SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 24, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Mazzarelli, J.P., Moskowitz, Manzanet-Daniels, Román, JJ.

8065-
8065A ASR Levensverzekering NV, et al., Index 650557/09
Plaintiffs-Appellants,

-against-

Breithorn ABS Funding p.l.c., et al.
Defendants,

Swiss Re Financial Products Corporation, et al.,
Defendants-Respondents.

_____

Motley Rice LLC, New York (William H. Narwold of counsel), for appellants.

Quinn Emanuel Urquhart & Sullivan, LLP, New York (Phillipe Z Selendy of counsel), for Swiss Re Financial Products Corporation, respondent.

Satterlee Stephens Burke & Burke LLP, New York (James Regan of counsel), for Bank of New York Mellon Corporation, respondent.

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Judgment, Supreme Court, New York County (Barbara R. Kapnick, J.), entered December 5, 2011, dismissing the complaint as against defendants Swiss Re Financial Products Corporation and Bank of New York Mellon Corporation, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered October 17, 2011, which granted said defendants' motion to

dismiss, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiffs' breach of contract and breach of the covenant of good faith and fair dealing claims were correctly dismissed since plaintiffs failed to show that they were third-party beneficiaries of any of the agreements relating to the credit default swaps (CDS) or credit default obligations (CDO) (*see Edge Mgt. Consulting, Inc. v Blank*, 25 AD3d 364, 368 [2006], *lv dismissed* 7 NY3d 864 [2006]). As an initial matter, the "for the benefit of" language in the agreements at issue refers solely to the issuer's assignment of its rights in the CDS to defendant Bank of New York Mellon Corporation (BNY), as indenture trustee, and defendant Swiss Re Financial Products Corporation's confirmation that it agreed with the assignment. Thus, the only thing that was done "for the benefit" of plaintiffs, directly or indirectly, was the issuer's assignment of its rights in the CDS to BNY. More substantively, any benefit conferred on plaintiffs under the agreements is merely incidental. The agreements in which plaintiffs are mentioned state that the assignment is for the express benefit of the signatories.

We reject plaintiffs' attempt to impose fiduciary obligations upon BNY, an indenture trustee with ministerial

duties (*see Racepoint Partners, LLC v JPMorgan Chase Bank, N.A.*, 14 NY3d 419, 425 [2010]). BNY owed plaintiffs no fiduciary duty until certain of the reference obligations in the reference pool that comprised the CDS failed in 2010 – long after BNY took the actions that form the basis of the complaint.

Plaintiffs' fraud claims were correctly dismissed because plaintiffs could not prove reasonable reliance on the broker quotes issued by Swiss Re (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). Not only did the broker quotes contain express disclaimers as to the amounts therein, but, in addition, plaintiffs had the ability to gauge for themselves the changing value of the notes, via the use of readily available financial services such as Bloomberg (*see DDJ Mgt., LLC v Rhone Group L.L.C.*, 15 NY3d 147, 154 [2010]). Nor does the record support the inference either that the broker quotes were false when sent or that they were sent with the intent that plaintiffs would rely on them for any purpose, let alone for assessing the value (to plaintiffs) of the notes at issue.

We have considered plaintiffs' remaining arguments and find them unavailing.

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

ENTERED: JANUARY 24, 2013

CLERK

Tom, J.P., Mazzarelli, Renwick, DeGrasse, JJ.

8233N Elvin Marte, Index 113275/02
Plaintiff-Appellant,

-against-

City of New York,
Defendant-Respondent.
- - - - -
[And a Third-Party Action]

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Paul G. Vesnaver, PLLC, Baldwin (Victor A. Carr of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Avshalom Yotam of counsel), for respondent.

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Order, Supreme Court, New York County (Barbara Jaffe, J.), entered August 8, 2011, which denied plaintiff's motion to strike defendant's answer pursuant to CPLR 3126, unanimously affirmed, without costs.

Discovery sanctions were inappropriate because plaintiff waived his right to challenge deficiencies in defendant's responses to discovery orders by filing a note of issue and certificate of readiness representing that all discovery had been completed and that there were no outstanding discovery requests (*see Rivera-Irby v City of New York*, 71 AD3d 482, 482 [1st Dept 2010]; *Escourse v City of New York*, 27 AD3d 319 [1st Dept 2006]).

In any event, denial of the motion to strike would not have constituted an abuse of discretion, given that the City

ultimately complied with the order to produce the City employee a month after the court-ordered deadline (*see Nussbaum v D'Amico*, 29 AD3d 449 [1st Dept 2006]), and the City's conduct during pre-note of issue discovery proceedings did not amount to willful and contumacious behavior (*see Glaser v City of New York*, 79 AD3d 600 [1st Dept 2010]). The court properly considered the City's opposition papers, given that plaintiff has not shown prejudice by the late service, and had, in fact, submitted reply and supplemental reply affirmations (*see Prato v Arzt*, 79 AD3d 622 [1st Dept 2010]).

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

ENTERED: JANUARY 24, 2013

CLERK

Friedman, J.P., Moskowitz, Freedman, Richter, Abdus-Salaam, JJ.

8326- Index 106701/10
8326A Jonathan Glynn,
Plaintiff-Appellant-Respondent,

-against-

177 West 26th Realty LLC,
Defendant-Respondent-Appellant,

Elias Bochner,
Defendant.

_____

Jack L. Lester, New York, for appellant-respondent.

Smith & Shapiro, New York (Harry Shapiro of counsel), for respondent-appellant.

