SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 29, 2014

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Tom, Saxe, Freedman, Manzanet-Daniels, JJ.

11797 Forest Laboratories, Inc., Index 600219/10
Plaintiff-Appellant,

-against-

Arch Insurance Company, et al.,
Defendants,

RSUI Indemnity Company,
Defendant-Respondent.

_____

Reed Smith LLP, New York (John B. Berringer of counsel), for appellant.

Babchik & Young, LLP, White Plains (Jack Babchik of counsel), for respondent.

_____

Order, Supreme Court, New York County (Melvin Schweitzer, J.), entered on or about September 14, 2012, which granted defendant RSUI Indemnity Company's (RSUI) motion to dismiss the complaint made pursuant to CPLR 3211(a)(1) and (7), unanimously affirmed, with costs.

The motion court properly determined that the express terms of RSUI's policy providing excess coverage to plaintiff required the previous layer of excess coverage to be exhausted through actual payment of that policy's limit prior to RSUI being

required to pay (*see e.g. JP Morgan Chase & Co. v Indian Harbor Ins. Co.*, 98 AD3d 18 [1st Dept 2012], *lv denied* 20 NY3d 858 [2013]).

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

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

ENTERED: APRIL 29, 2014

CLERK

Gonzalez, P.J., Sweeny, Moskowitz, Richter, Clark, JJ.

12325 The People of the State of New York, Respondent, Ind. 2309/01

-against-

Jose Martinez Baxin, Defendant-Appellant.

_____

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

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

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Order, Supreme Court, New York County (Thomas Farber, J.), entered August 14, 2012, which adjudicated defendant a level two sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Although in assessing points under the risk factor for continuing course of sexual misconduct, the court relied in part on grand jury minutes that were not disclosed to defendant, there was no violation of due process under the circumstances of the case, and a new hearing is not required. The grand jury minutes were cumulative to other evidence, establishing the same risk factor, that was fully disclosed to defendant, and defendant has not established that he was prejudiced (*see People v Frosch*, 69 AD3d 699, 700 [2d Dept 2010], *lv denied* 14 NY3d 707 [2010]).

The court properly exercised its discretion in declining to grant a downward departure to level one (*see People v Cintron*, 12 NY3d 60, 70 [2009], *cert denied* 558 US 1011 [2009]; *People v Johnson*, 11 NY3d 416, 418, 421 [2008]). The seriousness of the underlying conduct involving a child outweighs the factors defendant cites in support of a downward departure.

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

ENTERED: APRIL 29, 2014

CLERK

Gonzalez, P.J., Sweeny, Moskowitz, Richter, Clark, JJ.

12327-
12327A In re Alani G., and Another,

Dependent Children Under the
Age of Eighteen Years, etc.,

Angelica G.,
Respondent-Appellant,

Catholic Guardian Society and
Home Bureau,
Petitioner-Respondent.

_____

Geoffrey P. Berman, Larchmont, for appellant.

Joseph T. Gatti, New York, for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Adira Hulkower of counsel), attorney for the children.

_____

Orders, Family Court, New York County (Jody Adams, J.), entered on or about October 1, 2012, which, inter alia, upon findings of permanent neglect, terminated respondent mother's parental rights to the subject children and committed the custody and guardianship of the children to petitioner agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

The findings of permanent neglect were supported by clear and convincing evidence (*see* Social Services Law § 384-b[7]). The record demonstrates that the agency made diligent efforts to strengthen the parental relationship, which included providing

the mother with referrals to parenting skills classes and mental health services, and scheduling regular visitation. However, the mother failed, during the statutorily relevant time period, to plan for the children's return by refusing to avail herself of the assistance of a visiting coach and of a special needs parenting course, which would have assisted her with understanding the children's special needs (*see Matter of Racquel Olivia M.*, 37 AD3d 279 [1st Dept 2007], *lv denied* 8 NY3d 812 [2007]). The mother also failed to consistently visit the children during the statutorily relevant time period (*see Matter of Evan Matthew A. [Jocelyn Yvette A.]*, 91 AD3d 538 [1st Dept 2012]; *Matter of Amilya Jayla S. [Princess Debbie A.]*, 83 AD3d 582 [1st Dept 2011]).

