SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 11, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Saxe, Catterson, Acosta, Gische JJ.

8491 In re Alan Schiffren, Petitioner-Appellant, 102166/10

-against-

Brian Lawlor, etc., et al., Respondents-Respondents.

Himmelstein, McConnel, Gribben, Donoghue & Joseph, New York (Ronald S. Languedoc of counsel), for appellant.

Gary R. Connor, New York (Martin B. Schneider of counsel), for Brian Lawlor, as Acting Commissioner of the New York State Division of Housing and Community Renewal, respondent.

Belkin Burden Wenig & Goldman, LLP, New York (Magda L. Cruz of counsel), for 98 Riverside Drive, LLC, respondent.

Order, Supreme Court, New York County (Paul Wooten, J.), entered June 8, 2011, which denied the CPLR article 78 petition seeking annulment of the final determination of the New York State Division of Housing and Community Renewal, dated January 5, 2010, deregulating the subject rent-stabilized apartment on luxury deregulation grounds, unanimously affirmed, without costs.

This court is called upon, once again, to consider the interplay of an owner's participation in the J-51 tax benefit program (*See* RPTL 489; Administrative Code of the City of NY [RCNY] § 11-243) with luxury deregulation of a rent-regulated dwelling unit (*see* Rent Stabilization Law of 1969 [Administrative Code of the City of NY] § 26-504). It is undisputed that petitioner was a rent-stabilized tenant, pursuant to the Rent Stabilization Law of 1969, when he first moved into the dwelling unit in September 1989. The owner subsequently obtained J-51 tax benefits, which have since expired. The issue raised on this appeal is whether, as a matter of law, a dwelling unit that was subject to rent regulation before an owner received J-51 tax benefits can be subject to luxury deregulation once those tax benefits expire. This question has not been previously resolved, either by the Court of Appeals' decision in *Roberts v Tishman Speyer Props., L.P.* (13 NY3d 270 [2009]) or in any of our later decisions.

The plain language of Administrative Code §§ 11-243 and 26-504(c) supports the conclusion that the Legislature intended to provide that a building that is already regulated when it receives J-51 benefits will continue to be regulated under the original rent-regulation scheme when the tax benefits expire. We

conclude that the reversion to pre-J-51-benefit rent-regulation status includes the right of an owner to seek luxury deregulation in appropriate cases (*cf. Matter of 73 Warren St., LLC v State of N.Y. Div. of Hous. & Community Renewal*, 96 AD3d 524, 529 [1st Dept 2012]). While there is a collateral issue regarding whether tenant vacatur or notice in the lease is necessary to trigger reversion of a dwelling unit to the original rent-regulation regime, petitioner does not advance, and we do not decide, this issue on appeal. We only hold that luxury decontrol is not per se prohibited once the J-51 tax benefits expire on a dwelling unit that was subject to rent regulation before the tax benefits were obtained. The article 78 court, therefore, correctly concluded that upon expiration of the owner's receipt of J-51 tax abatements, petitioner's apartment continued to be subject to regulation under the same terms and conditions as before the receipt of J-51 abatements, making it subject to luxury decontrol.

The court also correctly held that mandatory IRA distributions received by petitioner in 2006 and 2007, which were reported as income in petitioner's New York State income tax returns, were properly included in the calculation of his income for those years (*see Matter of Nestor v. New York State Div. of*

Hous. & Community Renewal, 257 AD2d 395 [1st Dept 1999], *lv dismissed and denied* 93 NY2d 982 [1992]).

Finally, the court properly held that petitioner's failure to argue before the agency that his daughter should have been served with an income certification form, precluded him from advancing that position in his article 78 petition (*see Matter of Parcel 242 Realty v New York State Div. of Hous. & Community Renewal*, 215 AD2d 132 [1st Dept 1995]).

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

ENTERED: DECEMBER 11, 2012

CLERK

Tom, J.P., Andrias, DeGrasse, Richter, Román, JJ.

7549 John Cahn, Index 106110/04
Plaintiff-Respondent, 590947/05
590446/07
-against- 490446/07
590189/09

Ward Trucking, Inc., et al.,
Defendants-Respondents,

J.T. Falk & Company, Inc.,
Defendant-Respondent-Appellant,

460 Park Avenue South Associates, LLC,
Defendant.

- - - - -

J.T. Falk & Company, LLC,
Third-Party Plaintiff-Respondent-
Appellant,

-against-

Chemtreat, Inc.,
Third-Party Defendant-Appellant-
Respondent.

- - - - -

J.T. Falk & Company, LLC,
Second Third-Party Plaintiff-
Respondent-Appellant,

-against-

Atlantic Coastal Trucking, Inc., et al.,
Second Third-Party Defendants-
Respondents.

[And Other Actions]

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Mischel & Horn, P.C., New York (Scott T. Horn of counsel), for appellant-respondent.

Ahmuty, Demers & McManus, Albertson, (Glenn A. Kaminska of

counsel), respondent-appellant.

Pollack, Pollack, Isaac & De Cicco, New York (Michael H. Zhu of counsel), for John Cahn, respondent.

Downing & Peck, P.C., New York (John M. Downing, Jr. of counsel), for Ward Trucking, Inc., respondent.
Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New York (Debra A. Adler of counsel), for R.C. Dolner, LLC, respondent.

Law Office of James J. Toomey, New York (Evy L. Kazanzky of counsel), for Taconic Management Company, LLC and 450 Park Avenue South Associates LLC., respondents.

Quirk and Bakalor, P.C., New York (Debra E. Seidman of counsel), for Atlantic Coastal Trucking, Inc. and Triangle Trucking, respondents.

Order, Supreme Court, New York County (Paul Wooten, J.), entered February 16, 2011, which, to the extent appealed from, denied third-party defendant Chemtreat's motion for summary judgment dismissing the third-party complaint and all cross claims against it, and denied defendant/third-party plaintiff/second third-party plaintiff J.T. Falk's motion for summary judgment dismissing the complaint against it and for summary judgment on its claims for contractual and common-law indemnification against Chemtreat, and for common-law indemnification against Ward Trucking, Atlantic, Triangle and Bermudez, unanimously modified, on the law, to grant Chemtreat's motion, and to grant Falk's motion to the extent of dismissing

plaintiff's action as against it, and otherwise affirmed, without costs. The Clerk is directed to enter judgment dismissing the complaint as against defendant Falk and the third-party complaint and all cross claims as against defendant Chemtreat.

This is an action to recover damages for personal injuries sustained by plaintiff when he was struck by a barrel (or drum) of cleaning chemicals that fell off of a hand truck in the lobby of a building owned by defendant 450 Park, where plaintiff worked. Third-party Chemtreat, the vendor of the chemicals who allegedly failed to pack the barrels properly for delivery, was entitled to summary judgment. The claims for common-law indemnification against Chemtreat should have been dismissed, as the record shows that Chemtreat was not actively at fault in bringing about plaintiff's injury (*see McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 375 [2011]). Indeed, it is undisputed that the barrels were unpacked by the independent trucking contractors who delivered them, and that the barrel that hit plaintiff fell after the trucking contractors rocked the hand truck during delivery. Chemtreat also owed no duty of care to plaintiff, who was a third party to the vending contract between Chemtreat and Falk (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140-141 [2002]).

The claims for contractual indemnification against Chemtreat also should have been dismissed. The indemnity provision in Chemtreat's contract with Falk was limited on its face to losses arising from the use of Chemtreat's patented devices, processes, materials and equipment. Because the chemicals were not in use at the time of the accident, a properly strict reading of the indemnity clause bars a finding that Chemtreat owes Falk contractual indemnity (*Baginski v Queen Grand Realty, LLC*, 68 AD3d 905 [2009]). Nor did Chemtreat owe Ward Trucking, which subcontracted the delivery of the barrels to Atlantic/Triangle, contractual indemnity; the contract between Chemtreat and Ward Trucking contains an indemnification clause only in favor of Chemtreat. There is no basis in the record for finding that Chemtreat is subject to the indemnification provisions in the building manager Taconic's construction contract with Dolner, the general contractor.

The complaint also should have been dismissed as against Falk, which was performing work on the building's HVAC system. While its contract with Dolner, the construction manager, imposed responsibility upon Falk for "delivery, unloading . . . and all other risk of loss relating to materials" it used in the work, Falk did not actually supervise the unloading and delivery of the

barrels. Thus, it did not "launch[] a force or instrument of harm" *(Moch Co. v Rensselaer Water Co.*, 247 NY 160, 168 [1928]). As to the remaining bases for extending a contractual obligation to a party lacking privity (*Espinal*, 98 NY2d at 140), there is no evidence that plaintiff had come to rely on Falk's supervision of deliveries so as to reasonably expect that Falk would supervise the delivery that occasioned his injury (*id.*, citing *Eaves Brooks Costume Co. v Y.B.H. Realty Corp.*, 76 NY2d 220, 226 [1990]). Finally, Falk did not entirely displace the obligation of others to maintain safety at the premises during deliveries (*Espinal*, 98 NY2d at 140), and thus its "contractual undertaking is not the type of 'comprehensive and exclusive' property maintenance obligation contemplated by *Palka*" (*id.* at 141, citing *Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579, 584 [1994]).

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

ENTERED: DECEMBER 11, 2012

CLERK

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

8659 The People of the State of New York, Ind. 3/06
Respondent,

-against-

Lillo Brancato,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Martin M. Lucente of counsel), for appellant.

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

Judgment, Supreme Court, Bronx County (Steven L. Barrett, J., at suppression hearing; Martin Marcus, J. at jury trial and sentencing), rendered January 9, 2009, convicting defendant of attempted burglary in the first degree, and sentencing him to a term of 10 years, unanimously affirmed.

