Acosta, P.J., Renwick, Manzanet-Daniels, Singh, JJ.

9987- Ind. 2644N/09
9987A The People of the State of New York, 2514N/10
Respondent,

-against-

Juan Rosario,
Defendant-Appellant.

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Appeals having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Bonnie G. Wittner, J.), entered on or about December 4, 2014,

And said appeals having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated May 15, 2020,

It is unanimously ordered that said appeals be and the same are hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: JULY 23, 2020

CLERK

Richter, J.P., Gische, Mazzarelli, Gesmer, JJ.

10931-
10931A The People of the State of New York,
Respondent,

-against-

Anthony Blue,
Defendant-Appellant.

Ind. 1402/13

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Office of the Appellate Defender, New York (Christina Swarns of counsel), and Milbank LLP, New York (Joseph M. DaSilva of counsel), for appellant.

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

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Order, Supreme Court, New York County (Ellen N. Biben, J.), entered on or about April 20, 2018, which denied defendant's CPL 440.10 motion, unanimously modified, on the law, and the matter remanded for consideration of defendant's constitutional speedy trial argument, and otherwise affirmed. Appeal from judgment (same court, Bruce Allen, J. at suppression hearing and CPL 30.30 motion; Ellen N. Biben, J. at jury trial and sentencing), rendered November 12, 2015, convicting defendant of five counts of burglary in the second degree, and sentencing him to five consecutive terms of five years, held in abeyance pending the outcome of the hearing on the CPL 440.10 motion.

In challenging the denial of his motion to vacate the conviction, defendant focuses on three separate perceived infirmities in the court's decision. One relates to his claim that both his statutory and constitutional rights to a speedy

trial were violated, based on the passage of over two years between the filing of the indictment and the People's filing of their certificate of readiness. Another is concerned with his claim that trial counsel was ineffective insofar as she allegedly failed to adequately investigate an alibi defense. The third point defendant raises on appeal is that the indictment did not conform to the requirements of CPL 190.65(3), which requires the "foreman or acting foreman [of a grand jury] [to] file an indictment with the court by which it was impaneled."

With respect to the speedy trial issue, defendant contends, and the People concede, that the court analyzed the issue only under the statutory CPL 30.30 standard, and did not address defendant's constitutional speedy trial argument at all. Accordingly, the matter should be remanded so the court can assess the constitutional claim in the first instance. However, we agree with the court's rejection of the two other claims. Defendant argues that he was prejudiced by his attorney's failure to pursue two alibi witnesses who defendant claims would have testified that he was with them in Florida during the two months when the burglaries that were the basis of the indictment occurred. Each purported witness submitted an affidavit in connection with the motion to vacate the conviction asserting that they were willing to testify on defendant's behalf. One of the witnesses stated that defendant's lawyer never contacted her.

It is initially noted that the lawyer did not represent

defendant at trial. She represented him until a little less than two years before trial, then served as his legal advisor when he decided to represent himself, and then stepped aside completely almost one year before trial. Indeed, defendant asserted in his motion that, after the attorney had been relieved as counsel (but was still his advisor), he personally arranged for a witness to come from Florida to testify, but that no testimony was taken because the People were not ready for trial. Thus, the record reflects that defendant had taken control of securing the witnesses' testimony; moreover, he offered no detail as to how counsel's involvement would have made a difference. It is further noted that the affidavits submitted by the proposed alibi witnesses fail to explain how those witnesses would actually prove that defendant was with them during the months in question. For these reasons, it cannot be said on this record that defendant has raised a factual issue whether he was actually prejudiced by any claimed deficient representation by counsel (*see Strickland v Washington*, 466 US 668, 694 [1984]).

Finally, there is no merit to defendant's argument that the court erred in summarily denying his claim that the indictment

did not conform to the requirements of CPL 190.65(3).

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

ENTERED: JULY 23, 2020

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Gesmer, Moulton, JJ.

11453 In re Meopta Properties II, LLC, Index 157339/18
Petitioner-Respondent,

-against-

Ana Maria Pacheco,
Respondent-Appellant.

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Davidoff Hutcher & Citron LLP, New York (Andrew K. Rafalaf of counsel), for appellant.

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Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered January 9, 2019, which, pursuant to RPAPL 881, granted petitioner a 60-day license to enter respondent's adjoining property to perform remedial and protective exterior work, unanimously affirmed, without costs.

In weighing the interests of the parties, we find that granting petitioner a 60-day license to access a limited exterior portion of respondent's property for the purpose of performing remedial and protective construction work is reasonable and that any inconvenience to respondent will be slight compared to the hardship to both parties if the license is refused (*see Matter of Board of Mgrs. of Artisan Lofts Condominium v Moskowitz*, 114 AD3d 491 [1st Dept 2014]; RPAPL 881).

Although no license fee was granted, the court ordered petitioner to obtain and maintain insurance to protect respondent's property interests. RPAPL 881 merely makes the licensee "liable . . . for actual damages occurring as a result of the entry." If respondent incurs actual damages, she will

have a cause of action against petitioner under the statute (*see Sunrise Jewish Ctr. of Val. Stream v Lipko*, 61 Misc 2d 673, 676-677 [Sup Ct, Nassau County 1969]). The court did not abuse its discretion in declining to award attorneys' and expert's fees under the circumstances of this case.

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

ENTERED: JULY 23, 2020

CLERK

Richter, J.P., Manzanet-Daniels, Kapnick, Kern, Oing, JJ.

11637N In re Alexander Gliklad, Index 652641/15
Petitioner,

-against-

Oleg Deripaska,
Respondent-Appellant.

- - - - -

Buzzfeed, Inc.,
Nonparty Respondent.

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Bryan Cave Leighton Paisner LLP, New York (Howard M. Rogatnick of counsel), for appellant.

Loevy & Loevy, New York (Matthew V. Topic of the Bar of the State of Illinois, admitted pro hac vice, of counsel), for respondent.

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Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered June 4, 2019, which, to the extent appealed from as limited by the briefs, granted nonparty BuzzFeed's request to unseal the petition and confidential settlement agreement in this dismissed special proceeding, unanimously reversed, on the law and the facts, without costs, and the matter remanded for further proceedings consistent with this decision.

Since the order was not predicated upon a motion made on notice, it is not appealable as of right (CPLR 5701[a][2]; *see Sholes v Meagher*, 100 NY2d 333, 335 [2003]). In the interest of justice, we deem appellant Deripaska's notice of appeal as a request for leave to appeal and grant leave for determination on the merits (*see* CPLR 5701[c]; *Mulligan v New York Cornell Med. Ctr.*, 304 AD2d 492 [1st Dept 2003]).

Initially, we agree that Supreme Court had jurisdiction to

unseal the documents, even if it had no personal jurisdiction over Deripaska (*see Gambale v Deutsche Bank AG*, 377 F3d 133, 141 [2d Cir 2004]). However, we find that the court abused its discretion in granting BuzzFeed's request to unseal the petition and settlement agreement in their entirety. The court improvidently found that Deripaska could not have reasonably relied on the confidentiality of the subject documents because they were not filed under seal. The record shows that the settlement agreement was the subject of a prior sealing order, and the documents were never made publicly available, but filed under restricted access, before they were placed under seal.

Nonetheless, as BuzzFeed persuasively argues, New York has a "long-standing, sound public policy 'that all judicial proceedings, both civil and criminal, are presumptively open to the public'" (*Matter of James Q.*, 32 NY3d 671, 676 [2019], quoting *Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 715 [1980]; *see also Mosallem v Berenson*, 76 AD3d 345 [1st Dept 2010]). Sealing of a document, when the public or press seeks to gain access to it, should not be permitted except in compelling circumstances especially where as occurred here, the court relied on the documents in reaching its decision (*see generally United States v Amodeo*, 71 F3d 1044, 1049 [2d Cir 1995]; *see also Mosallem,* 76 AD3d at 350). Buzzfeed contends that Deripaska is a well-known figure, who is connected to numerous people in American public life and American government at the highest

level. The motion court described him as a figure of "notoriety." Appellant does not dispute this but contends that good cause existed for the prior justices to seal these documents,[1] and that Buzzfeed has not met its burden to undo those rulings. Appellant further argues that since the documents were previously sealed, a higher standard should apply and that in applying this higher standard, Buzzfeed failed to demonstrate why the petition and settlement agreement should be unsealed (*see Geller v Branic Intl. Realty Corp.*, 212 F3d 734 [2d Cir 2000]; *see also Securities & Exch. Commn. v TheStreet.Com*, 273 F3d 222 [2d Cir 2001]).

Here, in light of the strong public policy in favor of open court records and the fact that the documents were relied on by the court in its decision, we conclude that Buzzfeed has shown that complete sealing is not necessary. We reject Deripaska's contention that Buzzfeed's request is motivated by mere curiosity (*see generally Danco Labs. v Chemical Works of Gedeon Richter*, 274 AD2d 1 [lst Dept 2000]).

In unsealing the documents, the motion court did not address whether a more narrow remedy, such as limited redaction, would serve to protect any confidential or proprietary information in the agreements. While appellant contends that he relied on the sealing order when agreeing to the English Settlement Agreement,

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[1]The validity of the prior justices conclusion, that there was good cause for sealing these business documents, is not before us.

neither the record nor the briefs contain a satisfactory explanation as to exactly how he would be prejudiced if it were released, provided that any confidential or proprietary information is redacted. In rejecting appellant's contention that all of the documents should remain sealed we are not holding that all such media applications should be granted, but rather that, on balance, in this case Buzzfeed has established a basis for obtaining access subject to any redactions. Accordingly, we remand to the motion court for it to determine, after further submissions if it determines that is necessary, and after in camera review of the unredacted records, whether any redactions are necessary before the documents are released.

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

ENTERED: JULY 23, 2020

CLERK

Friedman, J.P., Richter, Gesmer, Oing, Singh, JJ.

11690 Bayview Loan Servicing, LLC, Index 810056/11
Plaintiff-Appellant,

-against-

Alleyne Sylvester, et al.,
Defendants-Respondents,

New York City Environmental Control Board, et al.,
Defendants.

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Marc Wohlgemuth & Associates, P.C., Monsey (Jeremy M. Doberman of counsel), for appellant.

Ronald D. Weiss, P.C., Melville (Rosemarie Klie of counsel), for respondents.

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Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered August 8, 2017, which, to the extent appealed from as limited by the briefs, denied that branch of plaintiff's motion seeking an award of legal fees from surplus funds of a foreclosure sale, or in the alternative, for a hearing to determine the amount of legal fees to which it would be entitled to be paid from the foreclosure sale surplus monies, unanimously affirmed, without costs.

The note and mortgage upon which this foreclosure action is based contain provisions entitling plaintiff to recover attorney's fees reasonably incurred in enforcing its rights under the mortgage documents. The judgment of foreclosure and sale that plaintiff ultimately obtained directed the appointment of a referee to disburse proceeds of a sale of the subject property,

including payment to plaintiff of reasonable legal fees to be determined at an assessment proceeding, and also directed the referee, after paying plaintiff all amounts due it under the mortgage documents, to deposit any surplus funds with the court within five days of receipt of the foreclosure sale funds. However, plaintiff failed to seek an assessment of its claim to reasonable attorney's fees until after the referee had filed his report of the sale with the court and had deposited the surplus monies from the sale with the court. Under these circumstances, the motion court properly denied plaintiff's confirmation motion to the extent that motion sought an award from the surplus sale proceeds deposited with the court of the attorney's fees that plaintiff had previously incurred in the foreclosure action and related proceedings (*see generally* RPAPL 1361[2]; *cf. Reilly v Empire State Improvement Corp.*, 251 NY 351 [1929]; *Mortgage Elec. Registration Sys., Inc. v Elliot*, 69 AD3d 911 [2d Dept 2010]).