A preponderance of the evidence shows that termination of the mother's parental rights was in the best interests of the children, who had been in foster care for most of their lives and needed permanency (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). A suspended judgment is not warranted under the circumstances because there was no evidence that the mother had a realistic and feasible plan to provide an adequate and stable home for the children, together with the two older siblings who required extensive services for their special needs. Moreover, the expert witness presented by the children's attorney testified

that returning the children to the mother's care would be damaging for them and could cause them to "regress" (*see Matter of Rayshawn F.*, 36 AD3d 429, 430 [1st Dept 2007]; *Matter of Rutherford Roderick T. [Rutherford R.T.]*, 4 AD3d 213, 214 [1st Dept 2004]).

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

ENTERED: APRIL 29, 2014

CLERK

Gonzalez, P.J., Sweeny, Moskowitz, Richter, Clark, JJ.

12328 In re Erica Grant, Index 400887/13
Petitioner,

-against-

New York City Housing Authority,
Respondent.

_____

The Bronx Defender, Bronx (Vichal Kumar of counsel), and Covington & Burling LLP, New York (Thomas Odell of counsel), for petitioner.

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

_____

Determination of respondent, dated February 13, 2013, which terminated petitioner's public housing tenancy, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Michael D. Stallman, J.], entered August 20, 2013) dismissed, without costs.

Respondent's determination is supported by substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights,* 45 NY2d 176, 179-182 [1978]). The record demonstrated that in a prior proceeding, petitioner's continued tenancy was conditioned upon her excluding her son's father, a level 3 sex offender, from her apartment. The Hearing Officer credited the testimony of the police officer, which was supported

by his memo book entries, that the excluded person was found in the closet in petitioner's apartment, after petitioner denied that he was in her apartment. There is no basis to disturb the credibility determination of the Hearing Officer.

Petitioner improperly argues, for the first time before this Court, that her due process rights were violated because at the hearing, where she appeared pro se, the hearing officer did not inform her that she could make a statement in mitigation. If we were to consider this argument, we would find it meritless. Petitioner received a notice of respondent's termination of tenancy procedures, which stated that she had the right to make a statement in mitigation. Moreover, the hearing officer had no legal duty to explicitly invite her to present evidence as to the appropriate penalty (*see Matter of Rivera v New York City Hous. Auth.*, 107 AD3d 404, 405 [1st Dept 2013]).

The penalty of termination of tenancy does not shock our sense of fairness in that the lesser penalty imposed in the prior proceeding against petitioner was unsuccessful in preventing the excluded person from entering petitioner's apartment and disturbing her neighbors by exposing himself in the hallway and masturbating in the elevator.

Petitioner is not entitled to her attorneys' fees in that she is not the prevailing party (*see Buckhannon Bd. & Care Home, Inc. v West Va. Dept. of Health & Human Resources*, 532 US 598, 603-604 [2001]).

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

ENTERED: APRIL 29, 2014

CLERK

Gonzalez, P.J., Sweeny, Moskowitz, Richter, Clark, JJ.

12329-
12329A Uptown Healthcare Management, Inc., doing business as, East Tremont Medical Center,
Plaintiff-Appellant,

-against-

Rivkin Radler LLP, et al.,
Defendants-Respondents.

Index 302814/12

_____

Blodnick Fazio & Associates, P.C., Garden City (Paul A. Lanni of counsel), for appellant.

Rivkin Radler LLP, Uniondale (Stuart M. Bodoff of counsel), for Rivkin Radler LLP and Barry I. Levy, respondents.

Katten Muchin Rosenman LLP, New York (Michael I. Verde of counsel), for Katten Muchin Rosenman LLP and Ross I. Silverman, respondents.

_____

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered October 9, 2012, which granted the motion of defendants Rivkin Radler LLP and Barry I. Levy, Esq. to stay this action until 30 days from the date of filing of the decision or order of Judge Eric N. Vitaliano in *State Farm Mut. Auto. Ins. Co. v Accurate Med., P.C.* (Eastern District of New York) on State Farm's motion to declare the document destruction provision of the settlement agreement in that case void, unanimously affirmed, without costs. Order, same court and Justice, entered October 10, 2012, which granted the motion of defendants Katten Muchin

Rosenman LLP and Ross Silverman, Esq. to stay this action as aforesaid, unanimously affirmed, without costs.

