SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 21, 2015

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Friedman, J.P., Sweeny, Acosta, Saxe, Manzanet-Daniels, JJ.

13282- Index 768000/08E
13283-
13284 In re Steam Pipe Explosion
at 41st Street and Lexington Avenue

- - - - -

Carrie Tassa,
Plaintiff,

Consolidated Edison Inc., et al.,
Defendants-Appellants,

-against-

Team Industrial Services, Inc.,
Defendant-Respondent,

City of New York,
Defendant.

[And Other Actions]

- - - - -

Consolidated Edison Inc., et al.,
Third-Party Plaintiffs-Appellants,

-against-

Team Industrial Services, Inc.,
Third-Party Defendant-Respondent.

_____

Davis Polk & Wardwell LLP, New York (Frances E. Bivens of counsel), for appellants.

Lewis Brisbois Bisgaard & Smith LLP, New York (Peter T. Shapiro of counsel), for respondent.

Order, Supreme Court, New York County (Barbara Jaffe, J.), entered December 9, 2013, which, granted defendants/third-party plaintiffs Consolidated Edison, Inc. and Consolidated Edison Company of New York, Inc.'s (collectively, Con Ed) motion to renew, and upon renewal, adhered to a prior order, same court and Justice, entered June 18, 2013, denying Con Ed's motion to compel defendant/third-party defendant Team Industrial Services, Inc. To produce its file related to another action (the *Diamond Shamrock* litigation), modified, on the law, to grant the motion to compel, and otherwise affirmed, without costs. Appeal from order entered June 18, 2013, dismissed as moot, without costs. Appeal from order, same court and Justice, entered December 31, 2013, which denied as moot Con Ed's motion to, among other things, compel compliance with the court's order entered April 26, 2013, dismissed, without costs.

The words "material and necessary," as used in CPLR 3101(a) are "to be interpreted liberally to require disclosure . . . of any facts bearing on the controversy" (*Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403, 406 [1968]). "The weight to be given evidence of other [lawsuits or claims] on the issues of notice

and causation, and indeed the very admissibility of such evidence . . . are not of concern in the context of disclosure" (*Mendelowitz v Xerox Corp.*, 169 AD2d 300, 307 [1st Dept 1991] [modifying order to permit discovery of prior lawsuits and claims alleging exposure to asbestos as the result of the use of the defendant's copy machines]).

In our view, the motion court applied too harsh a standard in determining that documents concerning the prior Diamond Shamrock incident are not discoverable. We are not concerned with the ultimate admissibility of the evidence at trial, but with the discovery of information concerning the prior incident, as to which a more liberal standard applies (*see Dattmore v Eagan Real Estate*, 112 AD2d 800, 800 [4th Dept 1985] [permitting discovery of records concerning prior accidents, noting that even if they are ultimately found to be inadmissible, "this is not the test for disclosure under CPLR 3101(a), which is to be liberally construed"]). The motion court's reliance on cases involving the exclusion of testimony or the evaluation of evidence submitted in opposition to a defendant's motion for summary judgment underscores that it applied a more restrictive standard in evaluating the discoverability of evidence concerning Diamond Shamrock and other incidents (*see e.g. Gjonaj v Otis El.* Co., 38

AD3d 384 [1st Dept 2007]; *Nichols v Cummins Engine Co.*, 273 AD2d 909 [4th Dept 2000], *lv denied* 96 NY2d 703 [2001]).

As even the motion court recognized, third-party defendant's excess application of leak sealant was a contributing factor in both the steam pipe explosion at Lexington Avenue and 41st Street and the incident at the Diamond Shamrock refinery in Texas. Diamond Shamrock's expert opined that injection of sealant caused a stress overload fracture of the outlet nozzle; and the team's senior technical specialist admitted that they had pumped far more sealant into the enclosure box at the refinery than it was capable of holding. The expert opined that the stress applied by third-party defendant's technicians during injection of sealant into the closure caused the rupture of the valve and the resulting explosion. Con Edison, in this case, alleges that excess application of sealant caused blockages of steam traps, preventing the removal of condensed steam from inside the steam main, and leading to a "water hammer" which caused the main to rupture. The precipitating causes and the circumstances surrounding both incidents are sufficiently similar so as to warrant discovery concerning the prior incident.

Con Edison is entitled to "all matter material and necessary" to its claims and defenses, including the 48 bankers'

boxes of Diamond Shamrock documents that have yet to be produced. Con Edison's independent efforts to obtain publicly-available documents, whether through record searches or FOIA requests, do not extinguish third-party defendant's obligations to comply with the CPLR.

To the extent Con Edison seeks documents regarding incidents occurring more than five years before the steam pipe explosion at issue here, they never appealed from the court's April 26, 2013 order denying that request.

To the extent Con Edison seeks compliance with the April 26, 2013 order directing Team to produce records of incidents involving excessive application of sealant or the use of sealant that caused or contributed to the failure or disruption of any customer's equipment within five years of the accident giving rise to this litigation, or, if no such records exist, a detailed affidavit explaining its search for such records, Con Edison failed to appeal from that aspect of the December 31, 2013 order denying its request to compel as moot. Accordingly, its request is not properly before this Court.

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

FRIEDMAN, J.P. (dissenting in part)

This appeal arises from consolidated pretrial proceedings in approximately 100 actions for damages incurred in the July 2007 explosion of a steam pipe owned by defendants and third-party plaintiffs Consolidated Edison, Inc. and Consolidated Edison Company of New York, Inc. (collectively, Con Ed). Defendant and third-party defendant Team Industrial Services, Inc. (Team) is sued herein based on its having been periodically retained by Con Ed to seal leaks at the site of the explosion; Team last performed such work at this particular site four months before the explosion. At issue on the appeal is whether Con Ed is entitled to discovery of Team's records concerning earlier litigation against Team, among others, arising from a 2001 fire at a refinery in Texas at which Team had performed design and repair work. After conducting a painstaking in camera review of ten boxes of documents comprising the working file of Team's defense counsel in the Texas litigation (the Diamond Shamrock litigation), Supreme Court — which has been closely supervising the intensive discovery proceedings in the instant matter since 2008 — determined that the Diamond Shamrock refinery fire was not sufficiently similar to the steam pipe explosion at issue here to justify granting Con Ed discovery of Team's records of the

Diamond Shamrock litigation.

In my view, whether there is sufficient similarity between the incidents respectively at issue in the instant litigation and in the Diamond Shamrock litigation to warrant discovery in this matter of Team's Diamond Shamrock file is precisely the kind of factually intensive inquiry on which this Court should defer to the considered findings of Supreme Court on the relevance of such documents to this litigation. Such deference is especially appropriate when one considers that Supreme Court based those findings on its in camera review of the documents in question (a review that this Court has not undertaken) and has been actively supervising discovery in this complex consolidated proceeding, involving scores of parties, for more than half a decade. Because I cannot see that Supreme Court, in determining that the Diamond Shamrock file is not relevant to this action, either abused or improvidently exercised its "broad discretion in supervising disclosure" (*Those Certain Underwriters at Lloyds, London v Occidental Gems, Inc.*, 11 NY3d 843, 845 [2008] [internal quotation marks omitted]), I would affirm that determination. Accordingly, while I concur in the majority's affirmance of the denial of Con Ed's motion for spoliation sanctions and in the dismissal of the appeal from the order entered December 31, 2013,

I respectfully dissent from the majority's modification of the order entered December 9, 2013, to grant, upon renewal, Con Ed's motion to compel production of Team's Diamond Shamrock documents.

In reversing Supreme Court's denial of Con Ed's application for discovery of Team's Diamond Shamrock files, the majority focuses, to the exclusion of virtually all other factors, on the circumstance that, both here and in the Diamond Shamrock litigation, Team's adversaries have alleged that the subject accident was caused, in part, by Team's application of an excessive amount of sealant in performing repair work on the equipment in question (here, a steam piping system; in Diamond Shamrock, an oil refinery valve). However, Supreme Court, through its detailed analysis of the highly technical facts of the two cases, discerned that the substantial differences between the mechanisms of causation in the two incidents far outweighed any common elements, rendering any similarity purely superficial. Supreme Court's careful analysis, which the majority cavalierly casts aside, is as follows:

> "While it is Con Ed's contention that the two incidents are similar because both involved the alleged excessive application of sealant, the sealant was, at most, a contributing factor in both incidents. However, the condition or nature of the two accidents was not substantially the same. In *Diamond Shamrock*, the conditions of the accident were a defective and

leaking valve in a unit in a refinery, which defect was then unknown[;] Team's alleged application of too much sealant to the leak and improper erection and installation of a leak enclosure unit, which allegedly contributed to causing the nozzle of the valve to rupture[;] and [a] subsequent chemical release and fire. The mechanism of the injury there, as it concerns Team, was its failure to design the leak enclosure unit properly and its excessive application of sealant into the unit which caused the nozzle to rupture, either by the pressure of the sealant application or the sealant itself.

"The incident at issue here involves a steam system overloaded by a large amount of rain in a short time period and unable to release accumulated steam properly due to blocked steam traps, which caused a steam pipe to burst and explode. And, the allegations against Team are that when it made various repairs on the steam system over the years, it injected too much sealant which then migrated from the pipes into the system and eventually blocked the traps. The mechanism of the injury as to Team is that Team's sealant migrated[,] rather than stayed attached to the pipes[,] and blocked steam traps.

"The conditions of the accident[s] are dissimilar. A leaking and defective valve in one case and an overloaded steam system in the other; a chemical release and fire in one case, and a burst steam pipe and explosion in the other. The particular allegations against Team are also disparate. Consequently, Con Ed has failed to establish that the relevant conditions of the subject accident and the one in *Diamond Shamrock* are substantially the same. [Citations omitted.]

"Con Ed has also failed to demonstrate how the *Diamond Shamrock* incident would have given Team notice of the allegations at issue here, or how Team's knowledge that excessive sealant application or pressure, combined with a defective valve and improper leak [containment] unit, could cause a chemical release and fire, would have given it notice that excessive

> application of sealant to pipes within a steam system could cause the sealant to migrate into the water and block steam traps, and, combined with a system overwhelmed by too much rain within a short period of time, could cause a burst steam pipe and an explosion. That the *Diamond Shamrock* incident may have placed Team on notice generally of dangers associated with excessive sealant is insufficient to show that Team had notice of the specific problem at issue here."

Thus, Supreme Court saw that, notwithstanding that the alleged application of excessive sealant is a common factor in the two cases, the mechanism of the accident's causation in each case is so different from the mechanism of causation in the other case that evidence from the earlier case is highly unlikely to be probative of Team's liability in this matter. In the Diamond Shamrock incident, pressure from the application of too much sealant directly caused a fracture in the valve, which immediately gave rise to a chemical leak and a fire. In this case, by contrast, the alleged application of too much sealant to steam pipe leaks over time, rather than directly causing the pipe to burst, resulted in sealant material coming loose and migrating through the pipes (like loosened plaque migrating through a person's arteries) and eventually contributing to the blockage of steam traps, which then, during a period of heavy rainfall, resulted in the build-up of excessive pressure and an explosion.

Beyond pointing to the common factor of the alleged

application of excessive sealant, the majority fails to refute Supreme Court's reasoning in determining that the above-described dissimilarity between the etiology of the two incidents renders the Diamond Shamrock litigation file irrelevant to the instant matter.[1] The majority errs in accusing Supreme Court of "apply[ing] too harsh a standard in determining . . . discoverab[ility]" because Supreme Court's determination was based on the dissimilarity of the two incidents. But even if one could reasonably disagree with Supreme Court's determination of this question, it cannot be denied that the determination is based on a thorough, logical, and reasoned analysis that is well within Supreme Court's "broad discretion in supervising disclosure" (*Occidental Gems*, 11 NY3d at 845 [internal quotation marks omitted]), especially in a matter as complex as this one, involving approximately 100 actions arising from the same pipe

[1]The majority's reliance on *Mendelowitz v Xerox Corp.* (169 AD2d 300 [1st Dept 1991]) is misplaced. In *Mendelowitz*, where the plaintiff's decedent allegedly had been exposed to asbestos from his use of the defendant's copying machines, we granted the plaintiff discovery only of those health claims by the defendant's workers that alleged "exposure to asbestos used in the manufacture of copying machines" (*id.* at 307-308). We specifically denied the plaintiff discovery of claims of asbestos exposure by the defendant's employees "that are not somehow connected with the manufacture of defendant's copying machines" (*id.* at 307), i.e., that did not arise from the presence of asbestos in the copying machines.

explosion that, as of this writing, have been pending for more than six years.

This is the paradigmatic case for the application of the principle that, notwithstanding this Court's power to exercise its own discretion in deciding an appeal, "'deference is afforded to the trial court's discretionary determinations regarding disclosure'" (*Gumbs v Flushing Town Ctr. III, L.P.*, 114 AD3d 573, 574 [1st Dept 2014], quoting *Don Buchwald & Assoc. v Marber-Rich*. 305 AD2d 338, 338 [1st Dept 2003]; *see also Elmore v 2720 Concourse Assoc., L.P.*, 50 AD3d 493, 493 [1st Dept 2008] [same]; 4 NY Jur 2d, Appellate Review § 679 ["As a matter of practice, . . . appeals in matters of discretion are not encouraged by the Appellate Division," which "rarely interferes, and as a rule only where the discretion seems to have been abused, or where there is a plain case of its unwise exercise"]; 11 Carmody-Wait 2d § 72:142 [same]). I see no justification for the majority's failure to defer to Supreme Court's exercise of its discretion in resolving a discovery dispute, based on that court's close examination and analysis of the relevant documents, in the context of a complex, long-running litigation requiring close judicial supervision of pretrial proceedings. I therefore respectfully dissent from the majority's modification to grant

the motion to compel production of the Diamond Shamrock documents and vote to affirm the order entered December 9, 2013, in its entirety.

