SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 9, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Saxe, Friedman, Richter, Abdus-Salaam, JJ.

8935 21st Century North America Insurance Company formerly known as American International Insurance Company as subrogee of Ghislaine Maxwell, Plaintiff, Index 101173/11

-against-

Diandra Douglas, Defendant-Respondent,

Big Apple Chimney, LLC, et al., Defendants,

Bulson Management, LLC, Defendant-Appellant.

_____

Dunnington, Bartholow & Miller LLP, New York (Samuel A. Blaustein of counsel), for appellant.

Hoey, King, Epstein, Prezioso & Marquez, New York (John A. Serio of counsel), for respondent.

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Order, Supreme Court, New York County (Debra A. James, J.), entered October 25, 2011, which denied defendant Bulson Management LLC's motion to stay the cross claims asserted against it by defendant Diandra Douglas and to compel arbitration of the cross claims, unanimously modified, on the law, to the extent of

staying further proceedings on the cross claims, severing the cross claims from this action with leave to proceed to arbitrate the cross claims if not rendered moot after resolution of the other claims in this action, and otherwise affirmed, without costs.

Questions as to whether the cross claims fall within the scope of the arbitration agreement between defendants, and whether the conditions precedent to arbitration have been waived, or if they are conditions in arbitration rather than conditions to arbitration, are for the arbitrator to decide (*see Life Receivables Trust v Goshawk Syndicate 102 at Lloyd's*, 66 AD3d 495, 496 [1st Dept 2009], *affd* 14 NY3d 850 [2010], *cert denied* __ US __, 131 S Ct 463 [2010]; *Ostberg v Litric*, 80 AD3d 518, 519-520 [1st Dept 2011]). Indeed, the arbitration clause expressly incorporates the construction industry arbitration rules of the American Arbitration Association, which provide that the arbitrator shall determine the existence, validity and scope of the arbitration agreement (*see Life Receivables Trust*, 66 AD3d at 495-496). There is no rule precluding arbitration of cross claims (*see e.g. Kenyon & Kenyon Reilly Carr & Chapin v Makor Sys.*, 57 AD2d 796 [1st Dept 1977]). Nor did Bulson waive its right to seek arbitration of the cross claims by taking discovery of Douglas. Bulson is faced with nonarbitrable claims by the

plaintiff in this action, which require it to participate in discovery to defend those claims (*see Sherrill v Grayco Bldrs.*, 64 NY2d 261, 273 [1985]).

Plaintiff, however, is entitled to proceed with its claims against defendants, as it is not in any way relying on the agreement referred to in the cross claims and was not a signatory to the agreement (*see Kenyon*, 57 AD2d at 797). Accordingly, the cross claims shall be severed from this action and stayed pending determination of the other claims in this action. If the cross claims are not rendered moot upon resolution of the other claims in this action, then defendants may proceed to arbitration of the cross claims (*id.*).

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

ENTERED: APRIL 9, 2013

CLERK

Gonzalez, P.J., Friedman, Moskowitz, DeGrasse, Freedman, JJ.

9122 Glenn Davis, et al., Index 117455/06
Plaintiffs-Respondents, 590486/07
590524/07

-against-

Breadstreet Holdings Corporation,
Defendant,

350 Park Investors LLC, et al.,
Defendants-Respondents-Appellants,

Nastasi & Associates, Inc.,
Defendant-Appellant-Respondent.

[And Other third Party Actions]

_____

Appeals having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Judith J. Gische, J.), entered on or about April 5, 2012,

And said appeals having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated September 20, 2012,

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 9, 2013

CLERK

Tom, J.P., Sweeny, Saxe, Richter, Manzanet-Daniels, JJ.

6119-
6120

D&A Construction, Inc.,
Plaintiff-Appellant,

-against-

New York City Housing Authority,
Defendant-Respondent.

Index 101379/10

_____

Goetz Fitzpatrick LLP, New York (Bernard Kobroff of counsel), for appellant.

Sonya M. Kaloyanides, New York (Corey Acri of counsel), for respondent.

_____

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered November 17, 2010, which granted defendant's motion to dismiss the complaint, and denied its alternative request to consolidate this action with a related lien foreclosure action pending in Kings County, unanimously reversed, on the law and the facts, without costs, the motion to dismiss denied, and the request for consolidation granted. Appeal from order, same court and Justice, entered April 5, 2011, which denied plaintiff's motion for renewal and reargument, unanimously dismissed, without costs.

The motion for renewal and reargument presented neither new facts nor a change in the law and was therefore a motion for reargument only (*see* CPLR 2221[e][2]). An order that denies a

motion for reargument is not appealable (*see Cuebas v Smith*, 24 AD3d 200 [2005]).

This action and the pending lien foreclosure action arise out of work done on the same two projects for defendant, and present competing claims to the same monies. Plaintiff's subcontractors are the lienor plaintiffs, and the parties in this action are named codefendants in the lien foreclosure action (*see* CPLR 602[a]; *Paddock Constr. v Thomason Indus. Corp.*, 133 AD2d 20, 23 [1987]). Moreover, plaintiff did not oppose defendant's request for consolidation.

It should be noted that defendant's motion for consolidation was made in the alternative to its motion to dismiss the complaint based on, inter alia, untimeliness and failure to join necessary parties. The motion court found that the first cause of action was time-barred and dismissed the second cause of action without prejudice to renew the claim in the lien foreclosure action. There are, however, factual issues that should be given further consideration, including whether D&A and the subcontractors are united in interest for the purpose of asserting the relation back doctrine (*see Buran v Coupal*, 87 NY2d 173, 177 [1995]). Based on the existence of factual issues, the

preference for consolidation (*see Geneva Temps, Inc. v New World Communities, Inc.*, 24 AD3d 332, 334 [1st Dept 2005]), and the fact the defendant has not articulated any prejudice, the motion to dismiss can be re-asserted in the consolidated Kings County action where the court can determine the entire matter before it.

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

ENTERED: APRIL 9, 2013

CLERK

Tom, J.P., Mazzarelli, Moskowitz, Abdus-Salaam, JJ.

8737 John Cumberland, Index 105631/09
Plaintiff-Appellant,

-against-

Hines Interests Limited
Partnership, et al.,
Defendants-Respondents.

[And a Third-Party Action]

_____

Sacks and Sacks, LLP, New York (Scott N. Singer of counsel), for appellant.

Lester Schwab Katz & Dwyer, LLP, New York (Harry Steinberg of counsel), for respondents.

_____

Order, Supreme Court, New York County (Paul G. Feinman, J.), entered June 29, 2011, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing plaintiff's Labor Law § 241(6) claim, unanimously modified, on the law, the motion denied with respect to the claim based on an alleged violation of Industrial Code (12 NYCRR) § 23-1.7(e)(1), and otherwise affirmed, without costs.

Contrary to the motion court's conclusion, plaintiff's deposition testimony raised an issue of fact as to whether he

fell in a "passageway" or an open work area (*Costabile v Damon G. Douglas Co.*, 66 AD3d 436 [1st Dept 2009]; *compare O'Sullivan v IDI Constr. Co., Inc.*, 28 AD3d 225, 225-226 [1st Dept 2006], *affd* 7 NY3d 805 [2006]).

