SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 19, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

9430-
9431 Linda Grant Williams,
Plaintiff-Appellant,

-against-

Citigroup, Inc., et al,.
Defendants-Respondents.

Index 650481/10

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Berns Weiss LLP, Wooddland Hills, CA, (Michael A. Bowse of the bar of the State of California, admitted pro hac vice of counsel), for appellant.

Cleary Gottlieb Steen & Hamilton LLP, New York (Carmine D. Boccuzzi, Jr., of counsel), for respondents.

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Judgment, Supreme Court, New York County (Bernard J. Fried, J.), entered July 3, 2012, dismissing the complaint pursuant to an order, same Court and Justice, entered June 21, 2012, which granted defendants' motion to dismiss the complaint in its entirety, unanimously modified, on the law, to the extent of reinstating the causes of action alleging a violation of General Business Law § 340, the Donnelly Act, and tortious interference with prospective business relations, and otherwise affirmed, without costs. Appeal from the aforementioned order, unanimously dismissed, without costs, as subsumed in the appeal from the

judgment.

In this action alleging that defendants, who are underwriters of airline special facility (ASF) bonds which are used to finance the construction of municipal airports, boycotted a structure that plaintiff, an experienced structured finance attorney, developed and patented for such bonds, because her structure permits ratings of these types of bonds that would lower the risk thereby lowering the interest rates paid on them, plaintiff has standing to state an antitrust claim under the Donnelly Act. Although she is not a participant in the market for underwriting ASF bonds, defendants' alleged group boycott of her patented structure for those bonds was a means to restrain trade in that market. Where, as here, plaintiff has attempted to facilitate competition with defendants, an attack on her through anticompetitive conduct is sufficient to confer standing (*Crimpers Promotions, Inc. v Home Box Office, Inc.*, 724 F2d 290, 294 [2d Cir 1983], *cert denied* 467 US 1252 [1984]).

Contrary to defendants' assertion, the Donnelly Act claim was neither dismissed with prejudice nor barred by the prior federal action (*Williams v Citigroup Inc.*, 659 F3d 208, 215 [2d Cir 2011] [vacating that portion of the district court's judgment that dismissed the state law claims with prejudice].

The dismissal with prejudice of plaintiff's Sherman Act claim at the pleading stage has no preclusive effect, in light of the heightened pleading requirements for antitrust claims in federal court (*see e.g. Bell Atl. Corp. v Twombly*, 550 US 544, 554-557 [2007]).

Although plaintiff has not pleaded direct evidence of a conspiracy, the allegations, which include statements alleged to have been made by defendants and other market participants, that defendants boycotted the use of plaintiff's structure to issue ASF bonds, are sufficient to raise an inference of conspiracy (*OLA, LLC v Builder Homesite, Inc.*, 661 F Supp 2d 668, 674-675 [ED Tex 2009]). Defendants' attack on the alleged relevant market relies on facts outside the complaint. In any event, the validity of an allegation of relevant market is generally a fact-intensive inquiry, not suited to resolution on a motion to dismiss (*see Found. for Interior Design Educ. Research v Savannah College of Art & Design*, 244 F3d 521, 531 [6th Cir 2001]).

Because plaintiff sufficiently alleged her Donnelly Act claim, her claim for interference with prospective business relations should not have been dismissed (*see Guard-Life Corp. v Parker Hardware Mfg. Corp.*, 50 NY2d 183, 193-194 [1980]). However, her claim for tortious interference with contract was

properly dismissed, as she failed to identify any term of the agreements that was breached (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 425 [1996]).

Plaintiff's attempt to assert, for the first time on appeal, a claim under General Business Law § 349, is unavailing. It was not raised below, and in any event, fails because that statute is limited to claims involving consumer oriented conduct *(Sheth v New York Life Ins. Co.*, 273 AD2d 72, 73 [1st Dept 2000]).

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

ENTERED: MARCH 19, 2013

CLERK

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

8522 Indira Abreu, Index 308565/08
Plaintiff-Respondent,

-against-

New York City Housing Authority,
Defendant-Appellant.

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Cullen and Dykman LLP, New York (Joseph C. Fegan of counsel), for appellant.

Subin Associates LLP, New York (Brooke Lombardi of counsel), for respondent.

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Order, Supreme Court, Bronx County (Kibbie F. Payne, J.), entered March 30, 2012, which denied defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendant dismissing the complaint.

Plaintiff sustained injury to her right hand and elbow while riding in an elevator in defendant's apartment building. On her way up to her fifth-floor apartment, the elevator stopped at the third floor. After a fellow passenger left the elevator cab, the outer door failed to swing completely shut. Plaintiff then pushed the door open with both hands, attempting to let the door swing shut on its own; however, a gap of several inches remained

between the door and the door jamb. After two such attempts to close the door proved unsuccessful, plaintiff reached around the edge of the door with her right hand and pulled it toward her, whereupon the door swung closed onto her hand, injuring the middle and ring fingers.

The alleged malfunction of the third-floor elevator door notwithstanding, the defect was not the proximate cause of plaintiff's injury, which was the immediate result of her own act of pulling the door onto her own hand, an action that "was not foreseeable in the normal course of events resulting from defendant['s] alleged negligence" (*Egan v A.J. Constr. Corp.*, 94 NY2d 839, 841 [1999]). Having no interior handle, the elevator door is not designed to be pulled inward, and plaintiff's doing so superseded any defect in the door's condition, severing the nexus between defendant's asserted negligence and plaintiff's injury (*id.*; *see also Rhodes v East 81st, LLC*, 81 AD3d 453 [1st Dept 2011]). As plaintiff conceded, both a stairway and a second elevator afforded safe, alternative access to her fifth floor destination, and she did not face any circumstances that required her to continue using the defective elevator (*see Jennings v 1704 Realty, L.L.C.*, 39 AD3d 392, 393 [1st Dept 2007]; *cf. Humbach v Goldstein*, 255 AD2d 420 [2d Dept 1998] [question of fact whether

attempt to lower himself out of a stalled elevator after futile attempts to summon help and the passage of an indefinite period of time was a foreseeable consequence of an emergency resulting from defendants' negligence]).

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

ENTERED: MARCH 19, 2013

CLERK

Andrias, J.P., Renwick, Freedman, Gische, JJ.

9271-
9272 Index 109668/06

General Motors Acceptance Corporation, et al.,
Plaintiffs-Respondents,

-against-

New York Central Mutual Fire Insurance Company,
Defendant-Appellant.

_____

Saretsky Katz Dranoff & Glass, L.L.P., New York (Patrick J. Dellay of counsel), for appellants.

Lawrence, Worden, Rainis & Bard, P.C., Melville (Roger B. Lawrence of counsel), for respondent.

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Order Supreme Court, New York County (Joan M. Kenney, J.), entered July 14, 2011, which, *inter alia*, granted plaintiffs a conditional order of preclusion, unanimously modified, on the facts, to clarify that the conditional order of preclusion is limited to those documents identified therein as either missing, or not disclosed, and otherwise affirmed, without costs. Order same court and Justice, entered May 17, 2012, which, to the extent appealed from, as limited by the briefs, ordered an adverse inference charge and limited preclusion against the defendant, unanimously affirmed, without costs.

Plaintiffs brought this action alleging that defendant insurance company (NYCM) acted in bad faith when it failed to

make any settlement offer in an underlying personal injury action (Sette action) where there was ultimately a verdict against General Motors Acceptance Corporation (GMAC) that exceeded GMAC's primary insurance coverage by $1.2 million dollars.

Following the deposition of defendant's former claims examiner in which she identified documents maintained by defendant in the Sette action, two prior court orders directing defendant to produce documents, and defendant's insistence that none existed, plaintiffs moved for discovery sanctions against defendant. In its order entered July 14, 2011, the motion court granted plaintiffs a conditional order of preclusion, allowing defendant one final opportunity to produce the documents. The motion court properly exercised its discretion in granting a conditional order at that time as a sanction for defendant's noncompliance with discovery (CPLR 3126; *see Gibbs v St. Barnabas Hosp.*, 16 NY3d 74 [2010]].

The July 14, 2011 order is, however, internally inconsistent. In one decretal paragraph the motion court precluded defendant from offering "any evidence in opposition to the plaintiffs' claim of liability," while in another decretal paragraph the motion court limited the scope of preclusion "to those matters not disclosed as directed herein and an adverse

inference at trial with respect to the missing documents which are the subject of the within motion application." The July 14, 2011 conditional order is, therefore, modified solely to harmonize these discrepant decretal paragraphs and clarify that the conditional order of preclusion only pertained and is limited to those documents identified therein as either missing or not disclosed.

Subsequently defendant provided the sworn affidavit of Diane Wildey, its vice president, who averred that she had made a "thorough search" of NYCM files and that documents compliant with the court's July 14, 2011 order were being produced.