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

ENTERED: APRIL 21, 2015

CLERK

Sweeny, J.P., Andrias, Saxe, DeGrasse, Gische, JJ.

13852 The People of the State of New York Ind. 545/07
Respondent,

-against-

Ricky Owens,
Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (Paul Wiener of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Nancy D. Killian of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Cassandra M. Mullen, J.), rendered August 16, 2010, as amended August 27, 2010, convicting defendant, after a jury trial, of manslaughter in the first degree and criminal possession of a weapon in the third degree, and sentencing him, as a second violent felony offender, to an aggregate term of 17 years, unanimously modified, on the law, to the extent of reducing the sentence for criminal possession of a weapon to a term of 3½ to 7 years, and otherwise affirmed.

Overwhelming evidence supports the verdict against defendant. Unbiased eyewitness Jaime Lopez testified that he saw the fatal shooting of Jose Ibanez on December 28, 2006 at approximately 2:15 p.m., and he identified defendant as the

attacker. Detective Luis Aponte, who arrived at the scene soon thereafter and gathered information from Lopez and other witnesses, testified that the day after the shooting he received a phone call from Ibanez's girlfriend, Sheila Sanchez, and later spoke with her in person.

Sanchez testified at trial about an incident that occurred almost two months before the shooting, on October 31, 2006, at about 2:30 p.m. She and her six-year-old son were in a costume store with Ibanez, when Ibanez was approached from behind by two black men, one who was shorter, more muscular, and had a lighter complexion than his companion. The shorter man asked, "[H]ey Ibanez, do you remember me?" When Ibanez turned around, extending his hand for a handshake, this man began to punch him, and the taller man joined in the attack. After Sanchez told the owner of the store to call the police, the two men left the store. Three or four minutes after they left, Ibanez made a telephone call. According to Sanchez's testimony, when she was interviewed the day after Ibanez was killed, she told the police about the Halloween incident, including a description of the phone call. She did not name in her testimony the person whom she believed Ibanez had called.

Sanchez subsequently identified defendant's brother, Jason

Owens, as the taller and less muscular of the two attackers. She did not identify the shorter man, who said, "[H]ey Ibanez, do you remember me?"

Detective Aponte testified that as a result of his conversations with Sanchez, he contacted the victim's cousin, Robert Pellerano, and that as a result of his conversations with Pellerano and some further investigation, he arrested defendant.

Robert Pellerano testified that starting in about February 1998, he and his cousin Jose Ibanez were both housed in a unit of Rikers Island, while defendant arrived at the same unit in November 1998. Pellerano explained that Ibanez was the self-appointed "owner of the house," meaning that he "r[a]n" the area, and all other inmates had to either obey his orders or be subject to negative repercussions. Pellerano testified that in late December 1998 or early January 1999, a fight was supposed to take place between Ibanez and another inmate, for which defendant was asked to act as a "holster" for Ibanez, assigned to "get a shank" and provide it to Ibanez if Ibanez requested it. However, when the time came for the fight, defendant failed to obtain the weapon. Later, in front of the entire housing area, Ibanez kicked defendant in the face and tried to cut him, but could not complete his attack because "[t]hey made us lock in," but

defendant was left crying in front of his cell, in view of the other inmates.

Pellerano and Ibanez were both released from Rikers Island in April 1999. When Pellerano subsequently returned to the same unit in June of 2000, it was defendant who was "running" that prison area. Pellerano and defendant had a fight on one occasion, during which defendant was "trash talking" about Pellerano and Ibanez.

Pellerano was permitted to testify that he received a phone call from Ibanez on Halloween 2006, at approximately 2:30 or 3 p.m., and that the "name mentioned between [him] and Jose Ibanez" during the call was "Ricky Owens." Pellerano further testified that he relayed to Detective Aponte the conversation he had with Ibanez on Halloween 2006.

Detective Aponte also established that defendant was paroled from state custody on October 26, 2006, five days before the assault in the costume store.

Defendant contends that the part of Pellerano's testimony conveying that during Ibanez's telephone call to him, Ibanez told him that defendant was one of his assailants, was inadmissible both as violative of the Confrontation Clause and as hearsay.

Initially, we observe that the challenged testimony does not

fall within the ambit of the Confrontation Clause because it was not "testimonial" (*see e.g. People v Gantt*, 48 AD3d 59, 69-71 [1st Dept 2007], *lv denied* 10 NY3d 765 [2008]). However, the hearsay nature of Pellerano's testimony relating Ibanez's out-of-court statement to Pellerano identifying defendant as his assailant -- either by name or by an identifying description that allowed Pellerano to name him -- was not remedied by framing the query posed to Pellerano as seeking the "name mentioned between you and Jose Ibanez" during the call.

We do not adopt the trial court's reasoning that the admission of this hearsay evidence was necessary to convey a coherent narrative of the relevant events or to eliminate the possibility of jury confusion about the extent of Pellerano's knowledge (*see People v Beato*, 124 AD3d 516 [1st Dept 2015]). However, we find that the error was harmless under the applicable standard of *People v Crimmins* (36 NY2d 230, 242 [1975]), which provides that error is reversible where "there is a significant probability, rather than only a rational possibility, in the particular case that the jury would have acquitted the defendant had it not been for the error or errors which occurred." We perceive no such probability that the jury would have acquitted without that challenged portion of Pellerano's testimony. The

admissible evidence included Lopez's eyewitness identification, along with Pellerano's testimony regarding defendant's humiliation at Ibanez's hands on Rikers Island, and the recovery of the murder weapon in defendant's brother's room. Further, even without the hearsay there was strong evidence that defendant was the second Halloween attacker, namely, a physical description consistent with defendant's appearance; the evidence that the assailant asked Ibanez if he "remembered" him; and the identification of defendant's brother as the second man who assaulted Ibanez. Indeed, the overwhelming evidence would satisfy the constitutional harmless error standard as well.

As to the trial court's admission of testimony suggesting inferentially that the eyewitness identified defendant from a photo array, any error in that regard was harmless.

Defendant's claim pursuant to CPL 270.35(1) and *People v Buford* (69 NY2d 290, 298 [1987]) is unpreserved in light of his failure to request that the court make inquiry of the possibly unqualified jurors, despite having had ample opportunity to do so (*see People v Hicks*, 6 NY3d 737, 739 [2005]; *People v Gonzalez*, 247 AD2d 328, 328-329 [1st Dept 1998]), and we decline to review it in the interest of justice.

The court did not err in submitting the charge of

manslaughter in the first degree to the jury; there was a reasonable view of the evidence under which defendant intended to seriously injure the victim, but not to kill him.

Finally, it is undisputed that the seven-year term imposed for the weapon possession count was illegal. The People agree with defendant that, as reflected on the original and amended sentence and commitment sheets, the court mistakenly believed that defendant was convicted of criminal possession of a weapon in the second degree – and sentenced him accordingly – when in fact he was convicted of criminal possession of a weapon in the third degree. However, because a concurrent sentence was imposed on the weapon possession charge, its alteration will not affect defendant's aggregate sentence. Accordingly, rather than remanding for re-sentencing on the third-degree weapon possession count, this Court simply modifies the sentence so as to impose the minimum term of 3½ to 7 years on that count.

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

ENTERED: APRIL 21, 2015

CLERK

Friedman, J.P., Andrias, Moskowitz, DeGrasse, Richter, JJ.

14281 Tannenbaum Helpern Syracuse & Hirschtritt LLP, Plaintiff-Respondent, Index 153088/12

-against-

Deheng Law Offices, et al., Defendants-Appellants.

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Law Offices of Dean T. Cho, LLC, New York (Dean T. Cho of counsel), for appellants.

Gallagher Law Offices PLLC, Pelham (John C. Gallagher III of counsel), for respondent.

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Order, Supreme Court, New York County (Ellen M. Coin, J.), entered October 3, 2013, which, to the extent appealed from, denied the motion of defendant Deheng Law Offices (DLO) to dismiss the complaint, and the motion of defendant Deheng Chen, LLC (DC) to dismiss the third, fourth and fifth causes of action, unanimously modified, on the law, to grant DC's motion to the extent of dismissing the fourth and fifth causes of action, and otherwise affirmed, without costs.

The motion court correctly declined to dismiss the breach of contract and account stated claims as against DLO. An attorney who obtains services on his or her client's behalf in connection with litigation can be held personally liable unless the attorney

expressly disclaims such responsibility (*see Rosenberg Selsman Rosenzweig & Co. v Slutsker*, 278 AD2d 145, 145 [1st Dept 2000]; *Urban Ct. Reporting v Davis*, 158 AD2d 401, 402 [1st Dept 1990]). Here, the retainer agreement executed by plaintiff and DLO is ambiguous as to whether plaintiff contracted with DLO or the ultimate clients, and issues of fact exist as to whether DLO expressly disclaimed responsibility for the fees and disbursements sought.

The motion court properly denied DLO's motion to dismiss the complaint for failure to join the clients as necessary parties. DLO has not shown that complete relief cannot be accorded between the parties absent joinder or that the clients might be inequitably affected by a judgment in this action (*see e.g. Country Vil. Towers Corp. v Preston Communications*, 289 AD2d 363, 364 [2d Dept 2001]).

DLO waived its defense of lack of personal jurisdiction based on improper service by failing to move on it within 60 days after having previously raised it in its answer (*see* CPLR 3211[e]; *Aretakis v Tarantino*, 300 AD2d 160 [1st Dept 2002]).

The motion court correctly declined to dismiss as against DC the third cause of action, for money had and received, inasmuch as the complaint alleges that both defendants received, and have

unjustifiably retained, funds sent to them by their foreign clients to pay plaintiff's fees, and the documentary evidence submitted in support of DC's motion does not conclusively establish that the allegations concerning DC's receipt and retention of these funds are untrue. We modify, however, to dismiss the two other quasi contract claims (for quantum meruit and unjust enrichment) as against DC, since the complaint fails to allege any way in which DC (which was not a party to any contract with plaintiff) benefitted, either directly or indirectly, from the services provided by plaintiff pursuant to the retainer agreement.[2]

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

ENTERED: APRIL 21, 2015

CLERK

[2] In its appellate briefs, DLO makes no specific argument as to why the quasi contract claims, as opposed to the entire complaint, should be dismissed as against it.

Friedman, J.P., Sweeny, Saxe, Feinman, Clark, JJ.

14337N Pursuit Investment Management, LLC, et al.,
Plaintiffs-Respondents,

-against-

Alpha Beta Capital Partners, L.P., et al.,
Defendants,

Claridge Associates, LLC, et al.,
Defendants-Appellants.

Index 652457/13

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Harris, O'Brien, St. Lauren & Chaudhry LLP, New York (Jonathan Harris of counsel), for appellants.

Cane & Associates LLP, New York (Peter S. Cane of counsel), for respondents.

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Order, Supreme Court, New York County (Richard F. Braun, J.), entered June 10, 2014, which denied a motion to compel arbitration, and to stay this action pending arbitration, by defendants Claridge Associates, LLC, Jamiscott LLC, Leslie Schneider and Lillian and Leonard Schneider, unanimously affirmed, with costs.

"Although arbitration is favored as a matter of public policy, equally important is the policy that seeks to avoid the unintentional waiver of the benefits and safeguards which a court of law may provide in resolving disputes" (*TNS Holdings v MKI*

Sec. Corp., 92 NY2d 335, 339 [1998][internal citations omitted]). "[A] party will not be compelled to arbitrate ... absent evidence which affirmatively establishes that the parties expressly agreed to arbitrate their disputes. The agreement must be clear, explicit and unequivocal" (*Matter of Waldron [Goddess]*, 61 NY2d 181, 183 [1984]).

Here, the motion court was right to deny defendants' motion given that only some of the parties to this litigation have agreed to arbitrate (*see Belzberg v Verus Investments Holdings Inc.*, 21 NY3d 626, 630 [2013] ["nonsignatories are generally not subject to arbitration agreements"] [citation omitted]); (*Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d at 128 [affirming denial of motion to compel arbitration due to substantial question as to whether the parties agreed to arbitrate]). Moreover, this action does not arise out of or relate to the partnership agreement, as required by the terms of the arbitration clause. Rather, the complaint alleges breach of a separate settlement agreement which does not contain an

arbitration provision (*see Matter of New York State Off. of Children & Family Servs. v Lanterman*, 14 NY3d 275, 283 [2010] [declining to compel arbitration where there was no alleged breach of the agreement containing the arbitration clause]).

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

ENTERED: APRIL 21, 2015

CLERK

Tom, J.P., Friedman, Renwick, Moskowitz, DeGrasse, JJ.

14858 The People of the State of New York, Ind. 3772/09
Respondent,

-against-

Alty Adamson,
Defendant-Appellant.

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

Alty Adamson, appellant pro se.

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

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Judgment, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered November 3, 2011, as amended December 5, 2011, convicting defendant, after a jury trial, of assault in the second and third degrees, petit larceny and criminal possession of stolen property in the fifth degree, and sentencing him, as a second violent felony offender to an aggregate term of five years, unanimously affirmed.

We reject defendant's challenges to the sufficiency and weight of the evidence supporting the element of physical injury with regard to one of the victims (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Defendant struck this victim in the head with a 40-pound bench, resulting in a one-inch gash that bled

extensively and required four staples to close. Viewed objectively, an injury caused in that manner "would normally be expected to bring with it more than a little pain" (*People v Chiddick*, 8 NY3d 445, 447 [2007]).