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

ENTERED: JULY 23, 2020

CLERK

CORRECTED ORDER - JULY 28, 2020

Richter, J.P., Kapnick, Webber, Gesmer, Moulton, JJ.

11742 In re Northern Manhattan Is Not for Sale, et al., Petitioners-Respondents,

-against-

City of New York, Respondent-Appellant.

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207 Street Owner LLC, 410 West 207th Acquisition LLC, Shermans Creek Development Corporation, and Consolidated Edison Company of New York, Inc., **The New York Public Library, Astor, Lenox and Tilden Foundations, New York State Senator Robert Jackson, and Member of Congress Adriano Espaillat,** Amici Curiae.

Index 161578/18

James E. Johnson, Corporation Counsel, New York (Scott Shorr of counsel), for appellant.

Sussman & Associates, Goshen (Michael H. Sussman of counsel), for respondents.

Akerman LLP, New York (Richard G. Leland of counsel), **for 207 Street Owner LLC, 410 West 207th Acquisition LLC, Shermans Creek Development Corporation, and Consolidated Edison Company of New York, Inc., amici curiae.**

Benjamin Mickle, New York, for The New York Public Library, Astor, Lenox and Tilden Foundations, amici curiae.

Law Office of Bonnie H. Walker, PLLC, New York (Bonnie H. Walker of counsel), for New York State Senator Robert Jackson and Member of Congress Adriano Espaillat, amici curiae.

Order and judgment (one paper), Supreme Court, New York County (Verna L. Saunders, J.), entered December 19, 2019, which

granted the petition to annul the New York City Council's resolutions adopting the subject rezoning plan, on the ground that the underlying environmental reviews failed to comply with the requirements of the State Environmental Quality Review Act (SEQRA) (ECL 8-0101 *et seq.*; 6 NYCRR 617.1 *et seq.*) and City Environmental Quality Review (CEQR) (43 RCNY 6-01 *et seq.*; 62 RCNY 5-01 *et seq.*), unanimously reversed, on the law, the petition denied, and the proceeding brought pursuant to CPLR article 78 dismissed, without costs.

In the spring of 2015, the New York City Economic Development Corporation began a three-and-a-half-year study into the long-term future of the Inwood neighborhood of Manhattan. This study, which included community outreach, bilingual public events, meetings with stakeholder groups, and virtual town halls, resulted in the release in June 2017 of the Inwood NYC Action Plan (the Plan); an updated Plan was released in December 2017. The Plan called for revitalizing Manhattan's Inwood section through rezoning and over $400 million in capital and programmatic investments. Specifically, the Plan called for construction of a new mixed-use building with a new library facility to replace the existing Inwood branch of the New York Public Library, updated and expanded residential zoning with provisions for affordable housing, new waterfront parks, improvements to existing parks and streets, and a new performing

arts center. Moreover, to the extent the rezoning proposal would allow for new residential development, the City's Mandatory Inclusionary Housing (MIH) program requires the creation of permanent affordable housing in new residential buildings. The Office of the Deputy Mayor for Housing and Economic Development (DMHED) was designated lead agency for SEQRA/CEQR review (*see* 6 NYCRR 617.2[v]). The City Council was an "involved agency" for purposes of SEQRA/CEQR review (*see* 6 NYCRR 617.2[t]).

In August 2017, DMHED released its environmental assessment statement and a positive declaration for the project indicating that there was a potential for adverse environmental impacts due to the project. Thus, DMHED directed that a draft environmental impact statement (DEIS) be prepared. The DEIS was completed in January 2018, and made available for public review and comment. A series of public hearings followed, and in response to the feedback, the City modified the zoning proposal. As required by SEQRA/CEQR, all public comments became part of the SEQRA/CEQR record.

On June 14, 2018, DMHED issued the 1,100-page Final EIS (FEIS), which addressed 19 impact categories, the potential for adverse impacts, alternatives to the proposed rezoning, and measures for mitigation. The FEIS also included a chapter that provided detailed responses to comments received during the comment period for the DEIS.

On August 2, 2018, the City Council's Subcommittee on Zoning and Franchises voted to approve the zoning proposal, with modifications. On August 3, 2018, DMHED issued technical memorandum (TM) 003, which found that the modifications would not raise any new significant adverse environmental impacts.

On August 8, 2018, the City Council approved the rezoning proposal, as modified. The Council specifically adopted the FEIS and subsequent TMs as the written statement of facts supporting its determination. Additionally, in making its determination, the City Council relied on the CEQR Technical Manual. On October 18, 2018, DMHED issued its statement of SEQRA findings. Based on review of the FEIS and TMs, DMHED found that the expected benefits of the Plan, including mandated affordable housing, provided a rationale for proceeding with the Plan notwithstanding its unavoidable environmental impacts.

The Court of Appeals stated in *Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 414-415 [1986], that

> "SEQRA insures that agency decision-makers – enlightened by public comment where appropriate – will identify and focus attention on any environmental impact of proposed action, that they will balance those consequences against other relevant social and economic considerations, minimize adverse environmental effects to the maximum extent practicable, and then articulate the bases for their choices."

The core of SEQRA is the Environmental Impact Statement process. Once the lead agency determines that a proposed action or plan includes "the potential for at least one significant

adverse environmental impact," the lead agency is required to produce an EIS (6 NYCRR 617.7[a][1]). "An EIS must assemble relevant and material facts upon which an agency's decision is to be made. It must analyze the significant adverse impacts and evaluate all reasonable alternatives" (6 NYCRR 617.9[b][1]). "EISs should address only those potential significant adverse environmental impacts that can be reasonably anticipated and that have been identified in the scoping process. EISs should not contain more detail than is appropriate considering the nature and magnitude of the proposed action and the significance of its potential impacts" (6 NYCRR 617.9[b][2]).

"It is axiomatic that judicial review of an agency determination under [SEQRA] is limited to whether the agency procedures were lawful and whether the agency identified the relevant areas of environmental concern, took a hard look at them, and made a reasoned elaboration of the basis for its determination" (*Matter of Friends of P.S. 163, Inc. v Jewish Home Lifecare Manhattan*, 146 AD3d 576, 577 [1st Dept 2017], *affd* 30 NY3d 416 [2017] quoting *Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d at 417 [internal quotation marks omitted]). Moreover, "it is not the role of the courts to weigh the desirability of any action or choose among alternatives, but to assure that the agency itself has satisfied SEQRA, procedurally and substantively" (*Matter of Jackson*, 67 NY2d at 416).

"An agency's compliance with its substantive SEQRA obligations is governed by a rule of reason and the extent to which particular environmental factors are to be considered varies in accordance with the circumstances and nature of particular proposals" (*Akpan v Koch*, 75 NY2d 561, 570 [1990]). Moreover, "[n]ot every conceivable environmental impact, mitigating measure or alternative must be identified and addressed before a FEIS will satisfy the substantive requirements of SEQRA" (*Aldrich v Pattison*, 107 AD2d 258, 266 [2d Dept 1985]). "What must be required is that information be considered which would permit a reasoned conclusion" (*Matter of Friends of P.S. 163*, 146 AD3d at 578, quoting *Coalition Against Lincoln W. v City of New York*, 94 AD2d 483, 492 [1st Dept 1983], *affd* 60 NY2d 805 [1983]). "Thus, the court may only annul a determination as to the sufficiency of an environmental impact statement and the environmental consequences of the proposed project 'if it is not rational – if it is arbitrary and capricious or unsupported by substantial evidence'" (*Aldrich v Pattison*, 107 AD2d at 267, quoting *Town of Hempstead v Flacke*, 82 AD2d 183, 187 [2d Dept 1981]).

Petitioners commenced this article 78 proceeding in December 2018, seeking an order annulling the Council resolutions adopting the Inwood rezoning plan. Petitioners argued that the City violated SEQRA and CEQR by failing to take a "hard look" at eight

issues: (1) impact of rezoning on existing preferential rents and effect on renter displacement; (2) impact on area racial makeup; (3) impact on minority and women-owned businesses (MWBEs); (4) accuracy of prior City FEIS projections on rezoning impacts; (5) impact of loss of the existing Inwood library; (6) impact on emergency response times; (7) cumulative impact of other potential area rezonings, including the adjacent 40-acre MTA railyard; and (8) speculative purchase of residential buildings in the wake of the rezoning. Petitioners also contended that the Council's August 8, 2018 vote adopting the rezoning was contrary to law because it was done prior to DMHED's issuance of its statement of findings on October 18, 2018.

The article 78 court determined that the City did not take a "hard look" at the eight issues raised by petitioners despite the fact that petitioners raised these issues during the public comment period for the DEIS. The court rejected the City's argument that it is not required to identify or address every conceivable environmental impact. The court also found that the City's reliance on the CEQR Technical Manual was misguided because the CEQR manual is a guideline and not a rule or regulation requiring strict compliance.

We find that the City's decision was not arbitrary and capricious, unsupported by the evidence, or contrary to law.

The City took the requisite "hard look" at all the issues

requiring study under SEQRA/CEQR (*Matter of Friends of P.S. 163, Inc. v Jewish Home Lifecare, Manhattan*, 30 NY3d 416, 430 [2017]; *Matter of Riverkeeper, Inc. v Planning Bd. of Town of Southeast*, 9 NY3d 219, 231-232 [2007]), but did not have to parse every sub-issue as framed by petitioners (*see Matter of Jackson,* 67 NY2d at 420-421). Moreover, the City was "entitled to rely on the accepted methodology set forth in the [CEQR] Technical Manual" (*Matter of Friends of P.S. 163*, 146 AD3d at 579; *see Matter of Chinese Staff & Workers' Assn. v Burden*, 88 AD3d 425, 429-430 [1st Dept 2011], *affd* 19 NY3d 922 [2012]), including in determining what issues were beyond the scope of SEQRA/CEQR review.

To the extent certain issues required a hard look to satisfy SEQRA, the FEIS provided reasoned explanations for the City's actions. For example, the FEIS stated that with regard to direct residential displacement, as none of the projected development sites included any residential units, "no existing residential units would be directly displaced." The FEIS also addressed indirect residential displacement, which required an analysis of the socioeconomic characteristics of the current population, and found that "approximately 83 percent of the rental housing stock is rent regulated and/or subsidized . . . [and that an] estimated 4,500 housing units . . . [were] unprotected by rent regulation." However, due to the shortage of housing in the Inwood

neighborhood, these unprotected units were likely already experiencing rent pressures. Under the proposed rezoning, various protections would be instituted to assuage the housing squeeze that Inwood residents were experiencing and would continue to experience without any intervention. Such protections included density caps, implementation and enforcement of the MIH program, and the requirement that new residential developments contain a certain percentage of permanent affordable housing units. Thus, the planned rezoning and new residential developments would likely improve the rental situation, or at least ease the rent pressures that were already in effect.

Although we understand petitioners' desire to require the City to explore the potential impacts on racial and ethnic groups, the City "was not required to perform analysis aimed at forecasting the mix of ethnicities expected to occupy units in the development, and the corresponding impact on prevailing area patterns of racial and ethnic concentration" (*Matter of Churches United for Fair Hous., Inc. v De Blasio*, 180 AD3d 549, 550 [1st Dept 2020]).