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Order and judgment (one paper), Supreme Court, New York County (Eileen A. Rakower, J.), entered October 12, 2011, to the extent appealed from as limited by the briefs, awarding defendant 177 West 26th St. Realty Corp. possession of eight loft units at the subject building, and denying defendant's motion for summary judgment to the extent it sought possession of Unit 501 and sought to dismiss the causes of action for breach of warranty of habitability as to Unit 501 and for restitution, unanimously modified, on the law, to dismiss the causes of action for breach of warranty of habitability as to Unit 501 and for restitution, and to grant possession of Unit 501 to defendant, and otherwise affirmed, without costs. Order, same court and Justice, entered

September 8, 2011, which granted plaintiff leave to amend the complaint to add a cause of action for constructive trust, unanimously reversed, on the law, without costs, and the motion denied.

Defendant established its entitlement to an ejectment and to the dismissal of the breach of warranty of habitability claim through affidavits, leases, and notices terminating the tenancies. Plaintiff failed to raise a triable issue of fact as to Unit 501.

The cause of action for restitution for the improvements plaintiff made to the units must be dismissed because the leases, which contain merger clauses, provide that any improvements to the units will become the landlord's property (*see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]).

Plaintiff's motion for leave to amend the complaint to add a cause of action for constructive trust must be denied because plaintiff failed to show that the parties' business transaction gave rise to a confidential or fiduciary relationship between them (*see Sharp v Kosmalski*, 40 NY2d 119, 121 [1976]).

The Decision and Order of this Court entered herein on October 18, 2012 is hereby recalled and vacated (*see* M—4986 decided simultaneously herewith).

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

ENTERED: JANUARY 24, 2013

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Richter, JJ.

8390 In re Sanayi Beckles, Index 401011/11
Petitioner,

-against-

Rafael E. Cestero, etc.,
Respondent.

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Sanayi Beckles, petitioner pro se.

Michael A. Cardozo, Corporation Counsel, New York (Graham Morrison of counsel), for respondent.

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Determination of respondent New York City Department of Housing Preservation and Development (HPD), dated February 28, 2011, terminating petitioner's Section 8 rent subsidy on the ground that she fraudulently misrepresented her household income, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Tanya R. Kennedy, J.], entered July 27, 2011) dismissed, without costs.

The determination was supported by substantial evidence showing that petitioner intentionally failed to disclose over $93,000 in income over the course of four years (*see Matter of Purdy v Kreisberg*, 47 NY2d 354, 358 [1979]). Indeed, petitioner admits that she "significantly underreported her income for several years." Petitioner's assertions that she did not

intentionally underreport her income, that she disclosed her income by submitting paystubs and by informing HPD caseworkers of the undisclosed employment, and that HPD employees assured her that she did not need to disclose a second, legally obtained social security number, were considered and rejected by the hearing officer and there exists no basis to disturb these credibility determinations (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]; *Matter of Porter v New York City Hous. Auth.*, 42 AD3d 314 [1st Dept 2007]).

The penalty imposed does not shock our sense of fairness (*see Matter of Bland v New York City Hous. Auth.*, 72 AD3d 528 [1st Dept 2010]; *Matter of Smith v New York City Hous. Auth.*, 40 AD3d 235 [1st Dept 2007], *lv denied* 9 NY3d 816 [2007]).

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: JANUARY 24, 2013

CLERK

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

8573 The People of the State of New York, Respondent, Ind. 5145/09

-against-

Lionel McCray, Defendant-Appellant.

_____

Stanley Neustadter, Cardozo Appeals Clinic, New York (Mark Baker of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Patricia M. Nunez, J.), rendered September 2, 2010, as amended October 28, 2010, convicting defendant, after a jury trial, of two counts of burglary in the second degree, and sentencing him, as a second felony offender, to an aggregate term of 15 years, unanimously affirmed.

The verdict was based on legally sufficient evidence. Defendant was properly convicted of two counts of second-degree burglary under Penal Law § 140.25(2) based on his entries into a hotel's employee locker room and a museum located in the same building as the hotel.

Each location constituted a dwelling within the meaning of the burglary statute. A building is a dwelling if it is "usually

occupied by a person lodging there at night" (Penal Law § 140.00[3]). Where, as here, "a building consists of two or more units separately secured or occupied, each unit shall be deemed both a separate building in itself and part of the main building" (Penal Law § 140.00[2]; *see also People v Quattlebaum*, 91 NY2d 744 [1998]).

It is of no consequence that the employee locker room of the hotel was not used for residential purposes (*see People v Dwight*, 189 AD2d 566 [1st Dept 1993], *lv denied* 81 NY2d 885 [1993]). Similarly, the museum, which was "under the same roof" as the hotel, is a dwelling irrespective of whether there was "internal communication" between the two (*Quattlebaum,* 91 NY2d at 747).

The court's imposition of consecutive sentences was lawful. Defendant committed two separate and distinct acts of burglary because his acts "impacted different victims, were separated by place and were temporally differentiated, though in part overlapping" (*People v Brown*, 80 NY2d 361, 364 [1992]).

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

ENTERED: JANUARY 24, 2013

CLERK

Andrias, J.P., Saxe, Moskowitz, Freedman, Abdus-Salaam, JJ.

8859 In re Gary Medure, Ind. 4933/09
[M-4852] Petitioner,

-against-

Hon. Ronald Zweibel, et al.,
Respondent.

_____

Siriano & Bernstein, P.C., Bronx (Anthony F. Siriano of counsel), for petitioner.

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

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

_____

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

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

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

ENTERED: JANUARY 24, 2013

CLERK

Tom, J.P., Saxe, Moskowitz, Abdus-Salaam, Gische, JJ.

9054 The People of the State of New York, Respondent, Ind. 3748/08

-against-

Christopher Thomas, Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Cheryl P. Williams of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Robert R. Sandusky, III of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Seth L. Marvin, J.), rendered July 8, 2010, convicting defendant, after a jury trial, of robbery in the third degree and grand larceny in the fourth degree, and sentencing him, as a second felony offender, to an aggregate term of three to six years, unanimously affirmed.

