Gonzales*, 110 AD3d 534 [1st Dept 2013]).

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

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

ENTERED: MARCH 12, 2015

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CLERK

about certain practices involving patient care, including the Health Center's failure to terminate a dentist who had an alcohol addiction that was not successfully treated. The motion court erred in finding that plaintiff failed to identify any law or rule reasonably believed to have been violated by the Health Center as required for him to prove his Labor Law § 741 claim (see *Webb-Weber v Community Action for Human Servs., Inc.*, 23 NY3d 448, 452-53 [2014]; *Bordell v General Elec. Co.*, 88 NY2d 869, 871 [1996]). Plaintiff's affidavit in opposition to the motion, points out that permitting a dentist to practice dentistry while intoxicated violates Education Law §§ 6509(3)-(4) and Board of Regents Rule 29.1 (8 NYCRR § 29.1).

Plaintiff's reports, in May and June 2009, to his superiors of his suspicions that this dentist, whom he supervised, was drinking while practicing dentistry were sufficiently close in time to support an inference of causation between his disclosures and his termination in July 2009 (see Labor Law § 741[2][a]; *Kim v New York State Div. of Human Rights*, 107 AD3d 434 [1st Dept 2013], *lv denied* 21 NY3d 866 [2013]; see also *Treglia v Town of Manlius*, 313 F3d 713, 720 [2d Cir 2002] [holding, in context of Federal age discrimination claim, that "a close temporal relationship between a plaintiff's participation in protected

activity and an employer's adverse actions can be sufficient to establish causation"]).

In response to the Health Center's asserted defense that it terminated plaintiff because of prior warnings and his mismanagement of his supervisee's alleged drinking (see Labor Law § 741[5]; *Luiso v Northern Westchester Hosp. Ctr.*, 65 AD3d 1296, 1298 [2d Dept 2009]), plaintiff raised issues of fact as to pretext by pointing to record evidence that he reported his supervisee's resumption of drinking to his superior as early as April 2009, but the superior told plaintiff only to monitor the dentist and keep a log. Accordingly, there are issues of fact as to whether plaintiff was terminated based on his disclosures that his supervisee was drinking alcohol while practicing dentistry.

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

ENTERED: MARCH 12, 2015

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CLERK

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: MARCH 12, 2015

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Mazzarelli, J.P., Andrias, Saxe, Feinman, Clark, JJ.

14502-

Index 650198/12

14502A In re Marco Pasanella, et al.,
Petitioners-Respondents,

-against-

James Quinn,
Respondent-Appellant,

Q Wines, LLC,
Respondent.

Sher Tremonte LLP, New York (Mark Cuccaro of counsel), for
appellant.

Law Offices of Ernest H. Gelman, New York (Ernest H. Gelman of
counsel), for Marco Pasanella and Premium Wines and Spirits, LLC,
respondents.

Order, Supreme Court, New York County (Melvin Schweitzer,
J.), entered January 30, 2014, which, to the extent appealable,
denied respondent James Quinn's motion to renew his motion to
vacate a default judgment, same court and Justice, entered April
4, 2013, confirming an arbitration award, and to vacate or modify
an income execution pursuant to CPLR 5240 and 5231(b)(iii),
unanimously reversed, on the law and the facts, without costs,
renewal granted, the matter remanded to Supreme Court for a
traverse hearing and further proceedings consistent with the
determination rendered after such hearing, and the income

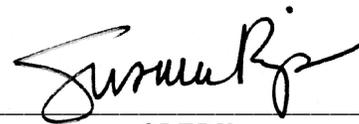
execution stayed pending such determination. Appeal from order, same court and Justice, entered October 21, 2013, unanimously dismissed, without costs, as superseded by the appeal from the January 30, 2014 order.

Appellant's initial, conclusory denial of the receipt of service was insufficient to rebut petitioner's prima facie evidence of proper service, as demonstrated by the affidavit of the process server (see *Grinshpun v Borokhovich*, 100 AD3d 551 [1st Dept 2012], *lv denied* 21 NY3d 857 [2013]). Although a party seeking renewal should offer a reasonable justification for failing to present any new facts on the prior motion (see CPLR 2221[e][3]), "courts have discretion to relax this requirement and to grant such a motion in the interest of justice" (*Mejia v Nanni*, 307 AD2d 870, 871 [1st Dept 2003]). Here, when seeking renewal, appellant submitted evidence suggesting that neither the process server, nor the agency he worked for, was licensed to serve process in either New York or Connecticut (see CPLR 313), which we conclude was sufficient to rebut petitioner's prima facie showing and warrant a traverse hearing (see *Finkelstein Newman Ferrara LLP v Manning*, 67 AD3d 538, 538-539 [1st Dept 2009]; *Norwest Bank Minnesota v Galasso*, 275 AD2d 400 [2d Dept 2000]; *Hopkins v Tinghino*, 248 AD2d 794, 795 [3d Dept 1998]).