Although the FEIS did not specifically address MWBEs, it did study the direct and indirect displacement of businesses in the rezoning area and found that the "Proposed Actions" would not result in significant adverse impacts. The City determined that the Plan would broadly promote business development by increasing

density and allowing a wider variety of types and uses of several blocks in the study area. Further, the FEIS noted that at least some opportunity for MWBEs would be created because developers of certain City-funded projects were required to spend at least a quarter of costs on MWBEs. In any event, and as argued by the City, pursuant to the CEQR Technical Manual, the characteristics of business ownership are not considered in a CEQR analysis. Thus, the City's decision not to specifically analyze the Plan's impact on area MWBEs was rational and complied with SEQRA/CEQR (*Churches United*, 180 AD3d at 550; *see also Matter of Friends of P.S. 163*, 146 AD3d at 579).

With respect to petitioners' remaining points of contention, it was not unreasonable for the City to determine that those issues were beyond the scope of SEQRA/CEQR review pursuant to the CEQR Technical Manual, did not result in a significant adverse impact, or were based on speculation and hypotheticals and therefore did not warrant further review. It bears repeating that, under the controlling precedent, the City "is entitled to rely on the accepted methodology set forth in the [CEQR] Technical Manual" (*Matter of Friends of P.S. 163*, 146 AD3d at 579, *affd* 30 NY3d 416 [2017]). To the extent petitioners take umbrage with the limited scope of the SEQRA/CEQR review process, this argument can only be raised to the legislative body that periodically revises the criteria contained in the CEQR Technical

Manual. In the meantime, this Court is constrained by the limited standard of review under the statute (*id.*; *see also Matter of Jackson*, 67 NY2d at 416-417).

The City Council acted properly, and consistently with SEQRA/CEQR procedures, in approving the rezoning and issuing its own written statement finding that the rezoning avoided or minimized adverse environmental impacts to the maximum extent practicable (*see* ECL 8-0109[8]; 6 NYCRR 617.11[d][2]-[3]). This is so notwithstanding that the Council acted prior to the lead agency's issuance of its written statement of findings two months later. As an "involved agency" (6 NYCRR 617.2[t]; *Troy Sand & Gravel Co., Inc. v Town of Nassau*, 125 AD3d 1170, 1172-1173 [3d Dept 2015]), the Council was authorized to engage in its own weighing and balancing of relevant considerations and issue its own statement of findings independent of the lead agency (*see Matter of Troy Sand & Gravel Co., Inc. v Fleming*, 156 AD3d 1295, 1300 [3d Dept 2017], *lv denied* 31 NY3d 913 [2018]).

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

ENTERED: JULY 23, 2020

CLERK

Friedman, J.P., Renwick, Gische, Mazzarelli, Moulton, JJ.

11814-
11815 The People of the State of New York, ex rel. Corey Stoughton, on behalf of Venus Williams, et al., Petitioners-Appellants,

-against-

Cynthia Brann, etc., et al., Respondents-Respondents.

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Physicians for Human Rights and Affiliated Medical Professionals, Amici Curiae.

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The People of the State of New York, ex rel. Brent Low and Jeremiah Rygus, on behalf of Hassan Muhammad, et al., Petitioners-Appellants,

-against-

Cynthia Brann, etc., et al., Respondents-Respondents.

Index 451609/20
260234/20

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Janet E. Sabel, The Legal Aid Society, New York (Corey Stoughton of counsel), for Gregory Jason, Anibal Quinones, Anthony Brown, Gian Verdelli, Eleuterio Carmona, Joseph Torres, Freddie Johnson, Ricardo Gonzales, Willie Florence and Hollis Hosear, appellants.

Brent Low and Jeremiah Rygus, Neighborhood Defender Service of Harlem, New York (Jeremiah Rygus of counsel), for Hassan Muhammad, Juan Reyes, Bala Niambele, Gregory Murad and Dennis Brown, appellants.

James E. Johnson, Corporation Counsel, New York (Jonathan Popolow of counsel), for Cynthia Brann, respondent.

Letitia James, Attorney General, New York (Philip J. Levitz of counsel), for Anthony Annucci, respondent.

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

Bridget G. Brennan, Special Narcotics Prosecutor, New York (Jannine Rowser of counsel), for Bridget G. Brennan, respondent.

Cleary Gottlieb Steen & Hamilton LLP, New York (Thomas J. Moloney of counsel), for amici curiae.

Judgment (denominated an order), Supreme Court, New York County (Steven M. Statsinger, J.), entered on or about March 20, 2020, and judgment (denominated a decision), Supreme Court, Bronx County (Albert Lorenzo, J.), entered on or about April 13, 2020, denying the petitions for writs of habeas corpus, unanimously affirmed, without costs.

These two "mass" habeas corpus proceedings are brought by defendants incarcerated on Rikers Island. Some are awaiting trial, and others have been convicted and are alleged to have violated their conditions of parole. Petitioners claim federal and state constitutional violations stemming from their continued detention despite the ongoing COVID-19 pandemic. The *Stoughton* proceeding was commenced on or about March 20, 2020 by 116 inmates at Rikers Island. All but nine of those petitioners have since been released. Each of the nine remaining petitioners allege that they have underlying conditions, including cardiovascular disease, hepatitis C, diabetes, asthma, and pulmonary disease. The *Low* proceeding was brought on or about April 8 by five Rikers inmates, only two of whom remain incarcerated. One petitioner is HIV-positive, and the other is a diagnosed tuberculosis carrier who also claims to be asthmatic.

The *Stoughton* petitioners were denied habeas relief, initially on the basis that they did not establish that

respondents' failure to release them in the face of the health threat amounted to the constitutional violation of "deliberate indifference." Deliberate indifference is the standard applied under the 14th Amendment where an inmate alleges that conditions of confinement "pose an unreasonable risk of serious damage" (*Darnell v Pineiro*, 849 F3d 17, 30 [2d Cir 2017]) and that officials "recklessly failed to act with reasonable care to mitigate the risk that the condition posed to the pretrial detainee even though the [officials] knew, or should have known, that the condition posed an excessive risk to health or safety" (*id.* at 35). On a motion for renewal brought by the *Stoughton* petitioners, the court elaborated that, unlike the usual case where a defendant is released from court and is given a date certain to return there, here petitioners were being asked to be released from *jail*, with there being no mechanism to advise them as to when they were expected to return. Thus, in addition to adhering to its determination on the federal constitutional question, the court rejected the state constitutional due process violation alleged by petitioners. The State Constitution is violated in condition-of-confinement cases where there is deliberate indifference, but the analysis also requires a balancing of the harm to the individual resulting from the alleged condition against the benefit sought by the State through continuation of the condition (*Cooper v Morin*, 49 NY2d 69, 79 [1979]). Here, the *Stoughton* court found that the second prong

weighed heavily in favor of respondents, since the need to ensure petitioners' return to jail was "a compelling governmental interest that would be affected to an extreme degree by the relief requested." The court additionally held that the individual petitioners provided insufficient factual information necessary to assess their flight risks, as well as the particular medical vulnerabilities that heightened their risks for serious illness or death if they contracted COVID-19.

The *Low* petitioners were also denied habeas relief. That court did not engage in the constitutional analysis performed by the *Stoughton* court; rather, it recited the flight risk factors posed by each petitioner were they to be released and the health conditions alleged by each petitioner, and concluded in each case that there was a compelling reason articulated by the State to continue the detention. With respect to petitioner Juan Reyes, the court noted that he was on parole for sexual crimes when he was rearrested for video recording up a woman's skirt. As for petitioner Dennis Brown, the court observed that he was on parole when he failed to report to a required program, changed his address, and was rearrested for assault.

On appeal, petitioners collectively argue that the courts erred in holding that respondents did not act with deliberate indifference to the presence of COVID-19 in the jail and the effect it can have on vulnerable inmates. Petitioners identify the risk as the undeniable presence of the novel coronavirus

within the jail, coupled with their particular vulnerabilities to the potentially deadly effects of the virus. With respect to the conditions, petitioners acknowledge the substantial measures prison officials have taken to mitigate the spread of the virus among the jail population. However, they assert that any measures short of immediate release from custody would be insufficient to protect them from the risk of contracting COVID-19 in light of their medical risk factors. They point to the constant turnover of inmates in the jails, where there is a regular stream of new arrivals. Further, they state that while jail authorities have instituted testing, it is not done regularly on new detainees, and then only on symptomatic and vulnerable people, missing those who may be carrying the virus but are asymptomatic. More concerning to petitioners is the fact that prison staff, who leave the facility after each shift to interact with, and possibly be exposed to the virus by, their families, friends, and countless other people whom they encounter, are not being regularly tested when arriving for their next shift. In fact, petitioners assert that as of mid-May, the vast majority of people at the jail who have contracted the virus were people who work there. Petitioners also cite calls from correctional public health experts, including from the New York City Board of Correction and Correctional Health Services (CHS), to immediately release those most vulnerable to the virus.

Petitioners further cite to the impossibility of "perfect"

infection containment. Indeed, the *Low* petitioners append an "observational audit" performed by the DOC in April, and they characterize the published findings as demonstrating that the efforts to mitigate spread of the virus by taking steps such as mandating mask wearing, keeping prisoners physically distanced from each other and aggressively disinfecting surfaces, are, however sincere, "merely aspirational." For example, the study found that only 50% of cell areas housing people who were symptomatic or exposed to the virus had a limited number of detainees and proper social distancing practices. Further, only 54% of staff were observed wearing masks consistently and correctly. Petitioners contend that DOC has made no effort to explain how, considering these data points, the mitigation steps DOC has taken will protect each petitioner from contracting the virus. Petitioners also contend that the courts should have found that respondents violated the due process clause of the state constitution. They assert that their interest in avoiding the worst effects of the novel coronavirus obliterates the corresponding interest of the government in ensuring their presence at their next court appearances.

As for respondents' positions, the City Department of Correction certainly does not claim to guarantee a COVID-free environment in the city jails. However, it contends that it has done everything reasonably possible to minimize the spread of the disease, and that it has been successful in "flattening the

curve" and seeing very few detainees die. Indeed, the City asserts that releasing detainees where it has direct authority to do so, and otherwise working with the State to suggest release of other detainees, are important weapons in its arsenal against COVID, and claims that, as a result, its jail population is the lowest it has been since the 1940s. This, the City contends, has resulted in the "overwhelming majority" of dormitory units being less than half-full, greatly increasing the ability to promote social distancing. The City also touts its early success in providing masks to all detainees and staff members, with replacements readily available, and its aggressive testing regime, with testing at a rate that is over four times the rate conducted of the general New York City population.

The City additionally stresses that it has taken substantial steps to segregate from the rest of the jail population those detainees who are medically vulnerable and those who have tested positive for COVID-19. For example, a building that had recently been closed was converted into a "surge" medical unit. Further, prison officials established therapeutic housing whereby detainees who are asymptomatic but considered high risk are separated from other inmates and are closely monitored by medical personnel, while those who are symptomatic with test results pending are housed in single cells. Notably, as of the submission of this appeal, three Rikers detainees had died from COVID-19, which, while tragic, is proportionately lower than the

death rate for the general New York City public. The City notes that, on May 19, 2020, one month after the "observational audit" on which petitioners rely, the senior vice president of CHS appeared before the New York City Council Committees on the Justice System and Criminal Justice, and testified that:

> "As a result of the Department's longstanding emergency preparedness protocols, our considerable experience in contagious disease management, adherence to CDC and DOHMH guidelines, and innovative problem-solving, we are seeing success. The number of new positive cases and quarantined housing units across the facilities is steadily declining, a clear indication that our containment strategies are working."