Defendant's legal sufficiency claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). As to each of the two incidents, there is no basis for disturbing the jury's determinations concerning identification and credibility, including its evaluation of inconsistencies in testimony. To the extent defendant is claiming that the lineup procedures were

unduly suggestive, we find that claim to be without merit (*see generally People v Chipp*, 75 NY2d 327, 336 [1990], *cert denied* 498 US 833 [1990]).

Defendant did not preserve his challenge to the court's charge, and his related challenge to the prosecutor's summation, and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits. The court adequately instructed the jury to consider the evidence of the two crimes separately, and the challenged portion of the prosecutor's summation was responsive to the defense summation.

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 24, 2013

CLERK

Tom, J.P., Saxe, Moskowitz, Abdus-Salaam, Gische, JJ.

9055 MH Residential 1, LLC, Index 57008/08
Petitioner-Respondent,

-against-

John Barrett, et al.,
Respondents-Appellants,

"John Doe," et al.,
Respondents.

_____

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

Axelrod, Fingerhut & Dennis, New York (David L. Fingerhut of counsel), for MH Residential 1, LLC, respondent.

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Appeal from an order of the Appellate Term of the Supreme Court, First Department, entered December 28, 2011, which, in consolidated summary holdover proceedings, reversed an order of the Civil Court, New York County (Brenda S. Spears, J.), entered on or about June 16, 2011, granting respondents-appellants tenants' motion to disqualify petitioner-respondent landlord's counsel, unanimously dismissed, without costs.

Pending the present appeal, the holdover proceedings were separately tried, resulting in final judgments entered in landlord's favor. The right to appeal from the intermediate

order does not survive entry of the final judgments (*see Matter of Aho*, 39 NY2d 241, 248 [1976]; *Jema Props. v McLeod*, 51 AD2d 702 [1st Dept 1976]).

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

ENTERED: JANUARY 24, 2013

CLERK

Tom, J.P., Saxe, Moskowitz, Abdus-Salaam, Gische, JJ.

9057 In re Bristene B.,

- - - - -

Commissioner of Social Service,
Assignor-Respondent,

-against-

Abraham G.,
Respondent-Appellant.

_____

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Drake A. Colley of counsel), for respondent.

Andrew J. Baer, New York, attorney for the child.

_____

Order, Family Court, New York County (Rhoda J. Cohen, J.), entered on or about March 27, 2012, denying appellant's objection to the December 20, 2011 decision of the Support Magistrate, which, upon appellant's default, and following an inquest, entered an order of filiation finding that appellant is the father of the subject child, and a child support order, unanimously affirmed, without costs.

The record supports the court's finding that the presumption of legitimacy was overcome based on the mother's testimony that she was divorced from her former husband three years before the child's birth, and that she was in an exclusive sexual relationship with appellant in the relevant period before the

child's birth. The court's determination that this testimony was "credible" is entitled to great weight and is supported by the record (*see Matter of Benjamin L.*, 9 AD3d 153, 155 [1st Dept 2004]).

Appellant may not appeal the equitable estoppel finding against him because he defaulted in appearing on the date the hearing was scheduled, after having failed to appear on the prior court date and after being warned that the court would proceed with or without him on the adjourn date (*see Matter of Anita L. v Damon N.*, 54 AD3d 630, 631 [1st Dept 2008]).

Even if we were to consider the matter on the merits, the evidence supported the finding that it was in the best interests of the child to deny appellant's request for a DNA test because the child believed that appellant was her father, she called him "Daddy," he sent her gifts, cards and letters, introduced her to others as his daughter, visited her and she visited his family. No evidence was presented that another man was the child's father.

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

ENTERED: JANUARY 24, 2013

CLERK

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

9058 Bellinson Law, LLC, Index 600593/09
Plaintiff-Defendant-Respondent,

-against-

Robert Iannucci,
Defendant-Plaintiff-Appellant.

_____

Thompson Hine LLP, New York (Douglas E. Grover of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Judith J. Gische, J.), entered February 15, 2012, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for summary judgment dismissing defendant's counterclaims for fraud and legal malpractice, unanimously affirmed, with costs.

In this action by plaintiff law firm seeking legal fees owed by defendant pursuant to a retainer agreement, plaintiff made a prima facie showing of entitlement to judgment as a matter of law. In opposition, defendant failed to raise triable issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). With respect to his counterclaim for legal malpractice, defendant failed to raise a triable issue as to whether plaintiff's alleged negligence proximately caused his damages and whether the claimed

damages were actual and ascertainable (*see Wo Yee Hing Realty, Corp. v Stern*, 99 AD3d 58, 62-63 [1st Dept 2012]; *see also Reibman v Senie*, 302 AD2d 290, 290 [1st Dept 2003]). The record does not support defendant's contention that he was forced to settle the underlying action because plaintiff was incompetent and unprepared on the eve of trial. Indeed, even if plaintiff was negligent, there is evidence in the record indicating that defendant had other options besides settling the case (*see Fusco v Fauci*, 299 AD2d 263 [1st Dept 2002]). Further, defendant's claimed damages could not be construed as actual and ascertainable, given that the bulk of the claimed damages in the underlying action were, at the time of settlement, subject to potential dismissal (*see generally Markard v Bloom*, 4 AD3d 128, 129 [1st Dept 2004], *lv denied* 2 NY3d 706 [2004]).

With respect to defendant's fraud-based counterclaim, defendant failed to offer proof of injury arising from

plaintiff's allegedly misleading claims of federal court trial experience (*see generally Small v Lorillard Tobacco Co.*, 94 NY2d 43, 57 [1999]).