As there is a possibility that the default judgment may have been obtained without personal jurisdiction over appellant, the income execution based upon it should be stayed pending the determination of the traverse hearing. Should appellant prevail at the traverse hearing, the income execution should be vacated. Otherwise, appellant is entitled to a hearing to determine whether there is evidence that his family support obligations owed pursuant to a judgment of divorce exceed twenty-five percent of his disposable earnings, and if so, whether he is entitled to vacatur or modification of the income execution (see CPLR 5240; 5231[b][iii]; *American Express Centurion v Melia*, 155 Misc 2d 587, 590-591 [Civ Ct, Kings County 1992]).

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

ENTERED: MARCH 12, 2015

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plaintiff's car was stopped when it was struck from behind by defendants' vehicle (see *Brown v Smalls* 104 AD3d 459 [1st Dept 2013]; *Johnson v Phillips*, 261 AD2d 269, 271 [1st Dept 1999]). The discrepant facts between the affidavits and the police report pointed out by defendants do not warrant a different determination.

Defendants failed to come forward with an adequate nonnegligent explanation for the accident. Their contention that plaintiff stopped short is insufficient, standing alone, to rebut the presumption of negligence (see e.g. *Santana v Tic-Tak Limo Corp.*, 106 AD3d 572 [1st Dept 2013]; *Corrigan v Porter Cab Corp.*, 101 AD3d 471, 472 [1st Dept 2012]). To the extent defendants argue that plaintiff's violation of Vehicle and Traffic Law § 1202(a)(1)(a) established a nonnegligent explanation, or at the very least, raised a triable issue of fact as to comparative negligence, such is also unavailing. Under the circumstances presented, the sole proximate cause of the accident was defendant driver's negligence (see *Malone v Morillo*, 6 AD3d 324 [1st Dept

2004])). Contrary to defendants contention, the granting of summary judgment was not premature as both drivers have submitted affidavits and the material facts are undisputed (see *Jeffrey v DeJesus*, 116 AD3d 574, 575 [1st Dept 2014]).

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

ENTERED: MARCH 12, 2015

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CLERK

claims since the complaint “fails to show either a deceit that reaches the level of egregious conduct or a chronic and extreme pattern of behavior on the part of” the defendant attorneys (see *Wailes v Tel Networks USA, LLC*, 116 AD3d 625, 625-626 [1st Dept 2014]; *Herschman v Kern, Augustine, Conroy & Schoppman*, 113 AD3d 520 [1st Dept 2014]). The complaint alleges only bare legal conclusions that the defendant attorneys, who jointly represented plaintiffs and defendants Janis and Designs in a prior lawsuit, acted with the requisite intent to deceive. Specifically, there are no factual allegations from which to infer that the attorneys knew that their advice to plaintiffs that there were no meritorious claims they could have asserted against Janis and Designs in the prior lawsuit, was false, and thus, that they knowingly and intentionally misled plaintiffs into releasing Janis and Designs from all claims in the course of settling that lawsuit (*Callaghan v Goldsweig*, 7 AD3d 361, 362 [1st Dept 2004]).

The motion court erred, however, in dismissing the derivative claims asserted by plaintiff Michelle Savitt on behalf of M+J Savitt, Inc. (M+J), against Janis and Designs on the basis of unclean hands (see *Ross v Moyer*, 286 AD2d 610, 611 [1st Dept 2001]). Michelle and Janis allege corporate misdeeds against each other. However, there are issues of fact as to whether

Michelle committed misconduct and, if so, whether Janis's misconduct far exceeded that of Michelle. There are also questions of fact as to whether Janis was aware of and consented to Michelle's conduct (*Dillon v Dean*, 158 AD2d 579, 580 [2d Dept 1990]; *Stahl v Chemical Bank*, 237 AD2d 231, 232 [1st Dept 1997]).

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

ENTERED: MARCH 12, 2015

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CLERK

Mazzarelli, J.P., Andrias, Saxe, Feinman, Clark, JJ.