Even were this Court to find, as urged by defendant, that the People failed to prove the voluntariness of defendant's statements beyond a reasonable doubt, and that defendant's suppression motion should have been granted, the error would have been harmless beyond a reasonable doubt. There is no reasonable possibility that the error contributed to defendant's conviction (*see People v Crimmins*, 36 NY2d 230, 237 [1975]).

The statements added nothing to the People's case, because

they merely tended to establish the elements of attempted burglary that were otherwise uncontested at trial. They also provided no material support for the People's case on the contested elements. In his trial testimony, defendant admitted that he had broken a window, but claimed that he believed that he had permission to enter his friend and drug supplier's apartment for the purpose of obtaining drugs. None of the admitted statements involved the disputed issue of permission. Even to the extent the statements referred to a "plan" to enter the apartment, this statement was entirely consistent with a plan to make a permitted entry, as defendant claimed. Moreover, there was overwhelming evidence refuting defendant's claim that he believed he was entering the apartment with permission. Defendant's testimony was both unbelievable (*see People v Hall*, 18 NY3d 122, 132 [2011] [considering defendant's "ridiculous

explanation" in harmless error analysis]) and contradicted by physical evidence, raising an inference that defendant was aware he was committing a crime.

We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 11, 2012

CLERK

Andrias, J.P., Friedman, DeGrasse, Manzanet-Daniels, Gische, JJ.

8763 The People of the State of New York, Ind. 7529/95
Respondent,

-against-

Jose Torres,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Jenetha G. Philbert of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Efrain Alvarado, J.), entered on or about November 3, 2011, which denied defendant's CPL 440.46 motion for resentencing, unanimously affirmed.

The court properly exercised its discretion in determining that substantial justice dictated denial of resentencing. Defendant's extensive criminal history includes several violent felonies, and he has an extremely poor prison disciplinary record with little or no evidence of rehabilitation (*see e.g. People v*

Suya, 87 AD3d 921 [1st Dept 2011], *lv denied* 17 NY3d 956 [2011]; *People v Gonzalez*, 29 AD3d 400 [1st Dept], *lv denied* 7 NY3d 867 [2006]).

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

ENTERED: DECEMBER 11, 2012

CLERK

Andrias, J.P., Friedman, DeGrasse, Manzanet-Daniels, Gische, JJ.

8764 In re Shannen Nicole O.,

A Child Under the Age of
Eighteen Years, etc.,

Abbott House,
Petitioner-Appellant,

Catherine O.,
Respondent-Respondent.

Law Offices of Quinlan & Fields, Hawthorne (Jeremiah Quinlan of counsel), for appellant.

Aleza Ross, Central Islip, for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Marcia Egger of counsel), attorney for the child.

Order, Family Court, Bronx County (Carol R. Sherman, J.), entered on or about April 13, 2012, which, after a fact-finding determination that respondent mother had permanently neglected the subject child, directed, during the pendency of the dispositional hearing, that, among other things, respondent and the child have two visits supervised by an independent forensic psychologist, unanimously affirmed, without costs.

The court's order was a provident exercise of discretion (*see Matter of Carl T. v Yajaira A.C.*, 95 AD3d 640, 641 [1st Dept 2012]). There was ample basis for the court's determination that

the circumstances had changed since the court's prior visitation order suspending visitation, and that limited, supervised visitation between respondent and the child was in the child's best interests (*id.* at 641-642). Indeed, at the time of the prior order, the child was unaware that she was a foster child and that respondent was her biological mother. Visits were suspended because respondent and the child had difficulty bonding, and the child had become upset when respondent hinted that she was the child's biological mother. The child has only recently learned the truth regarding her identity, and, as the court noted, has benefitted from therapy and has become strong enough to deal with the issue. Although the court determined that respondent had permanently neglected the child, the court has not yet terminated respondent's parental rights. Further, there has never been any allegation that respondent abused the child, and the court gave the forensic psychologist considerable discretion in supervising the visits, including the power to end the visits if she deemed it appropriate. The court acted within its discretion in questioning the reliability and advisability of the recommendations by the agency's experts (*see id.* at 641), which by the time of the order were outdated by several years and did not take into account the child's improvements.

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

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

ENTERED: DECEMBER 11, 2012

CLERK

Andrias, J.P., Friedman, DeGrasse, Manzanet-Daniels, Gische, JJ.

8765 Juel A. Frederick, etc., Index 113232/08
Plaintiff-Appellant,

-against-

550 Realty Heights, LLC, et al.,
Defendants-Respondents.

- - - - -

550 Realty Heights, LLC, et al.,
Third-Party Plaintiffs,

-against-

Douglas O'Neil, et al.,
Third-Party Defendants.

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Law Office of Charles Nathan, P.C., Bronx (Charles Nathan of counsel), for appellant.

Lewis Brisbois Bisgaard & Smith, New York (Georgia S. Alikakos of counsel), for respondents.

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Order, Supreme Court, New York County (Eileen A. Rackower, J.), entered November 7, 2011, which, inter alia, granted defendants' motion for summary judgment dismissing the complaint, and denied plaintiff's cross motion to find the Dead Man's Statute (CPLR 4519) applicable and to suppress the criminal records of plaintiff's decedent, unanimously affirmed, without costs.

Dismissal of the complaint was warranted in this action. Although plaintiff alleges that the decedent was fatally shot in

the lobby of the building where he resided, and that the shooter and two accomplices were able to gain access due to a negligently maintained lock, defendant established that plaintiff would be unable to demonstrate that the three perpetrators entered the premises by reason of a malfunctioning door lock and that the assailant was an intruder (*see Rivera v New York City Hous. Auth.*, 239 AD2d 114 [1st Dept 1997). Defendant submitted the sworn written statement and plea allocution of third-party defendant O'Neil, who was one of the three assailants, and who pled guilty to his role in the decedent's death. Those statements indicate that the decedent knew the assailants and permitted them to enter the building's lobby. Thus, the decedent's actions were "an intervening cause of the criminal act absolving defendants of any negligence" (*S.M.R.K., Inc. v 25 W. 43rd St. Co.*, 250 AD2d 487, 487 [1st Dept 1998], *lv denied* 92 NY2d 817 [1998]). Plaintiff's opposition failed to show that any negligent conduct on the part of defendants was a proximate cause of the injury (*see Morrison v New York City Hous. Auth.*, 227 AD2d 319 [1st Dept 1998]).

The motion court properly found that the Dead Man's Statute in CPLR 4519 does not require suppression of O'Neil's statements since he was not an interested witness within the meaning of the

statute (*Stay v Horvath*, 177 AD2d 897, 899 [3d Dept 1991]). O'Neil's written statement and plea allocution were made prior to the commencement of the action and well before the commencement of the third-party action against him (*see Ellis v Abbey & Ellis*, 271 AD2d 353 [1st Dept 2000], *lv denied* 95 NY2d 760 [2000]). Nor is there evidence that defendants violated any statutory provisions in obtaining the decedent's criminal records.

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

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

ENTERED: DECEMBER 11, 2012

CLERK

Andrias, J.P., Friedman, DeGrasse, Manzanet-Daniels, Gische, JJ.

8766 Oscar Torres, etc., Index 16105/07
Plaintiff-Appellant,

-against-

New York City Health and Hospitals Corporation (Lincoln Hospital),
Defendant-Respondent.

_____

Fitzgerald & Fitzgerald, P.C., Yonkers (John E. Fitzgerald of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Janet L. Zaleon of counsel), for respondent.

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Order, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered January 5, 2010, which denied plaintiff's motion to deem his previously served notice of claim timely, *nunc pro tunc*, and granted defendant's cross motion for dismissal of the complaint, unanimously affirmed, without costs.

In this action for medical malpractice, the infant plaintiff seeks to recover for injuries he suffered after being born extremely premature, at 25-weeks gestation, weighing only one pound and nine ounces. The motion court properly exercised its discretion in denying plaintiff's motion upon consideration of the pertinent statutory factors (General Municipal Law §50-e[5]). The infant plaintiff's mother's excuse that she was unaware that

she had a malpractice claim until more than six years after plaintiff's birth is unreasonable (*see Plaza v New York Health & Hosps. Corp. [Jacobi Med. Ctr.]*, 97 AD3d 466, 467-468 [1st Dept 2012]). Additionally, there was no excuse proffered for the additional delay of more than three years (almost 10 years after the birth), between the filing of the notice of claim and the time the instant motion was made.

Further, since the infant plaintiff's condition and prognosis are consistent with his prematurity, the hospital records do not suggest any injury attributable to malpractice (*see Williams v Nassau County Med. Ctr.*, 6 NY3d 531, 537 [2006]; *Rodriguez v New York City Health & Hosps. Corp. [Jacobi Med. Ctr.]*, 78 AD3d 538, 539 [1st Dept 2010], *lv denied* 17 NY3d 718 [2011]; *Velazquez v City of New York Health & Hosps. Corp.*, 69 AD3d 441, 442 [1st Dept 2010], *lv denied* 15 NY3d 711 [2010]).

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

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

ENTERED: DECEMBER 11, 2012

CLERK

Andrias, J.P., Friedman, DeGrasse, Manzanet-Daniels, Gische, JJ.

8768 Cristin Alvarez, etc., Index 22046/06
Plaintiff-Appellant,

-against-

New York City Health and Hospitals Corporation (North Central Bronx Hospital),
Defendant-Respondent.

_____

Fitzgerald & Fitzgerald, P.C., Yonkers (John E. Fitzgerald of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Mordecai Newman of counsel), for respondent.

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Order, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered April 14, 2010, which denied plaintiff's motion to deem her previously served notice of claim timely, *nunc pro tunc*, and granted defendant's cross motion for dismissal of the complaint, unanimously reversed, on the law and the facts, without costs, plaintiff's motion granted, and defendant's cross motion denied.