The court properly exercised its discretion when it inquired whether the jury had agreed upon a verdict as to any of the counts (*see e.g. People v Brown*, 1 AD3d 147 [1st Dept 2003], *lv denied* 1 NY3d 625 [2004]), *People v Mendez*, 221 AD2d 162, 163 [1st Dept 1995], *lv denied* 87 NY2d 923 [1996]). That inquiry was separate from its response to the jury's note requesting a readback of certain testimony, as to which the court had fully complied with the requirements of *People v O'Rama* (78 NY2d 270 [1991]). Even if the court's inquiry about a possible verdict could be deemed part of the court's response to the note, there was still no mode of proceedings error. Although the court did not announce to counsel its intention to make this inquiry, it had already fulfilled its "core responsibility" under *People v Kisoon* (8 NY3d 129, 135 [2007]). Accordingly, preservation was required (*see People v Williams*, 21 NY3d 932, 934-935 [2013]), and we decline to review defendant's unpreserved claim in the

interest of justice. As an alternative holding, we find no basis for reversal.

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

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

ENTERED: APRIL 21, 2015

CLERK

Tom, J.P., Friedman, Renwick, Moskowitz, DeGrasse, JJ.

14859 In re Sasha R.,
Petitioner-Respondent,

-against-

Alberto A.,
Respondent-Appellant.

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Michael F. Dailey, Bronx, for appellant.

Larry S. Bachner, Jamaica, for respondent.

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Order of protection, Family Court, Bronx County (Jennifer S. Burtt, Referee), entered on or about January 30, 2014, which, upon a fact-finding determination that respondent committed the family offenses of harassment in the second degree and disorderly conduct, granted petitioner a one-year order of protection against respondent, unanimously modified, on the law, to vacate the finding of harassment in the second degree, and otherwise affirmed, without costs.

Although the order of protection has expired by its own terms, the appeal is not moot in light of the enduring consequences of the finding that respondent has committed family offenses against petitioner (*see Matter of Veronica P. v Radcliff A.*, 24 NY3d 668, 671-672 [2015]).

The findings that respondent committed acts in 2003 and 2009

that constituted harassment in the second degree were improperly predicated upon facts not alleged in the petition (*see Matter of Anderson v Anderson*, 25 AD2d 512 [1st Dept 1966]; *Matter of Salazar v Melendez*, 97 AD3d 754, 755 [2d Dept 2012], *lv denied* 20 NY3d 852 [2012]). Accordingly, the finding that respondent committed the family offense of harassment in the second degree is vacated (*see e.g. Matter of Whittemore v Lloyd*, 266 AD2d 305 [2d Dept 1999]).

A fair preponderance of the evidence, however, supports the Referee's finding that respondent committed the family offense of disorderly conduct (*see* Family Ct Act § 832; Penal Law § 240.20[3]). Petitioner testified that on two separate dates, while she was outside of her apartment building in a public place, respondent screamed obscenities and insults at her in an abusive manner (*see Matter of William M. v Elba Q.*, 121 AD3d 489 [1st Dept 2014]). There is no basis for disturbing the Referee's credibility determinations (*see Matter of Peter G. v Karleen K.*, 51 AD3d 541 [1st Dept 2008]). The finding that respondent committed acts which constituted the family offense of disorderly conduct warranted the issuance of the order of protection (*see Matter of Banks v Opoku*, 109 AD3d 470 [2d Dept 2013]).

Petitioner's contention that the order of protection should be continued for another year is not properly before this Court because she did not appeal (*see Matter of Opportune N. v Clarence N.*, 110 AD3d 430, 431 [1st Dept 2013]).

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

ENTERED: APRIL 21, 2015

CLERK

Tom, J.P., Friedman, Renwick, Moskowitz, DeGrasse, JJ.

14860 The People of the State of New York, Ind. 5117/10
Respondent,

-against-

Christopher Collins,
Defendant-Appellant.

_____

Scott A. Rosenberg, The Legal Aid Society, New York (Bonnie C. Brennan of counsel) for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Nicole A. Coviello of counsel), for respondent.

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Order, Supreme Court, New York County (Thomas Farber, J.), entered on or about June 19, 2012, which adjudicated defendant a level three sexually violent offender and predicate sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly assessed 15 points for the risk factor of history of drug or alcohol abuse. Defendant's admission to a history of daily marijuana use, combined with his criminal record including at least seven marijuana-related convictions, along with his history of substance abuse treatment, constituted clear and convincing evidence that he had repeatedly used marijuana in excess (*see People v Palmer*, 20 NY3d 373, 378-79 [2013]).

Although defendant's point score of 90 placed him in the

middle of the range for a presumptive level two offender, we find that the court providently exercised its discretion in upwardly departing to level three, based on clear and convincing evidence of aggravating factors not adequately taken into account by the risk assessment instrument. The assessment of the maximum available points for defendant's criminal history was not enough to reflect the extent of that history, because the underlying crime was defendant's fifth conviction for a sexual offense in 14 years, demonstrating a high risk of sexual recidivism (*see People v Faulkner*, 122 AD3d 539 [1st Dept 2014], *lv denied* __ NY3d __, 2015 NY Slip Op 63882 [2015]). Moreover, defendant committed the underlying crime after having already having been adjudicated a level three offender on a prior case (*see id.*).

Defendant's procedural arguments are unavailing, because he has not shown that he was prejudiced by either of the procedural defects he alleges.

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

ENTERED: APRIL 21, 2015

CLERK

Tom, J.P., Friedman, Renwick, Moskowitz, DeGrasse, JJ.

14861- Ind. 3348/10
14862- 3792/10
14863 The People of the State of New York, 5238/10
Respondent,

-against-

Raymond Lewis,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Rachel T. Goldberg of counsel), for appellant.

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

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Judgments, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered on or about February 26, 2013, convicting defendant, upon his pleas of guilty, of burglary in the second degree and six counts of burglary in the third degree, and sentencing him, as a second felony offender, to an aggregate term of 8 to 12 years, unanimously affirmed.

Notwithstanding the inadequacy of the court's oral colloquy with defendant concerning his waiver of his right to appeal, the record reflects that defendant made a valid waiver, because he orally confirmed that he was agreeing to waive his right to appeal as part of this plea bargain and that he discussed this with counsel and understood it, the oral colloquy was

supplemented by a comprehensive written waiver that fully explained that the right to appeal is separate and distinct from trial rights (*see People v Lopez*, 6 NY3d 248, 256 [2006]), and defendant's age and experience indicate that he understood the rights he was waiving (*see People v Bradshaw*, 18 NY3d 257, 264 [2011]). This waiver forecloses review of his excessive sentence claim.

Regardless of whether defendant made a valid waiver of his right to appeal, we perceive no basis for reducing defendant's sentence.

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

ENTERED: APRIL 21, 2015

CLERK

Tom, J.P., Friedman, Renwick, Moskowitz, DeGrasse, JJ.

14864 Five Star Electric Corp., Index 602781/07
Plaintiff-Appellant-Respondent,

-against-

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

[And A Third-Party Action]
- - - - -
St. Paul Fire and Marine Insurance Company,
Third-Party Plaintiff-Respondent,

-against-

E.A. Technologies, Inc., et al.,
Third-Party Defendants,

Siemens Industry, Inc., etc.,
Third-Party Defendant-Appellant.

_____

Manatt, Phelps & Phillips, LLP, New York (Kenneth D. Friedman of counsel), for appellant.

Kaufman Dolowich & Voluck, LLP, Woodbury (Andrew L. Richards of counsel), appellant-respondent.

Schnader Harrison Segal & Lewis LLP, New York (Scott D. St. Marie of counsel), for Federal Insurance Company, respondent-appellant.

Torre, Lentz, Gamell, Gary & Rittmaster, LLP, Jericho (Benjamin D. Lentz of counsel), and Watt, Tieder, Hoffar & Fitzgerald, LLP, Jericho (Carter B. Reid of counsel), for St. Paul Fire and Marine Insurance Company, respondent-appellant/respondent.

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Order, Supreme Court, New York County (Jeffrey K. Oing, J.),

entered May 8, 2014, which, inter alia, granted plaintiff Five

Star Electric Corporation partial summary judgment against defendants-third party plaintiffs-co-sureties Federal Insurance Company and St. Paul Fire and Marine Insurance Company on the payment bond, and denied third-party defendant Siemens Industry, Inc.'s motion to dismiss St. Paul's third-party causes of action for implied indemnity, exoneration and quia timet, unanimously modified, on the law, to deny Five Star partial summary judgment on the payment bond, and otherwise affirmed, without costs.

The motion court erred in concluding that Federal Insurance Company and St. Paul Fire and Marine Insurance, the sureties on the payment bond at issue in this action, were collaterally estopped from challenging the arbitration award rendered between plaintiff Five Star and third-party defendant Transit Technologies LLC. Based on the record before this Court, the sureties did not have the full opportunity to contest the prior determination (*see Sepulveda v Dayal*, 70 AD3d 420, 421 [1st Dept 2010]).

The surety bond's principal is the two-company consortium formed by third-party defendants Siemens Industry Inc. and Transit Tech. Siemens, although not a party to the subcontract between plaintiff Five Star and Transit Tech, voluntarily agreed to participate in the arbitration and be bound by its result.

However, Five Star would only permit Siemens' participation on what could only be described as extortionate terms which Siemens could not rationally accept. Under these circumstances, with one of the surety bond's principals unable to participate in the underlying arbitration, the sureties cannot be collaterally estopped from contesting the result.

Moreover, given the fact that Five Star was a subcontractor to Transit Tech only, there is, at best, questionable privity between Five Star and the sureties, creating a question of fact concerning whether the sureties could reasonably be found to have consented to arbitration with Five Star (*see e.g. Matter of Fidelity & Deposit Co. of Md. v Parsons & Whittemore Contrs. Corp.*, 48 NY2d 127 [1979]).

The motion court correctly denied Siemens' motion to dismiss St. Paul's third-party causes of action. Each of the claims at issue is sufficiently stated, Siemen's arguments on appeal provide no basis for dismissal, and dismissal of these claims would have added to the confused state of this litigation.

In light of the foregoing, we need not reach the remaining arguments.

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

ENTERED: APRIL 21, 2015

CLERK

Tom, J.P., Friedman, Renwick, Moskowitz, DeGrasse, JJ.

14865 Isaiah Spearing, Index 5487/91
Plaintiff-Respondent,

-against

Sandra Spearing,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, Bronx (Natasha Y. Ingram of counsel), and Paul M. Eckles, New York for appellant.

Salvatore A. Lecci, Jericho, for respondent.

_____

Order, Supreme Court, Bronx County (Nelida Malave-Gonzalez, J.), entered January 3, 2013, to the extent it granted plaintiff's motion to reargue, and, upon reargument, vacated an order, same Court and Justice, entered on or about September 15, 2011, granting defendant's motion to modify the judgment of divorce to reflect that the New York City Police Pension Fund had succeeded the New York City Employees' Retirement System (NYCERS) as the administrator of plaintiff's pension plan, and directed plaintiff to distribute to defendant 25% of the sum he received from NYCERS as her equitable share of his pension, unanimously modified, on the law, without costs, to reinstate the September 15, 2011 order, and otherwise affirmed without costs. The appeal from the January 3, 2013 order insofar as it denied defendant's

cross motion for an order directing that 25% of plaintiff's pension benefits be placed in escrow pending the resolution of the proceedings, unanimously dismissed, without costs, as academic.

Given the brevity of the prior order, we cannot conclude that the court improperly granted reargument (CPLR 2221[d]).

In any event, the court should have adhered to its prior determination (*id.*). Plaintiff retired in 2009. The parties' 1991 stipulation of settlement, which was incorporated but did not merge into the judgment of divorce, clearly and unambiguously provides that defendant is entitled to 25% "of the value of" plaintiff's pension and retirement benefits "when available" to him, to be paid at 25% of plaintiff's "periodic or lump sum pension and retirement benefits at the time plaintiff receives them." It identifies NYCERS as the retirement plan in which plaintiff is a participant and further provides that at such time as plaintiff commences receiving retirement or pension payments from NYCERS, NYCERS shall pay defendant her 25% share. As the record conclusively demonstrates, contrary to the motion court's finding, plaintiff's NYCERS pension was transferred to the Police Pension Fund in 1995, when the City's law enforcement departments merged. Thus, defendant is entitled to 25% of sums paid to

plaintiff by NYCERS as well as 25% of plaintiff's retirement and pension benefits from the Police Pension Fund.

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

ENTERED: APRIL 21, 2015

CLERK

Tom, J.P., Friedman, Renwick, Moskowitz, DeGrasse, JJ.

14866 Patricia O'Reilly, Index 105405/07
Plaintiff,

-against-

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

FC Battery Park Associates, LLC, et al.,
Defendants-Appellants,

Apple-Metro, Inc.,
Defendant-Respondent.

_____

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Paul Wooten, J.), entered on or about October 17, 2013,

And said appeal having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated March 27, 2015,

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

ENTERED: APRIL 21, 2015

CLERK

Tom, J.P., Friedman, Renwick, Moskowitz, DeGrasse, JJ.

14867 The People of the State of New York, Respondent, Ind. 1978/10 5371/10

-against-

Ben Sidibe, Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (Leticia M. Olivera of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Daniel P. Conviser, J.), rendered January 10, 2012, convicting defendant, upon his pleas of guilty, of attempted gang assault in the first degree and assault in the second degree, and sentencing him to an aggregate term of six years, unanimously modified, on the law, to the extent of vacating the sentence and remanding for resentencing.