For its part, New York State Department of Corrections and Community Supervision (DOCCS) acknowledges that the most preferable course of action to combat the spread of COVID-19 is release, and argues that it has taken a comprehensive review of detainees being held on parole violations and new criminal charges to see who can be safely let out. However, it states that part of this review involves the assessments it makes whenever it is faced with recommending that an arrestee be permitted to remain at liberty while charges are pending. For parole violators this encompasses considering their risk scores, whether they were convicted of sex offenses, whether they suffer from mental illness or have a history of domestic violence, and whether they had existing residences or placements in housing facilities. Indeed, DOCCS maintains that approximately one half of all people being held on technical parole violations or

absconding charges have been released in accordance with this policy. It further asserts that it is implementing new criteria for issuing parole warrants designed to narrow the pool of new detainees.

DOCCS argues that there has been no constitutional violation because the data show that the City's efforts, over which DOCCS has no control, have actually resulted in a steady decline in the number of COVID-19 cases in City jails. Thus, petitioners cannot establish that the State has been deliberately indifferent to petitioners' health concerns. In any event, DOCCS argues that petitioners have the burden of establishing deliberate indifference, and have not met it, since they failed to explain how their particular, individualized circumstances, including the conditions of their confinement, placed them at increased risk of becoming seriously ill. At the same time, DOCCS stresses that it has explained the particularized threat to society flowing from any decision to release petitioners, and that its conclusions concerning those detainees outweigh any threat to petitioners' health given the mitigation measures being taken in the jail.

We agree with the result in each of these proceedings. Far from acting recklessly, respondents have demonstrated great care to ensure the safety of everyone who enters the facility. By any objective measure, they have been anything but indifferent to the risk that COVID-19 poses to the jail population.

Even petitioners admit that respondents have taken

substantial measures to reduce the spread of the virus on Rikers Island, and have had success in doing so. Moreover, petitioners have not cited to any controlling authority to establish that anything short of release constitutes deliberate indifference. They do cite a plethora of federal district court cases granting habeas corpus petitions related to COVID-19, but those decisions involved immigration detainees where the United States Immigration and Customs Enforcement agency (ICE) did virtually nothing to mitigate the threat. The contrast between those cases and this one is clear, especially where ICE detainees are being held on civil immigration violations, not in connection with crimes. For these reasons, petitioners have failed to establish any due process violation under the United States Constitution.

We further hold that petitioners have not made out a claim under the State Constitution. The State articulated compelling reasons why petitioners needed to continue to be held, such as their commission of serious offenses and violations of parole. That the State has agreed to release a significant number of detainees to help control the spread of the virus actually demonstrates that it has given a great deal of consideration to who should and should not be released, and its decision not to release petitioners based on their criminal history backgrounds is thus persuasive. Coupled with what the State and City have done to protect detainees, discussed above, we conclude that the weighing of interests falls in respondents' favor.

We also believe that, notwithstanding that we perceive no constitutional violation in these cases, deciding them in a holistic fashion is less than ideal. It would be the better practice for habeas courts reviewing future cases while the pandemic persists to perform individualized assessments of those who petition the court for release. These assessments should consider, at the very least, each petitioner's risk of flight as assessed by the state, the particular health factors asserted by the petitioner as documented by appropriate medical records and physician affirmations where practical, the specific conditions of the petitioner's confinement at the time the petition is filed, and the environment into which the petitioner will be released and whether there is a plan in place to protect that person from contracting the virus and to monitor their health. With that data, courts hearing similar petitions will be in a good position to balance the competing interests at issue, and make decisions that recognize the potentially serious implications of confinement on detainees with underlying health conditions, but at the same time ensure the State's ability to enforce the law against those who might not return to face justice once released. We note that much of the information outlined above, which would be critical to make the necessary individualized assessments, was not supplied by petitioners in

these proceedings. Accordingly, even had the habeas courts attempted to decide the petitions on a case-by-case basis, they would have been faced with inadequate records.

M-1707 - ***The People of the State of New York, ex rel. Corey Stoughton, on behalf of Venus Williams, et al. v Cynthia Brann, Commissioner, New York City Department of Correction, et al.***

Motion by Physicians for Human Rights, among others, to file amici brief granted.

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

ENTERED: JULY 23, 2020

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rolando T. Acosta, P.J.
Dianne T. Renwick
Troy K. Webber
Ellen Gesmer, JJ.

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Index 24579/19E

_____x

Angel Rojas,
Plaintiff-Respondent,

-against-

Richard Romanoff, et al.,
Defendants-Appellants.

_____x

Defendants appeal from an order of the Supreme Court, Bronx County (John R. Higgitt, J.), entered September 20, 2019, which denied defendants' motion to dismiss the complaint.

Hollander Legal Group, PC, Melville (Allan S. Hollander of counsel), for appellants.

Goldstein & Handwerker, LLP, New York (Jason Levine of counsel), for respondent.

RENWICK, J.

This personal injury action raises long established principles of res judicata and collateral estoppel, more commonly referred to, respectively, as claim preclusion and issue preclusion. Specifically, this appeal concerns the preclusive effect on claims and issues in a personal injury action of a prior first-party, no-fault benefits action.[1] In the present action, plaintiff sues defendants, the owner and driver of a motor vehicle that allegedly collided with plaintiff pedestrian. In the prior action, Nationwide Agribusiness Insurance Company, defendants' (driver/owner) insurer, brought a declaratory judgment action against plaintiff and, by default judgment, obtained a declaration that it was not obligated to pay no-fault benefits to the claimant, plaintiff here, under the policy covering defendants' motor vehicle. In the declaratory judgment action, Nationwide claimed, among other things, that the injuries sustained by plaintiff did not come from the use or operation of

[1]New York's no-fault scheme—contained in article 51 of the Insurance Law – requires owners of vehicles to carry insurance with $50,000 minimum limits, which covers basic economic loss, i.e., first-party benefits, on account of personal injury arising from the use or operation of a motor vehicle. Basic economic loss includes, among other things: (1) medical expenses; (2) lost earnings up to $2,000 per month for three years; and (3) out-of-pocket expenses up to $25 per day for one year (Insurance Law § 5102[a]).

a Nationwide insured vehicle and that plaintiff's injuries were caused while he was operating a motorcycle, which is not covered by no-fault law.[2] Those issues were never litigated, because the declaratory judgment was granted on default.

We affirm the order of Supreme Court that denied defendants' motion to dismiss the complaint on the grounds of collateral estoppel and res judicata. We hold that neither claim preclusion nor issue preclusion applies to bar this personal injury action. First, the default nature of the judgment rendered in the prior declaratory judgment action prevents application of issue preclusion. Second, claim preclusion also does not apply because both actions did not involve the same parties or their parties in privity. As fully explained below, "same parties" means the same adversarial parties, and plaintiff and defendants were not

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[2]Article 51 of the Insurance Law, also known as the "No-Fault Law," applies to any cyclist, pedestrian, passengers, or driver injured by a motor vehicle in New York. The conditions that must be met to qualify for no-fault coverage include, among others: The accident occurred in New York and the injured party was the driver or passenger of the insured vehicle or a cyclist or pedestrian struck by or in contact with the motor vehicle (see Insurance Law § 5102(d)). The no-fault concept embodied in the Insurance Law modifies the common law system of reparation for personal injuries under tort law *(Safeco Ins. Co. of Am. v Jamaica Water Supply Co.*, 83 AD2d 427, 431 [2d Dept 1981], *affd* 57 NY2d 994 [1982] ["[F]irst-party benefits are a form of compensation unknown at common law, resting on predicates independent of the fault or negligence of the injured party"] (*id.*).

adversaries in the prior litigation. As to claim preclusion, the only adversaries in the prior action were plaintiff (as a defendant) and defendants' (driver's/owner's) insurer, Nationwide (as the plaintiff) with whom defendants (driver/owner) were not in privity in the no-fault benefits dispute.

Factual and Procedural Background

This personal injury action was commenced by plaintiff Angel Rojas against defendants Richard Romanoff and Nebraskaland, Inc. to recover damages for personal injuries sustained during a purported motor vehicle accident that occurred on September 15, 2016. Plaintiff claims that he was "walking" his motorcycle across the street when he was struck by a vehicle being driven by defendant Richard Romanoff and owned by defendant Nebraskaland, Inc. Defendants, however, maintain that plaintiff fell off his motorcycle while performing wheelies, and that Romanoff slowly drove over one of the wheels of plaintiff's motorcycle, but did not actually strike plaintiff. Allegedly, plaintiff and others then collected the motorcycle and fled the scene, while Romanoff remained and called the police. A group of males allegedly then began to gather and bang on his car, causing Romanoff to flee out of fear. The group pursued Romanoff past a security entrance at the Hunts Point Meat Market and blocked him from leaving before continuing to attack and damage his vehicle.

After plaintiff filed a claim for no-fault benefits from Nationwide, defendants' insurer, Nationwide commenced a declaratory judgment action in Supreme Court, Nassau County, seeking a declaration, among other things, that: plaintiff was not an "eligible injured person," and had made material misrepresentations of fact and false/fraudulent statements in connection with his claim, and therefore was not entitled to no-fault benefits from Nationwide; "the injuries sustained by [plaintiff] did not arise from the use or operation of a NATIONWIDE insured vehicle"; plaintiff's "injuries were caused while he was operating a motorcycle" and Nationwide was not obligated to pay no-fault benefits, or afford bodily injury coverage, to plaintiff. Defendants here (Nationwide's insureds, driver/owner) were also named as nominal defendants in the declaratory judgment action. However, Nationwide did not seek any specific relief or declaration against its insureds regarding its duties under the motor vehicle policy to defend and indemnify the owner and driver of the insured vehicle.

Plaintiff defaulted in appearing in the declaratory judgment action, and, as a result, a default judgment was entered on January 24, 2018, which declared that Nationwide was not obligated either to pay no-fault benefits or to afford any bodily injury coverage to plaintiff for personal injuries arising from

the September 15, 2016 incident. After plaintiff commenced this action in Supreme Court, Bronx County in April 2019, defendants moved pre-answer to dismiss. In support, they argued that the default judgment in the Nassau County declaratory judgment action collaterally estopped plaintiff and barred plaintiff by res judicata from relitigating whether defendants were liable for any injuries that plaintiff may have allegedly suffered. In opposition, plaintiff argued that he did not fully litigate the issues raised in the declaratory judgment action, since the judgment in that case was entered on default. Supreme Court denied defendants' motion. It held that the default judgment in the Nassau County declaratory judgment action did not collaterally estop plaintiff in this action because plaintiff did not willfully or deliberately refuse to participate in that action. Nor was plaintiff barred by res judicata since the judgment entered in the Nassau County declaratory judgment action was entered on his default, and the issues in that action were not the same as those raised in the instant case.