In this action for medical malpractice, the infant plaintiff who was born at defendant hospital in October 2004 and was found to be suffering from abnormally low glucose levels shortly after her birth, alleges, inter alia, that defendant committed malpractice by failing to perform an emergency Cesarean section and in its diagnosis and treatment of plaintiff's hypoglycemia,

resulting in neurological injuries. Plaintiff served defendant with a notice of claim on June 5, 2006 but did not move to deem the notice timely until February 8, 2009.

In support of her motion, plaintiff submitted a pediatrician's affirmation which established that defendant had actual knowledge of the facts underlying her theory of a departure from the accepted standard of pediatric care with regard to the diagnosis and treatment of plaintiff's hypoglycemia and the existence of a causally related injury, which opinions are not refuted by any pediatric defense expert (*see Perez v New York City Health & Hosps. Corp.*, 81 AD3d 448 [1st Dept 2011]).

Plaintiff also established the lack of substantial prejudice resulting from the delay as the hospital records, which evidence an investigation in the cause of the infant's condition, provide "an extensive 'paper trail' and preserve all of the essential facts relating to this claim" (*Matter of Quiroz v City of New York*, 154 AD2d 315, 316 [1st Dept 1989]; *see also Young v New York City Health & Hosps. Corp.*, 90 AD3d 517, 518 [1st Dept 2011]). The claim that hospital personnel have left defendant's employ does not evidence substantial prejudice "absent a showing that the doctors are actually unavailable" (*Greene v New York*

City Health & Hosps. Corp., 35 AD3d 206, 207 [2006]). In addition, the absence of a reasonable excuse is not determinative (*see Perez*, 81 AD3d at 448; *Matter of Dubowy v City of New York*, 305 AD2d 320, 321 [2003]).

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

ENTERED: DECEMBER 11, 2012

CLERK

Andrias, J.P., Friedman, DeGrasse, Manzanet-Daniels, JJ.

8770 Adriana Bitter, et al., Index 652003/11
Plaintiffs-Appellants,

-against-

Louis N. Renzo, et al.,
Defendants-Respondents,

Ronkonkoma Operations LLC, et al.,
Defendants.

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Napoli Bern Ripka Shkolnik, LLP, New York (Adam J. Gana of counsel), for appellant.

Ganfer & Shore, LLP, New York (Mark A. Berman of counsel), for Louis N. Renzo, respondent.

Wilson Elser Moskowitz Edelman & Dicker LLP, White Plains (Gregory W. Gilliam of counsel), for Charles Raich, respondent.

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Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered April 16, 2012, which, to the extent appealed from as limited by the briefs, granted defendant Charles Raich's motion to dismiss the breach of fiduciary duty claim, and granted defendant Louis N. Renzo's motion to dismiss the aiding and abetting breach of fiduciary duty claim, unanimously affirmed, without costs.

The duty owed by an accountant to a client is generally not fiduciary in nature (*Able Energy, Inc. v Marcum & Kliegman LLP*, 69 AD3d 443, 444 [1st Dept 2010]; *DG Liquidation v Anchin, Block*

& Anchin, 300 AD2d 70, 70-71 [1st Dept 2002]). Nor does a conventional business relationship, without more, create a fiduciary relationship (*Friedman v Anderson*, 23 AD3d 163, 166 [1st Dept 2005]).

Here, plaintiffs alleged only that Raich agreed to provide accounting and consulting services for Scalamandre, the company in which plaintiffs held a financial interest, and its board of directors. This does not suffice to allege that Raich owed plaintiffs a fiduciary duty. In light of the insufficient allegations of any fiduciary duty owed by Raich, the trial court also correctly dismissed the claim of aiding and abetting a breach of fiduciary duty (*see Kaufman v Cohen*, 307 AD2d 113, 125 [1st Dept 2003]).

To the extent that plaintiffs argue on appeal that defendant Raich owed plaintiffs a fiduciary duty, not as an accountant or advisor, but as a "business broker," our review of the record reveals that this theory of liability was not articulated in the complaint or in plaintiffs' papers opposing dismissal. Accordingly, we decline to consider this claim (*see e.g.*

Sonnenschein v Douglas Elliman-Gibbons & Ives, 96 NY2d 369, 376-377 [2001]; *Recovery Consultants v Shih-Hsieh*, 141 AD2d 272, 276 [1st Dept 1988]).

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

ENTERED: DECEMBER 11, 2012

CLERK

Andrias, J.P., Friedman, DeGrasse, Manzanet-Daniels, Gische, JJ.

8771-
8771A City of New York, Index 401763/10
Plaintiff-Respondent,

-against-

TransportAzumah LLC,
Defendant-Appellant.

Steven Diaz, Washington, D.C., of the bars of the State of California and the District of Columbia, admitted pro hac vice, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth S. Natrella of counsel), for respondent.

Order and judgment (one paper), Supreme Court, New York County (Barbara Jaffe, J.), entered April 13, 2011, which granted plaintiff's motion for summary judgment on its complaint, declaring defendant in violation of Administrative Code of City of NY § 6-202 and permanently enjoining defendant from operating its bus service within the City of New York without obtaining a franchise, and to dismiss the counterclaims and affirmative defenses, and denied defendant's cross motion to dismiss the complaint, unanimously affirmed, without costs. Order, same court and Justice, entered October 4, 2011, which denied defendant's motion to vacate the April 13, 2011 order and dismiss the complaint for lack of subject matter jurisdiction,

unanimously affirmed, without costs.

Defendant challenges the enforceability of Administrative Code § 6-202, which states, "It shall be unlawful for any omnibus route or routes for public use ... to be operated in or upon any street within the city until and unless a franchise or right therefor shall be obtained from the board of estimate." Defendant contends that New York state courts do not have jurisdiction to enforce this provision against it because the provision is preempted by a federal law that states that "no State or political subdivision thereof ... shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to intrastate rates, intrastate routes, or intrastate services of any freight forwarder or broker" (49 USC § 14501[b][1]; *see Matter of Metropolitan Transp. Auth.*, 32 AD3d 943, 944 [2d Dept 2006]). However, as 49 USC § 14501(b) is captioned "Freight forwarders and brokers," while subsection (a) is captioned "Motor carriers of passengers," we find that "broker" in subsection (b)(1) refers to a broker for a freight forwarder, not a broker for a motor carrier of passengers.

We reject defendant's argument that only the Commissioner of the New York State Department of Transportation possesses the

power to regulate bus lines within New York City because plaintiff has not "adopted an ordinance, local law or charter to regulate or franchise bus line operations" (Transportation Law § 80[4]) (*see e.g. Matter of New York City Tr. Auth. v Pierrot*, 144 AD2d 814, 816 [3d Dept 1988]).

Defendant contends that the services at issue in this case constituted charter bus service, which plaintiff may not regulate. However, even if, arguendo, the Apple Core Transportation Club had a "common purpose" (17 NYCRR 700.1[i]; *see Matter of Rockland Tr. Corp. v Public Serv. Commn. of State of N.Y.*, 29 Misc 2d 909 [Sup Ct, Albany County 1961]), defendant's operations run afoul of the prohibition in 17 NYCRR 700.1(I) against carriers' "transport[ing] chartered parties between the same points or along the same routes so frequently as to constitute [a] bus line."

Defendant argues that its service is not a "bus line" (Transportation Law § 2[3]) because it is not open to the general public (*see* Transportation Law § 2[7]; *Public Serv. Commn. v Columbo*, 118 NYS2d 873, 877 [Sup Ct, Kings County 1952]). However, the evidence presented to the court showed that anyone could obtain an Apple Core pass and that such passes were not always required to board the buses that defendant had chartered

from Skyliner Travel & Tour Bus Corp.

We reject defendant's contention that it does not operate a bus route because it does not physically operate any buses (*see Klinkenstein v Third Ave. Ry. Co.*, 246 NY 327, 331-332 [1927] ["The illegality did not consist in operating an automobile bus, as the vehicle had been properly licensed and the chauffeur duly authorized to operate it. The illegality consisted ... in the carrying of passengers for hire"]; *see also Matter of Walsh v LaGuardia*, 269 NY 437, 442 [1936]). Defendant also had sufficient control or direction of the operation of a motor vehicle to be an operator (*see* 17 NYCRR 720.1[m]). It specified the times and places where Skyliner picked up and discharged passengers. Unlike the landlords in *Surface Transp. Corp. of N.Y. v Reservoir Bus Lines, Inc.* (271 App Div 556 [1st Dept 1946]), defendant exercised "exclusive control ... over the choice of routes and location of its stops" (*id.* at 558).

We reject defendant's contention that it is impossible to comply with Administrative Code § 6-202 because the Board of Estimate no longer exists. By operation of New York City Charter §§ 1152(e) and 363(b), the applicable powers and responsibilities of the Board of Estimate devolved upon the New York City Department of Transportation and the New York City Council.

Defendant's contention that the court erred by granting plaintiff summary judgment before defendant had the opportunity to take two more depositions is unavailing. As far as we can tell from the appendix submitted on appeal by defendant, defendant never submitted an affidavit in conformity with CPLR 3212(f) (*see Chemical Bank v PIC Motors Corp.*, 58 NY2d 1023 [1983]).

We reject defendant's contention that the injunction in the April 2011 order and judgment is vague and overly broad. The injunction obviously refers to the type of bus service that gave rise to the instant case, not to every possible type of bus service that defendant might offer in the future.

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

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

ENTERED: DECEMBER 11, 2012

CLERK

Andrias, J.P., Friedman, DeGrasse, Manzanet-Daniels, Gische, JJ.