As the People concede, defendant is entitled to resentencing pursuant to *People v Rudolph* (21 NY3d 497 [2013]) for a youthful offender determination.

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

ENTERED: APRIL 21, 2015

CLERK

Tom, J.P., Friedman, Renwick, Moskowitz, DeGrasse, JJ.

14869 Joseph Purcell, et al., Index 113123/09
Plaintiffs-Appellants, 590593/10

-against-

Visiting Nurses Foundation
Inc., et al.
Defendants-Respondents,

- - - - -

Visiting Nurses Foundation Inc., et al.,
Third-Party Plaintiffs-Respondents,

-against-

Northeastern Fabricators, Inc.,
Third-Party Defendant-Appellant,

Beyer Blinder Belle, Planners LLP, et al.,
Third-Party Defendants.

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Sacks & Sacks, LLP, New York (Scott N. Singer of counsel), for Purcell appellants.

Fabiani Cohen & Hall, LLP, New York (John V. Fabiani Jr. of counsel), for respondents.

Nicoletti Gonson Spinner LLP, New York (Jason I. Gomes of counsel), for North Eastern Fabricators Inc., appellant.

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Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered September 10, 2013, which, insofar as appealed from as limited by the briefs, denied plaintiffs' cross motion for partial summary judgment on the Labor Law § 240(1) claim as against defendant Cauldwell-Wingate, Inc. (Cauldwell), granted

Cauldwell's cross motion for summary judgment dismissing the Labor Law § 240(1) claim as against it insofar as based on a "falling object" theory, and denied the cross motion of third-party defendant Northeastern Fabricators, Inc. (NEF) for summary judgment dismissing defendant common-law indemnification and contribution claims against it, unanimously reversed, on the law, without costs, defendant Cauldwell's cross motion for summary judgment dismissing the Labor Law § 240(1) claim as against it denied, plaintiffs' cross motion for partial summary judgment on the Labor Law § 240(1) claim as against Cauldwell granted, and NEF's cross motion for summary judgment dismissing defendants' common-law indemnification and contribution claims against it granted.

The undisputed testimony of the two eyewitnesses established that while plaintiff was working on a gut renovation of a building, he performed his assigned task of standing on the third step of a ladder in the basement and gently pulling one end of an approximately 8- or 10-foot-long piece of steel called a C-channel (channel), which was positioned about 11 feet above the floor and had been mostly cut loose from the first floor framing, about one or two inches away from the eastern wall. At that moment, an unsecured terracotta wall adjacent to the structural

wall on the first floor, which had been resting on the C-channel and a concrete slab east of the channel, collapsed, knocking plaintiff and the ladder onto the floor. Plaintiff's foreman inferred that plaintiff's movement of the channel caused the unsecured concrete slab, which had been positioned about half of an inch to the east of the C-channel, to roll out from underneath the terracotta wall, causing the wall to fall.

Given that plaintiff's foreman had leaned the A-frame ladder against a wall in the closed position to allow plaintiff to reach the channel, the ladder was not "so . . . placed . . . as to give proper protection to" plaintiff (Labor Law § 240[1]; *see Campuzano v Board of Educ. of City of N.Y.*, 54 AD3d 268 [1st Dept 2008]; *Montalvo v J. Petrocelli Constr., Inc.*, 8 AD3d 173 [1st Dept 2004]). Moreover, plaintiff established that his injuries were also caused by the lack of any safety devices to secure the terracotta wall (*see Greaves v Obayashi Corp.*, 55 AD3d 409 [1st Dept 2008], *lv dismissed* 12 NY3d 794 [2009]).

Defendants failed to raise a triable issue of fact as to whether adequate safety devices were provided, or whether the lack or failure of safety devices proximately caused plaintiff's injuries (*see Panek v County of Albany*, 99 NY2d 452, 458 [2003]; *Campuzano*, 54 AD3d at 269). The foreman opined that the concrete

slab should have been connected to the wall by installing rebar into the wall and pouring concrete over the rebar, and others indicated that various shoring methods could have been used to secure the terracotta wall to the structural wall to prevent it from falling.

Misseritti v Mark IV Constr. Co. (86 NY2d 487 [1995]) is distinguishable. The decedent in *Misseritti* was sweeping the floor when he was fatally struck by a completed wall, which presented only the ordinary hazards of working on a construction site (*see Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 8-9 [2011]). Here, by contrast, plaintiff's work raised an extraordinary, elevation-related risk beyond that which workers are routinely exposed to on construction sites, and the terracotta wall "was an object that required securing for the purposes of the undertaking" (*Outar v City of New York*, 5 NY3d 731, 732 [2005]; *cf. Kaminski v 53rd St. & Madison Tower Dev., LLC*, 70 AD3d 530 [1st Dept 2010] [Labor Law 240 (1) claim properly dismissed where plaintiff, not working at an elevation, was injured by a wall collapse of undetermined cause]).

The court should have granted third-party defendant NEF's motion for summary judgment dismissing defendants' claim seeking common-law indemnification and contribution from it. NEF met its

initial burden to establish that plaintiff did not sustain a grave injury within the meaning of Workers' Compensation Law § 11, by submitting the report of a neurologist who examined plaintiff and concluded that he did not suffer from any brain injury rendering him "no longer employable in any capacity" (*Rubeis v Aqua Club, Inc.*, 3 NY3d 408, 413 [2004]). Defendants failed to raise an issue of fact as to whether plaintiff's brain injury constituted a grave injury. The evidence that plaintiff suffered from certain brain conditions, including headaches and post-concussion syndrome, did not satisfy the standard for a grave injury (*see Aramburu v Midtown W. B, LLC*, __ AD3d __, 2015 NY Slip Op 01996 [1st Dept 2015]; *Anton v West Manor Constr. Corp.*, 100 AD3d 523, 524 [1st Dept 2012]).

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

ENTERED: APRIL 21, 2015

CLERK

Tom, J.P., Friedman, Renwick, Moskowitz, DeGrasse, JJ.

14870 Joseph Raia, Index 113006/09
Plaintiff-Respondent,

-against-

Hubert Pototschnig,
Defendant-Appellant,

New Century Mortgage Corporation,
et al.,
Defendants.

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Hubert Pototschnig, appellant pro se.

Jeffrey I. Baum & Associates, P.C., Garden City (Maksim Leyvi of counsel), for respondent.

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Order, Supreme Court, New York County (George J. Silver, J.), entered February 21, 2014, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for summary judgment on his mortgage foreclosure claim against defendant Hubert Pototschnig, unanimously affirmed, with costs.

Plaintiff established prima facie his right to foreclosure by producing the mortgage documents, undisputed evidence of default, and a personal guaranty of payment of the mortgage note signed by defendant Pototschnig (*see Red Tulip, LLC v Neiva*, 44 AD3d 204, 209 [1st Dept 2007], *lv dismissed* 10 NY3d 741 [2008]). In opposition, defendant failed to raise a triable issue of fact

as to his affirmative defenses. As the motion court found, the statutes governing pleading and notice requirements and mandating settlement conferences in foreclosure actions involving certain home loans are inapplicable to the instant action (*see* RPAPL 1302; 1303; 1304; CPLR 3408).

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

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

ENTERED: APRIL 21, 2015

CLERK

Tom, J.P., Friedman, Renwick, Moskowitz, DeGrasse, JJ.

14871 The People of the State of New York, Ind. 5588/09
Respondent,

-against-

Donald R.,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Lawrence Marks, J. at hearing; Gregory Carro, J. at plea and sentencing), rendered December 1, 2010, convicting defendant of criminal possession of a controlled substance in the fifth degree, adjudicating him a youthful offender, and sentencing him to a conditional discharge, unanimously affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations.

After seeing defendant remain in the vestibule of a public housing building for more than five minutes, with no circumstances explaining his presence, the police possessed an objective, credible reason to ask him whether he lived there or

"had business" there (*see People v Wighfall*, 55 AD3d 347 [1st Dept 2008], *lv denied* 11 NY3d 931 [2009]). When defendant responded only that he was from Queens, with no indication that he was a resident or the guest of a resident, the police possessed, at the very least, founded suspicion of criminality, i.e. trespassing (*see id.*). Accordingly, their request that defendant step outside the vestibule so that they could talk to him was justified, and the encounter was not elevated to a seizure (*see e.g. People v Francois*, 61 AD3d 524, 525 [1st Dept 2009], *affd* 14 NY3d 732 [2010]).

When defendant suddenly reached into his jacket pocket, the officer acted reasonably in grabbing defendant's hand, which was found to contain drugs. This effort "to prevent defendant from possibly drawing a weapon" was a "minimal self-protective measure" (*People v Wyatt*, 14 AD3d 441, 441-442 [1st Dept 2005],

lv denied 4 NY3d 837 [2005]).

We have considered and rejected defendant's remaining arguments.

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

ENTERED: APRIL 21, 2015

CLERK

Tom, J.P., Friedman, Renwick, Moskowitz, DeGrasse, JJ.

14873 Portfolio Recovery Associates, LLC, Index 570278/13
Plaintiff-Respondent,

-against-

Richard Lall,
Defendant-Appellant.

- - - - -

Professors of Evidence at Fordham University School of Law, Albany Law School, CAMBA Legal Services, Inc., Legal Services NYC, MFY Legal Services, Inc., New Economy Project, Queens Volunteer Lawyers Project, Inc., The Financial Clinic, The Legal Aid Society, Schlanger & Schlanger, LLP, The Bromberg Law Office, P.C., The Law Office of Ahmad Keshavarz, DC 37 Municipal Employees Legal Services, Lincoln Square Legal Services, Inc., and St. Vincent de Paul Legal Program, Inc.,
Amici Curiae.

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New York Legal Assistance Group, New York (Shanna Tallarico of counsel), for appellant.

Selip & Stylianou, LLP, Woodbury (David Szalyga of counsel), for respondent.

Lincoln Square Legal Services, Inc., New York (Ian Weinstein of counsel), for Professors of Evidence at Fordham University School of Law and Albany Law School, amici curiae, and (Marcella Silverman of counsel), for CAMBA Legal Services, Inc., Legal Services NYC, MFY Legal Services, Inc., New Economy Project, Queens Volunteer Lawyers Project, Inc., The Financial Clinic, The Legal Aid Society, Schlanger & Schlanger, LLP, The Bromberg Law Office, P.C., The Law Office of Ahmad Keshavarz, DC 37 Municipal

Employees Legal Services, Lincoln Square Legal Services, Inc., and St. Vincent de Paul Legal Program, Inc., amici curiae.

Order of the Appellate Term of the Supreme Court, First Department, entered on or about October 15, 2013, which affirmed a judgment, Civil Court, Bronx County (Mitchell J. Danziger, J.), entered April 18, 2012, after a nonjury trial, in plaintiff's favor, unanimously affirmed, without costs.

Plaintiff's proof of the underlying debt obligation was shown through defendant's testimony that he used the credit card issued by plaintiff's assignor and by the self-authenticating account statements (*see Merrill Lynch Bus. Fin. Servs. Inc. v Trataros Constr., Inc.*, 30 AD3d 336 [1st Dept 2006], *lv denied* 7 NY3d 715 [2006]). Evidence of the assignment of defendant's account was the affidavit of sale, which, although created by the assignor, was properly introduced as a business record through the testimony of plaintiff's employee (*see Landmark Capital Invs., Inc. v Li-Shan Wang*, 94 AD3d 418, 419 [1st Dept 2012]). Plaintiff's reliance on documents of this type was a sufficient basis on which to permit its employee to lay the foundation for the admission of the affidavit of sale; contrary to defendant's contention, it was not necessary that there be a special relationship between plaintiff and its assignor.

We decline to consider defendant's argument, raised for the first time on appeal, that plaintiff failed to supply the best evidence of the assignment of the account.

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

ENTERED: APRIL 21, 2015

CLERK

Tom, J.P., Friedman, Renwick, Moskowitz, DeGrasse, JJ.

14874-
14875 Index 652417/12

In re J. Ezra Merkin,
Petitioner-Respondent-Respondent,

-against-

Richard Born, et al.,
Respondents-Petitioners-Appellants.

_____

Brickman Leonard & Bamberger, P.C., New York (David E. Bamberger of counsel), for appellants.

Dechert LLP, New York (Neil A. Steiner of counsel), for respondent.

_____

Order, Supreme Court, New York County (Richard B. Lowe, III, J.), entered January 24, 2014, which denied respondents/cross-petitioners' (the Born parties) motion to renew their prior application for court approval of a settlement between the parties, unanimously affirmed, with costs. Order (same court and Justice), entered June 13, 2014, which granted petitioner-cross-respondent Ezra J. Merkin's motion to confirm an arbitration award, and denied the Born parties' cross motion to vacate it, unanimously affirmed, with costs.

The court stated on September 27, 2011, that it would not approve any more settlements between Merkin and his investors, but subsequently approved settlements in 2012 and 2013. It was

the approval of these subsequent settlements that was the basis for the Born parties' renewal motion. These settlements do not constitute new facts which were available but not offered on the prior application (*see* CPLR 2221[e]). Were we to consider these new facts in the interest of justice, they would not change the prior determination (*id.*). Accordingly, denial of the motion to renew was proper.