Plaintiff brought a second motion for discovery sanctions. While the motion court acknowledged that there had been partial compliance with the July 14, 2011 order, defendant's production was still clearly deficient. There is evidence that the May 19, 2000 claims meeting involving the Sette action was recorded and transcribed, but no transcript of that meeting was produced by defendant. After providing several sworn affidavits that Wildey had conducted a thorough search for the transcript of that meeting but had not found it, defendant then provided a contradictory sworn affidavit with a copy of a document reportedly being the transcription of the minutes of that

meeting. Not only was the document produced heavily redacted and not what is commonly understood as a transcription, but Wildey offered no explanation for not finding the document sooner despite her "thorough" search, or for the incompleteness of the document.

Additionally, defendant's production of correspondence between NYCM and monitoring counsel Baxter & Smith is patently incomplete, consisting only of letters from Baxter & Smith to NYCM. Despite Wildey's sworn affidavit denying the existence of any correspondence from NYCM to Baxter & Smith regarding this case, the Baxter & Smith letters make multiple references to correspondence apparently received from NYCM, and other record evidence, including the testimony of counsel, and the billing records of the firm (which have never been disputed by New York Central), supports the existence of such correspondence.

Having been conditionally ordered to produce all correspondence by and between NYCM and Baker & Smith, and the transcripts of the audio tapes of meetings regarding the Sette action, in order to successfully oppose plaintiff's motion for discovery sanctions, defendant had to demonstrate (1) a reasonable excuse for the failure to produce the requested items and (2) the existence of a meritorious claim or defense in order

to relieve itself from the dictates of that order (*see Gibbs v St. Barnabas Hosp.*, 16 NY3d at 80). Defendant did not satisfy these requirements. Defendant's history of noncompliance with the court's prior discovery orders supports the motion court's finding that defendant's actions were wilful and contumacious (*see Manning v City of New York,* 29 AD3d 361 [1st Dept 2006], *lv denied* 7 NY3d 708 [2006]). The court providently granted plaintiffs' motion for an order precluding defendant from offering any evidentiary proof with respect to the transcription of committee meetings and/or correspondence by and between Baxter & Smith and defendant in defense and/or opposition to plaintiffs' prosecution of their bad faith claim at trial (*see Gogos v Modell's Sporting Goods, Inc.,* 87 AD3d 248 [1st Dept 2011]; *Kugel v City of New York,* 60 AD3d 403 [1st Dept 2009]; *Metropolitan N.Y. Coordinating Council on Jewish Poverty v FGP Bush Term.,* 1 AD3d 168, 168 [1st Dept 2003]).

Plaintiffs also made a prima facie showing that defendant had either intentionally or negligently disposed of the transcript of the May 19, 2000 meeting and that the spoliation of this critical evidence compromised its ability to prosecute their

bad faith action against defendant (*Ortega v City of New York*, 9 NY3d 69 [2007]; *Squitieri v City of New York*, 248 AD2d 201 [1st Dept 1998]). The motion court did not abuse its discretion in finding that certain evidence may have existed, but was not produced by defendant either because it was destroyed or withheld. Although plaintiffs moved to strike the answer, the court imposed the reasonable lesser sanction of an adverse inference charge, which will prevent defendant from using the absence of these documents at trial to its tactical advantage (*see VOOM HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 AD3d 33 [1st Dept 2012]; *Minaya v Duane Reade Intl., Inc.*, 66 AD3d 402 [1st Dept 2009]).

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

ENTERED: MARCH 19, 2013

CLERK

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

9352-
9353-
9354-
9354A-
9355-
9356

Index 112297/08

Stevi Brooks Nichols,
Plaintiff-Appellant,

-against-

W. Robert Curtis, etc., et al.,
Defendants-Respondents.

- - - - -

Marian C. Rice,
Nonparty-Respondent.

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Stevi Brooks Nichols, appellant pro se.

Curtis & Associates, P.C., New York (W. Robert Curtis of counsel), for W. Robert Curtis, Curtis & Riess-Curtis, P.C., and Curtis & Associates, P.C., respondents.

Cheryl L. Riess, respondent pro se.

L'Abbate, Balkan, Colavita & Contini, LLP, Garden City (Matthew J. Bizzaro of counsel), for Marian C. Rice, respondent.

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Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered on or about July 16, 2010, which granted defendants' motion to dismiss the complaint, sub silentio denied plaintiff's motion for sanctions against defendant W. Robert Curtis. (Curtis), denied plaintiff's motion for sanctions against nonparty Marian C. Rice, and granted Rice's cross motion for sanctions against plaintiff, unanimously modified, on the law, to

deny defendant's motion as to the first four causes of action and to deny Rice's cross motion, and otherwise affirmed, without costs. Order, same court and Justice, entered July 19, 2010, which denied plaintiff's motion for sanctions and granted Rice's cross motion for sanctions, unanimously modified, on the facts and in the exercise of discretion, to deny Rice's cross motion for sanctions, and otherwise affirmed, without costs. Judgment, same court (Edward H. Lehner, J.H.O.), entered February 18, 2011, against plaintiff in favor of Rice in the amount of $8,086.04, unanimously reversed, on the facts and in the exercise of discretion, and the judgment vacated. Appeal from order, same court and J.H.O., entered December 9, 2010, unanimously dismissed, without costs, as subsumed in the appeal from the February 18, 2011 judgment. Order, same court (Melvin L. Schweitzer, J.), entered January 10, 2012, which denied plaintiff's motion to vacate the prior orders and judgments pursuant to CPLR 5015(a)(2) and (3) and for renewal pursuant to CPLR 2221(e), unanimously affirmed, without costs. Order, same court and Justice, entered March 6, 2012, which denied plaintiff's motion for summary judgment dismissing the counterclaim of Curtis, defendant Curtis & Riess-Curtis, P.C. (C&R-C), and defendant Curtis & Associates, P.C. (C&A)

(collectively, the Curtis defendants), unanimously affirmed, without costs.

In this action, plaintiff claims her former attorneys committed malpractice, breached their fiduciary duty, and engaged in fraud, coercion and defamation in prosecuting a malpractice action against the attorneys who represented her in an action in 1988 against nonparty Morris Sales, Inc. Notwithstanding the court's characterization of their motion, defendants moved to dismiss the fifth through ninth causes of action only. Curtis and C&A, against whom the first four causes of action are asserted, did not move to dismiss those causes of action, and, even though the court found them to have duplicated the fifth through ninth causes of action, the court should not have dismissed them sua sponte (*see e.g. Purvi Enters., LLC v City of New York*, 62 AD3d 508, 509 [1st Dept 2009]; *West Washington Cut Meat Ctr., Inc. v Solomon*, 260 App Div 741, 742 [1st Dept 1940]). Reinstatement of the first four causes of action is without prejudice to a motion for dismissal in view of the analysis set forth below.

Plaintiff's fraud claim is based on defendants' failure to tell her that C&R-C had been dissolved; she contends that, had she known that, she would not have retained C&R-C in 1998 and/or

would not have allowed defendants to continue representing her until 2003. However, where a dissolved "corporation carries on its affairs and exercises corporate powers as before, it is a *de facto* corporation ... and ordinarily no one but the state may question its corporate existence" (*Garzo v Maid of Mist Steamboat Co.*, 303 NY 516, 524 [1952]). Thus, defendants' failure to tell plaintiff that C&R-C had been administratively dissolved and subsequently reinstated was not a material omission (*see Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]; *see also Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 99 [1st Dept 2006] [materiality can be disposed of summarily], *lv denied* 8 NY3d 804 [2007]). Furthermore, plaintiff failed to show that she was injured by the alleged fraud (*see Lama*, 88 NY2d at 421). There is no indication that, had C&R-C not been dissolved, it would have provided better legal services to plaintiff. Plaintiff's request for at least $2 million in damages has no relationship to the $87,000 in fees that she paid defendants.

Plaintiff contends that the statute of limitations on her breach of fiduciary duty claims should be six years instead of three because the claims are based on fraud (*see e.g. IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 139 [2009]). However, since, as indicated, the complaint fails to state a cause of action for fraud, the statute of limitations for the

breach of fiduciary duty claims, which seek money damages rather than equitable relief, is three years (*see Kaufman v Cohen*, 307 AD2d 113, 119 [1st Dept 2003]); thus, those claims are time barred.

We also reject plaintiff's contention that defendants should be equitably estopped by their fraud from asserting the three-year statute of limitations defense to the malpractice, breach of contract (this claim is duplicative of the malpractice claim), and conversion claims. First, the complaint does not state a cause of action for fraud. Second, the failure to disclose that underlies plaintiff's equitable estoppel argument is also the basis for her fraud claim (*see Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 491 [2007]; *see also Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 789 [2012]). Third, plaintiff fails to allege specific actions by defendants that kept her from timely bringing suit (*see Putter v North Shore Univ. Hosp.*, 7 NY3d 548, 553 [2006]); mere failure to disclose wrongdoing is not sufficient (*see Ross*, 8 NY3d at 491; *see also Zumpano v Quinn*, 6 NY3d 666, 675 [2006]). Fourth, with respect to the malpractice and breach of contract claims, the complaint admits that plaintiff realized by November 2003 that defendants' representation of her had fallen below the skill and knowledge commonly required of members of the legal profession (*see Putter*, 7 NY3d at 553; *Zumpano*, 6 NY3d at 674).