We agree with the motion court that Industrial Code (12 NYCRR) § 23-1.7(e)(2) does not apply because the pipe and pipe fittings over which plaintiff fell were not "debris," but rather were "consistent with" the work being performed in the room *Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 383 [1st Dept 2007]; *Kinirons v Teachers Ins. & Annuity Assn. of Am.*, 34 AD3d 237, 238 [1st Dept 2006]).

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

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

ENTERED: APRIL 9, 2013

CLERK

Mazzarelli, J.P., Saxe, DeGrasse, Manzanet-Daniels, Clark, JJ.

9494 In re The Prudential Insurance Company of America,
Petitioner-Appellant,

-against-

James J. Wrynn, etc.,
Respondent-Respondent.

Index 102267/11

_____

McDermott Will & Emery LLP, New York (Arthur R. Rosen of counsel), for appellant.

Eric T. Schneiderman, Attorney General, New York (Brian A. Sutherland of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Peter H. Moulton, J.), entered April 25, 2012, which denied the petition for an order annulling a determination of respondent Superintendent of Insurance, dated November 18, 2010, denying petitioner's claim for a refund of retaliatory taxes for tax year 2003 in the amount of $2,935,493 and cancellation of an assessment of retaliatory taxes for tax year 2007 in the amount of $4,266,551, and dismissed the proceeding brought pursuant to CPLR Article 78, unanimously affirmed, without costs.

For the 1995 tax year, petitioner initially paid $22,663,988 in franchise taxes. In 2006, it was determined that petitioner had misapprehended the amount of the net operating loss (NOL) deduction it was entitled to take for that tax year, resulting in

an increase of its franchise tax liability for 1995 to $31,015,708. Petitioner paid the difference — $8,351,720 — and it is this sum for which petitioner now seeks a credit. This sum is not, however, an "overpayment" for purposes of Insurance Law § 9109, which defines an overpayment as a payment "in excess of the amount legally chargeable against it" (Insurance Law § 9109[a][1]). Far from making an overpayment for 1995, petitioner made an *underpayment* — an amount *less than* the "amount legally chargeable against it" (*id.*). Accordingly, petitioner cannot recover any refund of its additional franchise tax payment under Insurance Law § 9109.

Moreover, by its plain language, Insurance Law § 9109 limits refunds to amounts paid on account of factual errors or legal errors made because of an "erroneous interpretation of a statute of this or any other state" (Insurance Law § 9109[a][1]). Petitioner's underpayment resulted not from any erroneous interpretation of a "statute of this or any other state," but from its misinterpretation of net operating loss deduction provisions of the Federal Internal Revenue Code.

We reject petitioner's argument that, pursuant to Tax Law § 1511(b), payment of "any" franchise tax generates a credit which can be applied towards any assessed retaliatory tax. Rather than permitting franchise taxes to be offset against

retaliatory taxes in any year, the term "any taxes" in Tax Law § 1511(b) merely clarifies that the credit applies to "any" of the four different franchise taxes provided for in Article 33 of the Tax Law (*see* Tax Law §§ 1501, 1505-a, 1510, 1520; *United Servs. Auto. Assn. v Curiale*, 88 NY2d 306, 308 [1996]).

Also unavailing is petitioner's argument that it should be permitted to rely upon a December 2007 opinion of the Insurance Department's Office of General Counsel, which the Insurance Department itself now declines to follow. Petitioner has failed to preserve its argument that the Insurance Department's change of opinion should be applied only prospectively, and not retroactively to this case (*see Recovery Consultants v Shih-Hsieh*, 141 AD2d 272, 276 [1st Dept 1988]). Were we to consider this argument, we would find that retroactive application to petitioner of the Insurance Department's change of opinion is not so "palpably unjust" as to warrant prospective-

only application (*Matter of American Tel. & Tel. v State Tax Commn.*, 61 NY2d 393, 404 [1984]).

We have considered petitioner's remaining arguments and find them to be without merit.

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

ENTERED: APRIL 9, 2013

CLERK

Sweeny, J.P., Acosta, Román, Feinman, Clark, JJ.

9596 In re Andy Z.,

A Child Under Eighteen
Years of Age, etc.,

Hong Lai Z.,
Respondent-Appellant,

Commissioner of Social Services
of the City of New York,
Petitioner-Respondent.

_____

Steven N. Feinman, White Plains, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Fay Ng of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Elana E. Roffman of counsel), attorney for the child.

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Order of disposition, Family Court, New York County (Clark V. Richardson, J.), entered on or about June 8, 2010, which, to the extent appealed from as limited by the briefs, brings up for review a fact-finding determination that respondent-appellant father had neglected the subject child, unanimously reversed, on the law and the facts, without costs, the finding of neglect vacated, and the petition dismissed as against the father.

The Family Court's findings of neglect against the father, based on two incidents, are not supported by a preponderance of the evidence (*see* Family Ct Act § 1046[b][i]). Although, as the court noted, the father had numerous opportunities to reconsider

his decision to leave the child alone during one argument with the mother, it was the mother's ultimate failure to return home even after the police told her to do so, and after she knew that her husband could not do so, that caused the child, who was almost eight years old at the time, to be left alone overnight, possibly in imminent danger of becoming physically or emotionally impaired (*see* Family Ct Act § 1012[f][i][B]).

As the court noted, with respect to an alleged domestic violence incident between the parents, it is unclear what the child witnessed. In any event, this single incident, while unfortunate, was not, standing alone, so egregious as to support a finding of neglect (*compare Matter of Eustace B. [Shondella M.]*, 76 AD3d 428 [1st Dept 2010], *with Matter of Jeaniya W. [Jean W.]*, 96 AD3d 622 [1st Dept 2012]). The child's statement that he was "sad" after witnessing the incident does not establish that his mental or emotional condition was impaired or in imminent danger of being impaired as a result of the father's conduct (*see* Family Ct Act § 1012[f][i]; *Matter of Eustace B.*, 76 AD3d at 429).

Lastly, any domestic violence between the parents is no longer an issue, as the mother has died (*see Matter of Eustace*

B., 76 AD3d at 428). In addition, the child, now 12 years old, reports that he is happy living with the father, is doing well at school, and enjoys a close relationship with his father's ex-wife and her son (*id.*).

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

ENTERED: APRIL 9, 2013

CLERK

Mazzarelli, J.P., Acosta, Renwick, Richter, Gische, JJ.

9732-
9733 Geraldine McClatchie, Index 105185/11
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent.

_____

The Feinsilver Law Group, P.C., Brooklyn (H. Jonathan Rubinstein of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered August 5, 2011, which denied plaintiff's application seeking leave to file a late notice of claim, and order, same court (Arthur Engoron, J.), entered January 9, 2012, which granted defendant's motion to dismiss the complaint for failure to file a timely notice of claim, unanimously affirmed, without costs.