14507- Index 23962/06
14508 Edith Wiener, an individual partner 2451/05
of Absar Realty Company, 24440/13e
Plaintiff, **Action No. 1**

-against-

Laura Spahn,
Defendant-Respondent,

3900 Greystone Associates LLC,
Defendant-Appellant.

- - - - -

Edith Wiener, an individual partner
of Absar-Gerard Associations,
Plaintiff, **Action No. 2**

-against-

Laura Spahn,
Defendant-Respondent,

Chaim Schweid,
Defendant-Appellant.

- - - - -

Chaim Schweid, et al.,
Plaintiffs-Respondents, **Action No. 3**

Chicago Title Insurance Company,
Plaintiff,

-against-

Laura Spahn,
Defendant-Appellant.

Heller Horowitz & Feit, PC, New York (Stuart A. Blander of
counsel), for 3900 Greystone Associates LLC and Chaim Schweid,
appellants/respondents.

Anderson & Ochs LLP, New York (Mitchell H. Ochs of counsel), for Laura Spahn, respondent/appellant.

Order, Supreme Court, Bronx County (Geoffrey D. Wright, J.), entered on or about August 21, 2013, which, in Action Nos. 1 and 2, granted defendant Laura Spahn's motion to resettle a prior settled order to the extent of directing the deletion of the provision in the prior order that required Spahn to return to defendants Chaim Schweid and 3900 Greystone Associates LLC the purchase prices paid for interests in Spahn's property after the sales were set aside by the court, unanimously affirmed, without costs. Order, same court, (John A. Barone, J.), entered July 24, 2014, which, in Action No. 3, denied the motion of defendant Spahn to dismiss the complaint, unanimously affirmed, without costs.

In Action Nos. 1 and 2, the court properly granted the motion for resettlement to rectify the discrepancy between the court's decision after trial and the prior settled order (see *Ansonia Assoc. v Ansonia Tenants Coalition*, 171 AD2d 411 [1st Dept 1991]). The inclusion of a provision in the settled order for the return of the sales price to the purchasers, defendants Schweid and Greystone, went beyond the court's award.

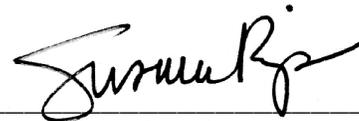
The court properly denied Spahn's motion to dismiss the

complaint in Action No. 3. Spahn failed to establish, at this stage of the proceedings, that plaintiffs were barred by the subject agreements from seeking the return of their purchase prices.

We have considered the remaining contentions and find them unavailing.

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

ENTERED: MARCH 12, 2015

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CLERK

Mazzarelli, J.P., Andrias, Saxe, Feinman, Clark, JJ.

14509 ePlus Group, Inc., et al., Index 114208/11
Plaintiffs-Appellants,

-against-

Dentons US LLP,
Defendant-Respondent.

Hyland Law PLLC, Reston, VA (Timothy B. Hyland of the bar of the State of Virginia admitted pro hac vice, of counsel), for appellants.

Dentons US LLP, New York (Richard M. Zuckerman of counsel), for respondent.

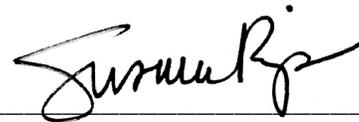
Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered on September 5, 2014, which, upon reargument, granted defendant's motion to dismiss plaintiffs' first, second, fourth and fifth causes of action as barred by a release, unanimously reversed, on the law, without costs, and defendant's motion denied.

Plaintiffs' claims against defendant's predecessor in interest were carved out from the release at issue; accordingly, those claims are not precluded as a matter of law (*CDR Créances S.A.S. v Cohen*, 104 AD3d 17, 29 [1st Dept 2012], *affd in relevant part* 23 NY3d 307 [2014]). The carve-out provision was intended to specifically anticipate the arguments raised by defendant. By

enforcing the carve-out provision, this Court is giving effect to the intent of the parties to the release (*Evans v Famous Music Corp.*, 1 NY3d 452, 458 [2004]).

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MARCH 12, 2015

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CLERK

Mazzarelli, J.P., Andrias, Saxe, Feinman, Clark, JJ.

14510 In re Calvin J.,

 A Child Under the Age of
 Eighteen Years, etc.

 Flor F., etc.,
 Respondent-Appellant,

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

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

Zachary W. Carter, Corporation Counsel, New York (Diana Lawless
of counsel), for respondent.