Plaintiff failed to support her request for leave to amend with an affidavit of merits and such other evidence as is appropriate on a motion for summary judgment (*see Non-Linear Trading Co. v Braddis Assoc.*, 243 AD2d 107, 116 [1st Dept 1998]).

Plaintiff's motion for sanctions against Curtis and Rice for retaining her files must be denied. Plaintiff had an opportunity to retrieve her files in 2005 when Curtis submitted an affidavit stating that plaintiff already had at least 99% of the case file from the actions underlying this malpractice case. In 2009, when plaintiff came to identify her files and belongings, Rice, as Curtis's counsel, had an obligation to supervise their removal to make certain that papers were properly duplicated and work product remained with Curtis or counsel. Thus, sanctions against her are not warranted. However, Rice's and Curtis's insistence on not returning original documents and requiring plaintiff to designate each garment individually, needlessly involving intervention by the Court and its clerk, to obtain documents and garments that had been previously ordered returned, precludes them from obtaining costs or sanctions from plaintiff.

Plaintiff's motion to vacate and renew was correctly denied as to defendant Cheryl F. Riess, since nothing new nor any specific evidence offered was directed against Riess.

The branch of the motion based on CPLR 5015(a)(3) (fraud,

misrepresentation, or other misconduct) was correctly denied as to Rice and the Curtis defendants, since plaintiff did not show that either Rice or the Curtis defendants committed fraud in procuring the July 2010 orders; she merely tried to show that the Curtis defendants had committed fraud in the underlying transaction (*see Jericho Group, Ltd. v Midtown Dev., L.P.*, 47 AD3d 463 [1st Dept 2008], *lv dismissed* 11 NY3d 801 [2008]). In any event, we are vacating the award of sanctions.

The branch of the motion based on CPLR 5015(a)(2) (newly-discovered evidence) was correctly denied as to the Curtis defendants and Rice because the evidence would not have produced a different result (*see Matter of Tamara B. v Pete F.*, 220 AD2d 318 [1st Dept 1995]). Similarly, assuming, without deciding, that plaintiff offered "new facts" on her CPLR 2221(e) motion, those facts would not have changed the prior determination (*see Mejia-Ortiz v Inoa*, 89 AD3d 514 [1st Dept 2011]).

As to plaintiff's motion for summary judgment dismissing the Curtis defendants' counterclaim, plaintiff and the Curtis

defendants signed a stipulation that withdrew the counterclaim with prejudice.

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

ENTERED: MARCH 19, 2013

CLERK

Andrias, J.P., Sweeny, Freedman, Feinman, Gische, JJ.

9541 Jose Rodriguez, et al., Index 8246/05
Plaintiffs-Respondents, 84849/05
85954/07

-against-

Dormitory Authority of the
State of New York, et al.
Defendants-Appellants,

Enclos Corp.,
Defendant-Respondent-Appellant.

- - - - -

Enclos Corp.,
Third-Party Plaintiff-Respondent-Appellant,

-against-

Atlantic Heydt Corp.,
Third-Party Defendant-Respondent.

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[And A Second Third-Party Action]

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Newman Myers Kreines Gross Harris P.C., New York (Adrienne Yaron of counsel), for appellants.

Law Offices of James J. Toomey, New York (Eric P. Tosca of counsel), for respondent-appellant.

Feld & Korman, P.C., New York (John G. Korman of counsel), for Jose Rodriguez and Rebecca Rodriguez, respondents.

French & Casey LLP, New York (Susan A. Romano of counsel), for Atlantic Heydt Corp., respondent.

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Order, Supreme Court, Bronx County (John A. Barone, J.), entered July 2, 2012, which, insofar as appealed from as limited by the briefs, denied defendants' motions for summary judgment dismissing the complaint and for summary judgment on their

contractual indemnification claims, unanimously modified, on the law, to the extent of dismissing the common-law negligence and Labor Law § 200 claims against defendants Dormitory Authority of the State of New York (DASNY) and Bovis Lend Lease LMB, Inc., and dismissing the § 241(6) claims against defendants insofar as they are predicated on alleged violations of provisions other than 12 NYCRR 23-1.7(e)(2), and otherwise affirmed, without costs.

The court should have granted the motions for summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims against DASNY and Bovis. Given that the accident was caused by a dangerous condition on the premises, rather than by the means or methods of plaintiff's work, defendants met their burden by showing that they neither created nor had actual or constructive notice of the alleged dangerous condition (*see Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011]), namely, a scaffold clamp that had been left on the floor where plaintiff was walking while carrying boxes. Plaintiff's testimony failed to raise an issue of fact, since he merely testified that he had seen similar hazards on the floor on the day of the accident and the day before; there was no testimony indicating how long the specific clamp that caused his fall had been in the location of his accident (*see Canning v Barneys N.Y.*, 289 AD2d 32, 33 [1st Dept 2001]). However, the

court properly denied defendant Enclos's motion for summary judgment dismissing the common-law negligence and Labor Law § 200 claims against it, since there are issues of fact about whether it created the hazardous condition (*see Murphy v Columbia Univ.*, 4 AD3d 200, 201 [1st Dept 2004]).

The court should have granted summary judgment dismissing the Labor Law § 241(6) claims that are based on alleged violations of Industrial Code provisions other than 12 NYCRR 23-1.7(e)(2). Defendants failed to make a prima facie showing that a violation of Industrial Code (12 NYCRR) § 23-1.7(e)(2) did not cause the accident, since plaintiff testified that scaffold clamps, including the one that caused his accident, were scattered across the working area, causing him to trip and fall (*see Collins v Switzer Constr. Group, Inc.*, 69 AD3d 407 [1st Dept 2010]). Sections 23-2.1(a)(1) and 23-1.7(e)(1) are inapplicable, since plaintiff's testimony established that the accident occurred in an open working area near a passageway, rather than in the passageway itself (*see Waitkus v Metropolitan Hous. Partners*, 50 AD3d 260, 260 [1st Dept 2008]; *Dalanna v City of New York*, 308 AD2d 400, 401 [1st Dept 2003]). Section 23-1.7(d) is also inapplicable, as the accident was not caused by a foreign substance (*see Kowalik v Lipschutz*, 81 AD3d 782, 784 [2d Dept 2011]). Plaintiff abandoned the Labor Law § 241(6) claims that

are predicated on violations of other Industrial Code provisions and OSHA regulations cited in his bill of particulars, since he failed to address them in his motion papers or on appeal (*see Cardenas v One State St.*, LLC, 68 AD3d 436, 438 [1st Dept 2009]). We reject Bovis's argument that it cannot be held liable pursuant to Labor Law § 241(6) because it was a construction manager. The "label of construction manager versus general contractor is not necessarily determinative" (*Walls v Turner Constr. Co.*, 4 NY3d 861, 864 [2005]). Given that Bovis was responsible for planning and coordinating construction activity throughout the project, providing safety supervision of all contractors and subcontractors on the project, and conducting daily safety walkthroughs on the site, an issue of fact exists as to whether it was the functional equivalent of a general contractor so as to hold it liable under § 241(6) (*see id.*).

Although the contractual indemnification claims set forth broad obligations for Enclos to indemnify DASNY and Bovis, and for third-party defendant Atlantic Heydt Corp. to indemnify Enclos, and are not limited to showings of negligence on the part of the proposed indemnitors, there are issues of fact regarding the liability of Enclos and Atlantic precluding summary judgment

on the claims (*see Francescon v Gucci Am., Inc.*, 71 AD3d 528, 529 [1st Dept 2010]).

We have reviewed defendants' remaining contentions and find them unavailing.

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

ENTERED: MARCH 19, 2013

CLERK

Andrias, J.P., Friedman, DeGrasse, Freedman, Abdus-Salaam, JJ.

9549 The People of the State of New York, Respondent,

-against-

Porfirio Mendoza, Defendant-Appellant.

Ind. 7737/01

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Richard M. Greenberg, Office of The Appellate Defender, New York (Avi Springer of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Marcy L. Kahn, J.), rendered May 31, 2002, as amended December 5, 2008, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, criminal sale of a controlled substance in or near school grounds, and criminal possession of a controlled substance in the third and fifth degrees, and sentencing him to an aggregate term of three to nine years, unanimously affirmed.