The court properly exercised its discretion by denying plaintiff's application, given that plaintiff failed to offer a reasonable excuse for the delay, does not contest that the City acquired no knowledge of the essential facts constituting the claim within 90 days after the claim arose or a reasonable time thereafter, and failed to demonstrate that the City suffered no substantial prejudice (*see* General Municipal Law § 50-e[5]; *see*

generally Matter of Strauss v New York City Tr. Auth., 195 AD2d 322, 322 [1st Dept 1993]). Where, as here, there is no reasonable excuse for the delay and the City did not acquire actual knowledge of the essential facts within the 90-day period, or a reasonable time thereafter, "the transitory nature of the defective condition weighs against the granting of an application to file a late notice of claim" (*Harris v City of New York*, 297 AD2d 473, 474 [1st Dept 2002], *lv denied* 99 NY2d 503 [2002]). Moreover, plaintiff's 14-month delay in seeking to file a notice of claim deprived the City of a reasonable opportunity to locate witnesses (*see Zarrello v City of New York*, 61 NY2d 628, 630 [1983]; *Ordillas v MTA N.Y. City Tr.*, 50 AD3d 391, 392 [1st Dept 2008]).

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

ENTERED: APRIL 9, 2013

CLERK

Mazzarelli, J.P., Acosta, Renwick, Richter, Gische, JJ.

9734-
9734A In re Julissa A.,
Petitioner-Appellant,

-against-

Martin O.,
Respondent-Respondent.

Daniel R. Katz, New York, for appellant.

Order, Family Court, New York County (Mary E. Bednar, J.), entered on or about January 4, 2012, which denied appellant-mother's objection to an order, same court (Paul Ryneski, Support Magistrate), entered on or about December 1, 2011, dismissing her petition for modification of an order of support entered upon her default, unanimously affirmed, without costs.

Although appellant may petition the court to modify her child support obligation despite failing to first move to vacate the September 22, 2011 order, which was entered upon her default (*see Matter of Forte v Forte*, 304 AD2d 577, 577-578 [2d Dept 2003]), the court properly dismissed the modification petition. Appellant failed to demonstrate the existence of a substantial change in circumstances since the prior support proceeding which

took place approximately one week before (*see Matter of Figueroa v Herring*, 61 AD3d 976, 977 [2d Dept 2009], *lv denied* 13 NY3d 703 [2009]; *Matter of Commissioner of Social Servs. v Campos*, 291 AD2d 203, 204-205 [1st Dept 2002]).

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

ENTERED: APRIL 9, 2013

CLERK

Mazzarelli, J.P., Acosta, Renwick, Richter, Gische, JJ.

9735 Bank of Smithtown, Index 109552/10
Plaintiff-Appellant,

-against-

264 West 124 LLC, et al.,
Defendants-Respondents.

_____

Lynch & Associates, New York (H. Michael Lynch of counsel), for appellant.

_____

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered on or about November 4, 2011, which denied plaintiff's motion for summary judgment as against defendants 264 West 124 LLC and Shlomo Levi, unanimously reversed, on the law, with costs, the motion granted, the counterclaims dismissed, the matter remanded for further proceeding, and People's United Bank substituted as plaintiff in the action.

Plaintiff demonstrated an entitlement to summary judgment by producing the note and mortgage and the uncontested proof of default, as well as the personal guaranty signed by defendant Levi as additional collateral for the mortgage (*see Hypo Holdings v Chalasani*, 280 AD2d 386 [1st Dept 2001], *lv denied* 96 NY2d 717 [2001]).

Defendants failed to raise a triable issue of fact as to any defense to foreclosure (*see Marine Midland Bank v Fillippo*, 276

AD2d 601 [2nd Dept 2000]). The uncorroborated affidavit from defendant Levi that plaintiff had orally agreed to modify the terms of the loan and that it should be estopped was insufficient because the note and mortgage prohibited oral modifications to the loan, and thus, even accepting the truth of Levi's allegations, any oral agreement was fundamentally ineffectual in modifying the loan (*see CrossLand Sav. v Loguidice-Chatwal Real Estate Inv. Co.*, 171 AD2d 457 [1st Dept 1991]).

Nor did defendants establish that the principles of equitable estoppel or partial performance apply because they did not materially alter their position based on any alleged oral modification, and their payment of common charge arrears was not unequivocally referable to the oral modification nor incompatible with the written agreement (*see Rose v Spa Realty Assoc.*, 42 NY2d 338, 343-45 [1977]). Payment of the common charge arrears was "reasonably explained" by their legal obligation to make those payments (*Anostario v Vicinanzo*, 59 NY2d 662, 664 [1983]).

Nor does the claim of unclean hands require denial of summary judgment. Even accepting the truth of Levi's allegations, plaintiff was under no obligation to modify the loan or to comply with any oral agreement, and there is nothing immoral or unconscionable about its decision to proceed with foreclosure.

Defendants' reliance on the prenegotiation letter is unavailing. The letter did not require plaintiff to modify the loan and reserved all of plaintiff's rights. The letter also authorized plaintiff to terminate participation in negotiations at any time, for any reason or no reason.

Following the commencement of this action, People's United Bank merged with Bank of Smithtown and is now the owner of the subject note. Thus, we substitute it as plaintiff.

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

ENTERED: APRIL 9, 2013

CLERK

Mazzarelli, J.P., Acosta, Renwick, Richter, Gische, JJ.

9741 The People of the State of New York, Ind. 5166/10
Respondent,

-against-

Adabu Cheeley,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Eve Kessler 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 (Bonnie G. Wittner, J.), rendered on or about March 8, 2011,

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 9, 2013

CLERK

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

Mazzarelli, J.P., Acosta, Renwick, Richter, Gische, JJ.

9743 Rite Aid of New York, Inc., et al., Index 651329/12
Plaintiffs-Respondents,

-against-

Chalfonte Realty Corp.,
Defendant-Appellant.

_____

Sperber Denenberg & Kahan, P.C., New York (Steven B. Sperber of counsel), for appellant.

Herrick, Feinstein LLP, New York (Michael Berengarten of counsel), for respondents.

_____

Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered August 17, 2012, which, to the extent appealed from, denied defendant's motion to dismiss the first cause of action, unanimously affirmed, with costs.

Plaintiffs adequately alleged that they did not possess the information necessary to determine that they had been overcharged under the provision of the parties' commercial lease relating to real estate taxes until 2012, and the documentary evidence submitted by defendant, consisting of annual invoices for real estate taxes and the accompanying documentation, failed to conclusively rebut plaintiffs' allegations (*compare Goldman Copeland Assoc. v Goodstein Bros. & Co.*, 268 AD2d 370 [1st Dept 2000], *lv dismissed* 96 NY2d 897 [2000]).

Moreover, the lease is silent as to which party bears the

responsibility for ascertaining whether the increase in the building's real estate assessment is attributable to a rise in the value of the building's commercial units, for which plaintiffs would be partially responsible, or to a rise in the value of the building's residential units, for which plaintiffs would bear no liability. In addition, plaintiffs adequately alleged that they did not know that defendant was assessing them based on the increase in residential value, because the only documentation of the valuations was provided by the City to defendant, and defendant never forwarded this information to plaintiffs along with the real estate tax invoices, and therefore they had no reason to suspect improper assessments. Under these circumstances, the documentary evidence does not refute plaintiffs' allegations that payments were made under material

mistakes of fact and law (*see Dillon v U-A Columbia Cablevision of Westchester*, 100 NY2d 525 [2003]).