The motion court did not improvidently exercise its discretion by staying this action (*see e.g. Belopolsky v Renew Data Corp.*, 41 AD3d 322 [1st Dept 2007]). Were we to substitute our own discretion (*see e.g. Andon v 302-304 Mott St. Assoc.*, 94 NY2d 740, 745 [2000]), we would reach the same result. Although there is not complete identity of parties and claims in the instant action and *State Farm*, there is a common question of law and fact (*see e.g. Belopolsky*, 41 AD3d at 322). If the Eastern District of New York finds that the document destruction clause is void, plaintiff will obviously have no claim in the case at bar for breach of that clause. "The duplication of effort, waste of judicial resources, and possibility of inconsistent rulings in the absence of a stay outweigh any prejudice to plaintiff resulting from the" stay (*OneBeacon Am. Ins. Co. v Colgate-Palmolive Co.*, 96 AD3d 541, 541 [1st Dept 2012]).

A stay can be granted, even though defendants have not yet interposed answers (*see Britt v International Bus Servs.*, 255 AD2d 143 [1st Dept 1998]).

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

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

ENTERED: APRIL 29, 2014

CLERK

Gonzalez, P.J., Sweeny, Moskowitz, Richter, Clark, JJ.

12331 The People of the State of New York, Ind. 89/12
Respondent,

-against-

Isaiah Goddard,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Renee White, J.), rendered on or about April 24, 2012, unanimously affirmed.

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

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

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

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

ENTERED: APRIL 29, 2014

CLERK

Gonzalez, P.J., Sweeny, Moskowitz, Richter, Clark, JJ.

12332 Francisco Jedrzejcyk, Index 260278/12
Petitioner-Appellant,

-against-

Nestor Gomez, et al.,
Respondents-Respondents.

_____

Ginsburg & Misk, Queens Village (Hal R. Ginsburg of counsel), for appellant.

Miriam Janicki-Crespo, Jackson Heights, for respondents.

_____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered on or about October 3, 2012, which denied the petition for judicial dissolution of a corporation, and granted respondents' cross petition to dismiss the petition for lack of standing, unanimously reversed, on the law, without costs, and the matter remanded for a hearing on the issue of standing.

Although no shares in respondent Wales Development, Inc. were ever issued, petitioner established prima facie that he was the owner of a 50% interest in Wales – and therefore had standing to petition for the corporation's dissolution (*see* Business Corporation Law § 1104[a]) – by submitting evidence of an agreement between himself and respondent Gomez that he owned 50% of the corporation (*see United States Radiator Corp. v State of New York*, 208 NY 144, 149-150 [1913]; *Matter of Bhanji v Baluch*,

99 AD3d 587 [1st Dept 2012]; *Matter of M. Kraus, Inc.*, 229 AD2d 347 [1st Dept 1996], *lv dismissed* 89 NY2d 916 [1996]; *LaConti v Urban*, 309 AD2d 735 [2d Dept 2003]; *but see Concrete Constr. Sys. v Jensen*, 65 AD2d 918, 919 [4th Dept 1978]). The evidence included proof that petitioner contributed $1.4 million to the corporation and an affidavit by his accountant stating that petitioner and Gomez had expressed an intent that each own 50% of the corporation, that petitioner had contributed monies to the corporation's bank account, that she had performed accounting services for the corporation pursuant to both petitioner's and Gomez's directions, and that petitioner and Gomez had held themselves out as partners.

Contrary to petitioner's contention, respondents' failure to include an affidavit by someone with personal knowledge does not render their factual assertions speculative, since the corporate books and records they submitted may constitute admissible evidence (*Hamiltonian Corp. v Trinity Ctr. LLC*, 66 AD3d 517 [1st Dept 2009]; CPLR 4518[a]).