The motion court properly confirmed the arbitral award. The Born parties' argument that the award was not "final and definite" (CPLR 7511[b][1][iii]) because it ordered Merkin to pay a certain sum jointly instead of awarding a specific sum to each Born party is unavailing (*see generally Matter of Meisels v Uhr*, 79 NY2d 526, 536 [1992]; *Matter of Guetta [Raxon Fabrics Corp.]*, 123 AD2d 40, 44 [1st Dept 1987]). We note that the Born parties did not request separate damages for each Born party until after the arbitrators rendered the award. "[H]aving charted their course in presenting and reaping the benefits of a joint" prosecution of their claim, they cannot now be considered separately for the purpose of damages (*Wiederhorn v Merkin*, 98 AD3d 859, 861 [1st Dept 2012], *lv denied* 20 NY3d 855 [2012]).

The Born parties' contention that the award is irrational because it did not compensate them for Merkin's alleged

alteration of a document is unavailing. Although the arbitration panel's reasoning is unknown, if it made an implicit factual finding that Merkin did not alter the document, we are bound by such a finding (*id.* at 862), and, even assuming, that it found that Merkin altered the document, it was not required to award punitive damages. In any event, "the adequacy of an arbitral award is not grounds for review" (*State of New York v Philip Morris Inc.*, 308 AD2d 57, 69 [1st Dept 2003], *lv denied* 1 NY3d 502 [2003]).

On appeal, the Born parties contend that the arbitral panel irrationally adopted the report of Merkin's expert on damages, even though it was severely flawed. However, they failed to make this argument before the panel rendered the award.

The Born parties' claim that the arbitrators *expressly agreed* to consider certain evidence but then refused to accept it is without factual foundation in the record. The Born parties were not deprived "of a fundamentally fair hearing" (*Kaminsky v Segura*, 26 AD3d 188, 189 [1st Dept 2006]) by the arbitrators'

refusal to accept certain excerpts of testimony from other actions and arbitrations.

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

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

ENTERED: APRIL 21, 2015

CLERK

Tom, J.P., Friedman, Renwick, Moskowitz, DeGrasse, JJ.

14876 The People of the State of New York, Ind. 4193/11
Respondent,

-against-

Nigel Livingston,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Bonnie Wittner, J.), rendered on or about April 4, 2012,

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

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

ENTERED: APRIL 21, 2015

CLERK

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

Tom, J.P., Friedman, Renwick, Moskowitz, DeGrasse, JJ.

14877 The People of the State of New York, Ind.5045/10
Respondent,

-against-

Kendall Brown,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Patricia Nuñez, J.), rendered on or about May 16, 2013,

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

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

ENTERED: APRIL 21, 2015

CLERK

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

Friedman J.P., Renwick, Moskowitz, DeGrasse, JJ.

14878 LF East 21 Property Co., LLC, Index 102375/11
Plaintiff-Appellant,

-against-

Iradj Moini, et al.,
Defendants-Respondents.

_____

Axelrod, Fingerhut & Dennis, New York (Osman Dennis of counsel), for appellant.

Kolodny P.C., New York (Peter Kolodny of counsel), for respondents.

_____

Order, Supreme Court, New York County (Debra A. James, J.), entered December 18, 2013, which, to the extent appealed from as limited by the briefs, granted defendants' cross motion for summary judgment dismissing the complaint as against defendant Iradj Moini, unanimously affirmed, without costs.

Given the plain terms of the agreements (*see W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]; *Sharp v Stavisky*, 221 AD2d 216 [1st Dept 1995], *lv dismissed* 87 NY2d 968 [1996]), the court properly concluded that defendant guarantor Iradj Moini had been relieved of any liability to plaintiff landlord. Under the Good Guy Guaranty, Iradj Moini was responsible only for defendant tenant Moini & Moini, Inc.'s obligations up to and until the date it vacated the premises. As the tenant was current on its

payments on that date, as required by the Stipulation of Settlement, the rent waiver under the Stipulation had not been rendered null or void, and, thus, had not yet become an obligation.

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

ENTERED: APRIL 21, 2015

CLERK

Tom, J.P., Friedman, Renwick, Moskowitz, DeGrasse, JJ.

14879 The People of the State of New York, Ind. 2202/12
Respondent,

-against-

Octavia Jackson,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Maxwell Wiley, J.), rendered on or about December 5, 2012,

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

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

ENTERED: APRIL 21, 2015

CLERK

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

Tom, J.P., Friedman, Renwick, Moskowitz, DeGrasse, JJ.

14880N Linda Myles, Index 306791/09
Plaintiff-Appellant,

-against-

Charles Perry III,
Defendant-Respondent.

_____

Hogan & Cassell, LLP, Jericho (Michael Cassell of counsel), for appellant.

Katsky Korins, LLP, New York (Albert L. Mandato of counsel), for respondent.

_____

Order, Supreme Court, New York County (Deborah Kaplan, J.), entered July 16, 2014, which granted defendant's motion for counsel fees, unanimously affirmed, without costs.

The court correctly held that the settlement agreement between the parties (Agreement) authorized defendant's firm to seek counsel fees from plaintiff. The Agreement states that the parties "agree that, with respect to the unpaid legal fees and disbursements each party owes to his or her attorneys . . . requests may be made for same to the Court upon papers . . . Notwithstanding the foregoing, each party shall be responsible for and shall pay his or her respective counsel . . . fees . . ." The Agreement then provides that each party is "solely responsible" for his counsel's fees and that each party

agrees to indemnify the adversary spouse against third-party claims for those fees. Relying on its prior order, entered on or about March 24, 2014, the court correctly interpreted the provision thus: first, to allow counsel to seek any unpaid legal fees from the adversary spouse upon motion to the court, and second, in the event the court awarded only part of the legal fees, to obligate the spouse to pay his remaining portion. Similarly, as the spouse remains solely responsible for the remaining portion, he must indemnify the adversary spouse if that remaining portion is sought from her.

Plaintiff contends that the Agreement allows counsel to seek fees from her own client only, not from the adversary spouse. However, as the court noted, there is no apparent reason to include such an agreement between an attorney and her client in a settlement agreement between adversary spouses.

The court correctly held that defendant's attorneys substantially complied with the billing requirements of 22 NYCRR 1400.2, and were thus entitled to seek counsel fees (see *Edelman v Poster*, 72 AD3d 182, 183-184 [1st Dept 2010]).

The court properly awarded defendant, who is cognitively impaired, an additional $62,500 in counsel fees, well below the more than $100,000 requested (Domestic Relations Law § 237[a];

DeCabrera v Cabrera-Rosete, 70 NY2d 879 [1987]). The court considered the parties' respective financial circumstances and plaintiff's earlier payment of $40,000 towards defendant's counsel fees. Moreover, the court considered the amount of defendant's distributive award and concluded that defendant had the ability to pay part of his counsel fees.

There is no basis for disturbing the court's conclusion that the firm's fees were reasonable and not excessive. Nor was plaintiff entitled to a hearing regarding those fees. As the court noted, the Agreement provides that any request for counsel fees will be decided "upon papers," and plaintiff was able to fully discuss her challenges to the hourly rates and itemized bills in her papers.

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

ENTERED: APRIL 21, 2015

CLERK

Friedman, J.P., Sweeny, Saxe, Feinman, Clark, JJ.

14881 Pursuit Investment Management LLC, et al.,
Plaintiffs-Respondents,

-against-

Alpha Beta Capital Partners, L.P., et al.,
Defendants,

Harris & Houghteling LLP,
Defendant-Appellant.

Index 652457/13E

_____

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

Cane & Associates LLP, New York (Peter S. Cane of counsel), for respondents.

_____

Order, Supreme Court, New York County (Richard F. Braun, J.), entered on or about September 9, 2014, which denied the motion of defendant Harris & Houghteling LLP (Harris) to dismiss the complaint as against it pursuant to CPLR 3211(a)(7), unanimously reversed, on the law, with costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint as against Harris.

Dismissal of the complaint as against Harris is warranted since plaintiffs failed to state a viable claim for tortious interference with contract, as plaintiffs did not allege that

Harris's conduct was the "but for" causation of their purported damages (*see Wilmington Trust Co. v Burger King Corp.*, 34 AD3d 401, 402-403 [1st Dept 2006], *lv denied* 8 NY3d 806 [2007]; *Cantor Fitzgerald Assoc. v Tradition N. Am.*, 299 AD2d 204 [1st Dept 2002], *lv denied* 99 NY2d 508 [2003]).

Dismissal of the action as against Harris, a law firm, is also warranted because it is immune from liability "under the shield afforded attorneys in advising their clients, even when such advice is erroneous, in the absence of fraud, collusion, malice or bad faith" (*Purvi Enters., LLC v City of New York*, 62 AD3d 508, 509-510 [1st Dept 2009] [internal quotation marks omitted]). To the extent plaintiffs allege fraud, collusion, malice and bad faith on the part of Harris, these allegations are conclusory (*see Abrams v Pecile*, 84 AD3d 618, 619 [1st Dept 2011]).

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

ENTERED: APRIL 21, 2015

CLERK

Acosta, J.P., Saxe, Richter, Gische, Kapnick, JJ.

14882 The People of the State of New York, Ind. 2016/10
Respondent,

-against-

Ousmane Ag,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Bruce D. Austern of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Charles H. Solomon, J. at pretrial motion to dismiss; Daniel McCullough, J. at jury trial, posttrial motion to dismiss and sentencing), rendered July 20, 2011, convicting defendant of criminal possession of a weapon in the second degree and unlawful possession of marijuana, and sentencing him to an aggregate term of 3½ years, unanimously affirmed.

There is no basis for dismissal of the indictment or reduction of the conviction to a misdemeanor in furtherance of justice. Although defendant's arguments center on the deportation consequences of his conviction, he has not shown that either of the forms of relief he requests would actually prevent his deportation, given the relevant federal law. In any event,

while deportation is a serious consequence of a defendant's conviction, and while defendant set forth some favorable factors, there is no "compelling factor" (CPL 210.40[1]) that would warrant that "extraordinary remedy" (*People v Moye*, 302 AD2d 610, 611 [2d Dept 2003]). Defendant was convicted of a serious weapons offense. He also was previously convicted of attempted assault in third degree as a hate crime, which, although a misdemeanor, further weighed against granting the motion.

Although some portion of the home videos recorded by defendant were admissible to establish his possession of the contraband at issue and his intent to use the weapon unlawfully, the court should have ordered redactions of irrelevant and inflammatory matter (*see generally People v Arafet*, 13 NY3d 460, 465 [2009]). In particular, we see no reason to have included the portion of the videos where defendant discusses his sexual activities or to have shown a woman in defendant's bed for an extended period. The People could have established defendant's ties to the weapon without this material, and his intent to use the weapon unlawfully could have been established by his actions and words apart from this salacious material. We find, however, that any error was harmless given the overwhelming evidence of

guilt (*see People v Crimmins*, 36 NY2d 230 [1975]). Moreover, despite having viewed the unredacted tapes, the jury acquitted defendant of a count charging weapon possession with unlawful intent.

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

ENTERED: APRIL 21, 2015

CLERK

Acosta, J.P., Saxe, Richter, Gische, Kapnick, JJ.

14883 In re Samara Lipsky, Index 260209/12
Petitioner-Appellant,

-against-

Ferkauf Graduate School
of Psychology, et al.,
Respondents-Respondents.

_____

Law Office Of Neil R. Finkston, Great Neck (Neil R. Finkston of counsel), for appellant.

Seyfarth Shaw, LLP, New York (Dov Kesselman of counsel), for respondents.

_____

Judgment, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered December 12, 2013, after a nonjury trial, denying the petition to annul respondent's determination, dated November 21, 2011, which dismissed petitioner from its clinical health Ph.D. program, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Respondents' determination dismissing petitioner from its Ph.D. program in clinical health was rational and was not arbitrary and capricious (*see Matter of Susan M. v New York Law School*, 76 NY2d 241, 246 [1990]; *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]). The

record establishes that petitioner failed to comply with a number of respondents' rules and procedures, failed to conduct herself in an ethical and professional manner, and, despite being given ample opportunities to change her behavior, including a detailed remediation plan that warned that she was subject to dismissal, failed to meet the expectations of the school.

The penalty does not shock our sense of fairness (*see Matter of Kelly v Safir*, 96 NY2d 32 [2001]).

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

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

ENTERED: APRIL 21, 2015

CLERK

Acosta, J.P., Saxe, Richter, Gische, Kapnick, JJ.

14884 In re Aaron B.,

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

_____

Tamara A. Steckler, The Legal Aid Society, New York (John A. Newbery of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Antonella Karlin of counsel), for presentment agency.

_____

Order of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about March 5, 2014, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of criminal possession of a weapon in the fourth degree, menacing in the second degree, and unlawful possession of an air pistol, and also committed the act of unlawful possession of a weapon by a person under 16, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

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

disturbing the court's credibility determinations. The evidence, viewed as a whole, satisfied the display element of second-degree menacing (*see People v Howard*, 92 AD3d 176, 179-180 [1st Dept 2012], *affd* 22 NY3d 388 [2013]), and also established a sufficient chain of custody to support the weapon possession charges (*see People v Julian*, 41 NY2d 340 [1977]).

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

ENTERED: APRIL 21, 2015

CLERK

Acosta, J.P., Saxe, Richter, Gische, Kapnick, JJ.

14885 The People of the State of New York, SCI 3685/12
Respondent,

-against-

Lafone Eley,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, Bronx County (Michael A. Gross, J.), rendered January 17, 2013, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the third degree, and sentencing him to a term of 1 year, unanimously modified, on the law, to the extent of vacating the sentence and remanding for resentencing, and otherwise affirmed.