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: APRIL 9, 2013

CLERK

Mazzarelli, J.P., Acosta, Renwick, Richter, Gische, JJ.

9744 Luis Casas, etc., Index 115106/04
Plaintiff-Respondent,

-against-

Consolidated Edison Company
of New York, Inc.,
Defendant-Appellant.

_____

Armienti, DeBellis, Guglielmo & Rhoden, LLP, New York (Vanessa M. Corchia of counsel), for appellant.

Annette G. Hasapidis, Mt. Kisco, for respondent.

_____

Order, Supreme Court, New York County (Paul Wooten, J.), entered October 3, 2011, which, to the extent appealed from, upon the parties' motions and cross motions, declared that defendant's answer was stricken by operation of an October 2006 order and that trial of this action shall be limited to the issue of damages, unanimously modified, on the law, to preclude plaintiff from litigating the issue of whether he had an accident-related disability subsequent to September 5, 2008, and otherwise affirmed, without costs.

The conditional preclusion order entered in Supreme Court on October 31, 2006 (the October 2006 order), which required defendant to produce certain discovery, or an affidavit explaining why it was unable to produce the discovery, within 30 days of entry of the order, was self-executing, and became

absolute when defendant concededly failed to produce any supplemental responses or explanatory affidavit within the stated time frame (*see Ramos v Stern*, 100 AD3d 409, 409 [1st Dept 2012]; *AWL Indus., Inc. v QBE Ins. Corp.*, 65 AD3d 904, 905 [1st Dept 2009]). In order to be entitled to vacatur of the order, defendant was required to show a reasonable excuse for its failure to comply with the order and a meritorious defense to the action (*AWL Indus.*, 65 AD3d at 905). Defendant failed to meet this burden, as it has not explained why it was unable to produce the supplemental responses, which it tendered in February 2010, within 30 days of entry of the October 2006 order (*see Ramos*, 100 AD3d at 410). Under the circumstances, whether defendant's default was willful or contumacious is irrelevant (*see Gibbs v St. Barnabas Hosp.*, 16 NY3d 74, 82 [2010]). We have considered defendant's remaining arguments relating to the striking of its answer and find them unavailing.

The Workers' Compensation Board (WCB) panel decision dated August 28, 2009, which affirmed a WCB judge's decision finding

that plaintiff had no accident-related disability subsequent to September 5, 2008, is entitled to preclusive effect (*see Auqui v Seven Thirty One Ltd. Partnership*, __ NY3d __, 2013 NY Slip Op 00950 [2013]).

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

ENTERED: APRIL 9, 2013

CLERK

Mazzarelli, J.P., Acosta, Renwick, Richter, Gische, JJ.

9745 The People of the State of New York, Respondent, Ind. 2281/09

-against-

Derrick Hill, Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (John B.F. Martin of counsel), for respondent.

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Judgment, Supreme Court, New York County (Daniel P. Conviser, J.), rendered April 13, 2010, convicting defendant, after a jury trial, of driving while intoxicated and driving while ability impaired, and sentencing him to an aggregate term of 60 days and 5 years' probation, unanimously affirmed.

The court properly exercised its discretion in determining that defendant's cross-examination opened the door (*see generally People v Massie*, 2 NY3d 179, 183-185 [2004]) to limited testimony that defendant declined to make a statement to the arresting officer. Defendant pursued a line of questioning that created misleading impressions about his post arrest interactions with the police (*see United States v Fairchild*, 505 F2d 1378, 1383 [5th Cir 1975]; *see also People v Davis*, 61 NY2d 202, 205-207 [1984]). Furthermore, any potential prejudice was prevented by

the court's thorough instruction, which defense counsel drafted, and which the jury is presumed to have followed (*see People v Davis*, 58 NY2d 1102, 1104 [1983]). In any event, any error in receiving the challenged testimony was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

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

ENTERED: APRIL 9, 2013

CLERK

Mazzarelli, J.P., Acosta, Renwick, Richter, Gische, JJ.

9747 Castlepoint Insurance Company, as subrogee of Linda Trager, Plaintiff-Respondent-Appellant, Index 110915/09

-against-

Wendy Moore, et al., Defendants-Appellants,

B & P Chimney Cleaning and Repair Company, Inc., Defendant-Respondent-Respondent.

_____

Devitt Spellman Barrett, LLP, Smithtown (John M. Denby of counsel), for appellants.

Law Office of Steven G. Fauth, LLC, New York (Michael J. Mernin of counsel), for respondent-appellant.

Traub Lieberman Straus & Shrewsberry LLP, Hawthorne (Colleen E. Hastie of counsel), for respondent-respondent.

_____

Order, Supreme Court, New York County (Richard F. Braun, J.), entered January 10, 2012, which denied defendants Wendy Moore and Justin Moore's motion for summary judgment seeking to dismiss the complaint as against them, granted defendant B & P Chimney Cleaning and Repair Co. Inc.'s motion for summary judgment dismissing the complaint as against it, and, upon a search of the record, dismissed the Moore defendants' and B & P's cross claims against each other, unanimously modified, on the law, B & P's motion denied, the Moore defendants' and B & P's

cross claims against each other reinstated, and otherwise affirmed, without costs.

The complaint should not have been dismissed as against B & P because a question of fact exists as to whether B & P owed Linda Trager, plaintiff's subrogor, a duty as a third-party beneficiary to B & P's contract with the Moore defendants (*see Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 181-182 [2011]; *Mendel v Henry Phipps Plaza W., Inc.*, 6 NY3d 783, 786 [2006]). Juarez, B & P's employee who inspected and repaired the Moore defendants' fireplace, testified that the Moore defendants told him that smoke was entering their neighbors' homes when they lit the fireplace, and that this was the only issue that they discussed with him. Neither Juarez's testimony, the Moore defendants' testimony, nor the face of B & P's contract with the Moores conclusively establishes that the voids and/or cracks within the firebox were necessarily outside the parameters of the contract, nor that Trager was not an intended third-party beneficiary thereof. Since the prevention of smoke into Trager's home could have been an immediate, and not merely incidental, benefit of the contract (*see McDonald v Riverbay Corp.*, 308 AD2d 345, 346 [1st Dept 2003]), and plaintiff, as the party summary judgment opponent, is entitled to have all reasonable inferences

drawn in its favor (*see Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt.*, L.P., 7 NY3d 96, 105-106 [2006]), the motion should have been denied.

A question of fact also exists as to whether B & P launched an instrument of harm or exacerbated a dangerous condition by either failing to inspect or inadequately inspecting the Moore defendants' firebox, or "certif[ying]" to the Moore defendants that the fireplace was safe to use by stating that it was "good to go," especially since the Moore defendants testified that once their neighbor told them that smoke entered into her home, they had stopped using the fireplace and only resumed use thereof after B & P completed its work (*see Stiver v Good & Fair Carting & Moving, Inc.*, 9 NY3d 253 [2007]; *Espinal v Melville Snow Contrs.*, 98 NY2d 136, 1 [2002]) *Ocampo v Abetta Boiler & Welding Serv., Inc.*, 33 AD3d 332 [1st Dept 2006]).