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

ENTERED: JANUARY 24, 2013

CLERK

Tom, J.P., Saxe, Moskowitz, Abdus-Salaam, Gische, JJ.

9060 The People of the State of New York, Ind. 4276/09
Respondent,

-against-

Heudy Paredes,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Yuval Simchi-Levi 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 (Ronald Zweibel, J.), rendered on or about August 4, 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: JANUARY 24, 2013

CLERK

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

Tom, J.P., Saxe, Moskowitz, Abdus-Salaam, Gische, JJ.

9061 In re Keenan Britt, Index 105655/11
Petitioner-Appellant,

-against-

City of New York, et al.,
Respondents-Respondents.

_____

Glass Krakower LLP, New York (Bryan D. Glass of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Kathy H. Chang of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Alexander W. Hunter, Jr., J.), entered January 19, 2012, denying the petition seeking, among other things, to annul respondents' determination, effective on or about February 2, 2011, which terminated petitioner's probationary employment and declined to reinstate him to his prior permanent position, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously reversed, on the law, without costs, the judgment vacated, and the matter remanded for a hearing on the issue of whether petitioner effectively resigned from his permanent position.

Since petitioner passed an open competitive examination for his position as Computer Science Technician (CST), Level II, from which he was terminated during the probationary period, he would not be entitled to reinstatement in his prior, permanent position

of Computer Aide if he voluntarily accepted his appointment to the CST position, which would constitute an effective resignation from his prior, permanent position (*see Matter of Bethel v McGrath-McKechnie*, 95 NY2d 7 [2000]). However, in light of the conflicting accounts of petitioner's appointment to the probationary position, there is a triable issue of fact as to whether he voluntarily accepted the appointment to the subsequent, probationary position, and we remand accordingly (*see* CPLR 7804[h]; *see also Matter of Anonymous v Commissioner of Health*, 21 AD3d 841, 844 [1st Dept 2005]).

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: JANUARY 24, 2013

CLERK

Tom, J.P., Saxe, Moskowitz, Abdus-Salaam, Gische, JJ.

9062 The People of the State of New York, Ind. 20002/10
Respondent,

-against-

Darryl Reaves,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of Appellate Defender, New York (Molly Booth of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Karinna M. Arroyo of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Herbert J. Adlerberg, J.H.O.), rendered October 4, 2010, convicting defendant, after a nonjury trial, of menacing in the third degree, and sentencing him to a term of one year of probation, unanimously affirmed.

Defendant's legal sufficiency claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's credibility determinations. Given the surrounding circumstances, defendant's display of a

knife constituted "physical menace" that was intended to intimidate the victim (*see* Penal Law § 120.15).

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

ENTERED: JANUARY 24, 2013

CLERK

Tom, J.P., Saxe, Moskowitz, Abdus-Salaam, Gische, JJ.

9064 Sony Ericsson Mobile Communications USA, Inc., Plaintiff-Appellant, Index 603505/07

-against-

LSI Corporation, Defendant-Respondent.

_____

Jonathan D. Sasser, New York, for appellant.

Sidley Austin LLP, New York (John J. Kuster of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered August 4, 2011, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

The record demonstrates that plaintiff could not reasonably have relied on any alleged misrepresentations by Agere Systems, Inc. (later acquired by defendant) about the completion dates for its new technology for plaintiff's wireless devices (*see Ventur Group, LLC v Finnerty*, 68 AD3d 638 [1st Dept 2009]). Long before the license agreement with Agere was executed, plaintiff, a sophisticated entity that did not, as a rule, rely on marketing presentations or vendor timetables, was aware of delays in development, understood that Agere's proposed schedule was subject to delays of up to a year, and was hearing from its own

representatives that Agere was unlikely to produce the technology on time. Moreover, plaintiff failed to obtain a "time is of the essence" clause in the agreement because even Agere regarded the time line as ambitious.

Plaintiff's inability to show reasonable reliance on defendant's alleged misrepresentations also defeats its claim under the North Carolina Unfair and Deceptive Trade Practices Act (*see Geo Plastics v Beacon Dev. Co.*, 434 Fed Appx 256, 262 [4th Cir 2011] [applying North Carolina law]).

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: JANUARY 24, 2013

CLERK

Tom, J.P., Saxe, Moskowitz, Abdus-Salaam, Gische, JJ.

9065 In re Kaeron H.,

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

_____

Lisa H. Blitman, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Julie Steiner of counsel), for presentment agency.

_____

Order of disposition, Family Court, Bronx County (Allen G. Alpert, J.), entered on or about September 19, 2011, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of assault in the second degree, menacing in the second degree, and criminal possession of a weapon in the fourth degree, and placed him with the Office of Children and Family Services for a period of up to 18 months, unanimously affirmed, without costs.

There was no violation of appellant's right to a speedy fact-finding hearing. Appellant consented to the only adjournment at issue. It is apparent that the minutes of the March 9, 2011 proceeding erroneously attribute appellant's counsel's express declaration of consent to counsel for another

respondent in the Family Court proceeding. Given that counsel for both co-respondents had just agreed to waive speedy trial time and that only appellant's counsel was being addressed by the court, it is evident that it was appellant's counsel, and not, as the transcript indicates, one of the other counsel, who agreed next. The court also made its own contemporaneous notation that appellant's counsel had waived any speedy trial challenges to this adjournment, and appellant did not challenge this characterization of the record.

Although appellant appeared before the court on two cases that day, we reject his argument that any waiver applied only to the other case. Appellant knew that both cases had been called, and did not limit his waiver to the other case or otherwise object to adjourning this case. The record is therefore "sufficiently clear to permit the conclusion that the adjournment was granted on consent" (*Matter of Hiram D.*, 189 AD2d 730, 732 [1st Dept 1993]).