Defendant is entitled to resentencing pursuant to *People v Rudolph* (21 NY3d 497 [2013]) for a youthful offender determination on his conviction of criminal possession of a weapon in the third degree. A statement made by the court during the plea proceeding does not obviate the need for resentencing, since the court "did not make the requisite explicit determination on the record at sentencing" (*People v Basono*, 122

AD3d 553, 553 [1st Dept 2014]; *see* CPL 720.20[1]). Although the court stated that defendant would receive youthful offender treatment on another charge (contained in an indictment that is not part of this appeal) to which he pleaded guilty on the same day "and only that" count, the court failed to clarify expressly whether it had "actually consider[ed] youthful offender treatment" or whether it had improperly "ruled it out on the ground that it had been waived as part of defendant's negotiated plea" (*People v Malcolm*, 118 AD3d 447 [1st Dept 2014]).

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

ENTERED: APRIL 21, 2015

CLERK

Acosta, J.P., Saxe, Richter, Gische, Kapnick, JJ.

14886-
14887 W. Robert Curtis, Index 104558/11
Plaintiff-Appellant,

-against-

David Bouley, et al.,
Defendants-Respondents.

_____

Curtis & Associates, P.C., New York (W. Robert Curtis of counsel), for appellant.

Wasserman Grubin & Rogers, LLP, New York (Douglas J. Lutz of counsel), for respondents.

_____

Appeal from order, Supreme Court, New York County (Eileen A. Rakower, J.), entered April 30, 2013, which denied plaintiff's motion to vacate a prior order denying his motion for a license pursuant to RPAPL 881 to enter adjacent premises, unanimously dismissed, without costs, as moot. Order, same court and Justice, entered July 12, 2013, which denied plaintiff's motion to amend the complaint, unanimously affirmed, without costs.

By the time the April 30, 2013 order was issued, as the motion court observed therein, defendants no longer had possession or control over the premises that plaintiff sought to enter, and plaintiff had been granted access by the new occupant; indeed, plaintiff concedes on appeal that he has made the repairs

for which he sought access.

The proposed amended complaint fails to state a cause of action for fraud since it does not allege that plaintiff reasonably relied on defendant David Bouley's alleged misrepresentations to his detriment (*see Meyercord v Curry*, 38 AD3d 315 [1st Dept 2007]).

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

ENTERED: APRIL 21, 2015

CLERK

Acosta, J.P., Saxe, Richter, Gische, Kapnick, JJ.

14888-
14889-
14890 Index 500088/02

In re Julie Stoil Fernandez, Esq.,
Respondent,

As Guardian of the Property and
Co-Guardian of the Person of Linda
Salvati, an incapacitated person
(now deceased),

George J. McCormack, Esq., Executor
of the Will of Linda Salvati,
Appellant.

_____

George J. McCormack, Brooklyn, appellant pro se.

Greenberg & Wilner, LLP, New York (Adam C. Wilner of counsel), for respondent.

_____

Order, Supreme Court, New York County (Lottie E. Wilkins, J.), entered June 25, 2013, which, among other things, granted respondent guardian's motion to confirm a referee's report, dismissed appellant executor's objections to the report, and awarded the guardian commissions, fees and disbursements, unanimously affirmed, with costs. Orders, same court and Justice, entered January 22, 2014, which granted the guardian's motions for attorneys' fees and bookkeeping fees, unanimously affirmed, with costs.

The court had jurisdiction to determine and resolve the

outstanding guardianship and estate issues after the death of the incapacitated person (*see Acito v Acito*, 72 AD3d 493, 494 [1st Dept 2010]; *see also Pollicina v Misericordia Hosp. Med. Ctr.*, 82 NY2d 332, 339 [1993]).

We reject the executor's contention that the discovery permitted by this Court in *Matter of Salvati (Fernandez)* (90 AD3d 406 [1st Dept 2011], *lv dismissed* 19 NY3d 939 [2012]) was improperly "truncated." The record shows that the executor and his counsel consented to the discovery schedule, and there is no showing that the executor had insufficient time to review the materials related to the accounts at issue.

The Referee's conclusions are supported by the record, and there is no basis for disturbing the Referee's credibility determinations (*see Kardanis v Velis*, 90 AD2d 727, 727 [1st Dept 1982]). The record does not support the executor's claims of due process violations, bias against him by the Referee, or misconduct by the guardian. The record shows that the Referee carefully reviewed all of the executor's claims and that the executor had a full and fair opportunity to present his objections to the court.

We have considered the executor's remaining arguments, including his request for additional time to file a reply brief, and find them unavailing.

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

ENTERED: APRIL 21, 2015

CLERK

Acosta, J.P., Saxe, Richter, Gische, Kapnick, JJ.

14891 In re Mohammed Alam, Index 22640/13E
Petitioner-Appellant,

-against-

Motor Vehicle Accident
Indemnification Corporation,
Respondent-Respondent.

_____

Weiss & Associates, PC, New York (Matthew J. Weiss of counsel), for appellant.

Kornfeld, Rew, Newman & Simeone, Suffern (William S. Badura of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered March 14, 2014, which, in an action to recover for personal injuries allegedly sustained in a hit-and-run accident, denied the petition seeking leave under Insurance Law § 5218 to bring an action against respondent, Motor Vehicle Accident Indemnification Corporation, unanimously reversed, on the law and the facts, and the petition granted, without costs.

Petitioner met his burden of demonstrating that the subject accident was one in which the identity of the owner and operator of the subject motor vehicle was not ascertainable through reasonable efforts (*see* Insurance Law § 5218[b][5]; *Cardona v*

Martinez, 61 AD3d 462 [1st Dept 2009]).

Petitioner was injured after being struck by a vehicle while crossing the street as he headed to his mosque for a prayer service. The driver pulled over, exited the vehicle, and approached petitioner. In response to the driver's multiple inquiries, plaintiff told the driver that he was fine. A few minutes later, the driver left the scene. Petitioner did not obtain the driver's contact information or the license plate number of the vehicle, and proceeded on to the mosque.

Petitioner testified, without opposition, that he did not believe he was seriously hurt in the moments after the accident. Petitioner's testimony that he felt pain in his left foot in the immediate aftermath of the accident does not necessarily compel a different result. His failure to seek immediate medical attention only confirms his initial belief that he was not significantly hurt. Because petitioner did not believe he was seriously hurt, it was reasonable that he did not ask the driver for identifying information at that time. *Matter of Riemenschneider [Motor Veh. Acc. Indem. Corp.]*, 20 NY2d 547, 549-551 [1967]).

Once he knew he was seriously injured, petitioner undertook reasonable efforts to ascertain the identity of vehicle owner or

operator. Petitioner testified that he filed a police report, canvassed the mosque and surrounding area to locate possible eyewitnesses, and obtained surveillance footage depicting the accident location, all of which ultimately proved unhelpful in identifying the operator or license plate number of the vehicle.

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

ENTERED: APRIL 21, 2015

CLERK

Acosta, J.P., Saxe, Richter, Gische, Kapnick, JJ.

14892 Alfred Joseph Ayers, III, Index 116404/07
Plaintiff-Respondent,

-against-

The Dormitory Authority of the
State of New York,
Defendant-Appellant,

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

_____

Brill & Associates, PC, New York (Corey M. Reichardt of counsel), for appellant.

Steven L. Salzman, P.C., New York (David S. Gould of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan A. Madden, J.), entered February 6, 2014, which denied the motion of defendant The Dormitory Authority of the State of New York (DASNY) for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Plaintiff was injured when he jumped from the second-floor of DASNY's building in an attempt to extinguish a fire that had started in a sidewalk shed that abutted the building. Plaintiff alleges that DASNY's negligence in leaving the sidewalk shed in disrepair and permitting students to smoke in the subject building were proximate causes of the fire.

DASNY, which holds title to the building, failed to meet its burden of establishing the absence of issues of fact surrounding duty, breach, and proximate cause. DASNY had a duty to keep the sidewalk shed safe (*see Ryan v Trustees of Columbia Univ. in the City of N.Y., Inc.*, 96 AD3d 551, 552 [1st Dept 2012]), and has failed to show that it did not have actual or constructive notice of either a hazardous condition on the sidewalk shed, namely the existence of construction debris and garbage, or the recurring condition of students smoking in the stairwells of the building and discarding lit cigarettes from the window (*see generally Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]; *Talavera v New York City Tr. Auth.*, 41 AD3d 135 [1st Dept 2007]).

There are also triable issues as to proximate cause, as DASNY has not shown the presence of an "extraordinary intervening act[]" that was "not foreseeable in the normal course of events"

(*Monell v New York*, 84 AD2d 717, 718 [1st Dept 1981]). In view of the numerous factual issues presented on this record, we decline plaintiff's request that we search the record and award summary judgment in his favor.

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

ENTERED: APRIL 21, 2015

CLERK

Acosta, J.P., Saxe, Richter, Gische, Kapnick, JJ.

14895 The People of the State of New York, Ind. 4434/11
Respondent,

-against-

Stephen Saunders,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Cassandra Mullen, J.), rendered May 22, 2012, convicting defendant, after a jury trial, of criminal possession of a weapon in the third degree and assault in the third degree, and sentencing him, as a second felony offender, to an aggregate term of 3½ to 7 years, unanimously affirmed.

Defendant's general objections failed to preserve his claim that the People introduced testimony that constituted uncharged crime evidence as well as hearsay (*see People v Tevaha*, 84 NY2d 879 [1994]), and we decline to review it in the interest of justice. As an alternative holding, we find the argument unavailing. Defendant was charged with assaulting a hospital security officer during a dispute over defendant's attempt to see

his wife, who was in a psychiatric emergency room. Evidence that the hospital staff had learned that defendant's wife did not wish to see defendant, whom she alleged to be the cause of her hospitalization, did not amount to evidence of a prior bad act (*see People v Hamilton*, 73 AD3d 408 [1st Dept 2010], *lv denied* 15 NY3d 774 [2012]; *People v Flores*, 210 AD2d 1, 2 [1st Dept 1994], *lv denied* 84 NY2d 1031 [1995]).

We perceive no basis for reducing the sentence.

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

ENTERED: APRIL 21, 2015

CLERK

Acosta, J.P., Saxe, Richter, Gische, Kapnick, JJ.

14896 The People of the State of New York, Ind. 4239/06
Respondent,

-against-

Shaheed Robinson,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Kerry S. Jamieson of counsel), and Weil Gotshal & Manges LLP, New York (Cheryl A. James of counsel), for appellant.

Shaheed Robinson, appellant pro se.

Robert T. Johnson, District Attorney, Bronx (Bari L. Kamlet of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Caesar D. Cirigliano, J.), rendered July 14, 2008, convicting defendant, after a jury trial, of robbery in the first degree and two counts of criminal possession of a weapon in the second degree, and sentencing him, as a second violent felony offender, to an aggregate term of 12 years, unanimously affirmed.

Although defendant generally objected to the discharge of an absent sworn juror and requested an adjournment until the following day, he did not preserve his claim that the court failed to conduct a reasonably thorough inquiry when it replaced the juror (*see People v Knight*, 84 AD3d 670, 671 [1st Dept 2011],

lv denied 17 NY3d 860 [2011]) and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. After conducting a suitable inquiry and determining that the absent juror would not appear within two hours after the time that the trial was scheduled to resume, the court properly exercised its discretion in substituting an alternate juror (*see* CPL 270.35[2][a]; *People v Jeanty*, 94 NY2d 507 [2000]). The juror had called in sick, and thereafter was not answering her home or cell phones. Under the circumstances, the court was not obligated to wait a full two hours before replacing the juror (*see People v Lopez*, 18 AD3d 233, 234 [1st Dept 2005], *lv denied* 5 NY3d 807 [2005]).

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

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

ENTERED: APRIL 21, 2015

CLERK

Acosta, J.P., Saxe, Richter, Gische, Kapnick, JJ.

14897-
14898 Index 651599/12

Epic Sports International, Inc.
formally known as Klip America, Inc.,
Plaintiff-Appellant,

-against-

Sean Frost, et al.,
Defendants-Respondents,

Samsung C&T American, Inc., et al.,
Defendants.

_____

Appeals having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Melvin L. Schweitzer, J.), entered on or about February 26, 2013, and from an order, same Court and Justice, entered October 2, 2013,

And said appeals having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated March 31, 2015,

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

ENTERED: APRIL 21, 2015

CLERK

Acosta, J.P., Saxe, Richter, Gische, Kapnick, JJ.

14899 The People of the State of New York, Ind. 384/12
Respondent,

-against-

Robert S. Brown,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Ashley Akins-Atewogboye of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Steven L. Barrett, J.), rendered on or about March 6, 2014,

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

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

ENTERED: APRIL 21, 2015

CLERK

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

Acosta, J.P., Saxe, Richter, Gische, Kapnick, JJ.

14903 The People of the State of New York, Ind. 5205/09
Respondent,

-against-

Roberto DeJesus,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Marisa K. Cabrera of counsel), for appellant.

Robert DeJesus, appellant pro se.

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

_____

Judgment, Supreme Court, New York County (Ruth Pickholz, J. at suppression hearing; Thomas Farber, J. at jury trial and sentencing), rendered October 7, 2011, as amended October 26, 2011, convicting defendant of robbery in the second degree (four counts), criminal impersonation in the first degree (two counts) and criminal possession of a weapon in the fourth degree, and sentencing him, as a persistent violent felony offender, to an aggregate term of 18 years to life, unanimously affirmed.