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

Order, Family Court, New York County (Clark V. Richardson,
J.), entered on or about February 18, 2014, which, after a
dispositional hearing, and upon a finding of neglect on consent,
awarded custody of the subject child to the nonparty father,
unanimously affirmed, without costs.

A sound and substantial basis in the record exists for the
court's determination that it is in the child's best interests
to award custody to the father (*see Matter of James Joseph M. v*
Rosana R., 32 AD3d 725, 726 [1st Dept 2006], *lv denied* 7 NY3d 717
[2006]). The court-appointed expert psychologist found that

respondent mother, who suffers from recurrent major depression and intermittent explosive behavior, has poor judgment and limited insight into her mental health issues (see e.g. *Matter of Devin M. [Margaret W.]*, 119 AD3d 435, 436 [1st Dept 2014]). In addition, the mother just recently obtained suitable housing after living in multiple shelters across New York State, while the father is employed and has maintained a home upstate with an extended family (see *Matter of Raymond A. v Lisa M.H.*, 115 AD3d 553, 554 [1st Dept 2014]). Although, at one time, the mother had an order of protection against the father due to domestic violence, there was evidence that the mother also physically assaulted the father, and there is no indication that the father has continued this violent behavior (see *Matter of David H. v Khalima H.*, 111 AD3d 544, 545 [1st Dept 2013], *lv dismissed* 22 NY3d 1149 [2013]).

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

ENTERED: MARCH 12, 2015



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The petition, having raised an issue of substantial evidence, should have been transferred to this Court pursuant to CPLR 7804(g). Accordingly, we "will 'treat the substantial evidence issue de novo and decide all issues as if the proceeding had been properly transferred'" (see *Matter of Roberts v Rhea*, 114 AD3d 504 [1st Dept 2014], quoting *Matter of Jimenez v Popolizio*, 180 AD2d 590, 591 [1st Dept 1992]).

Substantial evidence supports the determination that petitioner was guilty of numerous violations demonstrating his inability to conform his conduct to police department regulations. Petitioner's contention that the hearing officer improperly relied on hearsay evidence in finding him guilty of engaging in a verbal and physical domestic dispute is unavailing. The hearing officer's determination was based on petitioner's inconsistent statements in that his testimony at the hearing differed from statements he gave during an investigative interview. Thus, it is based on the hearing officer's credibility findings which are entitled to deference (see *Matter of Berenhaus v Ward*, 70 NY2d 436, 443 [1987]). Moreover, an administrative tribunal can rely upon credible hearsay evidence to reach its determination (*Matter of Muldrow v New York State Dept. of Corr. and Community Supervision*, 110 AD3d 425 [1st Dept

2013]).

The penalty imposed dismissing petitioner from the police force is not shocking to one's sense of fairness (*see generally Matter of Kelly v Safir*, 96 NY2d 32, 38 [2001]). Petitioner was brought up on five separate charges, based on events that occurred over a three-year period, and he was found guilty of nine of the specifications charged following a hearing. Although petitioner was a decorated officer, with eighteen years of service, who often received high ratings on department evaluations, he also was previously disciplined for insubordination and placed on one-year dismissal probation. However, given petitioner's service and awards, we modify the penalty to the extent indicated.

We have considered petitioner's remaining arguments and find them to be unpreserved and/or unavailing.

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

ENTERED: MARCH 12, 2015

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CLERK

of default events that may occur or on the number of accelerated judgments. In fact, it is clear that even after the wife obtains a first accelerated judgment for \$360,000, the husband is still obligated to make monthly payments, thus contemplating the potential for additional defaults and accelerated judgments.

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

ENTERED: MARCH 12, 2015

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access in an ongoing criminal trial. Respondents, the judge presiding over the trial in *People v Pedro Hernandez* (Sup Ct, NY County, indictment No. 4863/12), the District Attorney of New York County and the accused, who is charged with murder and kidnapping, all oppose. More specifically, with the consent of the District Attorney and the defendant, the trial court denied oral and written letter requests by some of the petitioners (1) to inspect and copy evidence from the suppression hearing, (2) to unseal the courtroom during certain in limine hearings and (3) to grant access to hundreds of completed juror questionnaires and the preliminary screening of jurors.