In light of the foregoing, Supreme Court should not have searched the record and dismissed the Moore defendants' cross claims against B & P and B & P's cross claims against the Moore defendants, because their negligence and apportioned share of liability, if any, is a question of fact for the jury to resolve (*see Cabrera v Hirth*, 8 AD3d 196, 197 [1st Dept 2004], *lv dismissed* 4 NY3d 794 [2005]). Moreover, the issue of B & P's liability for common law contribution and/or indemnification and

contractual indemnification as between it and the Moore defendants was not raised by either B & P's motion for summary judgment nor the Moore defendants' motion for summary judgment and, therefore, Supreme Court did not have the authority to search the record on that issue and award summary judgment to B & P dismissing the Moore defendants' cross claims (*see* CPLR 3212[b]; *Dunham v Hilco Constr. Co.*, 89 NY2d 425, 429-430 [1996]; *Quizhpe v Luvin Constr.*, 70 AD3d 912 [2d Dept 2010]; *Filannino v Triborough Bridge and Tunnel Auth.*, 34 AD3d 280, 281 [1st Dept 2006], *appeal dismissed* 9 NY3d 862 [2007]).[1]

The Moore defendants' motion seeking to dismiss the complaint as against them was properly denied. Questions of fact exist as to whether they had notice of the dangerous condition, and whether, under the circumstances, they exercised reasonable care in attempting to remedy it. The Moore defendants concede that in August 2008, they received a home inspection report from Safe Haven Inspections which stated that their chimney/brick/ mortar was deteriorated, recommended evaluation and repairs by a

[1] While B & P correctly contends that plaintiff lacks standing to appeal from that portion of the subject order which dismissed the Moore defendants' cross claims against B & P (*see D'Ambrosio v City of New York*, 55 NY2d 454, 459-460 [1982]; *11 Essex St. Corp. v Tower Ins. Co. of N.Y.*, 96 AD3d 699, 699-700 [1st Dept 2012]; *Mixon v TBV, Inc.*, 76 AD3d 144, 154-155 [2d Dept 2010]), we reach this issue because the Moore defendants also appealed therefrom.

licensed contractor, stated that the interior of the flue was not inspected, and recommended that they "retain a qualified chimney sweep to clean and evaluate the flue." The report also stated that their fireplaces "need a full evaluation by a fireplace specialist before any operation," recommended evaluation and repairs by a licensed contractor, explicitly noted that this "is a safety hazard - correction is needed," recommended installing a "safety spacer on damper when gas logs are present, and recommended "cleaning the debris and further evaluation." Considering this in conjunction with the undisputed testimony that the Moore defendants' neighbor told them that smoke entered her daughter's bedroom when the Moore's lit a fire, and that Trager told them that "there is something about smoke kicking back into the house," questions of fact as to notice abound (*see Piacquadio v Recine Realty Corp.*, 84 NY2d 967 [1994]; *Toner v National R.R. Passenger Corp.*, 71 AD3d 454, 455 [1st Dept 2010]). Contrary to the Moore defendants' contention, the foregoing certainly constitutes more than a mere "general awareness" that a hazardous condition "may be present" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 838 [1986]).

Finally, since the scope and breadth of B & P's engagement is unclear on this record and Juarez testified that the Moore defendants never gave him a copy of the Safe Haven report and

that the only issue they discussed with him was that smoke would go into the neighbor's residence when they lit the fireplace, so he "didn't really focus on the firebox because" of what the Moore defendants told him, a question of fact exists as to whether the Moore defendants acted reasonably in attempting to remedy the dangerous condition (*see Brown v New York Marriot Marquis Hotel*, 95 AD3d 585 [1st Dept 2012]; *Boderick v RY Mgt. Co., Inc.*, 71 AD3d 144 [1st Dept 2009]).

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

ENTERED: APRIL 9, 2013

CLERK

Mazzarelli, J.P., Acosta, Renwick, Richter, Gische, JJ.

9749 The People of the State of New York, Respondent, Ind. 1977/11

-against-

William Lazarus, Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Maxwell Wiley, J., at plea; Cassandra M. Mullen, J., at sentencing), rendered on or about August 10, 2011, unanimously affirmed.

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

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

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

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

ENTERED: APRIL 9, 2013

CLERK

Mazzarelli, J.P., Acosta, Renwick, Richter, Gische, JJ.

9750 Cadlerock, L.L.C., Index 105570/08
Plaintiff-Appellant-Respondent,

-against-

Jan Z. Renner,
Defendant-Respondent-Appellant.

_____

Vlock & Associates, P.C., New York (Steven P. Giordano of counsel), for appellant-respondent.

Goldstein & Greenlaw, LLP, Forest Hills (Andrew Schwarsin of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered August 15, 2012, which denied defendant's motion for summary judgment, and plaintiff's cross motion to strike defendant's affirmative defense of equitable estoppel and for summary judgment, unanimously modified, on the law, the cross motion granted, the matter remanded for a determination of attorneys' fees and expenses, and otherwise affirmed, without costs.

In this action to recover on a promissory note, we had found an issue of fact as to whether the action is barred as a result of equitable estoppel arising from plaintiff's failure until commencement of the action in April 2008 to seek recovery of arrears since the January 2003 sale of the cooperative unit that the note financed (72 AD3d 454 [2010]). Even if, arguendo,

silence is sufficient to support an estoppel, we find that, on this second motion for summary judgment after discovery, defendant failed to demonstrate that he suffered prejudice as a result of plaintiff's inaction. We disagree with the motion court's perception that defendant misunderstood the question about prejudice posed to him at his deposition, as well as with its conclusion that his failure to articulate any change in position resulting from plaintiff's inaction nevertheless constituted prejudice (*see BWA Corp. v Alltrans Express U.S.A.*, 112 AD2d 850, 853 [1st Dept 1985]).

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

ENTERED: APRIL 9, 2013

CLERK

Mazzarelli, J.P., Acosta, Renwick, Richter, Gische, JJ.

9751 The People of the State of New York, Ind. 6141/06
Respondent,

-against-

Joshue DeJesus,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered September 16, 2009, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 20 years to life, unanimously affirmed.

Evidence concerning the course of the police investigation of this homicide did not violate defendant's right of confrontation. Initially, we note that the prosecutor did not actually introduce any testimonial statements by nontestifying declarants. Instead, defendant complains that the jury could have misused certain police testimony as evidence that nontestifying persons incriminated him.

A detective's brief, limited testimony that defendant was already a suspect at the time the People's main witness was interviewed did not violate the Confrontation Clause. This

evidence was not offered for its truth (*see Tennessee v Street*, 471 US 409 [1985]), but for the legitimate nonhearsay purposes of completing the narrative, explaining police actions, providing the context of the interview, correcting a misimpression created by defendant on cross-examination and preventing jury speculation (*see People v Tosca*, 98 NY2d 660 [2002]; *People v Rivera*, 96 NY2d 749 [2001]; *see also United States v Reyes*, 18 F3d 65, 70-71 [1994]). The probative value of this evidence for its nonhearsay purposes outweighed any prejudicial effect.