In this observation sale case, the court properly exercised its discretion in permitting testimony that the police chose their observation post in response to complaints about drug sales on that block, and specifically in front of the particular building. This testimony was relevant as background information to explain the selection of that location and to avoid the

possibility of jury speculation as to why that location was targeted (*see e.g. People v Williams*, 13 AD3d 131 [1st Dept 2004], *lv denied*, 4 NY3d 837 [2005]). Although defendant objected on the ground of relevance, he did not assert that this testimony was prejudicial. In any event, any prejudice was prevented by the court's limiting instruction, which cautioned the jury that the prior complaints had nothing to do with defendant.

The court properly exercised its discretion in denying defendant's mistrial motion, made after a police witness under cross-examination referred to defendant's prior drug-related arrest. Defense counsel, although aware of defendant's prior arrest in the same building, clearly invited this testimony by pursuing a line of questioning about whether the detective knew defendant prior to the day of the charged sale. The court struck this testimony and gave curative instructions that were sufficient to prevent any prejudice (*see People v Santiago*, 52 NY2d 865 [1981]), and which the jury is presumed to have followed (*see People v Davis*, 58 NY2d 1102, 1104 [1983]).

By failing to object, making general objections or failing to request any specific further relief after the court sustained an objection, defendant failed to preserve his present challenges

to the prosecutor's summation (*see People v Romero*, 7 NY3d 911, 912 [2006), and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]). The court's curative actions were sufficient to prevent any improprieties from causing prejudice.

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

ENTERED: MARCH 19, 2013

CLERK

Andrias, J.P., Friedman, DeGrasse, Freedman, Abdus-Salaam, JJ.

9550 In re Pedro B.,

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

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Tamara A. Steckler, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.

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

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Order of disposition, Family Court, New York County (Susan R. Larabee, J.), entered on or about February 28, 2012, 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 robbery in the second degree and two counts of attempted robbery in the second degree, and placed him on probation for a period of 18 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's determinations concerning identification and credibility. The testimony of the victim and a police officer who witnessed the incident established appellant's

accessorial liability. Appellant's conduct during and after the robbery was inconsistent with that of a mere bystander. Among other things, the evidence clearly demonstrated that appellant grabbed at or pulled on the victim's bicycle during the robbery.

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

ENTERED: MARCH 19, 2013

CLERK

Andrias, J.P., Friedman, DeGrasse, Freedman, Abdus-Salaam, JJ.

9551-
9551A Index 303385/07

Zena Adamson, et al.,
Plaintiffs,

-against-

The City of New York,
Defendant-Respondent,

Verizon of New York Inc.,
Defendant-Appellant,

Hussein M. Abdulla, et al.,
Defendants.

_____

Krez & Flores, LLP, New York (Edwin H. Knauer of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Deborah A. Brenner of counsel), for respondent.

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Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered April 19, 2012, which granted defendant-appellant Verizon of New York Inc.'s motion to reargue a prior order of the same court and Justice, entered December 27, 2011, to the extent it granted defendant-respondent City of New York's motion for summary judgment dismissing the complaint and cross claims as asserted against it, and, upon reargument, adhered to the prior determination, unanimously affirmed, without costs. Appeal from the prior order, unanimously dismissed, without costs, as superseded by the appeal from the reargument order.

The court properly dismissed plaintiffs' complaint as asserted against the City. The owner of the property abutting the sidewalk, and not the City, was responsible for maintaining the sidewalk under New York City Administrative Code § 7-210. In any event, the record shows that the City did not have prior written notice of the defective sidewalk condition, as required by Administrative Code § 7-201[c][2] (*see Batts v City of New York*, 93 AD3d 425, 426 [1st Dept 2012]), and Verizon has not demonstrated that the special use exception applied to overcome the prior written notice requirement (*see Poirier v City of Schnectady*, 85 NY2d 310, 315 [1995]). Because of the fact that the City did not have notice of the alleged dangerous condition there is no basis for holding the City liable for failing to provide lighting (*see Thompson v City of New York,* 78 NY2d 682, 685 [1995]). Therefor, Verizon's cross claim against the City cannot be sustained on the theory that the City failed to provide adequate lighting.

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

ENTERED: MARCH 19, 2013

CLERK

Andrias, J.P., Friedman, DeGrasse, Freedman, Abdus-Salaam, JJ.

9552 The People of the State of New York, Ind. 5960/09
Respondent,

-against-

Kenny Grullon,
Defendant-Appellant.

_____

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Edward J. McLaughlin, J.), rendered on or about October 1, 2010,

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: MARCH 19, 2013

CLERK

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

Andrias, J.P., Friedman, DeGrasse, Freedman, Abdus-Salaam, JJ.

9553- Index 601995/07
9553A- 590203/08
9553B Alexandre Van Damme,
Plaintiff-Respondent,

-against-

Nahum Gelber,
Defendant-Appellant,

Arij Gasiunasen Fine Art of
Palm Beach, Inc., etc.,
Defendant.

- - - - - -

[And A Third-Party Action]

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

McLaughlin & Stern, LLP, New York (Jon Paul Robbins of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Bernard J. Fried, J.), entered December 28, 2011, awarding plaintiff Alexandre Van Damme partial summary judgment on his claims for specific performance and an award of attorney's fees, and enjoining and directing defendant Gelber to specifically perform the February 5, 2007 contract of sale and to release the subject painting to plaintiff upon payment by plaintiff of two million euros less the amount of legal fees awarded to plaintiff of $448,419.00, and which brings up for review, an order, same court and Justice, entered December 27, 2011, which denied defendant Gelber's motion

to vacate the court's July 8, 2009 order granting plaintiff's motion for partial summary judgment on claims for specific performance and an award of attorney's fees, unanimously affirmed, with costs. Appeals from orders, same court and Justice, entered March 22 and 23, 2012, respectively, which denied defendant Gelber's motions to vacate the judgment and for summary judgment, unanimously dismissed, without costs, as abandoned.

Gelber was not barred by either res judicata or collateral estoppel from arguing the issue of standing in his motion to vacate the July 8, 2009 order. In particular, this Court's holding on the prior appeal in this case (79 AD3d 534) cannot be considered binding for collateral estoppel purposes because this Court's initial holding as to the issue of standing was that it had not been preserved for review. It was only as an alternate holding that this Court stated that the standing argument, if it were to be considered, would be rejected (*see Tydings v Greenfield, Stein & Senior, LLP*, 11 NY3d 195, 200 [2008]).

However, Supreme Court properly denied Gelber's motion to vacate the July 8, 2009 order. The order was neither based on mistake nor on misrepresentations. The record evidence established that the three assignment forms were effectual even

though they contained minor differences, including the effective date of assignment, whether or not Van de Weghe has to cooperate with plaintiff, and whether or not consideration has to be paid to plaintiff. The operative language in the forms was identical and unambiguously indicated an intent to assign to plaintiff all rights, claims or causes of action regarding the painting which the assignors possessed (*see Leon v Martinez*, 84 NY2d 83, 88 [1994]). Thus, contrary to Gelber's claim, the record evidence reflects a meeting of the minds on all "essential" terms (*see Matter of Express Indus. & Term. Corp. v New York State Dept. of Transp.*, 93 NY2d 584, 589-590 [1999]). In this regard, we note that consideration is not a requirement of an effective written assignment (see GOL 5-1107).

Because the assignment was valid, and because the parties to the assignment actually intended to be bound by it, Gelber's argument that they misrepresented that there was a valid assignment fails. Indeed, all of the various affidavits and statements at deposition regarding the assignment were accurate.

Nor is it accurate to claim that plaintiff failed to provide the required discovery in this case. Indeed, it is undisputed that in March 2008 Gelber was given the three assignment forms by plaintiff. Further, Gelber's counsel utilized the three forms during depositions. Gelber mistakenly relies on the document

created by Gasiunasen's counsel with the "/s/" mistakenly written into the signature lines. Indeed, this mistake was quickly corrected before the motion court during the original summary judgment motion proceeding.

Nor do we find that Supreme Court should have vacated the order in the interests of justice.

The March 2012 orders concerned issues of comity and jurisdiction, which Gelber has not raised in his briefs to this Court. Thus, the appeals from those orders have been abandoned.

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

ENTERED: MARCH 19, 2013

CLERK

Andrias, J.P., Friedman, DeGrasse, Freedman, Abdus-Salaam, JJ.

9554 In re Wanda Coleman, Index 401619/11
Petitioner-Appellant,

-against-

John B. Rhea, etc.,
Respondent-Respondent.

South Brooklyn Legal Services, Inc., Brooklyn (Brent Meltzer of counsel), for appellant.

Kelly D. MacNeal, New York (Andrew M. Lupin of counsel), for respondent.

Judgment, Supreme Court, New York County (Eileen A. Rakower, J.), entered February 8, 2012, which denied the petition seeking to annul respondent New York City Housing Authority's (NYCHA) determination terminating petitioner's tenancy, and dismissed the proceeding brought pursuant to CPLR Article 78, unanimously reversed, on the law, without costs, the judgment vacated, and the petition treated as one transferred to this Court for de novo review, and upon such review, the challenged determination confirmed, the petition denied and the proceeding dismissed.