Discussion

Conceptually, "res judicata" is an umbrella term encompassing both claim preclusion and issue preclusion, which are described as two separate aspects of an overarching doctrine (*see Gramatan Home Invs. Corp. v Lopez*, 46 NY2d 481, 485 [1981];

Cromwell v County of Sac, 94 US 351, 352-53 [1876]; 73A NY Jur 2d, Judgments § 428; Restatement (Second) of Judgments, Volume 1, § 24 [1982]). Claim preclusion, the primary aspect of res judicata, acts to bar claims that were, or should have been, advanced in a previous suit involving the same parties (*O'Brien v City of Syracuse*, 54 NY2d 353 [1981]; *Lodal, Inc. v Home Ins. Co.*, 309 AD2d 634, 634 [1st Dept 2003]); issue preclusion, the secondary aspect, historically called collateral estoppel, pertains to the bar on relitigating issues that were argued and decided in the first suit (*Buechel v Bain*, 97 NY2d 295, 303 [2001] [citation omitted], *cert denied* 535 US 1096 [2002]).

It is important to distinguish these two types of preclusion, because they have different requirements. Claim preclusion prevents relitigation between the same parties, or those in privity with them, of a cause of action arising out of the same transaction or series of transactions that either were raised or could have been raised in the prior proceeding (*see Landau, P.C. v LaRossa, Mitchell & Ross*, 11 NY3d 8, 12 [2008]; *Matter of Josey v Goord*, 9 NY3d 386, 389 [2007]; *Matter of Hunter*, 4 NY3d 260, 269 [2005]; *O'Brien v Syracuse*, 54 NY2d at 357; *Gramatan Home Invs. Corp. v Lopez*, 46 NY2d 481, 485 [1979]). As the Court of Appeals has stressed, this "identity" requirement is a "linchpin of res judicata," which applies "only

when a claim between the parties has been previously 'brought to a final conclusion'" (*City of New York v Welsbach Elec. Corp.*, 9 NY3d 124, 127 [2007] [emphasis omitted], quoting *Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 347 [1999]; see also Blue Sky, LLC v Jerry's Self Storage, LLC, 145 AD3d 945 [2d Dept 2016]). Stated differently, the "doctrine of res judicata only bars additional actions between the same parties on the same claims based upon the same harm" (*Employers' Fire Ins. Co. v Brookner*, 47 AD3d 754, 756 [2d Dept 2008] [internal quotation marks omitted]).

Issue preclusion prohibits the relitigation of issues argued and decided in a previous case, even if the second suit raises different causes of action (*Buechel v Bain*, 97 NY2d at 303; *Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]). Under issue preclusion, the prior judgment conclusively resolves an issue actually litigated and determined in the first action (*Buechel v Bain*, 97 NY2d at 303-304). There is a limit to the reach of issue preclusion, however. In accordance with due process, it can be asserted only against a party to the first lawsuit, or one in privity with a party (*see Arizona v California*, 460 US 605, 619, 103 SCt 1382 [1983]; *People v Guerra*, 65 NY2d 60, 63 [1985]; *Sales v State Farm Fire & Cas. Co.*, 902 F2d 933, 936 [11th Cir

1990]).

Issue preclusion differs from claim preclusion in two ways. First, issue preclusion does not bar entire causes of action. Instead, it prevents relitigation of previously decided issues (*Buechel v Bain,* 97 NY2d at 303). Second, unlike claim preclusion, issue preclusion can be raised by one who was not a party or in privity in the first suit. Only the party against whom the doctrine is invoked must be bound by the prior proceeding. Thus, issue preclusion applies: (1) after final adjudication (2) of an identical issue (3) actually litigated and necessarily decided in the first suit and (4) the issue was necessary to support a valid and final judgment on merits (*Conason v Megan Holding, LLC*, 25 NY3d 1, 17 [2015]).

Initially, we find that the default nature of the judgment rendered in the prior declaratory judgment action prevents application of issue preclusion to the instant personal injury action. "An issue is not actually litigated" for collateral estoppel purposes "if, for example, there has been a default" (*Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 456-457 [1985]). Accordingly, "[b]ecause the judgment taken against [plaintiff here] was entered on default, the issue of liability [including whether plaintiff's injuries were causally related to a motor vehicle accident involving defendant driver] was not actually

litigated in the [declaratory judgment] action and [any] finding of liability therefore has no collateral estoppel effect" (*Pigliavento v Tyler Equip. Corp.*, 233 AD2d 810, 811 [3d Dept 1996]; *see Matter of American Tr. Ins. Co. v Hossain*, 100 AD3d 421, 421, *lv denied* 20 NY3d 859 [2013] [1st Dept 2012] [default judgment obtained by insurer in Nassau County Supreme Court did not have collateral estoppel effect]).

In addition, we find that the doctrine of claim preclusion does not bar plaintiff from bringing this personal injury action. Claim preclusion cannot apply here, because plaintiff and defendants are litigating a claim against each other for the first time. As discussed above, in order for the doctrine of claim preclusion to apply, there must be "identity of parties." Under claim preclusion, both actions must involve the same parties or their privies. The same parties means the same adversarial parties. Generally, codefendants are not adversaries for the purposes of res judicata, unless a codefendant files a cross claim against the other (*see City of New York v Welsbach Electric Corp.* (9 NY3d 124 [2007] [res judicata did not bar the second action because the parties in the second action were not adversaries in the prior action, where the City, as a defendant in the prior action, had not elected to make a cross claim against its codefendants, the contractor]; see also *Parker v*

Blauvelt Volunteer Fire Co., 93 NY2d 343, 347 [1999] ["Under res judicata, or claim preclusion, a valid final judgment bars future actions between the same parties on the same cause of action"]). Accordingly, the character of a party, as adverse or otherwise, is to be determined not by his position upon the docket, or in the title of the case, but by reference to his relations to the other parties, as shown by his interest in the case. In other words, claim preclusion never arises between codefendants in a prior action unless they represented adverse interests in the prior action as to a claim that was in fact litigated between them (*see City of New York v Welsbach Electric Corp*. (9 NY3d at 125; *Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d at 347).

Here, in the prior declaratory judgment action, plaintiff and defendants (driver/owner) never litigated any claims against each other, as they were never adversaries in the no-fault declaratory judgment action. In fact, although defendants here were named as parties to the first action by their insurer, Nationwide, they were merely nominal parties who did not participate in the first action, nor did the insurance carrier or plaintiff here seek any relief against them. Under the circumstances, whether the two lawsuits potentially involved similar issues, that is, the causal connection of defendants' vehicle to plaintiff's injuries, is beside the point. Claim

preclusion does not bar plaintiff from suing defendants in this personal injury action, because defendants are not the "same parties" who prosecuted the prior action against plaintiff.

Requiring parties to have previously held adversarial positions in order to satisfy the "same parties" element of claim preclusion is illustrated by the Court of Appeals' decision in *Welsbach Electric Corp*. (9 NY3d 124). In *Welsbach*, the Court of Appeals held that res judicata did not bar the City of New York from suing the manufacturer of a traffic signal for contribution, or indemnification to recover a payment on a judgment that had been entered against the City. In *Welsbach*, a two-car collision occurred at a New York City intersection controlled by a traffic signal maintained by Welsbach, a contractor. One of the drivers and his passenger sued the other driver, Welsbach, and the City. As against Welsbach and the City, the plaintiffs alleged that their injuries resulted from the negligent repair and maintenance of the traffic signal, because it gave both drivers a green light. Although Welsbach asserted cross claims against the City and the other defendants, the City never asserted a cross claim against Welsbach.

The trial court later granted summary judgment on all claims and cross claims against Welsbach, holding that Welsbach owed no duty to members of the public to perform its contract (9 NY3d at

126). The City never appealed from the judgment dismissing the claims asserted against Welsbach. Following a trial on the remaining claims, the jury found the City liable for the plaintiffs' injuries because the traffic signal gave both drivers a green light. After satisfying the judgment, the City sued Welsbach for indemnification or contribution, alleging that Welsbach negligently maintained the traffic signal. Welsbach moved for summary judgment on res judicata and collateral estoppel grounds. Supreme Court and this Court reached contrary conclusions on Welsbach's motion. The Court of Appeals, however, unanimously held that res judicata was inapplicable (*id.* at 127-28). Since the City never asserted a claim against Welsbach in the earlier liability action, the Court reasoned, the City and Welsbach were not "actually litigating successive actions against each other," barring the application of res judicata. In other words, the Court of Appeals ruled that, because the City had not made any claims against Welsbach in the initial case, the City's claim had not been brought to a conclusion in the prior action so as to trigger claim preclusion (*id.*).

Nor can defendants satisfy the "same parties" requirement of claim preclusion by arguing that they were in privity to a party in the prior action, their insurer Nationwide, which was an adverse party to plaintiff in the prior action. Under the res

judicata doctrine, "the concept of privity requires a flexible analysis of the facts and circumstances of the actual relationship between the party and nonparty in the prior litigation" (*Syncora Guarantee Inc. v J.P. Morgan Securities LLC*, 110 AD3d 87, 93 [1st Dept 2013]; *see also D'Arata v New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659, 664 [1990] [noting that privity "is an amorphous concept not easy of application"]). "The statement that a person is bound by or has the benefit of a judgment as a privy is a short method of stating that under the circumstances and for the purpose of the case at hand he is bound by and entitled to the benefits of all or some of the rules of res judicata by way of merger, bar or collateral estoppel" (Restatement [First] of Judgments § 83, Comments a). Thus, privity of a nonparty with a party of a prior litigation is determined for res judicata purposes (similarly to claim and issue preclusion), by considering whether the circumstances of the actual relationship, the mutuality of interests, and the manner in which the nonparty's interests were represented in the earlier litigation established a functional representation such that the nonparty may be thought to have had a vicarious day in court *(D'Arata v New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659, 664 [1990]; *see also Syncora Guarantee Inc. v J.P. Morgan Securities LLC,* 110 AD3d 87 [1st Dept 2013]; Restatement

[Second] of Judgments, Introductory Note, ch 4 at 344). In other words, "the doctrine extends to persons who were not parties to the previous action but who were connected with it to such an extent that they are treated as if they were parties" (*All Terrain Props, Inc. v Hoy*, 265 AD2d 87, 93 [1st Dept 2000] [internal quotation marks omitted]; *Failla v Nationwide Ins. Co.*, 267 AD2d 860, 862-863 [3d Dept 1999]).

Here, in the prior declaratory judgment action, there was no privity between defendants and their insurer, Nationwide, because the first proceeding involved a no-fault benefits dispute pursuant to the Insurance Law where defendants' (driver's/owner's) liability was not at stake. In determining whether privity existed, courts have distinguished between proceedings such as the prior proceeding in this case, where only the insurer's liability for first-party payments under the state's no-fault scheme was at issue, and other types of proceedings implicating the indemnitor and indemnitee relationship between insurer and insured. In the latter circumstance, because both the liability insurer and its insured defendant whom it must indemnify are necessarily interested in obtaining a favorable outcome in all claims, or proceedings, where the extent of the insured's liability is in issue, the courts in such cases have repeatedly found privity between the

liability insurer and its insured (*see Hinchey v Sellers*, 7 NY2d 287, 295 [1959]; *Bonde v General Security Ins. Co. of Canada*, 55 Misc 2d 588 [Sup Ct, Albany County 1967]; *Fadden v Cambridge Mut. Fire Ins. Co.*, 51 Misc 2d 858 [Sup Ct, Albany County [1966], *affd* 27 AD2d 487 [3d Dept 1967]). Thus, for example, an insurer cannot escape the possible application of the res judicata doctrine to a personal injury action rendered against its insured; by virtue of an indemnitor-indemnitee relationship, the insurer is in privity with a defendant insured in the original action (*Hinchey v Sellers*, 7 NY2d at 295).