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

ENTERED: JANUARY 24, 2013

CLERK

Tom, J.P., Saxe, Moskowitz, Abdus-Salaam, Gische, JJ.

9066 The People of the State of New York, Respondent, Ind. 66745C/07

-against-

Alexander Williams, Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (David Crow of counsel), and Cahill Gordon & Reindel LLP, New York (John O. Enright of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Jason S. Whitehead of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Elizabeth Foley, J.), rendered December 17, 2008, convicting defendant, after a jury trial, of three counts of endangering the welfare of a child, and sentencing him to an aggregate term of three months of intermittent imprisonment to be served on weekends and three years' probation, unanimously affirmed.

The court properly declined to charge justification. There was no reasonable view of the evidence, viewed in a light most favorable to defendant, that supported a justification defense (*see People v Watts*, 57 NY2d 299, 301-302 [1982]; *People v Hubrecht*, 2 AD3d 289, 290 [2003], *lv denied* 2 NY3d 741 [2004]). Neither the prosecution nor the defense case provided a factual basis for such a charge. In any event, any error in declining to

charge justification was harmless. Defendant was convicted of endangering the welfare of a child, a crime to which the defense of justification generally does not apply (*see People v Varela*, 164 AD2d 924 [2d Dept 1990], *lv denied* 76 NY2d 1025 [1990]; *People v Fields*, 134 AD2d 365 [2d Dept 1987], *lv denied* 72 NY2d 956 [1988). Even assuming that this defense could apply to an endangering charge, under the present circumstances, there is no reasonable possibility that a justification instruction would have resulted in a more favorable verdict.

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

ENTERED: JANUARY 24, 2013

CLERK

Tom, J.P., Saxe, Moskowitz, Abdus-Salaam, Gische, JJ.

9068 1855 East Tremont Corp., Index 381232/10
Plaintiff-Appellant,

-against-

Collado Holdings LLC, et al.,
Defendants-Respondents,

Casa Redmix Concrete Corp., et al.,
Defendants.

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Belkin Burden Wenig & Goldman, LLP, New York (Magda L. Cruz of counsel), for appellant.

Catafago Law Firm, P.C., New York (Jacques Catafago of counsel), for respondents.

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Order, Supreme Court, Bronx County (John A. Barone, J.), entered October 7, 2011, which, to the extent appealed from, denied plaintiff's motion for summary judgment dismissing defendants' affirmative defenses and counterclaim, awarding plaintiff a judgment of foreclosure, and referring the matter to a referee for an accounting of the amount due to plaintiff under the subject mortgage, unanimously reversed, on the law, with costs, the motion granted, and the matter remanded for appointment of a referee, to compute and ascertain the amount due to plaintiff on the subject mortgage and to report on whether the subject property should be sold in one parcel.

Plaintiff established its prima facie right to foreclosure

with evidence that defendants failed to pay the outstanding principal due under the parties' mortgage documents and loan agreements (*see ING Real Estate Fin. (USA) LLC v Park Ave. Hotel Acquisition, LLC*, 89 AD3d 506 [1st Dept 2011]; *JPMCC 2007-CIBC19 Bronx Apts., LLC v Fordham Fulton LLC*, 84 AD3d 613 [1st Dept 2011]).

In response to plaintiff's prima facie showing, defendants failed to raise any triable issue of fact regarding their affirmative defenses and counterclaim (*see Red Tulip, LLC v Neiva*, 44 AD3d 204, 209 [1st Dept 2007], *lv dismissed* 10 NY3d 741 [2008]). Defendant TCB Property Management Corp.'s execution of a mortgage to secure defendant Collodo Holdings LLC's debt does not invalidate the mortgage or otherwise render it unenforceable (*see Amherst Factors v Kochenburger*, 4 NY2d 203, 207-208 [1958]; *Levi v Commonwealth Land Title Ins. Co.*, 2011 WL 4542904, *5, 2011 US Dist LEXIS 112307, *14-15 [SD NY, Sept. 30, 2011, No. 09-Civ-8012(SHS)]). Nor is summary judgment precluded by discrepancies in the amounts of money claimed by plaintiff to be outstanding. Notably, defendants do not dispute that approximately $700,000 was disbursed pursuant to the loan agreement, and they make no claim on this appeal to have repaid any of the principal. Since defendants "challenge only the amount of the mortgage debt," the proper procedure here is an

order of reference, to determine the "amount due and owing to the plaintiff" (*Johnson v Gaughan*, 128 AD2d 756, 757 [2d Dept 1987]).

We also reject defendants' argument that the mortgage is unenforceable for lack of separate consideration. The extension of credit to Collado Holdings may itself be said to constitute consideration for the giving of the mortgage (*see Consumers Union of U.S., Inc. v Campbell*, 1989 WL 304762, *5 n 5, 1989 US Dist LEXIS 13634, *14 n 5 [SD NY, Nov. 16, 1989, Nos. 88-Civ-7980(JMW), 89-Civ-4704(JMW)] ["It is settled law in New York that a contract of guaranty entered into concurrently with the principal obligation is supported by the same consideration which underlies the principal contract"]).

Also unavailing is defendants' suggestion that the mortgage is unenforceable because the lender did not issue the maximum amount issuable under the note. The note on its face makes clear that a maximum of $2.258 million might be advanced, but not necessarily the entire sum. Plaintiff has tendered affidavits and other evidence establishing that over $700,000 in principal was disbursed pursuant to the loan agreement in response to four requisition requests. Defendants do not dispute any of this evidence or make any claim that they requested any further advances. For the foregoing reasons, TCB's counterclaim for lender liability, premised on the notion that it suffered damages

on account of the lender's alleged failure to disburse the entire $2.258 million provided for under the note, also fails.