The petition raises an issue of substantial evidence, and thus, the proceeding should have been transferred to this Court pursuant to CPLR 7804(g). Accordingly, we treat the substantial evidence issue de novo and decide all issues as if the proceeding

had been properly transferred (*see Matter of Filonuk v Rhea*, 84 AD3d 502, 502 [1st Dept 2011]).

The finding of nondesirability is supported by substantial evidence, including that petitioner is chronically delinquent in payment of her rent, and that her adult son, an authorized member of her household, pleaded guilty to engaging in illegal drug activity on NYCHA premises (*see Matter of Rodriguez v New York City Hous. Auth.*, 84 AD3d 630, 631 [1st Dept 2011]; *Matter of Zimmerman v New York City Hous. Auth.*, 84 AD3d 526, 526 [1st Dept 2011]).

Petitioner's claim that her right to due process was violated when the hearing officer permitted NYCHA to submit an updated ledger at a resumed hearing in December 2010, is meritless (*see Mathews v Eldridge*, 424 US 319, 335 [1976]). Petitioner was free to testify regarding the updated rent charges, the hearing officer kept the record open post-hearing to give petitioner a full opportunity to respond to the updated rent charge, and petitioner availed herself of this opportunity by submitting documentary evidence. Moreover, the hearing officer did not violate NYCHA's internal Termination of Tenancy Procedures.

Under the circumstances presented, the penalty of termination does not shock our conscience (*see Matter of Wooten v Finkle*, 285 AD2d 407, 408-409 [1st Dept 2001]).

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

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

ENTERED: MARCH 19, 2013

CLERK

Andrias, J.P., Friedman, DeGrasse, Freedman, Abdus-Salaam, JJ.

9555- Index 150164/10
9556-
9557 Georgette Fleischer,
Plaintiff-Appellant,

-against-

NYP Holdings, Inc., etc., et al.,
Defendants-Respondents.

_____

Heller, Horowitz & Feit, P.C., New York (Stuart A. Blander of counsel), for appellant.

Levine Sullivan Koch & Schulz, LLP, New York (Katherine M. Bolger of counsel), for NYP Holdings, Inc., respondent.

Law Offices of James J. Toomey, New York (Evy L. Kazansky of counsel), for Nadine Johnson & Associates, Inc., and Nadine Johnson, respondents.

Davis Wright Tremaine LLP, New York (Deborah A. Adler of counsel), for Gothamist LLC and Gawker Media, LLC, respondents.

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Judgment, Supreme Court, New York County (Milton A. Tingling, J.), entered June 27, 2012, dismissing the complaint in its entirety, unanimously affirmed, without costs. Appeals from orders (same court and Justice), entered September 28, 2011 and March 26, 2012, respectively, which, upon consolidating the CPLR 3211(a)(7) motion to dismiss the complaint brought by defendants Gawker Media, LLC and Gothamist LLC with a motion for the same relief brought by defendant NYP Holdings, Inc., granted the motions and granted defendants Nadine Johnson and Nadine Johnson

& Associates, Inc.'s (collectively Johnson defendants) motion for summary judgment, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

In this action for defamation and invasion of privacy, plaintiff alleges that she was defamed by false statements written about her in two articles that appeared in the New York Post, dated May 11, 2011 and May 12, 2011, and that she suffered injury to her personal reputation and in her trade or profession as an English professor (*see e.g. LeBlanc v Skinner*, __ AD3d __, 955 NYS2d 391 [2d Dept 2012]). The articles also appeared on defendant NYP's website and related articles appeared on defendants Gothamist's and Gawker's websites.

The challenged statements in the May 11, 2011 article, when read in context, do not constitute false factual statements, which is a sine qua non of a libel claim (*see Sandals Resorts Intl. Ltd. v Google, Inc.*, 86 AD3d 32, 40-43 [1st Dept 2011]; *see also Thomas H. v Paul B.*, 18 NY3d 580, 584 [2012]). Plaintiff alleges that the article contained false statements that a popular Soho restaurant was closed because of her regular complaints regarding noise and smoke emission and that she made reference to the restaurant's owners as "acting like barbarians." However, the article does not explicitly state that the restaurant was closed due to her complaints. Rather, the article

quoted city officials who stated that the restaurant was shuttered for serious building code violations. At most, the article suggests that the inspections resulted from plaintiff's complaints, which is an inference well supported by the record, including plaintiff's own allegations. Expressions of opinion are non-actionable (*see generally Steinhilber v Alphonse*, 68 NY2d 283 [1986]). Additionally, plaintiff does not deny stating that the restaurant owners were "acting like barbarians." Accordingly, the first cause of action against defendant NYP Holdings for defamation, predicated upon its May 11, 2011 article, was properly dismissed for failure to state a cause of action (*see CPLR* 3211[a][7]).

Plaintiff's second cause of action alleging defamation based on the May 12, 2011 article was also properly dismissed for failure to state a cause of action. This article opined that plaintiff was as "bothersome" to her students as she had been to the commercial establishments in her neighborhood. It quoted one of plaintiff's former students who stated that plaintiff had "ridiculous" mood swings, would "create issues" to get students "in trouble," and was a "narc." Such vague terms indicate non-actionable expressions of opinion. We note that plaintiff never refuted NYP's assertion that she declined to respond to the former students alleged remarks. Having been afforded a timely

opportunity to respond undermines her claim that publication of the challenged statements was made with reckless disregard (*see generally Sprewell v NYP Holdings, Inc.*, 43 AD3d 16, 21 [1st Dept 2007]). Plaintiff's bald allegation that the former student never made such remarks, is conclusory and lacks factual support. In any event, since the article makes it clear that the statements came from a former student, no basis exists for a reasonable reader to conclude that the author was relating incontrovertible facts about the experiences of plaintiff's students (*see Sprewell*, 43 AD3d at 21).

Plaintiff's allegations that all defendants, including the Johnson defendants, engaged in a conspiracy to defame her are speculative and insufficient to sustain such claim. There are no factual allegations to support a claim of conspiratorial conduct. Plaintiff does not allege that the Johnson defendants made defamatory comments about her, nor does she allege that the Johnson Defendants instructed NYP, Gawker and/or Gothamist to make or publish defamatory comments about her.

Plaintiff's third and fourth causes of action alleging "invasion of privacy" claims against the Gothamist and Gawker, respectively, under sections 50 and 51 of New York's Civil Rights Law, were also properly dismissed for failure to state a cause of action. The blog columns maintained by these defendants each had

links to the faculty page on the website of the college where plaintiff teaches which contained plaintiff's photograph and scholastically relevant personal information. The information at issue -- the closing of a popular New York City restaurant and the complaints against it lodged by plaintiff, a local resident and college professor -- was newsworthy, and plaintiff's photograph bore a real relationship to the story. Accordingly, no remedy is available to plaintiff pursuant to §§ 50 and 51 of New York's Civil Rights Law (*see Howell v New York Post Company*, 81 NY2d 115, 122-123 [1993]; *Bement v N.Y.P. Holdings, Inc.*, 307 AD2d 86, 89-90 [1st Dept 2003], *lv denied* 100 NY2d 510 [2003]).

Plaintiff's fifth and sixth causes of action alleging prima facie tort and intentional infliction of emotional distress against each of the defendants, were properly dismissed as duplicative. The underlying allegations fall within the ambit of other traditional tort liability, namely, plaintiff's cause of action sounding in defamation (*see Freihofer v Hearst Corp.*, 65 NY2d 135, 142-143 [1985]; *Akpinar v Moran*, 83 AD3d 458, 459 [1st Dept 2011], *lv denied* 17 NY3d 707 [2011]). In any event, plaintiff fails to state a claim as to either cause of action, inasmuch as the record undermines any allegation that the challenged articles and postings were published solely for

malevolent purposes (*see Amodei v New York State Chiropractic Assn.*, 160 AD2d 279 [1st Dept 1990], *affd* 77 NY2d 890 [1991]), and the allegations do not sufficiently allege conduct so extreme and atrocious as to support a claim for intentional infliction of emotional distress (*see Howell*, 81 NY2d at 122).

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

ENTERED: MARCH 19, 2013

CLERK

Andrias, J.P., Friedman, DeGrasse, Freedman, Abdus-Salaam, JJ.

9558 The People of the State of New York, Ind. 1511/10
Respondent,

-against-

DeJesus Payamps, etc.,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Orrie A. Levy of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (James M. Kindler, J. at plea; Peter J. Benitez, J. at sentencing), rendered August 9, 2010, convicting defendant of criminal sale of a controlled substance in the second degree, and sentencing him to a term of three years, unanimously affirmed.