Conversely, courts have found that the relationship between the insured and the insurer as payor of no-fault benefits is not that of indemnitor-indemnitee. The insurer in its contract with the insured agrees to make direct payments of no-fault benefits to certain classes of injured claimants found to be qualified under the Insurance Law (see Insurance Law, article 51). New York's "no-fault legislation reflects a public policy designed to make the insurer of first-party benefits absorb the economic impact of loss without resort to reimbursement from its insured or, by subrogation, from the tortfeasor" *(Country Wide Ins. Co. v Osathanugrah*, 94 AD2d 513, 514-515 [1st Dept 1983], *affd* 62 NY2d 875 [1974]. Thus, "it is the responsibility of the insurer, not the insured to make the first-party payments, and the liability

for such payments is not dependent upon or derivative from any liability of the insured" (*Baldwin v Brooks*, 83 AD2d 85, 88-89 [4th Dept 1981]). If a claim for first party benefits is granted, the insurer is contractually liable for the payments, not the insured, and it is the insurer whom claimant has the right to take to arbitration under Insurance Law (id.).

Baldwin v Brooks (83 AD2d 85) illustrates the point. In *Baldwin,* a pedestrian, who was struck and injured by an automobile brought a personal injury action against the driver and the driver's father, the owner of the car. Prior to the personal injury action, the plaintiff brought a no-fault arbitration proceeding against the defendants' insurer and won on a causation issue, that the defendants' car caused his injuries. Then, the plaintiff brought the tort action against the driver and his father, and the plaintiff wanted to collaterally estoppel them on the causation issue. The court denied the request, however, because the driver and the owner of the car were not parties to the first action against their insurer; their insurer was the party. Again, this is because, unlike ordinary liability coverage, where insurer and insured are in privity, in no-fault the insurer's statutory obligation runs directly to the injured person and there is no link between the insured and the insurer sufficient to bind one to an adverse finding made in a proceeding

involving the other.

To be sure, in the prior declaratory judgment action, in this case, for some unexplained reason, the motion court declared that plaintiff's default meant not only that the insurer, Nationwide, was not obligated to pay no-fault benefits, but also that Nationwide was not obligated "to afford any bodily injury coverage to [plaintiff] . . . [for] personal injury stemming from the alleged September 15, 2016 accident." The second part of that holding, however, -- that Nationwide was not obligated to pay plaintiff coverage for any bodily injury damages arising from the subject accident -- is irrelevant to whether claim preclusion applies to the current personal injury action. Defendants' rights to be defended and indemnified by Nationwide remained intact regardless of the outcome of the no-fault benefits dispute. In fact, as to defense and indemnification, an action by an insured seeking a declaratory judgment as to the scope of its liability insurer's promise to defend and indemnify the insured does not become a ripe controversy until a suit is filed against the insured; the mere threat of litigation, or the commencement of ancillary proceedings, is not sufficient (*Solo Cup Co. v Federal Ins. Co.*, 619 F2d 1178, 1189 [7th Cir 1980], *cert denied* 449 US 1033 [1980]). Courts have gone as far as to hold that a declaratory judgment action is premature to the

extent the "duty to indemnify must necessarily depend on the resolution of an issue that, if it arises, will be decided in the underlying action" (*Statt v American Home Assur. Co.*, 191 AD2d 962, 963 [4th Dept 1993]; *see Allstate Ins. Co. v Santiago*, 98 AD2d 608 [1st Dept 1983] [employer's insurer's declaratory judgment action seeking to establish that employee, involved in accident with negligence-action-plaintiff while driving employer's vehicle, was operating vehicle without consent of employer was premature, because the issue should be determined in underlying negligence action, and therefore resolution of question was not appropriate by declaratory judgment]). This is particularly true here since, as discussed, Nationwide and its insureds (defendants driver/owner) were not in privity with regard to the prior action involving a statutorily mandated no-fault benefits dispute. Thus, it follows logically, that although defendants here were named as parties to the first action by their insurer, Nationwide, they did not participate in the no-fault benefits dispute; nor did Nationwide seek any relief against them. They had no adverse interest in the outcome.

Additionally, under the particular circumstances here, giving preclusive effect to a prior default determination on no-fault benefits, in a subsequent personal injury action would contravene the concept of fairness underlying the doctrine of res

judicata. The primary purposes of res judicata are grounded in public policy and are to ensure finality, prevent vexatious litigation and promote judicial economy (*see Matter of Hodes v Axelrod*, 70 NY2d 364, 372 [1987]; *Reilly v Reid*, 45 NY2d at 28). However, unfairness may result if the doctrine is applied too harshly; thus "[i]n properly seeking to deny a litigant two 'days in court', courts must be careful not to deprive [the litigant] of one" (*Reilly v Reilly*, 45 NY2d 24, 28 [1978]). Important here is that the preclusive effect of the declaratory judgment in favor of Nationwide should be evaluated in the context that the causation issue -- whether an automobile accident caused plaintiff's injuries -- was never decided because the prior action was determined on default, to which issue preclusion does not apply. Applying "issue" preclusion in this manner encourages litigants not to over-litigate seemingly minor issues – if a party defaults on what appears to be a minor issue that turns out to be important in a later suit, she has the opportunity to litigate that issue in the later suit. Yet, by applying claim preclusion to this case, we would in effect be saying that plaintiff is precluded from raising an issue that should have been litigated in the prior no-fault benefits action decided on default.

Finally, we recognize that the Second Department has ruled

otherwise (*see Albanez v Charles* (134 AD3d 657 [2d Dept 2015]). We are not bound by the decision of the Second Department (*see Mountain View Coach Lines v Storms*, 102 AD2d 663, 665 [2d Dept 1984]). Of course, because stare decisis serves the important interests of stability in the law and predictability of decisions, we ordinarily follow the decisions of other departments unless we have good reason to disagree (see McKinney's Cons Laws of NY, Book 1, Statutes § 72[b]; *see e.g. Church of St. Paul and St. Andrew v Barwick*, 67 NY2d 510, 519 [1986]). In this case, departure from *Albanez v Charles* is indeed justified, because that court failed to apply "the same parties" requirement of claim preclusion articulated in *Welsbach Electric Corp.* (9 NY3d at 127) and *Parker v Blauvelt Volunteer Fire Co.*, (93 NY2d at 347). As a result, *Albanez v Charles'* conclusion that claim preclusion applies in a personal injury action of a prior first-party, no-fault benefits action, where the plaintiff and the defendants were not adversaries in the prior litigation, and defendants were not in privity with the insurer in the prior litigation, is not supported. On the contrary, this case is analogous to this Court's holding in Amalgamated *Bank v Helmsley-Spear, Inc.* (109 AD3d 418, 419 [1st Dept 2013], *affd* 25 NY3d 1098 [2015]), which held that "intervenors cannot intervene by arguing that the default

judgment has a res judicata effect on the supplemental proceeding and adversely affects their rights in that proceeding," because "[u]nder res judicata, or claim preclusion, a valid final judgment bars future actions between the same parties on the same cause of action," quoting *Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d at 347).

Accordingly, the order of the Supreme Court, Bronx County (John R. Higgitt, J.), entered September 20, 2019, which denied defendants' motion to dismiss the complaint, should be affirmed, without costs.

All concur.

Order, Supreme Court, Bronx County (John R. Higgitt, J.), entered September 20, 2019, affirmed, without costs.

Opinion by Renwick, J. All concur.

Acosta, P.J., Renwick, Webber, Gesmer, JJ.

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

ENTERED: JULY 23, 2020

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rolando T. Acosta, P.J.
Rosalyn H. Richter
Angela M. Mazzarelli
Troy K. Webber
Lizbeth González, JJ.

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Edward Joseph Filemyr IV,
Plaintiff-Appellant,

-against-

Melissa Hall, et al.,
Defendants-Respondents

Zakia Richardson,
Defendant.
_____x

Plaintiff appeals from an order of the Supreme Court, New York County (Andrew Borrok, J.), entered on or about May 28, 2019, which, inter alia, denied plaintiff's motion to strike affirmative defenses and granted defendants' cross motion to dismiss the complaint.

Edward Joseph Filemyr IV, appellant pro se.

Diana Jarvis, New York, for respondents.

WEBBER, J.

In this appeal we are called upon to determine whether Supreme Court correctly found that plaintiff's failure to serve, pursuant to Part 137 of the Rules of the Chief Administrative Judge, a notice of right to arbitrate within two years of rendering legal services barred his contract action for unpaid fees.

Factual Background:

In June 2010, defendants retained plaintiff to provide legal services for the benefit of 1885-93 7 Avenue HDFC, a cooperative corporation of which all defendants were shareholders. The agreed upon scope of services were representation concerning issues of proper governance of the cooperative corporation, improper acts by members of the board of directors, and invalid acts or resolutions of said board of directors. It was contemplated that the services provided would include litigation. The retainer agreement also included a provision that defendants may have the right to arbitration of a dispute concerning attorney's fees.

It is undisputed that plaintiff continued the representation until 2015. At that time, defendants ceased paying plaintiff. It is undisputed that the last day on which plaintiff rendered legal services was June 2, 2015.

On June 25, 2018, plaintiff sent to defendants, by certified mail, a notice of right to arbitrate. Defendants received the notice and defendant Hall (to whom the notice was addressed), sought to arbitrate her claims with the Joint Committee on Fee Disputes and Conciliation, pursuant to Part 137 of the Rules of the Chief Administrative Judge (the Committee).

The Committee subsequently denied arbitration of the claim. By letter dated August 30, 2018, the Committee noted that the last day plaintiff rendered legal services was more than two years earlier. As such, under its own rules, it denied the request to arbitrate.

In September 2018, plaintiff brought this action for breach of contract to collect the unpaid legal fees. In his complaint, plaintiff alleged that he had sent the required notice of right to arbitrate to all defendants, that Hall had requested arbitration, and that the Committee had denied the request to arbitrate based on the fact that no legal services had been rendered in the prior two years.

Defendants answered and asserted certain affirmative defenses including waiver, laches and unclean hands.

Plaintiff moved to dismiss the affirmative defenses. Defendants opposed and cross-moved to amend their answer, to dismiss the complaint and to compel arbitration. Plaintiff

argued that the affirmative defenses for waiver, laches, and unclean hands were insufficiently pleaded, both because they were bare conclusions, and because defendants failed to allege any change in position in reliance on plaintiff's actions.

Defendants argued that dismissal was proper because plaintiff's untimely service of the notice of right to arbitrate deprived them of their right to arbitrate the fee dispute before the Committee. They argued, inter alia, that to allow a plenary suit to go forward, would thwart a client's right to arbitrate fee disputes.

Supreme Court denied plaintiff's motion to dismiss the affirmative defenses. It found that the loss of the right to arbitrate provided sufficient harm to plead the affirmative defenses of laches, waiver and unclean hands.

The court also granted defendants' cross motion to dismiss, holding that the failure to provide timely notice of the right to arbitrate was a bar to a subsequent plenary action for legal fees. The court agreed that to hold otherwise would gut the client's right to arbitrate.

Discussion:

This action presents a question of first impression for this Court. Indeed, there appears to be very few cases which have addressed the issue presented.