We have considered defendants' remaining arguments, including their contention that the default notice was served at an improper address, and find them unavailing.

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

ENTERED: JANUARY 24, 2013

CLERK

Tom, J.P., Saxe, Moskowitz, Abdus-Salaam, Gische, JJ.

9070 Mee Direct, LLC, Index 108264/11
Plaintiff-Appellant,

-against-

Automatic Data Processing, Inc.,
Defendant-Respondent.

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Ellenoff Grossman & Schole LLP, New York (Ted Poretz of counsel), for appellant.

Drinker Biddle & Reath LLP, Florham Park, NJ (Stephen R. Long of the bar of the State of New Jersey, admitted pro hac vice of counsel), for respondent.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered March 19, 2012, which granted defendant's motion to dismiss the complaint, unanimously modified, on the law, to deny the motion as to the breach of contract and common-law indemnification causes of action, and otherwise affirmed, without costs.

Plaintiff alleges that it contracted with defendant for payroll services, that defendant materially breached the contracts by violating California law in providing the payroll services, and that as a result of the breach plaintiff suffered damages, i.e., it paid a substantial sum to settle a class action brought against it by its employees in California. These allegations are "sufficiently particular to give the court and

parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of [the breach of contract] cause of action" (CPLR 3013; *see Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). The three boilerplate order forms submitted by defendant fail to establish a defense as a matter of law (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). Even if plaintiff's predecessor had been a party to a contract based on one of those order forms, which plaintiff's executive denies, that would not necessarily "utterly refute[]" (*id.*) plaintiff's allegation that the parties entered into an agreement as described in the complaint and the executive's affidavit.

By voluntarily agreeing to the court-approved settlement of the class action in California, plaintiff waived its entitlement to seek contribution from defendant (*see* General Obligations Law § 15-108[c]; *Glaser v Fortunoff of Westbury Corp.*, 71 NY2d 643, 645-646 [1988]). However, plaintiff is not barred from seeking common-law indemnification from defendant for defendant's alleged "fault in bringing about the injury," i.e., for issuing paychecks

to plaintiff's employees on a New Jersey bank account, in violation of California Labor Code § 212 (*see McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 375 [2011]).

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

ENTERED: JANUARY 24, 2013

CLERK

Tom, J.P., Saxe, Moskowitz, Abdus-Salaam, Gische, JJ.

9071 The People of the State of New York, Respondent, Ind. 2130/11

-against-

Herminio Villanueva, Defendant-Appellant.

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

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Judgment, Supreme Court, New York County (Patricia Nunez, J.), rendered on or about July 7, 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: JANUARY 24, 2013

CLERK

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

7816-
7816A-
7817-
7817A-
7818-
7818A

Index 603350/07
591100/07

Millennium Import, LLC,
Plaintiff,

-against-

Reed Smith LLP, et al.,
Defendants.

- - - - -

Reed Smith LLP, et al.,
Third-Party Plaintiffs-Appellants,

-against-

James H. Berry, Jr., et al.,
Third-Party Defendants-Respondents.

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Schulte, Roth & Zabel, LLP, New York (Robert M. Abrahams of counsel), for appellants.

Furman, Kornfeld & Brennan, LLP, New York (Andrew R. Jones of counsel), for James H. Berry, Jr. and Berry & Perkins, etc., respondents.

Coughlin Duffy, LLP, New York (Daniel F. Markham of counsel), for Barrack, Ferrazzano, Kirschbaum & Nagelberg, LLP, respondent.

Eaton & Van Winkle, LLP, New York (Robert S. Churchill of counsel), for Fross, Zelnick, Lehrman & Zissu, P.C., respondent.

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Judgments, Supreme Court, New York County (Milton A. Tingling, J.), entered November 15, 2011, July 6, 2011 and July 18, 2011, reversed, on the law, without costs, and the third-party complaint reinstated. Appeals from orders, same court and

Justice, entered March 30, 2011, July 6, 2011 and July 18, 2011, dismissed, without costs, as subsumed in the appeals from the judgments.

Opinion by Saxe J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Richard T. Andrias
Rolando T. Acosta
David B. Saxe
Karla Moskowitz, JJ.

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7817A-7818-7818A

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Millennium Import, LLC,
Plaintiff,

-against-

Reed Smith LLP, et al.,
Defendants.

- - - - -

Reed Smith LLP, et al.,
Third-Party Plaintiffs-Appellants,

-against-

James H. Berry, Jr., et al.,
Third-Party Defendants-Respondents.

_____x

Reed Smith LLP, Douglas J. Wood and Darren B. Cohen appeal from judgments of the Supreme Court, New York County (Milton A. Tingling, J.), entered November 15, 2011, July 6, 2011 and July 18, 2011, dismissing the third-party complaint as against third-party defendants James H. Berry, Jr. and Berry & Perkins, Barack, Ferrazzano, Kirschbaum & Nagelberg LLP and Fross, Zelnick, Lehman & Zissu, P.C.,

respectively. Appeals from the orders, same court and Justice, entered March 30, 2011, July 6, 2011 and July 18, 2011, which granted third-party defendants' motions to dismiss the third-party complaint.

Schulte, Roth & Zabel, LLP, New York (Robert M. Abrahams of counsel), and Riker, Danzig, Scherer, Hyland, & Perretti LLP, New York (Anthony J. Sylvester of counsel), for appellants.

Furman, Kornfeld & Brennan, LLP, New York (Andrew R. Jones, A. Michael Furman and Bain R. Loucks of counsel), for James H. Berry, Jr. and Berry & Perkins, respondents.