8772 Barbara Scelzo, Index 7654/07
Plaintiff-Appellant,

-against-

Acklinis Realty Holding LLC, et al.,
Defendants-Respondents,

Anthony V. Carella, M.D., et al.,
Defendants.

- - - - -

[And a Third Party Action]

Yudin & Yudin, PLLC, New York (Ronald Yudin of counsel), for appellant.

Malapero & Prisco LLP, New York (Frank J. Lombardo of counsel), for Acklinis Realty Holding, LLC and Acklinis Yonkers Realty, LLC, respondents.

Simmons Jannace, LLP, Syosset (Michael D. Kern of counsel), for Best Buy Co. Inc., and Best Buy Stores, L.P., respondents.

Law Offices of Safranek, Cohen & Krolian, White Plains (James G. Kelly of counsel), for Lewiston Construction Companies, LLC, respondent.

Order, Supreme Court, Bronx County (Robert Torres, J.), entered December 14, 2011, which, to the extent appealed from as limited by the briefs, upon reargument, granted the summary judgment motions of the Acklinis defendants, the Best Buy defendants, and defendant Lewiston, dismissing the complaint as against them, unanimously modified, on the law, to deny the

Acklinis defendants' motion, and otherwise affirmed, without costs.

Justice Torres had the authority to consider the motions for reargument, as the Justice who signed the order on the prior motions for summary judgment was unable to hear the motions for reargument (*see* CPLR 2221[a]). Justice Torres properly granted the motions for leave to reargue, as the Justice who signed the order on the prior motions failed to address defendants' assertion that the defect which caused plaintiff's accident was trivial (*see* CPLR 2221[d][2]).

Upon reargument, the court should have not dismissed the complaint as against the Acklinis defendants. Plaintiff's testimony and the photograph of the tree well where plaintiff allegedly tripped raise a triable issue of fact as to whether the subject defect was trivial (*see Dominguez v OCG, IV, LLC*, 82 AD3d 434, 434 [1st Dept 2011]). Further, the lease between landlord Acklinis and tenant Best Buy shows that Acklinis was obligated to maintain, among other things, the curbing and all common areas, including the sidewalks and landscaping.

The court, however, correctly dismissed the complaint as against general contractor Lewiston. There was no evidence that Lewiston had any obligation to maintain the tree well or the

sidewalks in front of the Best Buy store. Nor was there any evidence that Lewiston had returned to the job site after it constructed the store almost 3 years before plaintiff's accident (*see Fernandez v 707, Inc.*, 85 AD3d 539, 541 [1st Dept 2011]).

The court also correctly dismissed the complaint as against the Best Buy defendants. There was no evidence that tenant Best Buy had any obligation or took any steps to maintain the tree well, or that it had agreed in writing to modify the lease, which imposed the duty to maintain the tree well on landlord Acklinis.

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

ENTERED: DECEMBER 11, 2012

CLERK

Andrias, J.P., Friedman, DeGrasse, Manzanet-Daniels, Gische, JJ.

8773 The People of the State of New York, Ind. 2883/08
Respondent,

-against-

Patricia Williams,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

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

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Rena Uviller, J.), rendered on or about December 23, 2008,

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: DECEMBER 11, 2012

CLERK

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

Andrias, J.P., Friedman, DeGrasse, Manzanet-Daniels, Gische, JJ.

8775 The People of the State of New York, Ind. 237/10
Respondent,

-against-

Robin Wilson,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Juan M. Merchan, J.), rendered September 21, 2010, as amended October 12, 2010 and December 20, 2010, convicting defendant, after a jury trial, of criminal possession of stolen property in the fourth degree, two counts of possession of burglar's tools, and three counts of petit larceny, and sentencing him, as a second felony offender, to an aggregate term of two to four years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The People presented reliable evidence, including business records and photographs, that the stolen merchandise had a total value in excess of $1000 (*see e.g. People v Gonzalez*, 92 AD3d 510 [1st Dept 2012], *lv denied* 18 NY3d

994 [2012]). The fact that one of the business records was inaccurate as to the color of one of the stolen sweaters does not provide a reason to doubt the accuracy of the record as to the selling price of the sweaters. We have considered and rejected defendant's remaining arguments on the issue of value.

Defendant's Confrontation Clause claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits.

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

ENTERED: DECEMBER 11, 2012

CLERK

Andrias, J.P., Friedman, DeGrasse, Manzanet-Daniels, Gische JJ.

8776 Segunda Paduani, Index 303099/09
Plaintiff-Appellant,

-against-

Charlie Rodriguez,
Defendant-Respondent,

Kaystel Avila, et al.,
Defendant.

Goldstein & Handwerker, LLP, New York (Steven Goldstein of counsel), for appellant.

Richard T. Lau & Associates, Jericho (Gene W. Wiggins of counsel), for respondent.

Order, Supreme Court, Bronx County (Kenneth L. Thompson Jr., J.), entered October 17, 2011, which, in this action for personal injuries sustained in a motor vehicle accident, granted defendants' motions for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff was a passenger in a car owned by defendant Razia Avila and driven by defendant Kaystel Avila, when the car collided with a vehicle driven by defendant Rodriguez. Plaintiff alleged that as a result of the accident, she sustained serious injuries to her cervical spine, lumbar spine, and right shoulder under the “significant limitation of use,” “permanent

consequential limitation of use," and 90/180-day categories of Insurance Law § 5102(d).

Defendants established their entitlement to judgment as a matter of law as to plaintiff's injury to her cervical spine by submitting their orthopedist's report finding full range of motion with the exception of a minor limitation in one plane, and diagnosing a resolved cervical spine strain (*see Castillo v Cinquina*, 85 AD3d 660 [1st Dept 2011]). The orthopedist's finding of a minor limitation in one aspect of the cervical spine is insufficient to negate the prima facie showing (*see Canelo v Genolg Tr., Inc.*, 82 AD3d 584 [1st Dept 2011]; *Sone v Qamar*, 68 AD3d 566 [1st Dept 2009]), and plaintiff failed to raise a triable issue of fact (*see Toure v Avis Rent A Car Sys*, 98 NY2d 345, 350-351 [2002]).

Defendants also met their burden as to the alleged lumbar spine injury by submitting, inter alia, the affirmed report of an orthopedist who found full range of motion, and their radiologist's MRI report finding diffuse multilevel degenerative disc disease and degenerative changes unrelated to trauma, as well as a radiograph report of plaintiff's radiologist finding severe degenerative changes (*see Torres v Triboro Servs., Inc.*, 83 AD3d 563 [2011]; *Spencer v Golden Eagle, Inc.*, 82 AD3d 589,

590-591 [1st Dept 2011]). Plaintiff failed to raise a triable issue of fact. While her expert acknowledged in his own report MRI findings of degenerative changes in the lumbar spine, he did not address or contest such findings, and the MRI report of her radiologist found herniations but did not address causation (*see Williams v Horman*, 95 AD3d 650 [1st Dept 2012]; *Rosa v Mejia*, 95 AD3d 402, 404-405 [1st Dept 2012]). Nor did plaintiff's expert address plaintiff's deposition testimony that she had sustained a back injury in a prior car accident (*see McArthur v Act Limo, Inc.*, 93 AD3d 567 [1st Dept 2012]).

As to plaintiff's right shoulder, defendants established prima facie lack of causation by submitting their radiologist's non-conclusory opinion that the supraspinatus tendinosis and acromioclavicular joint disease observed in the MRI film were preexisting degenerative conditions (*see Torres*, 83 AD3d at 564; *Spencer*, 82 AD3d at 590). As with the lumbar spine, plaintiff's expert failed to address evidence that the condition was degenerative in origin (*see Rosa*, 95 AD3d at 404-405).

Defendants disproved a 90/180-day injury by submitting plaintiff's deposition testimony, wherein she stated that she was able to babysit her grandchildren after the accident, and was able to go to the store about a month after the accident, as well

as her bill of particulars alleging that she was not confined to bed or home after the accident (*see Zhijian Yang v Alston*, 73 AD3d 562 [1st Dept 2010]). Plaintiff has not submitted any evidence in opposition.

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

ENTERED: DECEMBER 11, 2012

CLERK

Andrias, J.P., Friedman, DeGrasse, Manzanet-Daniels, Gische, JJ.

8778 Anna Corrigan, Index 104373/10
Plaintiff-Respondent,

-against-

Porter Cab Corp., et al.,
Defendants-Respondents,

John Katsomaliaris, et al.,
Defendants-Appellants.

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Marjorie E. Bornes, Brooklyn, for appellants.

Werbel, Werbel & Verchick, LLP, Brooklyn (Glenn Verchick of counsel), for Anna Corrigan, respondent.

Gerber & Gerber, PLLC, Brooklyn (Thomas Torto of counsel), for Porter Cab Corp. and MD T. Islam, respondents.

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Order, Supreme Court, New York County (George J. Silver, J.), entered April 9, 2012, which denied the motion of defendants John Katsomaliaris and Sunday J. Oseni for summary judgment dismissing the complaint and all cross claims as against them, unanimously reversed, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

"It is well settled that a rear-end collision with a stopped vehicle creates a presumption that the operator of the moving vehicle was negligent" (*Agramonte v City of New York*, 288 AD2d 75, 76 [1st Dept 2001]). Defendants-appellants, through the

deposition testimony of Oseni and plaintiff, made a prima facie showing of entitlement to judgment as a matter of law by demonstrating that the vehicle owned by Katsomaliaris and driven by Oseni was stopped at a red light when it was struck in the rear by the vehicle driven by defendant Islam, which propelled it into plaintiff as she attempted to cross the intersection. In opposition, defendant Islam failed to rebut the inference of negligence by providing a nonnegligent explanation for the collision (*Profita v Diaz*, 2012 N.Y. App. Div. LEXIS 7575; 2012 NY Slip Op 7604 [1st Dept 2012]).