We find that Supreme Court properly dismissed the action. Supreme Court correctly concluded that, by waiting to provide notice of right to arbitrate more than two years after legal services had been rendered, plaintiff deprived defendants of the right to arbitrate, and thus violated 22 NYCRR 137 (*see e.g. Pascazi Law Offs., PLLC v Pioneer Natural Pools, Inc.*, 136 AD3d 878, 879 [2d Dept 2016], *lv dismissed and denied* 27 NY3d 1047 [2016]); *Julien v Machson*, 245 AD2d 122 [1st Dept 1997].

22 NYCRR 137 gives clients the right to demand arbitration of any fee dispute in an amount between $1,000 and $50,000 (22 NYCRR 137.1[b][2]). The failure of an attorney to participate in fee arbitration is a violation of the ethical rules (Rules of Professional Conduct 22 NYCRR 1200.00) rule 1.4; (*see* 22 NYCRR 137.11). 137.1 sets out the limitations on the disputes that will be heard by the Committee. This includes matters outside the dollar range, claims inextricably intertwined with malpractice claims, and as relevant here, claims where no legal services have been performed in the prior two years (22 NYCRR 137.1[b][6]).

In *Borah, Goldstein, Altschuler, Schwartz, & Nahins, P.C. v Lubnitzki* (13 Misc 3d 823, 826 [Civ Ct, NY County 2006]), plaintiff commenced an action for fees more than two years after legal services had been rendered. Plaintiff ultimately obtained

a default judgment for the fees. Defendant successfully moved to vacate the default and, in her answer, pleaded an affirmative defense that plaintiff had not complied with Part 137. The court granted plaintiff leave to amend its complaint. In its amended complaint, plaintiff then alleged that Part 137 was inapplicable because it was more than two years since legal services had been rendered.

In rendering its decision, the court reasoned that 22 NYCRR 137 reflects an administrative preference for arbitrators and mediators to decide disputes which have not become stale. "[T]hose responsible for establishing the Part could not have intended that the mere passage of time warrants litigation in court, and thus, it ought not cure [a] plaintiff's initial failure to notify defendant of [their] right to arbitrate or mediate fee disputes" (*id*. at 826). The court sua sponte dismissed the action stating that:

> "plaintiff ought not be permitted to seek refuge from a dismissal despite the two years that passed before it amended its complaint solely to allege an exemption that was inapplicable when it first brought the action. To permit plaintiff the benefit of the exemption in these circumstances would give insufficient consideration to the [Part 137's] intent that clients be given notice of the availability of arbitration and mediation, something that was concededly not done here" (*id at* 826).

Fee arbitration is mandatory if requested by a client or a former client. It is a right of the client. Where, as in this case, an attorney, through their own delay deprives the client of that right, the attorney cannot in good faith claim compliance with the procedures of Part 137. Not only would this effectively give counsel the option of whether to arbitrate, because counsel could control whether the dispute began in two years or less, it would also be directly contrary to the rules, which provide that it is the client's choice.

Plaintiff also argues that missing the two-year deadline did not necessarily bar arbitration, because the Committee determines whether a dispute is within the ambit of Part 137. Again, this argument ignores the right of the client to decide whether or not to arbitrate as it would leave it to the discretion of attorneys whether to provide the notice of right to arbitrate (*see Lorin v 501 Second St.*, 2 Misc 3d 646, 649 [Civ Ct, Kings County 2003]). In *Lorin*, plaintiff brought suit without complying with Part 137. Defendants asserted a counterclaim for malpractice, as well as for failure to comply with Part 137. Plaintiff argued that his failure to comply was harmless, because malpractice claims were excluded from arbitration, and defendants had asserted plaintiff's malpractice as an affirmative defense. The court reasoned that it was the client's choice to either have a

streamlined process for the fee dispute and forgo the malpractice claim or choose to assert malpractice and litigate. As the court noted, "it is for the 'Local Administrative Body,' not the lawyer, to make the determination that the defense of malpractice is inextricably intertwined with the plaintiff's claim for payment, and then issue a letter declining jurisdiction and giving the attorney the 'right to sue,' after first evaluating the case" (*id.* at 649).

Supreme Court properly declined to dismiss the affirmative defenses of laches, waiver and unclean hands. Plaintiff's violation of Part 137 constituted unethical conduct sufficient to constitute unclean hands (*see National Distillers & Chem. Corp. v Seyopp Corp.*, 17 NY2d 12, 15 [1966]). The loss of the right to arbitrate that resulted from plaintiff's delay sufficiently supported the defense of laches (*see Matter of Linker*, 23 AD3d 186, 189 [1st Dept 2005]). Finally, by the aforementioned conduct, we find that plaintiff waived his right to initiate an action in court (*Jefpaul Garage Corp. v Presbyterian Hosp. in City of N.Y.*, 61 NY2d 442, 446 [1984]).

Accordingly, the order of Supreme Court, New York County (Andrew Borrok, J.), entered on or about May 28, 2019, which,

inter alia, denied plaintiff's motion to strike affirmative defenses and granted defendants' cross motion to dismiss the complaint should be affirmed, without costs.

All concur.

Order, Supreme Court, New York County (Andrew Borrok, J.), entered on or about May 28, 2019, affirmed, without costs.

Opinion by Webber, J. All concur.

Acosta, P.J., Richter, Mazzarelli, Webber, González, JJ.

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

ENTERED: JULY 23, 2020

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rosalyn H. Richter, J.P.
Judith J. Gische
Cynthia S. Kern
Jeffrey K. Oing
Peter H. Moulton, JJ.

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William Dugan, et al.,
Plaintiffs-Respondents-Appellants,

—against—

London Terrace Gardens, L.P.,
Defendant-Appellant-Respondent.

- - - - -

William Dugan, et al.,
Plaintiffs-Respondents,

—against—

London Terrace Gardens, L.P.,
Defendant-Appellant.

David Blech, et al.,
Respondents.

_____x

Plaintiffs and defendant appeal from the order of the Supreme Court, New York County (Lucy Billings, J.), entered November 22, 2017, which, to the extent appealed from, denied defendant's motion for summary judgment, and granted in part and denied in part plaintiffs' motion for summary judgment. Defendant appeals from the order of the same court and Justice, entered September 11, 2017, which, to the extent appealed from, expanded the originally certified definition of the class; the order

of the same court and Justice, entered November 24, 2017, which granted defendant's motion for payments for interim past and ongoing use and occupancy by respondents David Blech and Margie Chassman, but declined to set the amount, and granted Blech and Chassman's cross motion for summary judgment on their claim for rent overcharge to the same extent as that granted to the class action plaintiffs in the order entered November 22, 2017, and the order of the same court and Justice, entered August 30, 2017, which denied defendant's motion to make certain interim payments to plaintiffs.

Borah Goldstein Altschuler Nahins & Goidel, P.C., New York (Robert D. Goldstein and Paul N. Grubel of counsel), and Proskauer Rose LLP, New York (Richard M. Goldstein and Seth D. Fier of counsel), for appellant-respondent/appellant.

Himmelstein, McConnell, Gribben, Donoghue & Joseph LLP, New York (Ronald S. Languedoc, William Gribben, Kevin R. NcConnell and Jesse Gribben of counsel), Emery Celli Brinckerhoff & Abady LLP, New York (Matthew Brinckerhoff of counsel) and Bernstein Liebhard LLP, New York (Joseph R. Seidman, Jr. of counsel), for respondents-appellants/respondents.

RICHTER, J.P.

These four appeals arise from consolidated class action litigations challenging the deregulation of hundreds of apartments at London Terrace Gardens (London Terrace), a 10-building housing complex in Manhattan. Plaintiffs are current and former London Terrace tenants, and defendant London Terrace Gardens, L.P. is the owner of the complex. London Terrace, which consists of approximately 1,000 units, was constructed in 1931, and was originally subject to rent control laws. Pursuant to the 1974 Emergency Tenant Protection Act, upon vacancy, rent controlled apartments in London Terrace became subject to rent stabilization. Since 1974, there has been a mix of rent stabilized and rent controlled apartments in the complex.

Beginning in 1993, defendant began to deregulate apartments in London Terrace. The Rent Regulation Reform Act of 1993 allowed building owners to deregulate rent-regulated apartments where rents and/or occupants' incomes exceeded certain statutory thresholds. However, in 2009, the Court of Appeals made it clear that building owners were not entitled to deregulate units while they were simultaneously receiving tax benefits under New York City's J-51 tax abatement and exemption program (*Roberts v Tishman Speyer Props., L.P.*, 13 NY3d 270, 279-280 [2009]).[1]

[1]Under the J-51 program, a building owner who makes qualifying improvements to its property is eligible to receive tax abatements and exemptions.

Further, apartments in buildings receiving these tax benefits "must be registered with the State Division of Housing and Community Renewal (DHCR), and are generally subject to rent stabilization for at least as long as the J-51 benefits are in force (*see* 28 RCNY at 5-03 [f])" (*id.* at 280; *see* Rent Stabilization Law [RSL] [Administrative Code of City of NY] § 26-504[c] [rent stabilization law shall apply to dwelling units in a building receiving J-51 benefits]).

On July 1, 2003, after performing qualifying improvements to the property, defendant began receiving J-51 tax benefits.[2] Prior to that date, defendant had already deregulated approximately 95 apartments in the complex. However, defendant did not, as required by law, return these previously deregulated units to rent regulation. Further, after the J-51 benefits were conferred, defendant continued to deregulate additional apartments, despite the fact that the complex was receiving J-51 benefits. Defendant charged market rents for the deregulated units, did not treat tenants in those units as rent regulated, did not register the apartments with DHCR, and did not follow the rent laws in calculating the proper rents to be charged.

On November 13, 2009, shortly after *Roberts* was decided, plaintiff William Dugan and nine other London Terrace tenants brought this class action alleging that defendant wrongfully

[2] The J-51 benefits ended on June 30, 2014.

deregulated apartments while receiving J-51 tax benefits, and failed to return previously deregulated apartments to rent stabilization when the J-51 benefits commenced. On December 8, 2009, plaintiff James Doerr brought a separate class action against defendant making similar allegations. In both complaints, plaintiffs alleged that, as a result of defendant's wrongful acts, they were denied rent-regulated status and were charged amounts in excess of the legal rents for their units. Plaintiffs sought, inter alia, a declaration that their apartments are subject to rent regulation, and monetary damages for rent overcharges. Defendant answered and asserted various counterclaims and affirmative defenses, including that the action was barred by the statute of limitations, and that *Roberts* should not be applied retroactively.

The two actions were subsequently consolidated and a class was certified. Plaintiffs then moved to dismiss defendant's counterclaims and affirmative defenses, and sought partial summary judgment seeking, inter alia, a determination of the proper methodology for calculating the legal rents and the amount of any rent overcharges. Defendant cross-moved for summary judgment seeking, inter alia, dismissal of the complaint on the ground that *Roberts* is not retroactive, dismissal of the complaint as time-barred, and a declaration on the proper methodology to calculate rents. Both plaintiffs and defendant

submitted their own proposed method for calculating rents and overcharges. In a decision entered November 22, 2017, the motion court rejected defendant's statute of limitations defense, and concluded that *Roberts* may be applied retroactively. The court also set forth a methodology for calculating the legal rents and the amount of any overcharges. Both plaintiffs and defendant appeal from the motion court's order.