The trial court providently exercised its discretion when it replaced a juror who, after repeated phone calls from the court, finally called the court almost two hours after the trial's scheduled starting time, and stated that he had overslept after a

night of drinking. "The Court of Appeals has held that the 'two-hour rule' gives the court broad discretion to discharge any juror whom it determines is not likely to appear within two hours" (*People v Kimes*, 37 AD3d 1, 24 [1st Dept 2006], *lv denied* 8 NY3d 881 [2007], citing *People v Jeanty*, 94 NY2d 507, 517 [2000]). Here, it was certain that the juror would not appear within the two-hour period, and the court providently chose not to delay the trial any further. Defendant's claim that the court should not have had an ex parte phone conversation with the juror is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits, and we also find that there was no mode of proceedings error. Phone contact with a juror regarding the juror's absence or lateness is a quintessentially ministerial matter, frequently handled by nonjudicial staff, and it is very different from the type of inquiry contemplated by *People v Buford* (69 NY2d 290 [1987]).

The court properly denied defendant's motion to suppress evidence recovered subsequent to his stop, frisk, and resulting arrest. There is no basis for disturbing the court's credibility determinations. The court also properly denied defendant's motion to suppress statements. There was no coercive police

conduct, and the totality of the circumstances establishes that the statements were voluntarily made (*see Arizona v Fulminante*, 499 US 279, 285-288 [1991]; *People v Anderson*, 42 NY2d 35, 38-39 [1977]). Although the statements were obtained over a lengthy period of time, only a small part of this time was spent on interrogation. Defendant had ample time to sleep if he so chose, took several naps, and received food and an opportunity to talk to his child's mother. Accordingly, the People established that the statements were voluntary (*see e.g. People v Salley*, 25 AD3d 473, 474 [1st Dept 2006], *lv denied* 6 NY3d 838 [2006]).

The court properly admitted evidence of an uncharged Brooklyn robbery that defendant committed shortly before one of the charged crimes. The charged and uncharged robberies were inextricably interwoven, they were supported by overlapping evidence, and they constituted a single chain of events and a common scheme or plan (*see People v Dorm*, 12 NY3d 16, 19 [2009]; *People v Alvino*, 71 NY2d 233, 242 [1987]; *People v Vails*, 43 NY2d 364, 368-369 [1977]). The probative value of this evidence outweighed any potential prejudice, which the court minimized by way of thorough limiting instructions.

By delivering an adverse inference charge, the court provided an adequate remedy for the People's loss of the

recording of a robbery victim's 911 call (*see People v Martinez*, 71 NY2d 937, 940 [1988], and it properly exercised its discretion in denying defendant's requests for other relief. We note that defendant was provided with the Sprint report of the call.

We perceive no basis for reducing the sentence.

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

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

ENTERED: APRIL 21, 2015

CLERK

Acosta, J.P., Saxe, Richter, Gische, Kapnick, JJ.

14904 The People of the State of New York, Ind. 5250N/12
Respondent,

-against-

Steven McCormack,
Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (Arthur H. Hopkirk of counsel), for appellant.

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Michael Sonberg, J.), rendered on or about July 2, 2013,

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

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

ENTERED: APRIL 21, 2015

CLERK

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

Acosta, J.P., Saxe, Richter, Gische, Kapnick, JJ.

14907 In re Anthony Blue Ind. 1402/13
[M-755] Petitioner,

-against-

Hon. Bruce Allen, et al.,
Respondents.

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Anthony Blue, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Anthony Tomari of counsel), for Hon. Bruce Allen, respondent.

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

_____

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

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

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

ENTERED: APRIL 21, 2015

CLERK

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

14030 Carlos Rodriguez Pastor, Index 652396/13
Plaintiff-Appellant,

-against-

Peter DeGaetano, etc., et al.,
Defendants-Respondents,

Maureen Klinsky, et al.,
Defendants.

_____

David Bolton, P.C., Garden City (David Bolton of counsel), for appellant.

Stern Tannenbaum & Bell LLP, New York (David S. Tannenbaum, of counsel), for respondent.

_____

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered on or about March 20, 2014, modified on the law, to deny the motion for summary judgment on the first counterclaim and for dismissal of the first, third, fifth and sixth causes of action, and otherwise affirmed, without costs.

Opinion by Acosta, J. All concur.

Order filed.

Corrected Order - April 22, 2015

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Rolando T. Acosta
David B. Saxe
Karla Moskowitz
Paul G. Feinman, JJ.

14030
Index 652396/13

_____x

Carlos Rodriguez Pastor,
Plaintiff-Appellant,

-against-

Peter DeGaetano, etc., et al.,
Defendants-Respondents,

Maureen Klinsky, et al.,
Defendants.

_____x

Plaintiff appeals from the order of the Supreme Court, New York County (Jeffrey K. Oing, J.), entered on or about March 20, 2014, which, to the extent appealed from as limited by the briefs, granted defendants-respondents' motion for summary judgment on their first counterclaim and for dismissal of the first and third through sixth causes of action as against them.

David Bolton P.C., Garden City (David Bolton of counsel), for appellant.

Stern Tannenbaum & Bell LLP, New York (David S. Tannenbaum, Rosemary Halligan and Jonathan Kotler of counsel), for respondents.

ACOSTA, J.

The primary question raised by this appeal is whether a buyer can be forced to conclude a purchase of real property where the seller has not definitively resolved a third-party cooperative's challenge to the buyer's right of exclusive use over a portion of the property. We find that, because questions of fact remain as to whether the seller obtained unequivocal assurances that the coop's board of directors would not interfere with the buyer's right of exclusivity, the seller has not demonstrated that it was ready, willing, and able to close the sale. In addition, there are questions of fact as to whether the seller breached the implied covenant of good faith and fair dealing. Therefore, the seller is not entitled to summary judgment permitting it to retain the buyer's down payment.

I. Facts and Background

On March 21, 2012, plaintiff entered into a contract of sale to purchase the shares allocated to a penthouse apartment from defendants-respondents – executors of the Estate of Monique Uzielli (hereinafter the Estate) – for $27.5 million, paying a 10% deposit of $2.75 million. The parties intended to close the sale after obtaining the unconditional consent of the board of directors of the cooperative corporation (the Board or the Coop).

A crucial element of the transaction related to plaintiff's exclusive use of the apartment's terrace, a right emanating from the proprietary lease.[1] Soon after the contract of sale was signed, however, the Board attempted to eliminate plaintiff's right, as the prospective owner of the penthouse, to use the terrace exclusively, as provided by the Coop's governing documents.

By letter dated May 17, 2012, the Board's managing agent informed plaintiff that "[i]t is important to note that the upper roof [above the penthouse] accessible by the stairs on the terrace may be used by shareholders at any time as a common area of the building." The stairs referenced in the letter had

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[1] The proprietary lease contained a provision (Article I, Paragraph "Eighth") stating that the penthouse owner "shall have and enjoy the exclusive use of the roof appurtenant to such apartment [i.e. the terrace] as shown on the plan of the penthouse," except that, among other things, the Coop would be permitted to access the roof for maintenance and the like.

Paragraph 52 of the rider to the contract of sale further provided, in relevant part,

> "Seller shall deliver to Purchaser at or prior to Closing the 'plan of the penthouse' ('Plan') referred to in the Proprietary Lease Article I, Paragraph Eighth, from the [Coop] or an agent thereof, addressed to the Purchaser which Plan shall be substantially similar to that of the floor plan annexed hereto as Exhibit A."

previously been used only for maintenance purposes; the other shareholders in the building had never been granted access to the roof as a common area, presumably because the only way they could reach the rooftop would be by traversing the penthouse terrace and, consequently, impeding the owner's exclusive use thereof.[2] Notably, the stairs are not depicted in the penthouse floor plan that was annexed to the contract of sale (the Contract Plan).

The Board's position "came as a complete shock" to plaintiff. Although the Board notified the parties in June 2012 that it approved the sale (without imposing any conditions), it again sought to interfere with plaintiff's right of exclusivity when, in an August 2012 email, the Board proposed a "conditional consent agreement" to be signed by plaintiff and the Estate. The proposed agreement stated that the plan of the penthouse was "either missing or lost"; that "[t]he entire Penthouse Roof is a common area"; that "the Cooperative and its shareholders have the right to use . . . [the maintenance stairway] in their sole discretion for the purpose of obtaining access to the Penthouse Roof"; and that "[s]uch parties, further, have the right to use a

[2] The letter further stated that the shareholders would access the maintenance stairs "via . . . a short path on the [penthouse] terrace level . . . to the higher level."

pathway . . . leading from the internal Building stairs to the [maintenance stairs]."

The Estate was similarly troubled by the Board's position. According to plaintiff's affidavit, plaintiff and the Estate refused to sign the conditional consent agreement, and one of the Estate's executors advised plaintiff not to sign it.

The Estate commenced an action against the Coop and its managing agent in September 2012 (the Separate Action), seeking an order, inter alia, directing the Coop to provide a copy of the plan of the penthouse, requiring the Board to withdraw the conditional consent agreement, directing the Board to acknowledge that its consent to the sale was unconditional, and declaring that the roof cannot become a common area and "that the Terrace is for the exclusive use and enjoyment of the lessee of the Penthouse and that the residents of the Building and others may not use it as a pathway to the Upper Roof."

Although the Separate Action was ultimately resolved when the Coop provided multiple floor plans and withdrew its requirement that the parties sign the conditional consent agreement, the Estate never obtained the declaratory judgments it originally sought.

In its complaint, the Estate alleged that access to the roof above the penthouse "was 'strictly prohibited' to other shareholders and residents of the Building" and only used for authorized maintenance "[d]uring the entirety of the 53 year period" in which Ms. Uzielli owned the apartment. The Estate further argued that "[p]ermitting residents of the Building to regularly access the Upper Roof via the Terrace staircase destroys an obvious and critical component of the value of the Penthouse and also violates the right to the exclusive use and enjoyment granted . . . under the terms of the [Proprietary] Lease," and that the Board's attempt to "convert the Upper Roof to a common area . . . threaten[ed] the Buyer that the private and exclusive use of the Terrace will be terminated, thereby irreparably harming the value of the Penthouse and potentially inducing the Buyer to cancel the Contract of Sale."

The Coop and its managing agent answered the Separate Action complaint in December 2012. The Estate moved for partial summary judgment, and the court issued an order on May 23, 2013, directing the Coop to provide the Estate with a copy of "a floor plan at issue in the motion."

On May 28, 2013, the Coop's attorney provided the Estate with "the floor plan for the Penthouse Unit" (the May Plan) and

stated that the Board had "waived the conditional consent clause of the buyer." Later that day, the Estate forwarded the May Plan to plaintiff and notified him of the Board's waiver. This did not resolve the exclusivity issue to plaintiff's satisfaction, however.

By letter dated May 29, plaintiff's counsel informed the Estate that plaintiff was electing to cancel the contract and request return of the deposit because, he asserted, the May Plan was not substantially similar to the Contract Plan. Plaintiff determined that the plans were not substantially similar, as required by Paragraph 52 of the rider, because the May Plan showed a "large stairway extending into the southeast terrace of the [penthouse]." This was the same maintenance stairway that the Board referenced in its May 2012 letter, when it initially stated its intention to treat the rooftop as a common area accessible via the maintenance stairs on the penthouse terrace.

In an apparent attempt to allay plaintiff's concerns and proceed with the sale, the Estate again moved for partial summary judgment in the Separate Action and obtained from the Coop a new floor plan (the June Plan), which omitted the maintenance staircase. On the record, at a hearing on June 6, 2013 (so ordered on June 11), the court ruled that the June Plan was

substantially similar to the Contract Plan.[3] The Coop's attorney also stated that the Board would "adopt" the June Plan and had withdrawn its requirement that the parties sign the conditional consent agreement. Significantly, however, the Board did not withdraw its position as stated in the May 2012 letter, nor did it unequivocally and affirmatively acknowledge plaintiff's right of exclusive use over the terrace or state that the Board would refrain from taking future action to interfere with that right.

The Estate then rejected plaintiff's attempted cancellation of the contract by letter dated June 12, 2013, and enclosed the June Plan, claiming that it had until closing to provide a plan of the penthouse under Paragraph 52 of the rider. In addition, the Estate purported to schedule a time-of-the-essence closing date and warned plaintiff that his failure to appear at the closing would be deemed a breach of the contract, entitling the Estate to retain the down payment.

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[3] Attached to the so-ordered transcript of the proceedings is the Contract Plan, the substantially similar June Plan (reflecting minor changes with respect to two interior details), and a plan from the same architectural firm and bearing the same date as the May Plan (except that, as counsel for the Board advised the court, "the staircase has been removed"). Significantly, nothing in the record of the Separate Action indicates that the court made any finding that the May Plan was substantially similar to any of those plans.

In response, plaintiff rejected the Estate's attempt to set a closing date by letter dated June 25, 2013, asserting that the submission of the June Plan, which omitted the maintenance staircase, confirmed that the May Plan was not substantially similar to the Contract Plan. Plaintiff further contended that Paragraph 52 of the Rider – which required the Estate to provide the Plan "at or prior to Closing" – did not "allow the Estate to provide one version of the plan 'prior to Closing' and a different version 'at Closing.'"

On July 3, 2013, the Estate appeared at the closing, and plaintiff did not appear.

In September 2013, plaintiff commenced this action seeking, inter alia, return of the $2.75 million deposit. Before discovery had been conducted, the Estate moved for summary judgment directing the release of the deposit from escrow and dismissing plaintiff's causes of action. On the record at oral argument, Supreme Court granted the Estate summary judgment on their first counterclaim and dismissed several of plaintiff's causes of action.