Islam's testimony that defendants-appellants' vehicle stopped suddenly is insufficient to raise a triable issue of fact (*see Cabrera v Rodriguez*, 72 AD3d 553, 553 [1st Dept 2010]). Vehicle and Traffic Law § 1129 imposes "a duty to be aware of traffic conditions, including vehicle stoppages" (*Johnson v Phillips*, 261 AD2d 269, 271 [1999]). While Islam maintains that the light was green when he struck defendants-appellants vehicle, Islam testified that the traffic was "medium" and that he was only approximately two feet away from defendants-appellants vehicle when he first saw it stopped. He did not explain why he did not maintain a safe distance between his vehicle and defendants-appellants' vehicle *(see Dattilo v Best Transp. Inc.,*

79 AD3d 432 [1st 2010]; *Soto- Maroquin v Mellet*, 63 AD3d 449, 449-450 [1st Dept 2009]).

The plaintiff's completely speculative assertion that her injuries were worsened because Oseni may have stepped on the gas pedal instead of the brake after his vehicle was hit from behind was insufficient to defeat the motion for summary judgment (*see Sosa v Rehmat*, 46 AD3d 306 [1st Dept 2007]; *Sirico v Beukelaer*, 14 AD3d 549 [2d Dept 2005]).

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

ENTERED: DECEMBER 11, 2012

CLERK

Andrias, J.P., Friedman, DeGrasse, Manzanet-Daniels, Gische, JJ.

8779-8780 The People of the State of New York, Appellant,

-against-

David Snipes, Defendant-Respondent.

Ind. 1304/09

Cyrus R. Vance, Jr., District Attorney, New York (Sara M. Zausmer of counsel), for appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Katharine Skolnick of counsel), for respondent.

Judgment of resentence, Supreme Court, New York County (Ruth Pickholz, J.), rendered September 23, 2011, resentencing defendant as a second violent felony offender, and bringing up for review an order of the same court and Justice, entered on or about May 16, 2011, which granted defendant's CPL 440.20 motion to set aside his sentence as a persistent felony offender, and an order of the same court and Justice, entered on or about August 1, 2011, which, upon reargument, adhered to the May 16, 2011 order, unanimously reversed, on the law, and the original sentence as a persistent violent felony offender reinstated. Appeal from the May 16, 2011 order, unanimously dismissed, as subsumed in the appeal from the judgment.

The court erred in granting defendant's motion to set aside

his sentence on the ground that his adjudication as a persistent violent felony offender was unlawful. "There is nothing in the Penal Law to indicate that a resentencing necessarily resets the controlling sentencing date for purposes of sequentiality" (*People v Davis*, 93 AD3d 524, 524 [1st Dept 2012], *lv denied* 19 NY3d 995 [2012]). This Court, citing *People v Acevedo* (17 NY3d 297 [2011]), has held that where a defendant's resentencing was at the behest of the Division of Parole for purpose of imposing a period of postrelease supervision, the resentencing date controls whether a conviction meets the sequentiality requirement for sentencing as a persistent violent felony offender (*see People v Butler*, 88 AD3d 470 [1st Dept 2011], *lv denied* 18 NY3d 992 [2012]; *see also People v Sanders*, 99 AD3d 575 [2012]; but see People v *Boyer*, 91 AD3d 1183 [3d Dept 2012], *lv granted* 19 NY3d 1024 [2012]). However, this rule does not apply where, as here, the resentence was a nullity under *People v Williams* (14 NY3d 198 [2010], *cert denied* 562 US__, 131 S Ct 125 [2010]), and was thus ineffective to alter the relevant sentencing sequence (*see Acevedo*, 17 NY3d at 302 [opinion of Lippman, C.J.]).

Accordingly, defendant was properly sentenced as a persistent violent felony offender at his original sentencing in March of 2010.

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

ENTERED: DECEMBER 11, 2012

CLERK

Andrias, J.P., Friedman, DeGrasse, Manzanet-Daniels, Gische, JJ.

8781 In re CRP/Extell Parcel I, L.P., Index 113914/10
Petitioner-Appellant,

-against-

Andrew M. Cuomo, in His Capacity
as the Attorney General fo the State
of New York, et al.,
Respondents-Respondents.

Boies, Schiller & Flexner LLP, Armonk (Edward J. Normand of counsel), for appellant.

Eric T. Schneiderman, Attorney General, New York (Lewis A. Polishook of counsel), for attorney general, respondent.

Cohen & Coleman, LLP, New York (John A. Coleman, Jr., of counsel), for 3to4, LLC; Parker Bagley and Julie Baker; Bincube Partners; BRSP Realty, LLC; Christopher A. Chang and Maria Wu; Ona Colasante; Melinda Everett and Gerard Milligan; Jessica Faieta; Max Gilani; Kenneth Goodman and Andrea Economos; Kenneth Goodman and Lydia Goodman; Gary Huang and Evelyn Huang; Janice Huff-Dowdy and Warren Dowdy; Gyoo Gwan Kim and Su Jin Kim; Kyung Kim and Henry Myunghwan Kim; Melissa Ko and S. Douglas Hahn; Gail S. Landis and R. Victor Bernstein; Benjamin W. Lau and Judith T. Lau; Gregory Lee; Seung Moh Lee; Haley Lieberman Binn; Diane Lieberman and Lisa Ginsburg; Albert L. Marino and Beth F. Hinnen; Alan Meyers and Evelyn Meyers; Trevor Moran; Marla C. Muns and Kimberly McNesse; Mitchell E. Newman; Hyun Kyu Park and Doja Song; Shirley Romig and Nicholas Romig; Pauline Shender and Alex Shender; Han Soon Yom; and Pil Yoon and Young Yoon, respondents.

Woods Lonergan, LLP, New York (James F. Woods of counsel), for Lola Gusman, respondent.

Derryl Zimmerman, Bronx, for Mark Chu and Nancy Chan, respondents.

Order and judgment (one paper), Supreme Court, New York

County (Anil C. Singh, J.), entered January 25, 2012, which, among other things, denied the petition to annul the determinations of respondent Attorney General, directed the release and return of down payments made by respondent purchasers in connection with purchase agreements for condominium units, and dismissed this hybrid CPLR article 78 proceeding/reformation action, unanimously affirmed, without costs.

The Attorney General's determinations were not affected by an error of law or arbitrary and capricious (CPLR 7803[3]; *see Matter of Madison Park Owner LLC v Schneiderman*, 93 AD3d 555, 556 [1st Dept 2012]). Indeed, the Attorney General properly applied the common law in denying petitioner's claim for contract reformation based on an alleged scrivener's error (*see e.g. Stonebridge Capital, LLC v Nomura Intl. PLC*, 68 AD3d 546, 548 [1st Dept 2009], *lv denied* 15 NY3d 735 [2010]).

The court properly denied discovery in connection with the CPLR article 78 proceeding, as the material petitioner sought to be discovered is neither material nor necessary to assess whether the Attorney General's determinations were affected by an error of law or arbitrary and capricious (*see Matter of Levine v Board of Estimate of City of N.Y.*, 143 AD2d 598, 599 [1st Dept 1988]). Nor was discovery required in connection with the claim for

reformation, as the court properly dismissed the claim on the ground of collateral estoppel. Indeed, collateral estoppel bars petitioner from litigating the claim, as it was fully litigated before and decided by the Attorney General (*see Ryan v New York Tel. Co.*, 62 NY2d 494, 499-501 [1984]).

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

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

ENTERED: DECEMBER 11, 2012

CLERK

Andrias, J.P., Friedman, DeGrasse, Manzanet-Daniels, Gische, JJ.

8782 Wadsworth Ventura Associates 367 LLC, Index 570204/10
Petitioner-Respondent, 69265/07

-against-

Carmen Frias,
Respondent-Appellant.

Northern Manhattan Improvement Corp., Legal Services, New York (Alan G. Morley of counsel), for appellant.

Rose & Rose, New York (Todd A. Rose of counsel), for respondent.

Order of the Appellate Term of the Supreme Court, First Department, entered on or about November 10, 2010, which affirmed an order of the Civil Court, New York County (Peter M. Wendt, J), entered February 26, 2010, denying respondent tenant's motion to stay execution of the warrant of eviction, unanimously affirmed, without costs.

The record shows that tenant violated two probationary stipulations in this chronic nonpayment case. Accordingly, it was not an abuse of discretion for the court to enforce the stipulation by its terms, which provided for no further defaults,

and allow for the eviction of tenant (*see Hotel Cameron, Inc. v Purcell*, 35 AD3d 153, 155-156 [1st Dept 2006]; *see also 565 Tenants Corp. v Adams*, 54 AD3d 602 [1st Dept 2008]).

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

ENTERED: DECEMBER 11, 2012

CLERK

Andrias, J.P., Friedman, DeGrasse, Manzanet-Daniels, Gische, JJ.

8784 Matthew J. Wadiak, Index 652697/11E
Plaintiff-Respondent,

-against-

Pond Management, LLC, et al.,
Defendants-Appellants.

Stillman & Friedman, P.C., New York (Scott M. Himes of counsel), for appellants.

Goodstadt Law Group, PLLC, Carle Place (Andrew S. Goodstadt of counsel), for respondent.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered June 11, 2012, which, insofar as appealed from as limited by the briefs, denied defendants' motion, made pursuant to CPLR 3211, to dismiss plaintiff's claims for defamation and slander per se, tortious interference with prospective business advantage/relations, and intentional infliction of emotional distress, unanimously affirmed, with costs.