Defendant did not preserve his challenge to the voluntariness of his guilty plea, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. The court's failure to advise defendant of the possibility of deportation did not affect the voluntariness of the plea (*see People v Ford*, 86 NY2d 397, 404 n [1995]). *Padilla v Kentucky* (559 US __, 130 S Ct 1473 [2010]) neither declares deportation to be a direct consequence for plea allocution purposes nor expands the duties of a court upon accepting a plea

from a noncitizen (*People v Diaz*, 92 AD3d 413 [2012], *lv granted* 19 NY3d 972 [2012]). Moreover, in this case the record reflects that defense counsel advised defendant of the deportation consequences of the plea.

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

ENTERED: MARCH 19, 2013

CLERK

Andrias, J.P., Friedman, DeGrasse, Freedman, Abdus-Salaam, JJ.

9560 The People of the State of New York, Ind. 3508/10
Respondent,

-against-

Anna Pacheco,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of The Appellate Defender, New York (Rosemary Herbert 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 (Juan M. Merchan, J.), rendered March 21, 2011, convicting defendant, after a jury trial, of robbery in the first degree, robbery in the second degree (two counts), burglary in the first degree (two counts) and assault in the second degree, and sentencing her to an aggregate term of 10 years, unanimously affirmed.

The court correctly denied defendant's request for an intoxication charge (*see* Penal Law § 15.25). There was insufficient evidence, even when viewed in the light most favorable to defendant, for a reasonable person to entertain a doubt as to the element of intent on the basis of intoxication (*see People v Perry*, 61 NY2d 849 [1984]; *People v McCray*, 56 AD3d 359 [1st Dept 2008], *lv denied* 12 NY3d 760 [2009]; *People v Manning*, 1 AD3d 241, 241 [1st Dept 2003], *lv denied* 1 NY3d 630

[2004]).

The verdict was based on legally sufficient evidence and was not against the weight of the evidence. We find the sentence not to be excessive.

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

ENTERED: MARCH 19, 2013

CLERK

Andrias, J.P., Friedman, DeGrasse, Freedman, Abdus-Salaam, JJ.

9561 Greentech Research LLC, et al., Index 602477/09
Plaintiffs-Appellants,

-against-

Barrett Wissman,
Defendant,

Clark Hunt, et al.,
Defendants-Respondents.

_____

Gusrae Kaplan Nusbaum PLLC, New York (Alison B. Cohen of counsel), for appellants.

McKool Smith, P.C., Dallas, TX (Garret W. Chambers of the bar of the State of Texas, admitted pro hac vice, and Kyle A. Lonergan, New York, of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (O. Peter Sherwood, J.), entered October 18, 2011, dismissing the complaint as against defendants Clark Hunt and Hunt Financial Ventures, L.P. (HFV), unanimously affirmed, with costs.

The court properly dismissed the fraud claim for failure to plead fraud with the particularity required by CPLR 3016(b) and for failure to plead loss causation (*see Laub v Faessel*, 297 AD2d 28, 31 [1st Dept 2002]). As the motion court noted, and as plaintiffs fail to refute on appeal, their losses were directly caused by the negative press reports about defendants, not by Hunt's and HFV's alleged misrepresentations and omissions.

The court properly dismissed the negligent misrepresentation

claim for failure to plead a special relationship. An arm's length business relationship, as existed here, is not generally considered to be the sort of confidential or fiduciary relationship that would support a cause of action for negligent misrepresentation (*see Silvers v State of New York*, 68 AD3d 668, 669 [1st Dept 2009], *lv denied* 15 NY3d 705 [2010]). Nor did Hunt or HFV "possess unique or specialized expertise" (*Kimmell v Schaefer*, 89 NY2d 257, 263 [1996]) in raising capital from investors. Indeed, the complaint alleges that plaintiff Hilary J. Kramer (the controlling person of plaintiff Greentech Research LLC) is an experienced financial analyst and money manager. Further, Hunt's and HFV's alleged superior knowledge of their alleged wrongdoing and defendant Barrett Wissman's admitted wrongdoing is not the type of unique or specialized expertise that would support a cause of action for negligent misrepresentation (*see generally Dobroshi v Bank of Am., N.A.*, 65 AD3d 882, 884 [1st Dept 2009], *lv dismissed* 14 NY3d 785 [2010]).

Because Hunt and HFV did not have "superior knowledge of essential facts" (*P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d 373, 378 [1st Dept 2003] [internal quotation marks omitted]), the court properly dismissed that part of plaintiffs' fraud claim that was based on Hunt's and HFV's

alleged omissions (*see Dembeck v 220 Cent. Park S., LLC*, 33 AD3d 491, 492 [1st Dept 2006]).

The court providently exercised its discretion in denying plaintiffs' request for leave to replead (*see Eighth Ave. Garage Corp. v H.K.L. Realty Corp.*, 60 AD3d 404, 405 [1st Dept 2009], *lv dismissed* 12 NY3d 880 [2009]), given the absence of an affidavit of merits and evidentiary proof to support their request (*cf. Zaid Theatre Corp. v Sona Realty Co.*, 18 AD3d 352, 355 [1st Dept 2005]).

Even though plaintiffs' fraud and negligent misrepresentation claims were properly dismissed, they can still bring a new action based on breach of contract (*see 175 E. 74th Corp. v Hartford Acc. & Indem. Co.*, 51 NY2d 585, 590 n 1 [1980]).

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

ENTERED: MARCH 19, 2013

CLERK

Andrias, J.P., Friedman, DeGrasse, Freedman, Abdus-Salaam, JJ.

9562-
9563 Index 303065/07

Jose Deleon,
Plaintiff-Respondent,

-against-

Keystone Freight Corp., et al.,
Defendants-Appellants.

_____

Foster & Mazzie, LLC, New York (Mario A. Batelli of counsel), for appellants.

Pollack, Pollack, Isaac & De Cicco, New York (Brian J. Isaac of counsel), for respondent.

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Appeal from order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered July 15, 2011, which, in this action for personal injuries sustained in an automobile accident, denied defendants' motion for a new trial on the issue of past lost earnings pursuant to CPLR 4404(a), deemed appeal from judgment, same court and Justice, entered August 9, 2011, awarding plaintiff, inter alia, $174,000.68 for past lost earnings from the date of the injury to the date of the verdict (CPLR 5520[c]), and, so considered, the judgment is unanimously affirmed, without costs.

Plaintiff sustained his burden of establishing the amount of his past lost earnings with reasonable certainty through the

uncontroverted testimony of his economist (*see Papa v City of New York*, 194 AD2d 527, 531 [2d Dept 1993], *lv dismissed* 82 NY2d 918 [1994]). Plaintiff also tendered sufficient medical testimony connecting his injuries to his inability to work for the entire period from the date of the accident to the date of the verdict (*cf. Razzaque v Krakow Taxi,* 238 AD2d 161, 162 [1st Dept 1997]). The amount of damages is primarily a question for the jury, which was entitled to credit the testimony of plaintiff's treating physicians regarding plaintiff's physical condition and his ability to work, and to discredit the testimony of defendants' witnesses regarding that issue (*see Balsam v City of New York*, 298 AD2d 479 [2d Dept 2002]).

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

ENTERED: MARCH 19, 2013

CLERK

Andrias, J.P., Friedman, DeGrasse, Freedman, Abdus-Salaam, JJ.

9564 BREAA LLC, Index 651118/12
Plaintiff-Respondent,

-against-

Stephen Passarelli,
Defendant-Appellant.

_____

Antony Hilton, New York, for appellant.

Amos Weinberg, Great Neck, for respondent.

_____

Order, Supreme Court, New York County (Ellen Coin, J.), entered September 17, 2012, which denied defendant's motion to dismiss the complaint, unanimously reversed, on the law, with costs, the motion granted and the complaint dismissed. The Clerk is directed to enter judgment accordingly.

The agreement between the parties provided that plaintiff's officer-members would be defendant's exclusive agents to represent him in finding a buyer for his valuable comic book, but it did not give them the exclusive right to sell (*see Far Realty Assoc. Inc. v RKO Del. Corp.*, 34 AD3d 261 [1st Dept 2006]). Thus, since no commission was due to plaintiff if defendant independently procured a buyer and sold the comic book during the exclusive agency period, as the complaint alleges, plaintiff's breach of contract claim should have been dismissed. In addition, the second cause of action for breach of the implied

covenant of good faith and fair dealing should have been dismissed since such a claim may not be used as a substitute for a nonviable claim of breach of contract (*see Murphy v American Home Prods. Corp.*, 58 NY2d 293, 304 [1983]).

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

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

ENTERED: MARCH 19, 2013

CLERK

Andrias, J.P., Friedman, DeGrasse, Freedman, Abdus-Salaam, JJ.

9565 The People of the State of New York, Ind. 4362/10
Respondent,

-against-

Kenneth Sutton,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of The Appellate Defender, New York (Avi Springer of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Daniel McCullough, J.), rendered on or about March 21, 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: MARCH 19, 2013

CLERK

Andrias, J.P., Friedman, DeGrasse, Freedman, Abdus-Salaam, JJ.