The First Amendment guarantees the public and the press a qualified right of access to criminal trials (*see Richmond Newspapers, Inc. v Virginia*, 448 US 555, 580 [1980]). This right must be kept in balance with the compelling interest of the defendant's Sixth Amendment right to a fair trial and the right to privacy of prospective jurors (*see Press-Enterprise Co. v Superior Court of Cal., Riverside Cty.*, 464 US 501, 510 [1984] [*Press-Enterprise I*]). The public's right of access may be limited where there is a compelling governmental interest and

LLC, The New York Times Company and Dow Jones & Company, Inc.

closure is narrowly tailored to serve that interest (*id.*).

New York's approach to courtroom closure is "comparable to the federal analysis" (*Courtroom Tel. Network LLC v State of New York*, 5 NY3d 222, 232 [2005]). The press is not imbued with any special right of access, and while it possesses "the same right of access as the public," it has no right to information about a trial that is "greater" or "superior" to that of the general public (*id.* at 229 [internal quotation marks omitted]). A "trial judge has an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity'" (*Matter of Westchester Rockland Newspapers v Leggett*, 48 NY2d 430, 438 [1979], quoting *Gannett Co., Inc. v DePasquale*, 443 US 368, 378 [1979]). Decisions to seal or disclose records fall within the inherent power of the court to control the records of its own proceedings (see *Matter of Crain Communications v Hughes*, 74 NY2d 626, 628 [1989]). While a court must guarantee that the defendant receives a fair trial, it must do so in a manner that balances the interests of "the defendant, jurors, witnesses, attorneys and the public at large" (*Courtroom Tel. Network LLC* at 232).

The Court in *Matter of Westchester Rockland Newspapers v Leggett*, explained that the defendant seeking to exclude the

public from a pretrial proceeding, must move for such relief on the record, in open court (48 NY2d at 442). The defendant must demonstrate "a strong likelihood" that particular evidence would prejudice the defendant's trial if disclosed to potential jurors (*id.*). If, during the course of argument, counsel believes it necessary to introduce specified items of proof which would, if disclosed, create the very prejudice sought to be avoided, counsel may request that argument briefly continue without the public present, although in the presence of both counsel (*id.*). Where the court grants the request, the court shall circumspectly give reasons for closure in open court (*id.*). All proceedings on the motion, both in open and closed court, should be recorded for appellate review (*id.*).

The defendant bears the burden of showing that his or her right to a fair trial may be compromised by an open proceeding (*Matter of Associated Press v Bell*, 70 NY2d 32, 39 [1987]). The trial court must make "specific findings" that closure would prevent a substantial probability that the defendant's right to a fair trial would be prejudiced by publicity and that there are no reasonable alternatives to closure to protect the defendant's fair trial rights (*id.*, citing *Press-Enterprise Co. v Superior Court of Cal., County of Riverside*, 478 US 1, 12-13 [1986]

[*Press-Enterprise II*]).

Applying these principles to the case at bar, we conclude that petitioners have not established a clear right to the relief they seek. The suppression hearing in this matter was held in open court, with the press in attendance. Petitioners' request for a copy of the videotaped confessions and certain police notes was denied in a written decision dated October 6, 2014, which balanced the competing rights of the press and public against the defendant's ability to receive a fair trial. At the time, the court had not yet ruled on the admissibility of the confessions. The trial court specifically provided that the press could renew its application for unsealing after the trial commenced.

Ultimately the videotaped confessions were ruled admissible in a redacted form, and the redacted version was played at trial. The redacted version has been released to the press. Under these circumstances, we find no clear error.

Turning to the trial court's closure of the courtroom for consideration of various in limine motions, our review of those sealed transcripts reveals that the closure was appropriate after balancing the press and public's right to access against the need to either protect witnesses or ensure the defendant's right to a fair trial. The vast majority of the proceedings in this trial

have been open and the court has sparingly exercised its discretion to close the court (see *Poughkeepsie Newspapers v Rosenblatt*, 92 AD2d 232, 234-235 [2d Dept 1983], *affd* 61 NY2d 1005 [1984] [public excluded only from a brief hearing to determine admissibility of certain evidence]).