We reject defendants' argument, that the IAS Court improvidently exercised its discretion, by refusing, at oral argument, to convert that branch of their motion to dismiss plaintiff's defamation claim to a motion for summary judgment. We also decline to exercise our own discretion to so convert the motion since the record does not establish that the parties

"deliberately chart[ed] a summary judgment course" (*Elsky v Hearst Corp.*, 232 AD2d 310 [1st Dept 1996] [internal quotation marks omitted]; *see Nonnon v City of New York*, 9 NY3d 825, 826 [2007]; *Four Seasons Hotels v Vinnik*, 127 AD2d 310, 320 [1st Dept 1987]). Plaintiff's counsel's objection at oral argument to converting defendants' motion is a significant indiciation that the parties were not charting such a course (*see Four Seasons*, 127 AD2d at 321).

Giving the complaint the benefit of every favorable inference, we find that the complaint states a cause of action for tortious interference with prospective contractual relations (*see e.g. Posner v Lewis*, 18 NY3d 566, 570 n 2 [2012]).

In light of the above, defendants' argument that the cause of action for intentional infliction of emotional distress should be dismissed if the defamation and tortious interference claims are dismissed, fails.

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

ENTERED: DECEMBER 11, 2012

CLERK

Andrias, J.P., Friedman, DeGrasse, Manzanet-Daniels, Gische, JJ.

8785 Ahmad Alavian, et al., Index 103835/08
Plaintiffs-Respondents,

-against-

Ted Zane,
Defendant-Appellant,

Arnold Ross,
Defendant.

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Ateshoglou & Aiello, P.C., New York (Steven D. Ateshoglou of counsel), for appellant.

Adam Leitman Bailey, P.C., New York (Jeffrey R. Metz of counsel), for respondents.

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Order, Supreme Court, New York County (Milton A. Tingling, J.), entered March 5, 2012, which, insofar as appealed, denied defendant Ted Zane's cross-motion for summary judgment dismissing the complaint against him, unanimously reversed, on the law, without costs, the cross-motion granted, and the complaint dismissed as against Zane.

Plaintiffs assert that, for a period of over four years, defendants deliberately interfered with the closing of executed contracts of sale of two cooperative apartments. It is undisputed, however, that the contracts satisfactorily closed in August 2011. Delay, even "substantial delay," in the closing of

a real estate transaction does not constitute breach of the contract of sale (*Ulysses I & Co. v Feldstein*, 75 AD3d 990, 992 [3d Dept], *lv dismissed in part, denied in part*, 15 NY3d 944 [2010]). Accordingly, since there was no "actual breach" of the contracts of sale, plaintiffs may not maintain a claim for tortious interference with contract against Zane (*see NBT Bancorp Inc. v Fleet/Norstar Fin. Group, Inc.*, 87 NY2d 614, 620-21 [1996]; *Ulysses*, 75 AD3d at 991-92).

We note that plaintiffs' only other claim against Zane, for injunctive relief in the form of an order preventing him from interference with the closing, was mooted by the fact that the closing has occurred.

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

ENTERED: DECEMBER 11, 2012

CLERK

Andrias, J.P., Friedman, DeGrasse, Manzanet-Daniels, Gische ,JJ.

8787 [M-4842] In re William H. Depperman, Petitioner,

-against-

Hon. Barbara R. Kapnick, etc., Respondent.

Index 69612/12

William H. Depperman, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Charles F. Sanders of counsel), for respondent.

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

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

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

ENTERED: DECEMBER 11, 2012

CLERK

Andrias, J.P., Friedman, DeGrasse, Manzanet-Daniels, Gische, JJ.

8788 [M-5108] In re William H. Depperman, Petitioner,

-against-

Hon. Barbara R. Kapnick, etc., Respondent.

Index 69612/12

William H. Depperman, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Charles F. Sanders of counsel), for respondent.

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

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

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

ENTERED: DECEMBER 11, 2012

CLERK

Mazzarelli, J.P., Saxe, DeGrasse, Richter, Abdus-Salaam, JJ.

7960-
7961 Jacobson Family Investments, Inc., et al., Plaintiffs-Appellants-Respondents, Index 601325/10

-against-

National Union Fire Insurance Company of Pittsburgh, PA, et al., Defendants-Respondents-Appellants.

Kasowitz, Benson, Torres & Friedman LLP, New York (Adam S. Ziffer of counsel), for appellants-respondents

Bressler, Amery & Ross, P.C., New York (Robert Novack of counsel), for National Union Fire Insurance Company of Pittsburgh, PA., respondent-appellant.

Carroll McNulty & Kull, LLC, New York (Joseph P. McNulty of counsel), for Continenta Casualty Company, respondent-appellant.

Eckert Seamans Cherin & Mellot, LLC, White Plains (Geraldine A. Cheverko of counsel), for Fidelity and Deposit Company of Maryland and Great American Insurance Company, respondents-appellants.

Order, Supreme Court, New York County (Richard B. Lowe, III, J.), entered July 13, 2011, affirmed, with costs. Order, same court and Justice, entered February 29, 2012, modified, on the law, to apply the $3 million single loss deductible to each net loser's recovery, if any, and otherwise affirmed, with costs.

Opinion by Mazzarelli, J.P. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
David B. Saxe
Leland G. DeGrasse
Rosalyn H. Richter
Sheila Abdus-Salaam, JJ.

7960-
7961
Index 601325/10

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Jacobson Family Investments, Inc., et al.,
Plaintiffs-Appellants-Respondents,

-against-

National Union Fire Insurance Company of Pittsburgh, PA, et al.,
Defendants-Respondents-Appellants.
_____x

Plaintiffs appeal from the order, Supreme Court, New York County (Richard B. Lowe, III, J.), entered July 13, 2011, which, to the extent appealed from, denied plaintiff insureds' motion for partial summary judgment, and granted defendant insurers' cross motion for summary judgment to the extent of limiting any recovery by plaintiffs under the fidelity bonds at issue to the loss of their investment interest and dismissing plaintiffs' claim for breach of the implied covenant of good faith and fair dealing. Order, same court and Justice, entered February 29, 2012, which, to the extent appealed from, granted plaintiffs' motion for leave to renew and adhered to the original determination, and denied so much of defendants' motion for summary judgment as

sought dismissal of the “net loser” plaintiffs’ claims.

Kasowitz, Benson, Torres & Friedman LLP, New York (Adam S. Ziffer, Marc E. Kasowitz and Robin L. Cohen of counsel), for appellants-respondents.

Bressler, Amery & Ross, P.C., New York (Robert Novack and Charles W. Stotter of counsel), for National Union Fire Insurance Company of Pittsburgh, PA., respondent-appellant.

Carroll McNulty & Kull, LLC, New York (Joseph P. McNulty and Douglas Eisenstein of counsel), for Continental Casualty Company, respondent-appellant.

Eckert Seamans Cherin & Mellot, LLC, White Plains (Geraldine A. Cheverko of counsel), and F. Joseph Nealon of the bar of the State of Pennsylvania and the District of Columbia, admitted pro hac vice, for Fidelity and Deposit Company of Maryland and Great American Insurance Company, respondents-appellants.

MAZZARELLI, J.P.

Plaintiff Jacobson Family Investments (JFI) is an investment management company that manages the assets and businesses of the 16 other plaintiffs, which are various limited liability companies, limited partnerships, foundations and trusts established by various members of the Jacobson family and another family. JFI manages the assets of these entities by selecting outside investment advisors. In 1998, JFI made the fateful decision to select Bernard L. Madoff and his firm, Bernard L. Madoff Investment Securities LLC (BLMIS), as one of those outside investment advisors.

JFI attempted to protect its investments by purchasing fidelity bonds insulating it from theft or other dishonest acts of the outside investment advisors. The primary bond at issue in this case was sold to JFI by defendant National Union and covered the policy period from October 19, 2007 to November 1, 2008, and was later extended to March 2009. JFI also purchased several layers of excess fidelity bonds (the excess bonds) from National Union and the remaining defendants.[1] The bond had a $10 million single loss limit of liability, an aggregate limit of liability

[1]The excess bonds were subject to the same terms and conditions as the bond. Accordingly, any discussion of the bond herein applies to the excess bonds as well.

of $20 million, and a deductible of $3 million per single loss. The operative portion of the bond provided that coverage would be afforded for "[l]oss resulting directly from dishonest or fraudulent acts committed by an Employee[2] acting alone or in collusion with others." The term "loss" is not defined anywhere in the bond.

As part of its application to National Union for the bond, JFI disclosed that the amount of assets being managed by BLMIS on behalf of the various entities was at the time $123,805,948. Unbeknownst to JFI or National Union, a substantial portion of that figure represented fictitious gains in JFI's initial investment with BLMIS. Rider 9 to the bond constituted JFI's representation that the information disclosed in the application was complete, true and correct and provided that the application "constitutes part of this policy."

After Madoff's fraud was exposed in December 2008, following his arrest, it was revealed that six of the plaintiffs had contributed more money to BLMIS than they had withdrawn from it, or, in the common parlance, were "net losers." The remaining plaintiffs were "net winners," because over time they had withdrawn more money than they had invested. When the "net wins"

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[2] Rider 14 to the 2007 bond extended coverage to acts of outside investment advisors such as BLMIS.

and "net losses" of the individual plaintiffs are aggregated, the entities are shown to have had a total net win of $3,142,677. Nevertheless, JFI submitted a single proof of loss to National Union in the amount of $107,619,369.33[3], which was based on the last account statement furnished by BLMIS prior to Madoff's arrest. That statement, of course, and the proof of loss which was based on it, included the millions of dollars in "gains" which Madoff infamously conjured out of thin air.

National Union denied coverage, asserting, inter alia, that JFI suffered no losses from Madoff's wrongdoing because "the non-existent profits that Mr. Madoff fraudulently attributed to his purported investments" did not constitute a loss under the bond. The excess insurers denied JFI's claim on the same grounds. JFI commenced this action, seeking a declaratory judgment that the entire claimed loss was covered by the bond, as well as damages for breach of contract and breach of the implied covenant of good faith and fair dealing.