Defendant also claims that police testimony about obtaining information from other persons in the course of the investigation similarly violated his right of confrontation. However, due to its lack of specificity, this evidence presented little or no danger that the jury would draw an inference that these persons provided incriminating information. In any event, like the evidence of the point at which defendant became as suspect, this additional evidence was admissible for legitimate nonhearsay purposes, and its admission did not violate the Confrontation Clause.

Defendant did not preserve his claim that the court should have instructed the jury regarding the limited use of the evidence that was not received for its truth, and we decline to review it in the interest of justice. As an alternative holding,

we find that the absence of an instruction was harmless under all the circumstances of the case, including the limited prejudicial effect of the challenged evidence. Defendant's claim that trial counsel rendered ineffective assistance by not requesting such and instruction is improperly raised for the first time in a reply brief (*see e.g. People v Napolitano*, 282 AD2d 49, 53 [2001], *lv denied* 96 NY2d 866 [2001]). In any event, regardless of whether counsel should have requested the instruction, defendant has not established that the absence of the instruction resulted in prejudice under the state or federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]).

Defendant's mistrial motion was insufficient to preserve his claim that the prosecutor unfairly insinuated that defendant intimidated witnesses or potential witnesses, and we decline to review it in the interest of justice. As an alternative holding, we find that the comments and evidence challenged by defendant did not deprive him of a fair trial. The evidence challenged by defendant was relevant to issues raised at trial. Furthermore, defendant's recorded conversations permitted a reasonable inference that he was involved in witness intimidation.

Defendant's pro se claim about prosecutorial vouching in summation is without merit. Defendant did not preserve any of

his other pro se claims, or any of the other challenges to the prosecutor's summation raised in defendant's main brief, or his challenge to police testimony that allegedly expressed an opinion on the main witness's reliability, and we decline to review these claims in the interest of justice. As an alternative holding, we reject them on the merits.

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

ENTERED: APRIL 9, 2013

CLERK

Mazzarelli, J.P., Acosta, Renwick, Richter, Gische, JJ.

9752 Bruce Lindenman, et al., Index 109292/97
Plaintiffs-Respondents,

-against-

David M. Kreitzer, etc.,
Defendant-Appellant,

Donald B. Vogelman, etc., et al.,
Defendants.

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David M. Kreitzer, appellant pro se.

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Amended judgment, Supreme Court, New York County (Louis B. York, J.), entered September 16, 2011, which, after a non-jury trial, awarded plaintiff Bruce Lindenman $1,500,000 for past pain and suffering, $4,000,000 for future pain and suffering, $457,204.56 for past and future lost earnings (reduced from $4,102,000 by stipulated collateral source deductions), and awarded plaintiff Jane Lindenman $1,200,000 for past loss of services and $2,000,000 for future loss of services, and bringing up for review an order, same court and Justice, entered on or about September 16, 2011, which found in favor of plaintiffs and awarded the above-listed damages; an order, same court and Justice, entered August 28, 2009, which denied defendant David M. Kreitzer's motion for, *inter alia*, a hearing on collectibility of the judgment; and an order, same court and Justice, entered

August 24, 2011, which denied defendant's motion to dismiss plaintiffs' complaint for failure to timely settle the judgment, unanimously modified, on the law and the facts, to grant defendant's motion for a hearing on collectibility, reduce the damages for past pain and suffering to $500,000, future pain and suffering to $750,000, past loss of services to $200,000, and future loss of services to $300,000, and otherwise affirmed, without costs.

The trial court's award of $5,500,000 for past and future pain suffering deviated materially from reasonable compensation to the extent indicated. Although plaintiff Bruce Lindenman demonstrated that he suffered a brain injury, he did not undergo surgery and was able to continue to engage in activities such as driving and playing tennis (*cf. Paek v city of New York*, 28 AD3d 207 [1st Dept 2006], *lv denied* 8 NY3d 805 [2007]). The award for past and future loss of services deviated materially from reasonable compensation under the circumstances to the extent indicated (*see Penn v Amchem Products*, 85 AD3d 475 [1st Dept 2010]; *Cutrone v New York City Transit Auth.*, 73 AD3d 462 [1st Dept 2010]. Given that this was a bench trial, we need not remand for a new trial on the issue of damages (*see Chock Full O'Nuts Corp. v NRP LLC I*, 47 AD3d 189 [1st Dept 2007]; *Hernandez v Bentinck*, 17 AD3d 532 [2d Dept 2005]).

The trial court should have granted defendant's motion for a collectibility hearing following the verdict and award of damages. In a legal malpractice action, it is not until "plaintiff has proved the case within the case, including the value of the lost judgment, that the issue of collectibility may arise" (*see Lindenman v Kreitzer*, 7 AD3d 30, 34-35 [1st Dept 2004]). The value of the lost judgment was proved on June 25, 2009 when the trial court issued its finding on the apportionment of liability and the value of the damages, and, at that time, defendant's request for a hearing on the issue of noncollectibility should have been granted (*id.*).

We have reviewed defendant's additional arguments and find them unavailing.

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

ENTERED: APRIL 9, 2013

CLERK

Mazzarelli, J.P., Acosta, Renwick, Richter, Gische, JJ.

9753 DL Marble & Granite Inc., Index 104923/10
Plaintiff-Appellant,

-against-

Madison Park Owner, LLC, et al.,
Defendants-Respondents.

Wells Fargo Bank, N.A., et al.,
Defendants.

_____

Michael A. Zimmerman & Associates, PLLC, Melville (Michael A. Zimmerman of counsel), for appellant.

Zetlin & De Chiara LLP, New York (Lori Samet Schwarz of counsel), for respondents.

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Order, Supreme Court, New York County (Joan M. Kenney, J.), entered May 2, 2011, which, insofar as appealed from as limited by the briefs, denied plaintiff's motion for summary judgment as against defendant Madison Park Owners, LLC (Madison) and for leave to amend its complaint, granted Madison's cross motion for summary judgment dismissing all of the causes of action against it, directed entry of judgment in favor of Madison and severed and continued the action against the remaining defendants, unanimously modified, on the law, the cause of action against Madison to foreclose on the mechanic's lien reinstated, and otherwise affirmed, without costs.

The motion court properly dismissed the contract and quasi-

contract claims asserted against Madison, the owner of the property being renovated. The record establishes that plaintiff, a subcontractor working at the property, contracted with nonparty G. Builders IV LLC, Madison's general contractor, and that Madison did not expressly consent to pay for plaintiff's work (*see Abax Inc. v New York City Hous. Auth.*, 282 AD2d 372, 373 [1st Dept 2001]). The account stated claim asserted against Madison in the sixth cause of action was also properly dismissed. Such a claim cannot be used to create liability where none otherwise exists (*see Gurney, Becker & Bourne, Inc. v Benderson Development Co., Inc.*, 47 NY2d 995, 996 [1979]).

Madison did not move for summary judgment dismissing plaintiff's first cause of action to foreclose on a mechanic's lien and summary judgment on that cause of action is not warranted. Thus, it was error for the motion court to dismiss the complaint as against Madison and direct entry of judgment in its favor.

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

ENTERED: APRIL 9, 2013

CLERK

Mazzarelli, J.P., Acosta, Renwick, Richter, Gische, JJ.

9754 Ivy Torres, Index 111655/09
Plaintiff-Appellant,

-against-

Fallou Ndongo, et al.,
Defendants-Respondents.