9566 Saydi Polanco, Index 302782/10
Plaintiff-Respondent

-against-

Mallam Y. Alhassan, et al.,
Defendants-Appellants,

Alan Bell,
Defendant.

_____

Cobert, Haber & Haber, Garden City (David C. Haber of counsel), for appellants.

Pollack, Pollack, Isaac & De Cicco, New York (Brian J. Isaac of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (John A. Barone, J.), entered December 21, 2011, which granted plaintiff's motion for partial summary judgment on the issue of liability, unanimously reversed, on the law, without costs, and the motion denied.

Summary judgment on the issue of liability was improperly granted in this action where plaintiff pedestrian was injured when she was struck by a taxicab owned and operated by defendants-appellants. The record presents triable issues of fact as to whether plaintiff was in the crosswalk at the time of the accident. Both plaintiff and defendant driver testified that they looked and that the intersection was clear before they made their respective movements, and neither saw the other until the

moment of impact. Although plaintiff testified that she was walking across the intersection within the crosswalk when the accident occurred, the police accident report indicated that she was rushing across the street. Moreover, defendant driver testified that at the time of impact, the front of the car, which was the part of the vehicle that struck plaintiff, was past the crosswalk (*see Wein v Robinson*, 92 AD3d 578 [1st Dept 2012]; *Villaverde v Santiago-Aponte*, 84 AD3d 506 [1st Dept 2011]).

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

ENTERED: MARCH 19, 2013

CLERK

Andrias, J.P., Friedman, DeGrasse, Freedman, Abdus-Salaam, JJ.

9568 Alastair Onglingswan, Index 115505/09
Plaintiff-Respondent,

-against-

Chase Home Finance, LLC, et al.,
Defendants,

Adam Plotch, et al.,
Defendants-Appellants.

_____

Paula A. Miller P.C., Smithtown (Paula A. Miller of counsel), for appellants.

Felix Shneiderovsky, PC, Brooklyn (Felix Shneiderovsky of counsel), for respondent.

_____

Order, Supreme Court, New York County (Judith J. Gische, J.), entered October 4, 2011, which granted plaintiff's motion to renew and reargue prior motions for summary judgment, unanimously reversed, on the law, without costs, and the motion to renew and reargue denied.

Although plaintiff's motion for reargument was untimely, the court had discretion to reconsider its prior order (*see Kleinser v Astarita*, 61 AD3d 597, 598 [1st Dept 2009]). In any event, the motion should have been denied because plaintiff sought to improperly advance new theories that had not been set forth on

the initial motion (*see DeSoignies v Cornasesk House Tenants' Corp.*, 21 AD3d 715, 718 [1st Dept 2005]). The motion to renew also should have been denied, given the absence of any justification for not submitting the purportedly new evidence on the initial motion (*see James v 1620 Westchester Ave., LLC*, — AD3d —, 2013 NY Slip Op 00807, *4 [1st Dept 2013]). Further, the circumstances did not warrant renewal in the interest of justice (*cf. Garner v Latimer*, 306 AD2d 209, 210 [1st Dept 2003]).

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

ENTERED: MARCH 19, 2013

CLERK

Andrias, J.P., Friedman, DeGrasse, Freedman, Abdus-Salaam, JJ.

9569 Maria Figueroa, Ind. 23062/04
Plaintiff-Appellant,

-against-

The New York City Board of Education,
Defendant-Respondent.

_____

Gregory J. Cannata & Associates, New York (Gregory J. Cannata of counsel), for appellant.

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

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Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered October 19, 2011, which, after a jury trial, granted defendant's motion to set aside the jury verdict and directed entry of judgment in favor of defendant dismissing the complaint, unanimously affirmed, without costs.

Plaintiff commenced this action for injuries she sustained while visiting the classroom of her daughter, who was employed, as a parent-coordinator, with defendant the New York City Board of Education. While attempting to exit the classroom, plaintiff

tripped and fell over the legs of a blackboard easel. The Court correctly concluded that there was no evidence of a dangerous condition in the classroom (*see Mastellone v City of New York*, 29 AD3d 540 [2nd Dept 2006]).

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

ENTERED: MARCH 19, 2013

CLERK

Andrias, J.P., Friedman, DeGrasse, Freedman, Abdus-Salaam, JJ.

9570N Milagros Pina, Index 300756/08
Plaintiff-Respondent,

-against-

Jobar U.S.A. LLC, et al.,
Defendants-Appellants.

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Kantrowitz, Goldhamer & Graifman, P.C., Chestnut Ridge (Michael L. Braunstein of counsel), for appellants.

John L. Buckheit, Suffern, for respondent.

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Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered January 27, 2012, which, in an action to recover for personal injuries sustained in a trip and fall at the entrance of defendants' building, denied defendants' motion to vacate the default judgment entered against them after inquest, and for leave to serve an answer, unanimously affirmed, without costs.

Relief under CPLR 317 is not warranted where, as here, defendants' failure to obtain proper notice was the result of a deliberate attempt to avoid such notice (*see Pena v Mittleman*, 179 AD2d 607, 610 [1st Dept 1992]). The individual defendant averred that neither he nor the corporate defendant received actual service of the summons and complaint, or of the supplemental summons and amended complaint, or of any of the notices served by plaintiff following commencement of the action.

However, this conclusory denial of receipt is insufficient to raise an issue of fact as to proper service in the face of plaintiff's submission of affidavits from a process server, which constitute prima facie evidence of proper service (*see Grinshpun v Borokhovich*, 100 AD3d 551, 552 [1st Dept 2012]; *Matter of de Sanchez*, 57 AD3d 452, 454 [1st Dept 2008]). Moreover, the record demonstrates that the corporation's designated agent for service signed the certified mail return receipt acknowledging it had received the notice of entry of the default judgment as to liability against the individual defendant, and of an order directing the Clerk of New York County to accept a notice of pendency regarding the building where plaintiff's accident occurred. Under these circumstances, defendants have failed to rebut the presumption of receipt of service (*see Lugo v H.B.T. Hous. Co.*, 1 AD3d 119 [1st Dept 2003]).

The court properly determined that the portion of defendants' motion seeking vacatur of the default judgment pursuant to CPLR 5015(a)(1) is untimely. The record demonstrates that the corporate defendant's designated agent acknowledged receipt of the notice of entry on September 25, 2008, yet defendants did not seek vacatur until May 3, 2011 (*see Matter of Orange County Dept. of Social Servs. v Germel Y.*, 101 AD3d 1019, 1019-1020 [2d Dept 2012]; *DeLisca v Courtesy Transp.*, 6 AD3d 646,

657 [2d Dept 2004]). Further, defendants failed to provide a reasonable excuse for their default. It is therefore unnecessary to consider whether they have a meritorious defense (*see Matter of Amirah Nicole A. [Tamika R.]*, 73 AD3d 428, 429 [1st Dept 2010], *lv dismissed* 15 NY3d 766 [2010]; *J.P. Equip. Rental & Materials v Fidelity & Guar. Ins. Co.*, 288 AD2d 187 [2d Dept 2001]).

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

ENTERED: MARCH 19, 2013

CLERK

Andrias, J.P., Friedman, DeGrasse, Freedman, Abdus-Salaam, JJ.

9571 In re Daryl Bidding, Ind. 1142/12
[M-472] Petitioner,

-against-

Hon. Gregory Carro, etc.,
Respondent.

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Daryl Bidding, petitioner pro se.

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

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

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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: MARCH 19, 2013

CLERK

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

9377 First New York Bank for Business, Index 4800/90
Plaintiff,

-against-

Geoffrey Alexander,
Defendant-Respondent.

- - - - -

The Cadle Company,
Assignee-Appellant.

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The Law Offices of Mark J. Friedman P.C., Syosset (Matthew B. Kogan of counsel), for appellant.

Eric H. Holtzman, Hauppauge, for respondent.

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Order, Supreme Court, New York County (Anil C. Singh, J.), entered January 27, 2012, reversed, on the law, without costs, the motion denied, the declaration vacated, and the matter remanded for further proceedings consistent with this decision.

Opinion by Román, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
David B. Saxe
Leland G. DeGrasse
Nelson S. Román, JJ.

9377
Index 4800/90

_____x

First New York Bank for Business,
Plaintiff,

-against-

Geoffrey Alexander,
Defendant-Respondent.

- - - - -

The Cadle Company,
Assignee-Appellant.

_____x

Assignee appeals from an order of the Supreme Court, New York County (Anil C. Singh, J.), entered January 27, 2012, which granted defendant's motion to declare that an April 25, 1990 judgment in the amount of $314,735.19 was conclusively presumed to have been paid and satisfied in accordance with CPLR 211(b).