The motion court found that the Estate was ready, willing, and able to close at the time-of-the-essence closing, and because plaintiff failed to appear on the closing date, the Estate was

entitled to retain the contract deposit. The court also accepted the Estate's argument that it had until the closing to tender a plan that was substantially similar to the Contract Plan – or, in other words, to "cure any defect" arising from the May Plan. If plaintiff objected to the May Plan, said the court, his proper remedy was to appear at the closing and raise the objections. Thus, the court dismissed plaintiff's causes of action alleging breach of contract and seeking the return of the deposit. The court also dismissed plaintiff's claim for rescission of the contract based on mutual mistake, ruling that there was no mistake since plaintiff and the Estate correctly believed at the time of the contract that the subject matter was a penthouse apartment with exclusive use of the terrace. Finally, the court dismissed plaintiff's claim alleging that the Estate breached the implied covenant of good faith and fair dealing by issuing the time-of-the-essence letter, finding that the Estate was simply attempting in good faith to close the deal.

Plaintiff appeals.

II. Discussion

a. Whether the Estate was ready, willing, and able to conclude the sale

First, in order to obtain summary judgment permitting it to retain the deposit, the Estate "must establish that it was ready, willing, and able to perform on the time-of-the-essence closing date, and that the purchaser failed to demonstrate a lawful excuse for its failure to close" (*Donerail Corp. N.V. v 405 Park LLC*, 100 AD3d 131, 138 [1st Dept 2012]; *see also Cipriano v Glen Cove Lodge # 1458, B.P.O.E.*, 1 NY3d 53, 63 [2003]). The Estate failed to carry its burden, as it has not adduced evidence that the Coop unequivocally withdrew its position with respect to the penthouse owner's right of exclusivity granted in the proprietary lease. That is, even assuming the Estate satisfied Paragraph 52 of the rider by providing a Plan that was substantially similar to the Contract Plan, it has not shown that the Board categorically recognized plaintiff's right to exclusively use the terrace or stated that it would not seek to abrogate that right in the future. Additionally, the Coop attempted to interfere with plaintiff's right of exclusivity soon after the contract of sale was signed, subsequently requested plaintiff to relinquish his right of exclusivity via a conditional consent agreement, and suspiciously submitted the May Plan, which included the very maintenance staircase that was a point of strident contention. Even though the Coop subsequently submitted the June Plan,

pursuant to a court order, plaintiff contends that none of the plans provided by the Coop are *the* Plan, because the Coop admitted that the original plan was lost and the Estate has not shown whether the Board formally adopted any of the new plans. In the circumstances of this case, given the Coop's earlier statement that it planned to interfere with plaintiff's exclusive use of the terrace and its submission of several different floor plans – one of which roused plaintiff's suspicions that the Coop remained intent on accessing the rooftop via the terrace staircase – the Estate needed to obtain a full retraction of the Coop's position before it could close the sale, and it has failed to show that it did so.

The Coop, by seeking to terminate the penthouse owner's right of exclusivity as early as May 2012, cast a pall over the transaction. That plaintiff would have an ongoing relationship with the Board, which unreasonably attempted to terminate his right of exclusivity after he entered into a contract of sale with the seller, understandably gave him trepidation about proceeding with the transaction. This is particularly problematic given that plaintiff was not purchasing a house or condominium, in which case he would have essentially unrestrained ownership, but instead contracted to purchase shares in a coop

(*see* 1 NY Law & Practice of Real Property §§ 15:4; 15:11 [2d ed]). The lingering specter of a coop board's refusal to comply with the governing document's provision regarding the owner's right to exclusive access over the subject property would make any reasonable purchaser uneasy.

The Estate recognized that this "cloud" needed to be lifted – indeed, the Estate acknowledged that the Board's position, if successful, would damage the value of the penthouse – and commenced the Separate Action against the Coop. Notwithstanding that the Estate obtained multiple floor plans and the Coop's withdrawal of the conditional consent requirement, the record before us suggests that it failed to achieve a sufficient resolution of the exclusivity issue.[4] As this Court recently noted, "A decision on the merits warrants the issuance of a declaration" (*Greenwich Ins. Co. v City of New York*, 122 AD3d 470, 472 [1st Dept 2014], citing *Hirsch v Lindor Realty Corp.*, 63 NY2d 878, 881 [1984]) – relief the Estate initially sought in the

[4] We note that, despite the Estate's argument that it did not pursue the Separate Action on plaintiff's behalf, the fact remains that he was "a mere contract vendee of shares in [the] cooperative corporation and, accordingly, . . . was without standing to enforce the proprietary lease against the cooperative" (*Woo v Irving Tenants Corp.*, 276 AD2d 380, 380 [1st Dept 2000]).

Separate Action but apparently abandoned – without which the court's purported findings and the parties' equivocal statements and submissions fall well short of resolving the issue.

For example, the Estate's counsel stated before the motion court that the Coop conceded in the Separate Action (1) that it was withdrawing the conditional consent requirement, and (2) "that *the shareholders do not have the right to use [the maintenance] staircase* to access the roof" (emphasis added).[5] Yet the record is devoid of evidence corroborating that the Coop ever made the latter statement or its equivalent. The Board first stated its position on the exclusivity issue in its May 2012 letter, months before it requested the parties to sign the conditional consent agreement. Accordingly, the Board's subsequent "waiver" of the conditional consent requirement did not also constitute a retraction of its May 2012 statement that the shareholders could access the rooftop through the penthouse terrace.

[5] There is a critical difference between these two statements. The first indicates that the Board will approve the sale absent the parties' acknowledgment of the *Coop's right* to traverse the penthouse terrace; the second indicates that the Coop recognizes *plaintiff's right* of exclusivity and will cease any attempts to interfere with that right.

Indeed, this is unsurprising, because it was in the Coop's interest to provide minimal assurances – i.e., withdrawing its conditional consent requirement without fully retracting its May 2012 position, and submitting the May Plan, which included the maintenance staircase – in order to maintain a future claim that the rooftop is a common area and that the shareholders would have a right to traverse plaintiff's terrace. And it was in the Estate's interest, as the seller, to accept whatever minimal assurances the Coop provided, in order to proceed with the closing. These interests, however, conflict with plaintiff's interest in receiving what he bargained for.

In the context of the Board's previous attempts to interfere with plaintiff's right of exclusivity, and contentious litigation between the Estate and the Coop – in which the Coop submitted the May Plan, which plaintiff understood as representing the Coop's unwavering intent to convert the rooftop into a common area accessible via the maintenance stairs – anything short of an unequivocal assurance was inadequate. Even the subsequent June Plan, without more, would not suffice. Without the Board's affirmative and unequivocal acknowledgment that the shareholders have no right to traverse the terrace, and that it would not take future action to revoke plaintiff's exclusive right to use that

space, plaintiff lacked adequate assurances that his right of exclusivity (and the market value of the apartment) would remain undisturbed if he consummated the sale (*see Voorheesville Rod & Gun Club v Tompkins Co.*, 82 NY2d 564, 571 [1993] ["[A] purchaser ought not to be compelled to take property, the possession or title of which he may be obliged to defend by litigation. He should have a title that will enable him to hold his land free from probable claim by another, and one which, if he wishes to sell, would be reasonably free from any doubt which would interfere with its market value"] [internal quotation marks omitted]).

The Estate has not shown that plaintiff was given these assurances and, consequently, it failed to demonstrate its ability to close (*see Donerail Corp.*, 100 AD3d at 138-139 [seller demonstrated ability to close where buyer was informed at closing that seller's title insurer was prepared to issue title insurance without exception for existing mortgage as required by contract of sale, and deposition of counsel to seller's title insurer confirmed same]; *see also Pesa v Yoma Dev. Group, Inc.*, 18 NY3d 527, 532-533 [2012]). Moreover, absent a showing that plaintiff received unequivocal assurances that the Coop would not interfere with his right of exclusivity going forward, the Estate cannot

show that plaintiff lacked a lawful excuse to abstain from attending the closing (*see Rivera v Konkol*, 48 AD3d 347, 348 [1st Dept 2008] ["only reason" closing did not occur was plaintiff buyer's failure to deliver balance of purchase price "due to the alleged embezzlement of funds by one of her attorneys and to her own failure to fulfill her contractual obligation to apply for a mortgage loan"]; *see also Cipriano*, 1 NY3d at 62-63; *904 Tower Apt. LLC v Mark Hotel LLC*, 853 F Supp 2d 386, 397 [SD NY 2012]).

Discovery may reveal that the plaintiff was given the requisite assurances, and that at least one of the plans offered at the closing was "substantially similar" to the Contract Plan, but that discovery remains outstanding. Accordingly, summary judgment should be denied pursuant to CPLR 3212(f). Facts may exist that are within the exclusive knowledge of the Estate (and the Coop), and plaintiff has made reasonable attempts to obtain discovery; he argued before the motion court that discovery was needed, and he had already served the Estate with **a** request for the production of documents, which was not answered (*see* CPLR 3212[f]; *Voluto Ventures, LLC v Jenkens & Gilchrist Parker Chapin LLP*, 44 AD3d 557 [1st Dept 2007]; *Berkeley Fed. Bank & Trust v 229 E. 53rd St. Assoc.*, 242 AD2d 489 [1st Dept 1997]; *International Rescue Comm. v Reliance Ins. Co.*, 230 AD2d 641 [1st

Dept 1996]). Furthermore, contrary to the Estate's contention that "[p]laintiff is not entitled to discovery, as there is no genuine issue of material fact warranting the same," this is not the appropriate standard. Discovery is warranted with respect to *relevant* matters (CPLR 3101; *Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 407 [1968]; Siegel, NY Prac § 344 [5th ed]); plaintiff needs to present a triable issue of fact to withstand summary judgment, but need only show that the matter is relevant to obtain discovery. Therefore, the Estate's motion for summary judgment should be denied without prejudice to renewal after disclosure.

b. Whether the Estate consistently acted in good faith

Next, a denial of summary judgment is similarly warranted because questions of fact exist regarding whether the Estate breached the covenant of good faith and fair dealing, implied in all New York contracts (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]), when it submitted the May Plan to plaintiff and sought to set a closing date. Viewing the facts in the light most favorable to plaintiff (*see Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 105 [2006]), we are compelled to agree with plaintiff that the May Plan's inclusion of the maintenance staircase rendered it

substantially dissimilar to the Contract Plan. Although the parties agree that the stairway existed when the contract was executed, we must accept as true plaintiff's allegation that the Board added the stairway to the May Plan in order to bolster its claim that the rooftop is a common area and that shareholders would be permitted access to the roof via the maintenance stairs on the penthouse terrace (*see Graham v Columbia Presbyt. Med. Ctr.*, 185 AD2d 753, 754 [1st Dept 1992]).

Plaintiff raises questions as to whether the Estate colluded with the Coop in accepting the May Plan and abandoning the Separate Action after receiving the June Plan and the Board's withdrawal of its conditional consent requirement. He argues that the Estate readily accepted those concessions by the Coop in the Separate Action – without obtaining the declaratory judgments it initially sought – in order to force the closing, irrespective of whether the Board intended to take future action to interfere with plaintiff's right of exclusivity.[6] Although plaintiff

[6] We reject plaintiff's additional argument that the timing of the Estate's summary judgment motion in the Separate Action was suspicious. His claim that the Estate moved before issue was joined is without merit, because the record on appeal reveals that the Coop and its managing agent answered the Separate Action complaint – and, thus, issue was joined (*see* Siegel, NY Prac § 279 [5th ed]) – in December 2012, approximately five months before the Estate's motion.

infers that the Estate's haste in setting the closing date might have been pursuant to a side agreement between the Estate and the Coop during the Separate Action, it is also possible that the Estate did so without such an agreement but with a lackadaisical pursuit of relief in the Separate Action in order to close the sale.

These questions remain unanswered and, given the absence of discovery, the Estate is not entitled to summary judgment (*see* discussion of CPLR 3212[f] in section II.a., above). Plaintiff is entitled to discovery of the Estate and the Board's discussions and exchanges in an attempt to determine whether there was collusion between them, as he alleges. In addition, he is entitled to discovery of evidence concerning when and how the Coop first decided it would attempt to interfere with the prospective penthouse owner's right of exclusivity vis-à-vis the terrace, and whether it ever actually abandoned its position on that issue. The veracity of the Estate's self-serving statement that "[t]here is simply nothing to discover" remains to be tested.

c. Rescission based on mistake

Lastly, plaintiff's cause of action for rescission based on mistake was properly dismissed, because there was no mistake at

the time of the contract about the penthouse owner's right to exclusive use of the terrace (*see Matter of New York Agency & other Assets of Bank of Credit & Commerce Intl. [Superintendent of Banks of State of N.Y.—CITIC Indus. Bank]*, 90 NY2d 410, 424 [1997]; *Da Silva v Musso*, 53 NY2d 543, 552 [1981]). The proprietary lease clearly defined the penthouse owner's right of exclusivity, and the Coop's attempt to interfere with that right does not evince a mistake over the subject matter at the time of contracting.

III. Conclusion

Accordingly, the order of the Supreme Court, New York County (Jeffrey K. Oing, J.), entered on or about March 20, 2014, which, to the extent appealed from as limited by the briefs, granted defendants-respondents' motion for summary judgment on their first counterclaim and For dismissal of the first and third through sixth causes of action as against them, should be modified, on the law, to deny the motion as to the counterclaim

and as to the dismissal of the first, third, fifth, and sixth causes of action, and otherwise affirmed, without costs.

All concur.

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

ENTERED: April 21, 2015

CLERK