Before discovery commenced, JFI moved for partial summary judgment declaring, inter alia, that the bond covered the full extent of the losses it claimed. Defendants jointly cross-moved

[3] The proof of loss included an account for an individual who is not a party to this appeal. Without that account, the total loss which JFI claimed as attributable to Madoff was $105,562,237.82.

for summary judgment declaring that coverage under the bond was limited to JFI's "actual losses" in its Madoff accounts, and also moved to dismiss JFI's claim for breach of the covenant of good faith and fair dealing. In an argument which they withdrew before the court decided the motions, defendants further asserted that, if their "actual losses" theory was adopted, the gains and losses of the various JFI entities should be aggregated. Because this would result in a total net win for JFI, defendants submitted that the entire complaint should be dismissed.

Supreme Court denied JFI's motion, and granted the cross motion, to the extent of finding that the bond limited coverage to JFI's "actual losses." The court concluded that because the fictitious gains recorded by BLMIS were "never owned" by JFI, they could not have been "lost." The court also dismissed JFI's claim for breach of the covenant of good faith and fair dealing, since defendants had an "arguable basis" for denying coverage.

After the parties had begun discovery, JFI moved for leave to renew its motion on the basis that it had gained access to information in the possession of defendants and third parties which warranted a different conclusion than the court had reached. The first new development presented by JFI had to do with the fact that a fidelity bond that National Union had issued to JFI in 2003 was expressly limited to losses of JFI's

"investment interest" because of the dishonest acts of outside investment advisors, that is, the actual amount of cash which JFI entrusted to them. JFI claimed that it had discovered that National Union representatives had specifically insisted on the inclusion of that limitation in the 2003 bond, and argued that the omission of this limitation in the bond at issue was thus a purposeful act which established that National Union expected to cover more than simply lost "investment interest." The second new development which formed the basis of the renewal motion was JFI's having learned that, in calculating the bond's premium, National Union multiplied the premium by 375% to cover the total "assets at risk." According to JFI, this established that National Union understood that it was insuring the entire value of assets being managed by BLMIS at the time the bond was purchased, which, albeit unbenownst to the parties, included tens of millions of dollars of fictitious profits.

Defendants simultaneously moved for summary judgment dismissing the complaint, reviving the claim made in the original motion that, on a net, aggregated basis, plaintiffs suffered no losses, as they collectively withdrew more money than they invested with Madoff. In making the argument that plaintiffs had to be viewed as having submitted a single claim, defendants noted that JFI submitted just one proof of claim. They also cited

three provisions in the bond. The first was Rider 8, which listed all of the individual entities covered by the bond and stated that they constituted the "Complete Named Insured." The second provision on which defendants relied was the definition of the term "Single Loss" in the section of the bond related to limits of liability. Because "Single Loss" was defined by the policy as "all covered loss . . . resulting from [various acts of malfeasance]," defendants argued that all of the various losses suffered by the individual plaintiff entities constituted one aggregate loss. Finally, defendants relied on the Bond's "Joint Insured" provision, which stated:

> "If two or more Insureds are covered under this bond, the first named Insured shall act for all Insureds . . . . The liability of the Underwriter for loss or losses sustained by all Insureds shall not exceed the amount for which the Underwriter would have been liable had all such loss or losses been sustained by one Insured."

As further evidence that plaintiffs collectively did not suffer a loss, defendants submitted JFI's settlement agreement with the trustee for the Securities Investor Protection Corporation (SIPC), which was charged with marshalling the assets of the bankrupt BLMIS and compensating Madoff's victims. While the net loser plaintiffs were entitled to have their claims paid by SIPC, to the extent funds were available, the net winner

plaintiffs were subject to "clawback" claims from SIPC. The net losers agreed with SIPC to forego approximately $25 million worth of potential recovery in return for SIPC's release of its right to bring clawback claims against the net winners. Defendants argued that this constituted a "recovery" to JFI, and triggered the bond provision that

> "[r]ecoveries, whether effected by the Underwriter or by the Insured, shall be applied net of the expense of such recovery first to the satisfaction of the Insured's loss which would otherwise have been paid but for the fact that it is in excess of either the Single or Aggregate Limit of Liability, secondly, to the Underwriter as reimbursement of amounts paid in settlement of the Insured's claim, and thirdly, to the insured in satisfaction of any Deductible Amount."

Defendants also argued that any payment to the net losers should be offset by a $2.5 million dollar cash payment to them from SIPC, as well as a $2.2 million payment to them from two of the net winners. Finally, defendants asserted that, if the court were to reject their argument and find that the net losers' claims were separate from each other, it should declare that the $3 million policy deductible applied to each of those claims.

The court granted JFI's motion for leave to renew based on the newly discovered evidence, and adhered to its original determination that the bond covered only the investment interest of each plaintiff in its individual BLMIS account. With respect

to defendants' motion, the court found that the plain language of the cited bond provisions did not compel aggregation of plaintiffs' net wins and losses. The court specifically found that a "single loss" was defined as "all covered losses," not all "net losses." It found that the Joint Insured provision merely created an organized procedure for the 160 separate insureds to make claims under the bond. The court rejected defendants' argument that filing a single proof of loss suggested that JFI intended for the individual investing entities to be treated as a single insured, finding that by filing a single proof of claim JFI behaved consistently with the Joint Insured provision.

The court also rejected defendants' argument that the settlement with SIPC supported their claim that plaintiffs collectively suffered no loss, on the basis that the plain language of the bond precluded the consideration of extrinsic evidence. However, even reviewing the settlement agreement as potential evidence of a recovery by plaintiffs, the court held that it was unreasonable to consider the intangible net value JFI received as a result of the settlement agreement as a "recovery." The court also held that the $2.2 million payment to two of the net losers from two of the net winners did not constitute a "recovery" within the meaning of the bond. Because the issue of which plaintiffs suffered losses was no longer in dispute, the

court dismissed the complaint as to the net winners, as they did not suffer actual losses. However, the court rejected defendants' argument that the $3 million deductible applied to eight of the net losers, finding that Madoff's fraud was one single act of malfeasance, and all claims of the net losers would therefore be subject to one deductible. Thus, the court determined that the net losers were entitled to actual losses, minus any cash payments by the SIPC Trustee and the $3 million deductible, the exact amount to be determined at trial.

Because this dispute is so dependent on the interpretation of the language in the bond, it is worthwhile to review certain construction precepts. No different from interpreting the terms of any contract, the goal of a court reviewing an insurance policy is to ascertain "whether, affording a fair meaning to all of the language employed by the parties in the contract and leaving no provision without force and effect . . . there is a reasonable basis for a difference of opinion as to the meaning of the policy" (*Federal Ins. Co. v International Bus. Machs. Corp.*, 18 NY3d 642, 646 [2012] [internal quotation marks omitted]). If so, the policy is ambiguous, and a court may consider extrinsic evidence in attempting to resolve the ambiguity (*see State of New York v Home Indem. Co.*, 66 NY2d 669, 671 [1985]). However, if a policy "has a definite and precise meaning, unattended by danger

of misconception in the purport of the agreement itself, and concerning which there is no reasonable basis for a difference of opinion . . . a court is not free to alter the contract to reflect its personal notions of fairness and equity" (*White v Continental Cas. Co.*, 9 NY3d 264, 267 [2007] [internal quotation marks omitted]).

JFI has the burden of proof as to whether the entire loss it claims is covered by the bond (*Consolidated Edison Co. of N.Y. v Allstate Ins. Co.*, 98 NY2d 208, 218 [2002]. In arguing that the undefined term "loss" unambiguously encompasses the fictitious profits, it principally relies on two provisions in the bond. The first is Rider 9, which provides that JFI's application for the bond, which included the most recent statement from BLMIS, "constitutes part of this policy." The second is the section of the bond entitled "Ownership," which provides that "[t]his bond shall apply to loss of Property (1) owned by the Insured, (2) held by the Insured in any capacity, or (3) for which the Insured is legally liable." Conversely, JFI claims that the court, in finding that the term "loss" unambiguously embraces only the loss of "real" assets, improperly "supplied" terms to the policy that do not actually appear in the text of the bond, such as "actual" and "direct."

The sections of the bond which JFI affirmatively relies on

are insufficient to carry its burden. Rider 9 is an especially slim reed to hang on. It is true that it technically makes the most recent BLMIS statement part of the bond. Nevertheless, this offers no guidance on how to define the term "loss." Moreover, it hardly serves as an estoppel against defendants taking the position that only "real" losses are covered. JFI's attempt to analogize to *Haber v St. Paul Guardian Ins. Co.* (137 F3d 691 [2d Cir 1998]), fails. There, the court observed that it would be reasonable to infer, where a homeowner applies for a workers' compensation policy and discloses the existence of a live-in housekeeper, that the homeowner intended for the policy to cover that employee. However, in contrast to the fictitious Madoff gains at issue here, there was no question that the employee existed. The *Haber* court may have reached a different conclusion had the homeowner only "thought" that the employee existed.

The "Ownership" section of the bond also fails to advance JFI's position that the term "loss" covers the phantom gains. JFI claims that, if it could not have legally "owned" the fictitious profits, it was at least "legally liable" for them to the extent that it paid taxes on them. Also, it asserts, it held the profits in the "capacity" of having a UCC "security entitlement" in them. JFI is correct that, before the Madoff scheme was exposed, the taxing authorities, like most everyone

else in the world, assumed the investments were legitimate and would have had a right to collect taxes on the investment "gains." However, any such authority evaporated at the same time JFI learned it had no such "gains" to "lose." Indeed, JFI has attempted to take advantage of Internal Revenue Service procedures designed to relieve taxpayers who calculated their returns in part on "phantom" income. Similarly, any protectable UCC "interest" based on the fictitious value of securities only existed for as long as the Madoff scheme remained hidden.