Defendant maintains that when it deregulated the affected units, it was relying in good faith on DHCR's pre-*Roberts* interpretation of the relevant statutes, and that applying *Roberts* under those circumstances would offend due process. At the outset, defendant is collaterally estopped from advancing its due process argument. We rejected this claim in *Matter of London Terrace Gardens, L.P. v City of New York* (101 AD3d 27, 31-32 [1st Dept 2012], *lv denied* 21 NY3d 855 [2013]), a suit where defendant unsuccessfully tried to withdraw from the J-51 program. Although the *London Terrace Gardens* action arose in a different context, the due process issue decided by the Court there was identical to the one before us now, and defendant had a full and fair opportunity to litigate the issue.

In any event, defendant's argument fails on the merits. In *Gersten v 56 7th Ave. LLC* (88 AD3d 189, 198 [1st Dept 2011]), this Court held that *Roberts* should be applied retroactively because the decision simply interpreted a statute that had been

in effect for a number of years, and did not establish a new principle of law. Since then, we have consistently adhered to *Gersten,* and have specifically rejected due process challenges to the retroactivity of *Roberts* (*see Matter of London Terrace Gardens,* 101 AD3d at 31-32; *Roberts v Tishman Speyer Props., L.P.*, 89 AD3d 444, 445-446 [1st Dept 2011] [*Roberts* II]).

Defendant attempts to distinguish *Gersten* and *Roberts II*, on the ground that, unlike the building owners in those cases, defendant explicitly relied on DHCR's interpretation of the decontrol statutes at the time it decided to enter the J-51 program. However, we rejected this very same argument in *Matter of London Terrace Gardens* (101 AD3d at 31-32), and defendant fails to persuasively distinguish that case (*see also Gurnee v Aetna Life & Cas. Co.*, 55 NY2d 184, 192 [1982], *cert denied* 459 US 837 [1982] [although "the Insurance Department had promulgated regulations based on a construction of (a statute) contrary to that subsequently articulated by [the Court of Appeals]," "[a] judicial decision construing the words of a statute . . . does not constitute the creation of a new legal principle"]). Thus, defendant's challenge to the retroactivity of *Roberts* is unavailing.

Both plaintiffs and defendant raise various challenges to the motion court's methodology for calculating the legal rents and the amount of any overcharges. On June 14, 2019, New York

State enacted the Housing Stability and Tenant Protection Act of 2019 (L 2019, ch 36)(HSTPA), landmark legislation making sweeping changes to the rent laws and adding greater protections for tenants throughout the State. Of relevance to this appeal is Part F of the HSTPA, which amended RSL § 26-516 and CPLR 213-a, which govern claims of rent overcharge and the statute of limitations for bringing such claims. The HSTPA made significant changes to how rents and overcharges should be determined. RSL § 26-516 now explicitly provides that a court "shall consider all available rent history which is reasonably necessary" to investigate overcharges and determine the legal regulated rent (RSL § 26-516[a], [h]). The new legislation also directed that the statutory amendments contained in Part F "shall take effect immediately and shall apply to any claims pending or filed on or after such date" (HSTPA, Part F, § 7).

In *Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal* (— NY3d —, — ,2020 NY Slip Op 02127, *9 [2020]), the Court of Appeals determined that "the overcharge calculation amendments [in the HSTPA] cannot be applied retroactively to overcharges that occurred prior to their enactment." The Court also resolved a split in this Department as to what rent records can be reviewed to determine rents and overcharges in *Roberts* cases (*compare Taylor v 72A Realty Assoc., L.P.*, 151 AD3d 95 [1st Dept 2017], *mod* — NY3d — [2020] [a court

is permitted to examine the entire rental history of an apartment] *with Raden v W 7879, LLC*, 164 AD3d 440 [1st Dept 2018], *affd* — NY3d — [2020] [review of the rental history limited to the four-year period preceding the filing of the overcharge complaint]). *Regina* concluded that "under pre-HSTPA law, the four-year lookback rule and standard method of calculating legal regulated rent govern in *Roberts* overcharge cases, absent fraud" (2020 NY Slip Op 02127 at *7). Accordingly, we vacate that part of the motion court's order setting forth the methodology for calculating the legal rents and the amount of any overcharges, and remand the matter for the court to set forth a methodology consistent with the Rent Stabilization Law as interpreted by the Court of Appeals in *Regina*.

Defendant separately appeals from three other orders issued by the motion court. First, defendant challenges a September 11, 2017 order that expanded the originally certified definition of the class. In the initial certification order, the class was defined as "all past and current tenants of London Terrace Gardens who have been charged or continue to be charged deregulated rents during defendant's receipt of J-51 tax benefits." In the class expansion order, the class was redefined as "all past and current tenants of London Terrace Gardens who have resided in units that were deregulated during defendant's receipt of J-51 tax benefits." Thus, whereas the original class

included only tenants who were charged deregulated rents *during the J-51 period*, the proposed new class would encompass tenants who moved in after the J-51 benefits period ended and reside in apartments that, at some point in the past, had been wrongfully treated as deregulated.

CPLR 902 provides that a class action "may be altered or amended before the decision on the merits." However, that provision also states that "[an] action may be maintained as a class action only if the court finds that the prerequisites under [CPLR] 901 have been satisfied." Those requirements are generally referred to as "numerosity, commonality, typicality, adequacy of representation and superiority" (*City of New York v Maul*, 14 NY3d 499, 508 [2010]). CPLR 902 further requires the court to consider a range of factors before certifying a class.

Here, the motion court improvidently exercised its discretion in expanding the class. The court's order failed to analyze whether class action status was warranted based on the criteria set forth in CPLR 901 and CPLR 902. Conducting that analysis ourselves, we find that the redefined class represents such a fundamental change in the theory of plaintiffs' case that expansion of the class would be improper. When the class was originally certified, plaintiffs maintained, and the court agreed, that its members were tenants who received deregulated leases while the complex was receiving J-51 benefits. The

expanded class, however, would include tenants who never lived in the complex during defendant's receipt of J-51 benefits, and who received regulated leases for their tenancies. Thus, the legal issues for this group of tenants are separate and distinct from those of the original class.

In determining whether an action should proceed as a class action, the court must consider the "extent and nature of any litigation concerning the controversy already commenced by . . . members of the class" (CPLR 902[3]). This class action litigation was commenced over nine years ago, and has spawned expansive motion practice. Expanding the class to add members whose tenancies involve different legal issues from the original class would be inefficient at this late stage of the litigation and would unduly prejudice defendant. Thus, the court's order expanding the class should be reversed, and the class shall remain as originally certified.[3]

Next, defendant appeals from a November 24, 2017 order wherein the motion court (i) directed that the methodology it set forth in the class action be used to calculate the legal rent and any overcharges for Apartment 16ABEF; and (ii) ordered the payment of interim past and ongoing use and occupancy for that

[3]Although the number of class members in the originally certified class may be impacted as a result of the statutory amendments, the definition of the class should remain the same.

apartment, but failed to set the amount.[4] This apartment was created in 2005 by combining Apartments 16AB and 16EF, both of which were exempt from rent stabilization at the time defendant began receiving J-51 benefits in July 2003. Although it is undisputed that Apartment 16ABEF, and the two apartments that were combined to form it, were all improperly treated as deregulated while the building was receiving J-51 benefits, for the reasons discussed above, we vacate that part of the motion court's order setting forth the methodology for calculating the legal rents and the amount of any overcharges. The matter is remanded for the court to set forth a methodology for calculating rents and any overcharges for Apartment 16ABEF, and the amount of use and occupancy, consistent with the Rent Stabilization Law as interpreted by the Court of Appeals in *Regina*. We deny defendant's request that we search the record to grant it summary judgment on its nonpayment petition, without prejudice to defendant's filing a summary judgment motion in Supreme Court.

Finally, defendant appeals from an August 30, 2017 order wherein the motion court denied its motion to make certain interim payments to plaintiffs in an effort to mitigate any ultimate award of prejudgment interest. Defendant sought to condition its payments on the requirement that plaintiffs repay

[4]Defendant had previously commenced a summary nonpayment proceeding against the tenants of this apartment, and the tenants answered and alleged rent overcharges. The summary proceeding was then consolidated with the class action.

some or all of those amounts if the court ultimately found in defendant's favor on the issues of liability or the amounts of any overcharges owed to a particular plaintiff. The motion court properly denied the relief requested by defendant. The court was not required to fashion a remedy outside of the CPLR, or grant a motion that addressed only defendant's concerns. To the extent this conclusion may be inequitable, defendant's remedy lies not with this Court, but with the legislature.

Accordingly, the order of the Supreme Court, New York County (Lucy Billings, J.), entered November 22, 2017, which, to the extent appealed from, denied defendant's motion for summary judgment, and granted in part and denied in part plaintiffs' motion for summary judgment, should be modified, on the law, to vacate that part of the order setting forth the methodology for calculating the legal rents and the amount of any overcharges, and otherwise affirmed, without costs, and the matter remanded for the court, after further submissions from the parties, to set forth a methodology for calculating rents and any overcharges consistent with the Rent Stabilization Law as interpreted by the Court of Appeals in *Regina*; the order of the same court and Justice, entered September 11, 2017, which, to the extent appealed from, expanded the originally certified definition of the class, should be reversed, on the law, without costs, and the class should remain as originally certified; the order of the

same court and Justice, entered November 24, 2017, which granted defendant's motion for payments for interim past and ongoing use and occupancy by respondents David Blech and Margie Chassman, but declined to set the amount, and granted Blech and Chassman's cross motion for summary judgment on their claim for rent overcharge to the same extent as that granted to the class action plaintiffs in the order entered November 22, 2017, should be modified, on the law, to vacate that part of the order setting forth the methodology for calculating the legal rents and the amount of any overcharges, and otherwise affirmed, without costs, and the matter remanded for the court, after further submissions from the parties, to set forth a methodology for calculating rents and any overcharges, and the amount of use and occupancy, consistent with the Rent Stabilization Law as interpreted by the Court of Appeals in *Regina*; and the order of the same court and Justice, entered August 30, 2017, which denied defendant's motion

to make certain interim payments to plaintiffs, should be affirmed, without costs.

> The Decision and Order of this Court entered herein on September 17, 2019 (177 AD3d 1 [1st Dept 2019]) is hereby recalled and vacated (*see* M-1723 and M-1801 decided simultaneously herewith).

All concur.

Order of the Supreme Court, New York County (Lucy Billings, J.), entered November 22, 2017, modified, on the law, to vacate that part of the order setting forth the methodology for calculating the legal rents and the amount of any overcharges, and otherwise affirmed, without costs, and the matter remanded for the court, after further submissions from the parties, to set forth a methodology for calculating rents and any overcharges consistent with the Rent Stabilization Law as interpreted by the Court of Appeals in *Regina*; the order of the same court and Justice, entered September 11, 2017, reversed, on the law, without costs, and the class should remain as originally certified; order of the same court and Justice, modified, on the law, to vacate that part of the order setting forth the methodology for calculating the legal rents and the amount of any overcharges, and otherwise affirmed, without costs, and the matter remanded for the court, after further submissions from the parties, to set forth a methodology for calculating rents and any overcharges, and the amount of use and occupancy, consistent with

the Rent Stabilization Law as interpreted by the Court of Appeals in *Regina*; and the order of the same court and Justice, entered August 30, 2017, affirmed, without costs.

Opinion by Richter, J.P. All concur

Richter, J.P., Gische, Kern, Oing, Moulton, JJ.

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

ENTERED: JULY 23, 2020

CLERK