However, the parties' conflicting assertions and the inconsistent information in the corporate documents raise issues of fact, including the validity of the documents, that preclude a

summary determination of petitioner's ownership status (*see Matter of Singer v Evergreen Decorators*, 205 AD2d 694 [2d Dept 1994]).

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

ENTERED: APRIL 29, 2014

CLERK

Gonzalez, P.J., Sweeny, Moskowitz, Richter, Clark, JJ.

12333-
12334 Index 8176/06

Clara Milena Rivera, an infant by her mother and natural guardian, Soraya Gonzalez, et al.,
Plaintiffs-Respondents-Appellants,

-against-

Neighborhood Partnership Housing Development Fund Company Inc., et al.,
Defendants-Respondents,

Robert A. Dvorak,
Defendant-Appellant.

_____

Wilson Elser Moskowitz Edelman & Dicker LLP, White Plains (Joseph A.H. McGovern of counsel), for appellant and Diane L. Dvorak, respondent.

Law Office of Michael Stewart Frankel, New York (Richard H. Bliss of counsel), for respondents-appellants.

Faust Goetz Schenker & Blee LLP, New York (Jeffrey Rubinstein of counsel), for Neighborhood Partnership Housing Development Fund Company Inc. and 168th Street Development L.P., respondents.

Werner, Zaroff, Slotnick, Stern & Ashkenazy, LLP, Lynbrook (Howard J. Stern of counsel), for Bronx Pro Real Estate Company and Julio Saldana, respondents.

_____

Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered June 28, 2013, which, to the extent appealed from as limited by the briefs, granted so much of the motion of defendants Robert A. Dvorak and Diane L. Dvorak as sought summary judgment dismissing plaintiff's claims against Diane, and denied so much of the motion as sought summary judgment dismissing

plaintiff's claims against Robert, unanimously modified, on the law, to deny the motion as to Diane, and otherwise affirmed, without costs. Order, same court and Justice, entered June 28, 2013, which, to the extent appealed from as limited by the briefs, granted the motions of defendants Neighborhood Partnership Housing Development Fund Company, Inc., and 168th Street Development L.P. (the Neighborhood defendants), and of Bronx Pro Real Estate Company and Julio Saldana (the Bronx defendants) for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

In this action, plaintiffs allege that the infant plaintiff suffered injuries as a result of exposure to lead-based paint hazards, while residing in a single family house in Babylon, New York, and in a renovated apartment in the Bronx. The Dvorak defendants owned the Babylon premises, and the Bronx defendants owned and/or managed the Bronx premises.

The motion court correctly found that plaintiffs raised questions of fact as to whether Robert A. Dvorak had constructive notice of lead-based paint in the Babylon premises, since they presented evidence that he entered the premises, made repairs, knew that the building was constructed before the banning of lead-based interior paint, was aware that paint was peeling on the premises, knew of the hazards of lead-based paint to young

children, and knew that a young child lived in the house (*see Chapman v Silber*, 97 NY2d 9, 15 [2001]).

The motion court should not have granted summary judgment to Diane L. Dvorak, since, as a tenant by the entirety with her husband Robert, she may be held vicariously liable for his actions toward the property (*see Buran v Coupal*, 87 NY2d 173, 179 n 2 [1995], *affg* 213 AD2d 863 [3d Dept 1995]).

The motion court properly granted the Bronx defendants' motion for summary judgment. Prior to plaintiffs' residence in the Bronx apartment, the Bronx defendants gut renovated the building, replaced the interior, and painted with lead-free paint. They provided evidence demonstrating that there was no lead-based paint hazard in the building when plaintiffs moved into the apartment, and there is no evidence in the record of any peeling-paint condition inside the apartment (*see Juarez v Wavecrest Mgt. Team*, 88 NY2d 628, 647 [1996]; *Carrero v 266 Himrod Assoc.*, 3 AD3d 516, 517 [2d Dept 2004]).

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

ENTERED: APRIL 29, 2014

CLERK

Gonzalez, P.J., Sweeny, Moskowitz, Richter, Clark, JJ.

12335-
12336 The People of the State of New York, Respondent,

Ind. 919/12
922/12

-against-

Jacquese Henning,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Emily L. Auletta of counsel), for respondent.