JFI further argues that, even if its own effort to define the term "loss" is not directly supported by the language employed in the bond, the motion court overreached in attempting to fashion its own definition. The court's interpretation was primarily based on *Horowitz v American Intl. Group, Inc.* (2010 WL 3825737, 2010 US Dist LEXIS 103489 [SDNY, Sept. 30, 2010, No. 09-Civ-7312], *affd* 2012 WL 3332375, 2012 US App LEXIS 17055 [2nd Cir, August 15, 2012, No. 10-4408-cv]). In *Horowitz*, the plaintiffs purchased a homeowner's policy from the defendant with coverage for "the loss of money [or] securities . . . resulting directly from fraud, embezzlement, or forgery" (2010 WL 3825737, * 2, 2010 US Dist LEXIS 103489, *7, No. 09 Civ-7312]). They invested money with BLMIS and were net winners. However, the plaintiffs filed a claim for their vanished investment "profits."

The term "loss" was, like here, undefined in the policy. The court agreed with the defendant that the policy was not ambiguous on its face. It further rejected the plaintiffs' interpretation of the term "loss" as unreasonable, finding that "it is not reasonable to contend that one can lose money that never existed in the first place" (2010 WL 3825737, *6, 2010 US Dist LEXIS 103489, *19). The *Horowitz* court favorably cited the decision in the Madoff bankruptcy litigation in excluding the fictitious gains in creditors' claims, which was based in part on the observation that "'it would be simply absurd to credit the fraud and legitimize the phantom world created by Madoff'" (2010 WL 3825737, *7, 2010 US Dist LEXIS 103489, *29, quoting *In re Bernard L. Madoff Inv. Sec. LLC, SIPA Liquidation*, 424 BR 122, 140 [SDNY 2010]).

We adopt the logic of the *Horowitz* court and hold that no reasonable interpretation of the term "loss" in the context of the bond allows for coverage of fictitious Madoff gains. We further note that *Horowitz* is not alone in finding that "bookkeeping or theoretical loss[es], not accompanied by actual withdrawals of cash or other such pecuniary loss," are not covered by fidelity bonds (*Cincinnati Ins. Co. v Star Fin. Bank*, 35 F3d 1186, 1191 [7th Cir 1994] [internal quotation marks omitted] [endorsing position of insurance carrier for bank that

bank did not stand to suffer a "loss" were it forced to reimburse payor bank for funds that insured bank received by accepting a forged check]; *see also In re New Times Sec. Servs., Inc.*, 371 F3d 68, 88 [2d Cir 2004] [internal quotation marks omitted] [holding that Securities Investment Protection Act (SIPA) did not have to compensate Ponzi scheme victims beyond their cash investments because "basing customer recoveries on fictitious amounts in the firm's books and records would allow customers to recover arbitrary amounts that necessarily have no relation to reality"] [internal quotation marks omitted]).

JFI attempts to distinguish *Horowitz* by noting that the court there only considered whether the plaintiffs had parted with "something of value" within the meaning of that policy. However, this is too narrow a reading of *Horowitz*. The *Horowitz* court clearly meant to convey that no insurance policy can be interpreted to compensate an insured for something that, unbenknownst to the parties, only appeared to exist because of someone else's fraud. JFI criticizes the *Horowitz* court's reliance on *In re Bernard L. Madoff Inv. Sec.*, arguing that the Bankruptcy Court was concerned with the application of SIPA, not state insurance law. However, the distinction is meaningless. Under either scenario, it is not reasonable to claim that the revelation that an asset, once thought to exist, did not exist,

constitutes a “loss,” whether for the purpose of a claim under SIPA or under a fidelity bond. Further, in concluding that the bond covered only “actual” or “direct” losses, the motion court did not, as defendants argue, improperly “supply” terms to the policy that do not actually appear in the text of the bond. Nothing about the court’s analysis deviated from standard interpretation of contract terms, which, after all, was the court’s central role in resolving this dispute.

The recent Court of Appeals decision in *Simkin v Blank* (19 NY3d 46 [2012]) does not compel a different result than the one reached here. There, a divorcing couple entered into a settlement agreement in which the wife received a distribution that was based on a valuation of the marital estate that included Madoff funds, which the husband retained. The husband sought to reform the agreement after it was revealed that a significant portion of the Madoff fund valuation was based on fictitious profits. The Court, in rejecting the husband’s position, stated that “[t]his situation, however sympathetic, is more akin to a marital asset that unexpectedly loses value after dissolution of a marriage; the asset had value at the time of the settlement but the purported value did not remain consistent” (19 NY3d at 55). The Court’s statement that the Madoff assets “had value” has no impact on this case. That observation was directly related to

the court's holding that the parties did not commit a mutual mistake when they entered into the settlement agreement. It held that they did not because at the time the Madoff assets could have been redeemed in full. Here, there is no claim of mutual mistake. Rather, the analysis is strictly limited to what extent JFI's assets were protected by the bond.

Finally, JFI argues that extrinsic evidence proves that "loss" under the bond is not limited to investment interest. This evidence consists of defendants' alleged insistence on the "investment interest" limitation in the 2003 bond and the multiplication of the premium by 375% to cover the total "assets at risk." However, because we find that the term "loss" is not ambiguous, there is no reason to look outside the policy to interpret the term (*see State of New York v Home Indem. Co.*, 66 NY2d at 671). In any event, we disagree that the evidence is sufficient to create an issue of fact whether the fictitious profits are covered by the bond. Merely because the 2003 bond stated in explicit terms that only cash outlays were covered does not, without more, lead to the conclusion that another bond issued four years later without such express language was not so limited. As for the amount of premium paid, JFI fails to present sufficient evidence for a factfinder to infer that the increase applied to the bond was predominantly related to the amount of

assets being protected. To the contrary, the record reveals that, in the five years leading up to the issuance of the bond, the total amount of assets managed by outside investment advisors tripled, while the premium actually *decreased* over time. Further, the deposition testimony presented by JFI to support the premium theory is highly equivocal as to whether there was a direct correlation between the amount being insured and the premium, and in fact suggested that the amount was only one of several risk factors considered in calculating the premium.

Having agreed with defendants that JFI may only recover the actual cash investment it lost to Madoff's fraud, we must also conclude that plaintiffs' claim for breach of the implied covenant of good faith and fair dealing was properly dismissed, as plaintiffs did not establish that defendants had "no arguable basis" for denying coverage (*Wurm v Commercial Ins. Co. of Newark, N.J.*, 308 AD2d 324, 329-330 [1st Dept 2003], *lv denied* 3 NY3d 602 [2004]). We turn instead to defendants' position that the gains and losses of each individual investing entity must be seen as one whole. Defendants maintain that the bond unambiguously provides that the individual entities were to be considered together for purpose of making a claim. Again, however, we must apply the plain meaning of the relevant terminology (see *White v Continental Cas. Co.*, 9 NY3d at 267).

Defendants assert that because Rider 8 to the bond lists the covered investment vehicles under the umbrella term "Complete Named Insured," any claim made on behalf of more than one of those entities must be considered as a single, aggregated claim. We disagree. Rider 8 is a definitional, as opposed to an operative, section of the bond. As such, it is impossible to conclude that it has anything to do with whether claims by the individual insureds are to be considered separately or aggregated together. Similarly, the "Joint Insured" provision is a housekeeping measure which has no bearing on how individual claims may be accounted for. The provision which defines "single loss" as "all covered loss" arising out of related acts of wrongdoing cannot be reasonably read as requiring a setoff for insured entities that did not suffer a loss at all. At the same time, however, consistency dictates that, if each net loser is seeking coverage for its own loss, each individual claim is subject to the $3 million Single Loss Deductible.

Finally, we reject defendants' argument that the bond requires the SIPC settlement to offset the total loss accumulated by the net loser plaintiffs. The bond unambiguously provides that any "recovery" from a third party shall be applied "to the satisfaction of the Insured's loss." Since we have already rejected defendants' argument that the individual plaintiff

investment entities are not one aggregate "Insured," we must interpret this clause as requiring a "recovery" to the insured entity itself. Defendants' position, however, is that, by releasing their claims against SIPC, the "net loser" plaintiffs effected a benefit for the "net winners" in the form of a release of potential clawback claims. Accordingly, the recovery provision is not implicated by the settlement. However, on this record, it cannot be determined, as a matter of law, whether the alleged $2.2 million paid by two plaintiffs who were net winners to two plaintiffs who were net losers constituted a "recovery" under the bond. It is unclear for what purpose these payments were made and whether they were intended to compensate the two net losers for their loss such that payment by defendants would constitute a double recovery.

Accordingly, the order of the Supreme Court, New York County (Richard B. Lowe, III, J.), entered July 13, 2011, which, to the extent appealed from, denied plaintiff insureds' motion for partial summary judgment, and granted defendant insurers' cross motion for summary judgment to the extent of limiting any recovery by plaintiffs under the fidelity bonds at issue to the loss of their investment interest and dismissing plaintiffs' claim for breach of the implied covenant of good faith and fair dealing, should be affirmed, with costs. The order of the same

court and Justice, entered February 29, 2012, which, to the extent appealed from, granted plaintiffs' motion for leave to renew and adhered to the original determination, and denied so much of defendants' motion for summary judgment as sought dismissal of the "net loser" plaintiffs' claims, should be modified, on the law, to apply the $3 million single loss deductible to each net loser's recovery, if any, and otherwise affirmed, with costs.

All concur.

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

ENTERED: DECEMBER 11, 2012.

CLERK