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Mitchell Dranow, Sea Cliff, for appellant.

Baker, McEvoy, Morrissey & Moskovits, P.C., Brooklyn (Stacy R. Seldin of counsel), for respondents.

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Order, Supreme Court, New York County (George J. Silver, J.), entered December 14, 2011, which granted defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Defendants established their entitlement to judgment as a matter of law in this action where plaintiff alleges that she suffered serious injuries to her cervical and lumbar spine as a result of being hit by defendants' taxi in 2008. Defendants submitted affirmed medical reports showing that plaintiff did not suffer permanent consequential or significant limitation of use of her cervical and lumbar spines as a result of the accident, since she currently had full range of motion in the affected body parts and her MRI films showed only degenerative changes consistent with her age (*see Colon v Vincent Plumbing & Mech.*

Co., 85 AD3d 541, 541-542 [1st Dept 2011]). Defendants also submitted plaintiff's deposition testimony and medical records indicating that she had suffered similar injuries in a prior car accident two years earlier.

In opposition, plaintiff raises triable issues of fact. She submitted, inter alia, the affirmed report of a radiologist who, upon review of the MRI films, found disc bulges in the cervical and lumbar spines, and opined that these conditions were not degenerative in origin, in light of plaintiff's age (24 years old) and absence of other physical symptoms normally associated with degenerative disc disease (*see James v Perez*, 95 AD3d 788 [1st Dept 2012]; *Yuen v Arka Memory Cab Corp.*, 80 AD3d 481 [1st Dept 2011]). Plaintiff also provided evidence of contemporaneous and recent findings of limitations by her treating physician and neurologist, respectively, which supplied the requisite proof of limitations and duration of the disc injury to raise an issue of fact as to a significant or permanent consequential limitation (*see Perl v Meher*, 18 NY3d 208, 217-218 [2011]; *Duran v Kabir*, 93 AD3d 566 [1st Dept 2012]). In response to the evidence that she was involved in a prior accident resulting in injuries, plaintiff submitted an affirmation of her treating physician, who opined that her prior medical history was not contributory to the injuries she suffered to her cervical and lumbar spines as a

result of the 2008 accident (*see Bray v Rosas*, 29 AD3d 422, 423-424 [1st Dept 2006]).

To the extent defendants raised an issue as to a gap in plaintiff's treatment, plaintiff presented evidence concerning the reasons that she stopped, including her neurologist's conclusion that she had reached maximum medical treatment, so that any further treatment would have been only palliative (*see Pommells* v Perez, 4 NY3d 566, 577 [2005]; *Ayala v Cruz*, 95 AD3d 699 [1st Dept 2012]).

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

ENTERED: APRIL 9, 2013

CLERK

Mazzarelli, J.P., Acosta, Renwick, Richter, Gische, JJ.

9755N Keith Thames, Index 303295/12
Plaintiff-Appellant,

-against-

New York City Police
Department, et al.,
Defendants-Respondents.

_____

Mullaney & Gjelaj, PLLC, Middle Village (Nick Gjelaj of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Diana Lawless of counsel), for respondents.

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Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered August 10, 2012, which granted defendants' motion to change venue from Bronx County to Queens County, unanimously affirmed, without costs.

Plaintiff asserts causes of action for, inter alia, false arrest and imprisonment, malicious prosecution, and violation of civil rights, following his arrest, initial incarceration, prosecution, and eventual acquittal in Queens County. All of the necessary elements giving rise to plaintiff's causes of action for false arrest and imprisonment occurred in Queens County, and plaintiff does not assert any distinct claim based on misconduct of City officials occurring in Bronx County. Thus,

notwithstanding the length of plaintiff's detention in Bronx County, the action was properly transferred pursuant to CPLR 504(3) (*see Garces v City of New York*, 60 AD3d 551 [1st Dept 2009]; *Smith v City of New York*, 60 AD3d 540 [1st Dept 2009]).

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

ENTERED: APRIL 9, 2013

CLERK

Sweeny, J.P., Saxe, DeGrasse, Abdus-Salaam, Feinman, JJ.

9226 Seneca Insurance Company, Inc., Index 601087/10
Plaintiff-Appellant-Respondent,

-against-

Cimran Co., Inc., et al.,
Defendants-Respondents-Appellants.

_____

Tese & Milner, New York (Michael M. Milner of counsel), for appellant-respondent.

Keidel, Weldon & Cunningham, LLP, White Plains (Darren P. Renner of counsel), for respondents-appellants.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered June 21, 2012, modified, on the law, Seneca's cross motion granted to the extent of declaring that it had no duty to defend and indemnify defendants in the underlying personal injury action, and otherwise affirmed, without costs.

Opinion by Saxe, J. All concur except DeGrasse and Abdus-Salaam, JJ. who dissent in part in an Opinion by Abdus-Salaam, J.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

John W. Sweeny, Jr., J.P.
David B. Saxe
Leland G. DeGrasse
Sheila Abdus-Salaam
Paul G. Feinman, JJ.

9226
Index 601087/10

_____x

Seneca Insurance Company, Inc.,
Plaintiff-Appellant-Respondent,

-against-

Cimran Co., Inc., et al.,
Defendants-Respondents-Appellants.

_____x

Cross appeals from the order of the Supreme Court, New York County (Charles E. Ramos, J.), entered June 21, 2012, which denied defendants' motion for summary judgment dismissing the complaint and denied plaintiff's cross motion for summary judgment declaring that the insurance policy it issued to defendants was void ab initio and that it had no duty to defend and indemnify defendants in the underlying personal injury action.

Tese & Milner, New York (Michael M. Milner and Alexander Statsky of counsel), for appellant-respondent.

Keidel, Weldon & Cunningham, LLP, White Plains (Darren P. Renner and Zachary A. Mengel of counsel), for respondents-appellants.

SAXE, J.

This appeal provides us, once again, with the opportunity to reiterate and reaffirm an ancient principle of insurance law: that insurance coverage cannot be imposed based on liability for which insurance was not purchased or provided.

While summary judgment was properly denied to plaintiff, Seneca Insurance Company, on its cause of action seeking a declaration that the insurance policy it issued to defendants is void ab initio, we modify to grant Seneca's motion for summary judgment declaring, upon its second cause of action, that it has no duty to defend and indemnify defendants in the underlying personal injury action because the commercial general liability insurance policy it issued to them did not cover the portion of their property on which the accident occurred.

On or about October 12, 2009, while construction was under way to add three additional stories onto defendants' one-story building at 34-45 Francis Lewis Boulevard, in Flushing, Queens, an employee of the subcontractor handling the framing for the additional floors fell and sustained injuries. While the complaint in the personal injury action states merely that the plaintiff fell at "the construction site," the bill of particulars adds that the incident took place while "the plaintiff was working on the fourth floor on top of the steel

framing of the fourth floor side and/or edge."

By a Notice of Occurrence/Claim dated February 19, 2010, defendants provided notice of the occurrence to Seneca. In a letter dated March 3, 2010, Seneca advised defendants that it had received the summons and complaint, stating that this constituted its first notice of the claim. By follow-up letter dated March 15, 2010, Seneca reserved its rights to disclaim coverage and/or rescind the policy, stating that further investigation of the claim was needed, including whether defendants had misrepresented on their insurance application that they had no intention of conducting demolition or construction at the premises.