While, as petitioners argue, the guarantee of open proceedings applies to the examination of potential jurors (see *Press-Enterprise I*, 464 US at 501; *People v Martin*, 16 NY3d 607, 611-612 [2011]), the method of conducting the voir dire is left to the sound discretion of the trial court (see *United States v Wecht*, 537 F3d 222, 242-243 [3d Cir 2008]). Where the voir dire entails discussion of controversial or sensitive issues such that public access to the jurors' responses would significantly inhibit their candor, the presumption of access may be outweighed by fair trial considerations (see *United States v King*, 140 F3d 76, 82-84 [2d Cir 1998]; *but see ABC, Inc v Stewart*, 360 F3d 90, 101 [2d Cir 2004] [findings insufficient to establish a substantial probability that open voir dire would have prejudiced the defendants' right to a fair trial]).

Here, the trial court did not commit clear error in denying the request from members of the press to observe pre-screening of potential jurors regarding scheduling and access to juror

questionnaires containing personal information such as the juror's experience with psychiatric care and mental illness. We note that the trial court has since made clear that transcripts of the pre-screening are to be made available to the press. The trial court struck an appropriate balance of the privacy interests of the jurors with the qualified right of public access by releasing a blank questionnaire to the press (see *United States v Taveras*, 436 F Supp 2d 493, 505 [ED NY 2006], *affd in part, vacated in part on other grounds*, 514 F3d 193 [2d Cir 2008] [blank questionnaire forms distributed to press; completed forms not available as they could be traced to individual jurors who revealed highly personal information on the promise of confidentiality]). Most importantly, jurors who were not excused on consent during the pre-screening were questioned in open court, with the press present. All for cause and peremptory challenges were exercised in open court.

Although New York courts have implicitly recognized that a writ of mandamus may be available where a trial court has allegedly not followed required procedures in closing criminal proceedings, this is balanced against the trial court's discretion when it determines that the qualified right of public access must yield to competing concerns, including the right of

the accused to a fair trial (see *Associated Press v Bell*, 70 NY2d at 38-39). The Court of Appeals has held that because the court will have balanced the competing interests before closing pretrial proceedings or sealing court records -- both acts within its full discretion and jurisdiction -- typically "neither mandamus nor prohibition is available" (*Crain Communications*, 74 NY2d at 628).

On this record, there is no clear right to mandamus. For all categories, the extant record establishes that the court acted with the consent or at the request of the parties. The trial court restricted access to proceedings and evidence on a permissibly limited basis, balancing the defendant's compelling right to a fair trial against the public's right of access to a criminal proceeding.

While we find, on the available record, that the trial court acted within its discretion and appropriately balanced the competing constitutional mandates before closing the courtroom and sealing certain records, we caution that going forward, the court must adhere strictly to the procedures set forth in the controlling case law including affording a full opportunity by any interested members of the press to be heard, and making specific findings to support its determination without revealing

the subject or issue, before closing the courtroom or sealing exhibits (see *Westchester Rockland Newspapers*, 48 NY2d at 442). We remind the trial court that it cannot close the courtroom or seal evidence and transcripts merely because the parties are consenting to same and the case has obtained notoriety. Of course, if the courtroom is closed, only those issues which require closure should be addressed and the courtroom reopened immediately upon conclusion of the closed proceedings.

Accordingly, the petition is denied and the proceeding is dismissed.

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

ENTERED: MARCH 12, 2015


CLERK

Friedman, J.P., Renwick, Moskowitz, Richter, Manzanet-Daniels, JJ.

13607-

Index 100138/12

13608 In re James J. Seiferheld,
Petitioner-Appellant-Respondent,

-against-

Raymond Kelly, etc., et al.,
Respondents-Respondents-Appellants.

Ungaro & Cifuni, New York (Nicholas Cifuni of counsel), for
appellant-respondent.

Zachary W. Carter, Corporation Counsel, New York (Inga Van Eysden
of counsel), for respondents-appellants.

Judgment, Supreme Court, New York County (Kathryn Freed,
J.), entered June 4, 2013, reversed, on the law, without costs,
petitioner's ADR benefits reinstated retroactive to the date of
revocation, the Board's April 11, 2007 determination vacated, and
the matter remanded to the Board for a consideration of the
options consistent with this opinion. Appeal from order, same
court and Justice, entered December 5, 2013, dismissed, without
costs.

Opinion by Renwick, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
Dianne T. Renwick
Karla Moskowitz
Rosalyn H. Richter
Sallie Manzanet-Daniels, JJ.

13607-13608
Index 100138/12

In re James J. Seiferheld, x
Petitioner-Appellant-Respondent,

-against-

Raymond Kelly, etc., et al.,
Respondents-Respondents-Appellants.