The Law Offices of Mark J. Friedman P.C., Syosset (Matthew B. Kogan of counsel), for appellant.

Eric H. Holtzman, Hauppauge, for respondent.

ROMÁN, J.

On April 25, 1990, upon defendant's default, judgment in this action, in the amount of $314,735.19, plus interest, was entered in plaintiff's favor. On June 14, 1994, plaintiff assigned the judgment to The Cadle Company (Cadle). Pursuant to the assignment, Cadle was appointed

> "as the true and lawful attorney in fact for the Assignor [plaintiff], irrevocably, with power of substitution and revocation, to ask, demand and receive, and to issue executions and take all necessary steps for the recovery of the money due or to become due on said judgment."

On October 15, 2005, defendant filed for relief under Chapter 7 of the United States Bankruptcy Code.[1] Within the portion of his bankruptcy petition requiring an itemization of all unsecured debt, defendant listed a judgment awarded to plaintiff in the amount of $10,000. Where the petition asked for an account number in reference to the judgment, defendant listed this action's index number. Finally, in another portion of the petition entitled "Statement of Financial Affairs," which required defendant to list all lawsuits to which he had been a

[1] The parties fail to apprise this Court of the outcome of the bankruptcy proceeding. Since with the bankruptcy proceeding defendant sought to discharge the judgment granted in plaintiff's favor and plaintiff nevertheless continues to pursue payment, we presume that the debt owed was never discharged in bankruptcy.

party, defendant listed this action's caption, its index number, and that it was disposed of by judgment. However, while this action was brought in Supreme Court, defendant stated in his petition that this action was brought in Civil Court.

In September 2011, since defendant had not made any payments on the judgment, Cadle sought to enforce the judgment by serving restraining notices and subpoenas on several individuals. Thereafter, and in response, defendant made a motion seeking, inter alia, a declaration pursuant to CPLR 211(b). Specifically, defendant asked the motion court to declare that since plaintiff had not sought to enforce or collect on the judgment for more than 20 years from the time it was first entitled to enforce it, the judgment was presumed paid and satisfied and that, therefore, plaintiff was barred from enforcing it. Cadle opposed defendant's motion, arguing that, pursuant to CPLR 211(b), insofar as defendant acknowledged the judgment in the bankruptcy petition he filed in 2005, it had 20 years from the date of the acknowledgment to enforce the judgment.

Concluding that defendant's failure to acknowledge the full amount of the judgment in his bankruptcy petition did not trigger the exception in CPLR 211(b), the motion court granted defendant's motion, declaring that the judgment was presumed paid and satisfied. Cadle appealed and we hereby reverse.

CPLR 211(b) states, in pertinent part, that

> "[a] money judgment is presumed to be paid and satisfied after the expiration of twenty years from the time when the party recovering it was first entitled to enforce it. This presumption is conclusive, except as against a person who within the twenty years acknowledges an indebtedness, or makes a payment, of all or part of the amount recovered by the judgment, or his heir or personal representative, or a person whom he otherwise represents. Such an acknowledgment must be in writing and signed by the person to be charged. . . . If such an acknowledgment or payment is made, the judgment is conclusively presumed to be paid and satisfied as against any person after the expiration of twenty years after the last acknowledgment or payment made by him."

Accordingly, unless the party against whom a money judgment is granted, inter alia, acknowledges his or her indebtedness in a signed writing, the statute of limitations for an action to collect on a money judgment is 20 years from the date that the judgment can first be enforced. If, however, a party acknowledges his or her indebtedness to a money judgment, the statute of limitations runs anew, and is then 20 years from the last acknowledgment.

Provided that the judgment debtor admits in writing that it owes a debt to the person to whom a money judgment is granted and that such admission is conveyed to the judgment creditor, such

writing constitutes an acknowledgment of an obligation to pay (*Fletcher v Daniels*, 52 App Div 67, 68 [4th Dept 1900] [An acknowledgment, i.e. "a recognition of the debt [and] an admission that the writer is the debtor of the person addressed," is sufficient to make a new date from which the statute of limitations commences to run]). Moreover, for purposes of CPLR 211(b), such acknowledgment need not list the amount owed, the character of the obligation, or a promise to pay the debt (*id.* at 69; *Matter of Bassford*, 91 NYS2d 105, 114 [Sur Ct, Westchester County 1949] [construing Civil Practice Act § 44, statutory predecessor to CPLR 211(b)], *affd* 277 App Div 1128 [2d Dept 1950]; *Buckner v Bank of N.Y.*, 116 NYS2d 248, 249 [Sup Ct, NY County 1952] [same]; *Arizona Fire Ins. Co. v King*, 172 Misc 165, 167 [Sup Ct, NY County 1939] [same]; 2B Carmody-Wait 2d § 13:470 [2012] ["Unlike the rule applicable to claims other than judgments, however, an acknowledgment of a judgment debt need not imply a promise to pay, and a mere recognition of the judgment as a valid and subsisting obligation is sufficient to toll the statute [of limitations"]).

In *Matter of Bassford*, the court, articulating the requisites constituting an acknowledgment under CPLR 211(b), found that section 44 of the Civil Practice Act (CPA [statutory predecessor to CPLR 211(b)]) was satisfied when the decedent, who

had been ordered to pay alimony to the creditor by a final divorce decree, sent the creditor a letter merely admitting the obligation to pay alimony pursuant to the decree (*Matter of Bassford*, 91 NYS2d at 111-112, 114). Even though the letter did nothing more than admit the debt owed, the court nevertheless held that it was a sufficient acknowledgment of the debt under CPA 44 because "the memorandum contemplated by the statute need not contain, by express provision or by implication, a promise to pay nor specify the amount or character of the indebtedness" (*id.* at 114).

Contrary to defendant's contention, enforcement of the judgment issued against him is not barred by CPLR 211(b). While Cadle first sought to enforce the judgment in 2011, more than 20 years after the judgment could have first been enforced, defendant acknowledged the judgment in 2005 within his bankruptcy petition, thereby recommencing the statute of limitations from that date. Based on the 2005 acknowledgment, the statute of limitations to enforce the judgment ran anew in 2005 and Cadle has until 2025 to enforce the judgment assigned to it by plaintiff. Since a debtor sufficiently acknowledges a debt pursuant to a judgment simply by admitting to the creditor in writing that a debt is owed, here, defendant's listing of the judgment within his bankruptcy petition constitutes such an

admission and is thus, an acknowledgment under the statute. Moreover, insofar as an acknowledgment need not specify the amount nor the character of the debt owed (*Matter of Bassford*, at 114; *Buckner*, 116 NYS2d at 249; *Arizona Fire Ins. Co.*, 172 Misc at 167), defendant's failure to list the correct amount of the judgment or the court in which it was obtained does not constitute a shortcoming which avails defendant. Logically, if an acknowledgment omitting the nature and the amount of the debt satisfies the statute, then certainly one which misrepresents both the amount of the judgment and the court in which it was obtained does so as well. This is particularly true here, where defendant unambiguously admitted the debt owed to plaintiff by correctly identifying the debtor, admitting that the debt arose from a judgment and listing the correct index number for the action giving rise to the debt.

Similarly, since an acknowledgment of a debt pursuant to a judgment under CPLR 211(b) need not contain a promise to pay the debt (*Matter of Bassford* at 114; *Arizona Fire Ins. Co.* at 167), the listing of such a debt within a bankruptcy petition, which defendant avers implies an intent not to pay the debt, is nevertheless an acknowledgment under the statute (*Cross & Beguelin v Hall*, 170 NYS 64 [App Term, 1st Dept 1918] [merely

listing a judgment within a bankruptcy petition was sufficient to interrupt the running of ths statute of limitations to enforce the judgment]). While it is certainly true that debts listed in bankruptcy indicate "an intention by the bankrupt not to pay" (*In re Povill*, 105 F2d 157, 160 [2d Cir 1939]), since under CPLR 211(b) a debtor's acknowledgment of a debt pursuant to a judgment need not contain an intent to pay, the debtor's intent to pay is irrelevant.

To the extent that defendant avers that the bankruptcy petition was never provided to Cadle, the party which seeks the benefit of the acknowledgment, and that defendant never signed the petition as required by CPLR 211(b), he raises these arguments for the first time on appeal. The arguments are thus not properly before this Court and cannot be considered (*Matter of Reid v Moodie*, __AD3d__, 2013 NY Slip Op 00798 [1st Dept 2013]).

Accordingly, the order of the Supreme Court, New York County (Anil C. Singh, J.), entered January 27, 2012, which granted defendant's motion for a declaration that an April 25, 1990 judgment in the amount of $314,735.19 was conclusively presumed to have been paid and satisfied in accordance with CPLR 211(b),

should be reversed, on the law, without costs, the motion denied, the declaration vacated, and the matter remanded for further proceedings consistent with this decision.

All concur.

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

ENTERED: MARCH 19, 2013

CLERK