Meanwhile, by notice of cancellation dated March 11, 2010, Seneca had cancelled defendants' policy effective April 1, 2010, for the reason that "[t]he building is currently under construction."

Seneca then commenced this action, seeking a declaration that it had no duty to defend the defendants in the underlying action because the accident did not take place at the "Designated Premises" covered by the policy; specifically, the insured premises was a 10,000-square-foot, one-story building, but the accident occurred on the three story addition, which materially altered the "Designated Premises." Seneca also sought a declaration that the policy was void ab initio based on

defendants' material misrepresentations in their original insurance application, as well as in their yearly policy renewal applications, that no demolition or construction at the premises was contemplated.

Both sides moved for summary judgment. Defendants contended that Seneca's cancellation of the policy effective April 1, 2010 effectuated a waiver of the rescission claim or constituted grounds to estop it from seeking rescission of the policy. Seneca cross-moved for summary judgment declaring that the policy was void ab initio for material misrepresentations made in the insurance application, that it had no duty to defend or indemnify, and further, that the construction site from which the injured plaintiff fell was not part of the Designated Premises and therefore was not covered under the policy. The motion court denied both sides' motions.

Defendants' motion for summary judgment was correctly denied. There is no merit to defendants' argument that Seneca should be estopped from rescinding the subject policy because it already cancelled it. Seneca learned of the underlying lawsuit on February 19, 2010, and properly issued a notice cancelling the policy as of April 1, 2010, based on its new awareness that, contrary to the insureds' representations on their applications for insurance, the building was then under construction.

However, as of the time of the March 11, 2010 cancellation, Seneca did not know when the construction had begun, or had first been contemplated, so it did not yet have a basis for claiming a right of rescission (*see Security Mut. Ins. Co. v Perkins*, 86 AD3d 702, 704 [3d Dept 2011]). Notably, after the cancellation notice was issued, Seneca undertook the defense (for the period preceding cancellation), subject to its reservation of rights.

Plaintiff's motion for summary judgment declaring that the policy is void ab initio was correctly denied. Plaintiff cannot yet establish as a matter of law whether defendants were "contemplat[ing]" performing the construction work when they submitted a renewal application stating that they were not. Although defendant Cimran's president, defendant Darshan S. Bagga, indicated in 2006 that he was considering selling the premises, the 2006 proposal for construction work was not signed by him until 2008. Bagga testified at deposition that the decision to build on the existing structure was not made until March 2008, after the insurance application had been submitted in January 2007, and that an engineer was initially retained with regard to selling the premises and enhancing the value of the building by obtaining air rights.

The record before us also fails to support Seneca's claim that it was entitled to rescind its policy as of the renewal

dates, since neither the resubmission of all documentation, including the insurance application, nor the pertinent portions of the submitting broker's testimony, are included.

However, there are no issues of fact precluding summary judgment declaring that the construction site from which the injured worker fell was not part of the insured premises and therefore was not covered under the policy.

The property was described in defendants' application for insurance as a one-story building occupied by a billiard hall and a health spa. Since the policy was explicitly issued in reliance on the representations made in the application, there can be no real dispute or confusion that the purchased coverage was limited to the one-story building, which housed two commercial tenants. Nor is there any dispute or confusion regarding where the accident occurred; according to the plaintiff's bill of particulars in the personal injury action, the accident took place "on the steel framing of the fourth floor" of what he described as the "construction site" at 34-45 Francis Lewis Boulevard.

"Coverage cannot be afforded on liability for which insurance was not purchased" (*Holman v Transamerica Ins. Co.*, 183 AD2d 589, 591 [1st Dept 1992], *affd* 81 NY2d 1026 [1993]). While the obligation to defend is broader than the duty to indemnify,

it "does not extend to claims not covered by the policy" (*National Gen. Ins. Co. v Hartford Acc. & Indem. Co.*, 196 AD2d 414, 415 [1st Dept 1993]). "[I]f the allegations interposed in the underlying complaint allow for no interpretation which brings them within the policy provisions, then no duty to defend exists" (*Atlantic Mut. Ins. Co. v Terk Tech. Corp.*, 309 AD2d 22, 29 [1st Dept 2003]).

If a policy insures a portion of a building, it does not cover an injury occurring in another portion of the building; in *Axelrod v Maryland Cas. Co.* (209 AD2d 336 [1st Dept 1994]), the insured obtained a policy covering the fourth floor of a building, while the claimed injury for which the insured was sued occurred on the first floor, and this Court found no duty to defend. Defendants obtained insurance to cover a one-story, two unit building only.

Since the policy only provided coverage for injuries arising out of the insured building, namely, the 10,000 square feet located on the first, and at that time only, floor of the building, it necessarily did not provide coverage for an additional three floors of an intended four-story structure, nor for the structure that existed during the construction of three additional floors on top of the insured building.

The dissent argues that Seneca is not entitled to summary

judgment on this point because the documents it offers to prove that the accident occurred somewhere other than in the insured one-story building were not admissible evidentiary materials, having been verified only by counsel. However, it is these same documents that formed the basis for defendants' claim for insurance coverage. There is no reason why the court cannot hold, as a matter of law, that those documents fail to establish a valid basis for coverage under the purchased policy.

Seneca is therefore entitled to summary judgment on its second cause of action for a declaration that it has no obligation to defend and indemnify defendants for the claim brought against them by the plaintiff in the underlying action.

Accordingly, the order of the Supreme Court, New York County (Charles E. Ramos, J.), entered June 21, 2012, which denied defendants' motion for summary judgment dismissing the complaint and denied the cross motion of plaintiff, Seneca Insurance Company, for summary judgment declaring that the insurance policy Seneca issued to defendants was void ab initio and that Seneca had no duty to defend and indemnify defendants in the underlying personal injury action, should be modified, on the law, to grant

Seneca's cross motion to the extent of declaring that it had no duty to defend and indemnify defendants in the underlying personal injury action, and otherwise affirmed, without costs.

All concur except DeGrasse and Abdus-Salaam, JJ. who dissent in part in an Opinion by Abdus-Salaam, J.

ABDUS-SALAAM, J. (dissenting in part)

I believe that the motion court properly denied summary judgment to plaintiff on its second cause of action. In support of the motion, plaintiff submitted the complaint in the underlying action, which alleged that the accident had occurred at the premises and work site (also referred to in the complaint as the construction site). It also submitted the bill of particulars for the complaint, which alleges that the incident took place at the construction site at the premises, "specifically, on the steel framing of the fourth floor." Both the complaint and the bill of particulars are verified by counsel, who has no personal knowledge of the location of the accident, and thus these statements "fail[] to qualify as proof in admissible form" (*Kaufman v Medical Liab. Mut. Ins. Co.*, 92 AD3d 1057, 1059 [3d Dept 2012]). Plaintiff, having failed to tender "evidentiary proof in admissible form" regarding the

location of the accident *(Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), did not make a prima facie showing of entitlement to summary judgment (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

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

ENTERED: APRIL 9, 2013

CLERK