Coughlin Duffy, LLP, New York (Daniel F. Markham of counsel), and Figliulo & Silverman, P.C., Chicago, Il (James R. Figliulo of the bar of the States of Arizona and Illinois, admitted pro hac vice of counsel) for Barrack, Ferrazzano, Kirschbaum & Nagelberg, LLP, respondent.

Eaton & Van Winkle, LLP, New York (Robert S. Churchill, Bonnie R. Kim and Katherine P. Churchill of counsel), for Fross, Zelnick, Lehrman & Zissu, P.C., respondent.

SAXE, J.

This is a legal malpractice action in which defendant law firm brought third-party claims for contribution against three other law firms based on the allegation that they gave erroneous advice to plaintiff, either directly or through plaintiff's parent company, that contributed to plaintiff's losses. The motion court granted the dismissal motion of each of the three firms, citing *Hercules Chem. Co. v North Star Reins. Corp.* (72 AD2d 538 [1st Dept 1979]), on the ground that defendants' affirmative defense of negligence on the part of plaintiff and/or its agents precluded the third-party complaint for contribution against the agents. This appeal therefore requires us to decide whether, under *Hercules Chem. Co.*, defendants' affirmative defense of comparative negligence, based in part on the alleged malpractice of the other firms, precludes its third-party claims.

Plaintiff Millennium is a beverage company owned by luxury goods company LVMH, the owner of such brands as Louis Vuitton, Moet and Hennessy. Plaintiff marketed a high-end Polish vodka in the United States under the brand name "Belvedere," but was sued by a California winery (the winery), also named Belvedere, for trade-name infringement. The dispute was resolved by a settlement agreement in which plaintiff agreed to pay the winery $30,000 per year for a license to use the Belvedere name for its vodka; the agreement did not cover use of the Belvedere name for

distilled spirits.

Plaintiff's Belvedere vodka was highly successful, rendering the licensing fee "nominal." In what the parties acknowledge was likely an attempt to renegotiate the licensing fee, in March 2004, the winery wrote to plaintiff, stating that it was negotiating with a distributor of gin for a license of the Belvedere name.

Plaintiff forwarded the letter to defendant law firm Reed Smith, as one of its attorneys, and Reed drafted a response. In addition to sharing the draft response with plaintiff, Reed Smith also forwarded it to LVMH and LVMH's counsel, third-party defendant law firm Barack, Ferrazzano, Kirschbaum & Nagelberg (the Barack firm). The letter was sent to the winery in April 2004. It asserted, among other things, that plaintiff, through its successful use of the mark, had obtained certain rights in the mark, and that the gin distributor might be liable to plaintiff for "passing off" its gin as associated with plaintiff's vodka.

The winery did not respond for some 15 months. During that time, LVMH became the 100% owner of plaintiff. In the winery's response in July 2005, it stated that the Barack firm's letter was a challenge to the winery's right to license the mark, and therefore a breach of the licensing agreement, and demanded that plaintiff cure the breach.

To this end, plaintiff had California counsel, third-party defendant Berry & Perkins (the Berry firm), prepare a draft response. The draft was shared with LVMH and Reed Smith, as well as with the Barack firm. The response sent to the winery also incorporated analysis by third-party defendant Fross, Zelnick, Lehrman & Zissu (the Fross firm), another law firm advising LVMH on plaintiff's rights under the licensing agreement. The response maintained that a gin distributor's use of the Belvedere mark might infringe on rights acquired by plaintiff.

The winery then sued plaintiff for breach of the licensing agreement, and was ultimately granted summary judgment on its claims. Rather than appeal, plaintiff entered into a settlement agreement that included a payment to the winery of $83 million. Plaintiff then sued Reed Smith for malpractice. Reed Smith asserted an affirmative defense of contributory fault against plaintiff and its agents, and then brought a third-party action against the Berry, Barack and Fross firms seeking contribution under CPLR 1401, contending that their negligence with regard to advising plaintiff and/or LVMH contributed to plaintiff's loss.

The motion court granted third-party defendants' separate motions to dismiss the third-party complaint against them solely in reliance on the holding of *Hercules Chem. Co.* (72 AD2d 538), that a defendant's affirmative defense of comparative negligence precludes a third-party claim for contribution against any third-

party defendant who was acting as the plaintiff's agent, since the affirmative defense and the third-party claims are duplicative. We disagree with the motion court.

It is well settled that an attorney sued for malpractice may assert a third party claim against another lawyer who advised the plaintiff on the same matter. The leading case on this point is *Schauer v Joyce* (54 NY2d 1 [1981]). In *Schauer*, an attorney was sued by his client for malpractice, due to his failure to obtain alimony for his client. He, in turn, asserted a third-party claim for contribution under CPLR 1401 against the lawyer who succeeded him in representing the plaintiff, claiming that the successor lawyer's negligence in failing to properly reapply for alimony contributed to the loss. The Appellate Division upheld the dismissal of the third-party claim, reasoning that the third-party defendant could not be liable for the injury caused to the plaintiff by the third-party plaintiff; in the Court's view, "[t]he extent to which plaintiff either personally or through her agent [third-party defendant] failed to mitigate damages is a matter of defense" (79 AD2d 826, 826 [3d Dept 1980]). But the Court of Appeals reinstated the contribution claim, explaining that:

> "CPLR 1401, which codified this court's decision in *Dole v Dow Chem. Co.* (30 NY2d 143), provides that 'two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution

> among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought.' The section 'applies not only to joint tortfeasors, but also to concurrent, successive, independent, alternative, and even intentional tortfeasors'" (*Schauer*, 54 NY2d at 5, quoting Siegel, New York Practice, § 172, p 213; and citing McLaughlin, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 1401, pp 362-363).