Cross appeals from the judgment of the Supreme Court,
New York County (Kathryn Freed, J.), entered
June 4, 2013, denying petitioner's
application for, inter alia, retroactive
reinstatement of accidental disability
retirement benefits, and confirming the Board
of Trustees' determination that petitioner be
returned to work as a police officer.
Respondents appeal from the order of the same
court and Justice, entered December 5, 2013,
which denied their motion for reargument of
the June 4, 2013 judgment.

Ungaro & Cifuni, New York (Nicholas Cifuni,
Robert A. Ungaro and Daniel Jaffe of
counsel), for appellant-respondent.

Zachary W. Carter, Corporation Counsel, New
York (Inga Van Eysden and Keith Snow of
counsel), for respondents-appellants.

RENWICK, J.

Petitioner James J. Seiferheld is a former New York City Police Department officer on disability retirement who was caught performing construction work while claiming to be disabled. After 11 years as an NYPD officer, Seiferheld incurred an on-the-job injury and applied for accidental disability retirement (ADR) benefits. Seiferheld claimed that he fell while walking on ice and snow, which caused various neck and shoulder injuries that prevented him from performing police duty. Seiferheld's application was granted, and he was awarded ADR in 2004. One month later, the NYPD received information that Seiferheld was working elsewhere. A lengthy NYPD investigation, including videotaped observations, showed that Seiferheld was performing construction work on a daily basis without apparent difficulty. Based on the NYPD reports, the Police Pension Fund's Board of Trustees remanded his disability application to the Medical Board for reconsideration. The Medical Board concluded that Seiferheld's condition had improved dramatically, and recommended disapproval of his disability application.

On April 11, 2007, the Board of Trustees voted to place Seiferheld on a list of candidates eligible to become police officers. The Board acted pursuant to the safeguards of the disability retirement provision of the City's Administrative Code

(see §§ 13-202[a], [b]; 13-216[a], [b]; 13-254), which provides that a disability pensioner found able to work could be required to return to City service. Within months, however, Seiferheld became medically disqualified for the position after he tested positive for cocaine. The City's Law Department then advised the Police Pension Fund that Seiferheld was no longer disabled and was no longer entitled to a disability pension. The Fund's Board of Trustees did not act on this advice. Instead, on July 18, 2007, the Fund's Director of Pension Payroll simply informed Seiferheld that his pension benefit would be suspended.

Seiferheld filed an article 78 petition to annul the Director's suspension of ADR benefits. Petitioner argued that the suspension of his disability was arbitrary and capricious. Alternatively, petitioner sought his reinstatement as a police officer. Supreme Court dismissed the petition in its entirety.

First, Supreme Court found that "the determination of the Medical Board that petitioner was no longer disabled was supported by ample evidence derived from physical examinations and contained in the medical records reviewed" (22 Misc 3d 1132[a], 7 [Sup Ct NY County 2008], *revd* 70 AD3d 460 [1st Dept 2010], *affd* 16 NY3d 561 [2011]). Supreme Court "[t]herefore [found that] the challenged determination was neither arbitrary nor capricious" (*id.*).

Second, Supreme Court acknowledged that the safeguards statute did not specify the consequences of a disability beneficiary like Seiferheld who, due to his own fault, became disqualified from returning to City service. Nevertheless, Supreme Court reasoned that the statute must have intended to either reduce or suspend his benefits (*id.*).

This Court reversed Supreme Court's decision and order. Initially, like Supreme Court, "we reject[ed] petitioner's challenge to the Medical Board's determination that he is no longer disabled, since that determination is supported by "some credible evidence" and was not arbitrary and capricious" (70 AD3d 460, 462 [1st Dept 2010]). Contrary to Supreme Court, however, we found that the "suspension" or revocation of petitioner's disability benefits by the Police Pension Fund was without statutory authority, because it was not directed by the Board of Trustees" (*id.* at 462-463]). This Court noted that "[t]he last determination issued by the Board in this matter was that petitioner was not disabled and should be returned to work as a police officer" (*id.*). This last majority vote by the Board of Trustees took place prior to petitioner's testing positive for cocaine, which made him ineligible to return to duty. Respondent City appealed to the Court of Appeals (16 NY3d 561 [2011]).