_____

Judgments, Supreme Court, New York County (Michael J. Obus, J.), rendered September 27, 2012, convicting defendant, upon his pleas of guilty, of attempted robbery in the second degree (two counts) and grand larceny in the fourth degree, and sentencing him to an aggregate term of three years, unanimously affirmed.

Initially, we find that the record does not establish a valid waiver of defendant's right to appeal. However, we reject his claims on the merits.

Contrary to defendant's contention, the record reveals that the court considered but rejected youthful offender treatment (*compare People v Rudolph*, 21 NY3d 497 [2013]). At a calendar appearance to discuss a possible disposition of the charges, the court determined that defendant was ineligible as a matter of

law. That determination was correct, because defendant had already been adjudicated a youthful offender in a felony case, and was thus an ineligible youth (*see* CPL 720.10[2][c]; *People v Cecil Z.*, 57 NY2d 899 [1982]). To the extent defendant is arguing that a sequentiality requirement similar to that contained in the predicate felony offender statutes (*see e.g.* Penal Law § 70.06[1][b][ii]) should apply, that argument is contrary to the plain language of CPL 720.10(2)(c).

We perceive no basis for reducing the sentence.

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

ENTERED: APRIL 29, 2014

CLERK

Gonzalez, P.J., Sweeny, Moskowitz, Richter, Clark, JJ.

12338 Admiral Indemnity Company as subrogee of Woodbrooke Estates Condominium Section IIA, Plaintiff-Appellant, Index 111713/10

-against-

Marc Chernoff, et al., Defendants,

Electrolux Home Products, Inc., doing business as, Kenmore, Defendant-Respondent.

_____

Wenig & Wenig, New York (Alan Wenig of counsel), for appellant.

Hodges, Walsh, Messmer & Moroknek, LLP, White Plains (Sanford G. Jacobs of counsel), for respondent.

_____

Order, Supreme Court, New York County (Louis B. York, J.), entered December 18, 2012, which, to the extent appealed from, upon a search of the record, awarded defendant Electrolux Home Products, Inc. summary judgment dismissing the negligence cause of action as against it, unanimously affirmed, without costs.

The record evidence, i.e. the Electrolux instruction manual as to the proper way to clean lint out of the clothes dryer, the testimony of Electrolux's safety engineer as to the way consumers should clean lint out of the dryer, and the testimony of unit owners Marc Chernoff and Laura Chernoff that they did not follow the instructions as to cleaning lint out of the dryer,

demonstrates conclusively that Electrolux was not negligent in connection with the dryer fire that occurred in the Chernoffs' unit due to the presence of lint, causing damage to condominium association property. Thus, the motion court correctly awarded Electrolux summary judgment dismissing the negligence cause of action as against it upon a search of the record (*see* CPLR 3212[b]; *McDougal v Apple Bank for Sav.*, 200 AD2d 418, 419 [1st Dept 1994]).

The motion court's finding that there had previously been six dryer fires at the condominium is supported by the property manager's testimony and a letter from the condominium board of directors to the unit owners stating that the dryer fire in the Chernoffs' unit "marks 7 units in the last 5 years that have sustained damage due to dryer fires."

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

ENTERED: APRIL 29, 2014

CLERK

Gonzalez, P.J., Sweeny, Moskowitz, Richter, Clark, JJ.

12339 Wathne Imports, Ltd., Index 603250/05
Plaintiff-Appellant,

-against-

PRL USA, Inc., et al.,
Defendants-Respondents.

_____

Manatt, Phelps & Phillips, LLP, New York (Thomas C. Morrison of counsel), for appellant.

Kelly Drye & Warren LLP, (Robert I. Steiner of counsel), for respondents.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered November 12, 2013, which granted defendants' motion in limine to preclude evidence on the claim relating to the Polo Ralph Lauren trademark, unanimously affirmed, with costs.