Not only do we find this reasoning applicable to the third-party claim against the law firm that served directly as plaintiff's counsel, but we also see no basis to find this reasoning inapplicable to the law firms whose allegedly negligent advice was supplied to plaintiff via plaintiff's parent company. It is well settled that attorneys may be liable for their negligence both to those with whom they have actual privity of contract and to those with whom the relationship is "so close as to approach that of privity" (*Prudential Ins. Co. of Am. v Dewey, Ballantine, Bushby, Palmer & Wood*, 80 NY2d 377, 382 [1992]). Since here the allegations support a finding that the advice of the two firms acting as counsel to plaintiff's parent company was given "for the very purpose of inducing action" on plaintiff's part, the third-party claim against those firms for contribution is actionable (*id.* at 383).

The motion court's decision does not mention *Schauer v Joyce*. It relies solely on *Hercules Chem. Co.* -- which was issued in 1979, the year before *Schauer v Joyce* was decided. For the reasons that follow, we conclude that whatever applicability

the *Hercules* ruling may have had to the facts of that case, it cannot properly be applied here to preclude the third party complaint for contribution.

The brief memorandum decision in *Hercules* does not explain the nature of the plaintiff's complaint against the defendant reinsurance company -- although it does not appear to have been a legal malpractice claim. The decision merely indicates that Northstar Reinsurance asserted, as an affirmative defense, the contributory negligence of the plaintiff's attorneys, and then brought a third-party claim against the plaintiff's attorneys for contribution, based on the allegation that their negligence had contributed to the plaintiff's loss. The third-party defendants moved to dismiss the third-party claim on the ground that it was duplicative of the affirmative defense of contributory negligence, and this Court upheld the dismissal.

The defendant in *Hercules* had apparently argued that although it raised the affirmative defense of the plaintiff's attorneys' negligence, it was forced to bring a third-party claim against those attorneys, because under the rule of *Brown v Poritzky* (30 NY2d 289 [1972]), their negligence could not be imputed to the plaintiff. In *Brown v Poritzky*, after fire damaged the plaintiff's property, the plaintiff sued his insurance agent, who had failed to obtain fire insurance for him as promised; the insurance agent sought to avoid all liability on

contributory negligence grounds, relying on the alleged contributory negligence of the plaintiff's general agent, who had been charged with the task of ensuring that the promised fire insurance was procured. The Court held that in the circumstances, the general agent's contributory negligence could not be imputed to the principal so as to totally bar any recovery against the insurance agent (*id.* at 292).

The *Hercules* decision rejected the defendant/third-party plaintiff's suggestion that its third-party claim was necessitated by *Brown v Poritzky*, reasoning that since New York had adopted a comparative negligence standard after *Brown v Poritzky* was decided, "the third-party plaintiff's concern that it [would] be unable to impute the attorneys' negligence to the plaintiff and that it require[d] contribution to reach the same result [wa]s ill-founded. Suffice it to say, by its affirmative defense, the third-party plaintiff is afforded all the protection to which it is entitled at the pleading stage" (72 AD2d at 538).

Perhaps the underlying facts in *Hercules* justified the Court's conclusion that the third-party plaintiff was sufficiently protected by the affirmative defense. However, where, as here, a defendant charged with legal malpractice has a viable claim against other law firms that represented its client for concurrent or successive malpractice contributing to the client's damages, the defendant law firm is not necessarily

"afforded all the protection to which it is entitled" by the affirmative defense of comparative negligence. On the contrary, where several law firms allegedly participated in giving the advice that led to the plaintiff's damages, the sole law firm named as a defendant must be entitled to bring the other law firms in as parties to the action to ensure that it has the ability to fully protect its rights. We find that Reed Smith's third-party claim against the three firms is not necessarily completely duplicative of its comparative negligence defense, and therefore decline to apply the *Hercules* decision to these circumstances.

The Court in *Hercules* began its discussion by remarking that "we find it unnecessary ... to reach the issue of whether a third-party complaint may be stated against attorneys who, it is alleged, were negligent in the performance of legal services rendered to the plaintiff. Indeed, the issue does not even appear to be in the case" (72 AD2d at 538). The issue here is exactly that which was not "in the case" in *Hercules*, and we hold that such a third-party complaint may be stated.

Even if we agreed that the affirmative defense of comparative negligence precludes a claim for contribution against an agent of plaintiff's, that would only warrant dismissal of the third-party claim against the Berry firm, as counsel to (and agent for) plaintiff. The claim for contribution against the

other two third-party defendants could not be viewed as duplicative, since the affirmative defenses did not specifically name them as plaintiff's agents whose alleged negligence defendants sought to impute to plaintiff for comparative negligence purposes. Consequently, the third-party claims would be viable against third-party defendants the Barack firm and the Fross firm in any event.

With respect to the application to dismiss the third-party action without prejudice under CPLR 1010, there is no indication that the third-party complaint will delay the main action. On the contrary, there clearly are efficiencies to be gained from having the claims proceed together.

Accordingly, the judgments of the Supreme Court, New York County (Milton A. Tingling, J.), entered November 15, 2011, July 6, 2011 and July 18, 2011, dismissing the third-party complaint as against third-party defendants James H. Berry, Jr. and Berry & Perkins, Barack, Ferrazzano, Kirschbaum & Nagelberg LLP and Fross, Zelnick, Lehman & Zissu, P.C., respectively, should be reversed, on the law, without costs, the judgments vacated, and the third-party complaint reinstated. Appeals from the orders, same court and Justice, entered March 30, 2011, July 6, 2011 and

July 18, 2011, which granted third-party defendants' motions to dismiss the third-party complaint, should be dismissed, without costs, as subsumed in the appeals from the judgments.

All concur.

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

ENTERED: JANUARY 24, 2013

CLERK