On appeal, the City argued that because petitioner was no

longer entitled to benefits, ceasing to pay the benefits was a "purely ministerial act" (*id.* at 567]). The Court of Appeals rejected this argument, and affirmed this Court's order annulling the termination of petitioner's pension benefits. The Court found that the "Appellate Division correctly held that the benefits can be terminated only by the trustees of the Police Pension Fund, who have not taken the necessary action" (*id.* at 564). The Court explained, in pertinent part:

"However well justified a reduction or termination of benefits may be in this case, the Board of Trustees has to do it. There might be cases in which the impropriety of paying benefits is so obvious that Pension Fund employees can simply stop paying, without either advance approval or ratification from the board; this might be true, for example, if the statute said on its face, "No benefits shall be paid to any beneficiary who has a positive drug test." But the application of the confusing safeguards statute to this case is something the trustees must address. Of course the trustees should weigh the advice of the City's Law Department in deciding the question, but the decision is theirs, subject to appropriate judicial review (*id.* at 567-568)."

On remand, the Board of Trustees met at the behest of the City. The City moved to terminate petitioner's ADR benefits retroactively to July 2007, when his pension was suspended by the Police Pension Fund. There was a tie vote (6 in favor of termination of benefits and 6 against termination of benefits). When the City took the position that the tie vote meant that the benefits had not been reinstated by the Board of Trustees,

Seiferheld commenced this petition seeking to compel the City to retroactively restore his ADR benefits. In response, the City continued to maintain its position that only a vote by a majority of the Board of Trustees could restore petitioner's pension benefits. Supreme Court denied the petition to the extent Seiferheld sought reinstatement of the ADR benefits. Supreme Court, however, granted the petition to the extent Seiferheld sought reinstatement to the position of police officer. Both Seiferheld and the City appealed.

We agree with the City that Supreme Court erred in granting that part of the petition seeking Seiferheld's reinstatement to the position of police officer. The court's direction to reinstate petitioner to his position of police officer was inconsistent with Administrative Code § 13-254, in that petitioner rendered himself unqualified by reason of a positive drug test for cocaine, a fact not known to the Trustees at the time they directed that petitioner's name be placed on the civil service list of persons eligible to be a police officer.

We, however, reject the City's contention that the Police Pension Fund's July 18, 2007 termination of petitioner's ADR benefits remains in effect until a majority of the Board of Trustees votes to reinstate petitioner's pension benefits. Such position is contrary to this Court's prior decision and order (70

AD3d at 460). Obviously, our revocation of the Police Pension Fund's determination meant that petitioner's benefits were reinstated by this Court. In fact, in our decision and order, we explicitly "restore[d] said benefits" (*id.*), and the Court of Appeals affirmed our determination (16 NY3d 564).

Without question, like the Court of Appeals, we find this case "very troubling" because Seiferheld's pension benefits should have been reduced or terminated once he tested positive for cocaine. However, as this Court - as well as the Court of Appeals - has held, the safeguard statute makes clear that any action under the statute must be taken by the Board of Trustees. The fact remains, however, that the only determination made by the Board thus far is that petitioner is no longer disabled and should be returned to work as a police officer. That result is not possible, since petitioner forfeited his right to be placed on the preference list of police candidates when he disqualified himself by testing positive for cocaine.

Thus, the Board of Trustees must now make a determination with respect to petitioner's entitlement to ADR benefits. The Board has two options under the law. It must either terminate petitioner's ADR benefits or reduce petitioner's ADR benefits. Absent Board action, petitioner shall receive ADR benefits retroactive to July 18, 2007, the date of the improper

termination of benefits by the Police Pension Fund. Whether to terminate or reduce the ADR benefits is the Board's choice. However, the Board must act to protect the Fund and the public. Their ultimate decision is subject to appropriate judicial review. Thus, the matter is remanded to the Board of Trustees for immediate action consistent with this decision and order.

Accordingly, the judgment of the Supreme Court, New York County (Kathryn Freed, J.), entered June 4, 2013, denying petitioner's application for, inter alia, retroactive reinstatement of accidental disability retirement benefits, and confirming the Board of Trustees' determination, dated April 11, 2007, that petitioner be returned to work as a police officer, should be reversed, on the law, without costs, petitioner's ADR benefits should be reinstated retroactive to the date of revocation, and the Board's April 11, 2007 determination should be vacated, and the matter remanded to the Board for a consideration of the options consistent with this opinion. The appeal from the order of the same court and Justice, entered

December 5, 2013, which denied respondents' motion for reargument of the June 4, 2013 judgment, should be dismissed, without costs, as taken from a nonappealable order.

All concur.

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

ENTERED: MARCH 12, 2015


CLERK