The Polo Ralph Lauren trademark claim was dismissed more than five years ago in an order that granted in large part defendants' motion for summary judgment dismissing the complaint. The motion court dismissed all but certain specified claims, and, on appeal, this Court modified to deny the motion as to certain of those claims (63 AD3d 476 [1st Dept 2009]). Neither the motion court's nor this Court's order mentions the Polo Ralph Lauren claim by name. Contrary to plaintiff's contention, the motion court did not effectively dismiss a claim by granting the instant in limine motion.

Notwithstanding that the potential dismissal of all its claims was before the motion court on defendants' summary judgment motion, plaintiff failed to raise any argument about the apparent dismissal of the Polo Ralph Lauren claim in its appeal from the order that decided the motion; nor did it take action to clarify any alleged discrepancy between the motion court's reasoning and the terms of its order. Thus, plaintiff has waived its right to challenge the scope of the order (*see U.S. Bank N.A. v APP Intl. Fin. Co., B.V.*, 100 AD3d 179 [1st Dept 2012]; *Goncalves v Stuyvesant Dev. Assoc.*, 244 AD2d 267 [1st Dept 1997]).

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

ENTERED: APRIL 29, 2014

CLERK

Gonzalez, P.J., Sweeny, Moskowitz, Richter, Clark, JJ.

12341 DB Mansfield LLC, Index 654313/12
Plaintiff-Appellant,

-against-

BNY Capital Funding LLC, et al.,
Defendants-Respondents.

_____

Kasowitz, Benson, Torres & Friedman LLP, New York (Paul M. O'Conner III of counsel), for appellant.

Duval & Stachenfeld LLP, New York (Allan N. Taffet of counsel), for BNY Capital Funding LLC, respondent.

Patterson Belknap Webb & Tyler LLP, New York (Saul B. Shapiro of counsel), for FirstEnergy Generation Corp., respondent.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered August 2, 2013, which granted defendants' motions to dismiss the complaint pursuant to CPLR 3211(a)(1) and (a)(7), unanimously modified, on the law, the motion of BNY Capital Funding LLC denied with respect to those portions of the first cause of action that allege breach of the Purchase Agreement, and otherwise affirmed, without costs.

Contrary to plaintiff's contention, the motion court expressly adopted defendants' arguments, and did not improperly decide the motions on grounds not raised by the parties (*cf. Greene v Davidson*, 210 AD2d 108, 109 [1st Dept 1994], *lv denied* 85 NY2d 806 [1995]). Nor did the motion court hold that the

action should have been brought as an arbitration proceeding.

The breach of contract claim against FirstEnergy was properly dismissed. The Supplemental Appraisal Protocol merely added further procedures to existing ones, and, in light of its purpose (*see Beal Sav. Bank v Sommer*, 8 NY3d 318, 324-325 [2007]), and its disclaimer of "any obligations or duties to make any payment" to Mansfield, did not did confer on plaintiff any right to payment from FirstEnergy.

The unjust enrichment claim was also properly dismissed because the protocol was a valid contract and covered the subject matter of the dispute; that the rights plaintiff asserted were expressly disclaimed therein did not bring the pleading within the exception set forth in *Joseph Sternberg, Inc. v Walber 36th St. Assoc.* (187 AD2d 225 [1st Dept 1993]) to the required election of remedies between contract and quasi-contract causes of action.

However, the cause of action against BNY Capital Funding for breach of the Purchase Agreement should not have been dismissed. According the complaint the benefit of the inferences, there are issues of fact as to whether BNY acted in a commercially reasonable manner and in good faith with respect to its duties to help plaintiff maximize the value of its interest and to refrain from conduct that could have an adverse impact on such interest.

BNY's assertion that it permissibly acted in its self-interest does not insulate it, at this juncture, from plaintiff's claim. Whether BNY justifiably acted to protect the profit it might reap from the subject transaction is open to doubt; its claimed expectation was based on an appraisal later found to be significantly disparate from the other two appraisals that would determine the price BNY might receive, so whether the claim of self-interest is legitimate and borne out by the facts cannot be determined on this motion to dismiss (*cf. Bankers Trust Co. v Dowler & Co.*, 47 NY2d 128, 136 [1979] [summary judgment]; *Citibank, N.A. v Solow*, 92 AD3d 569 [1st Dept 2012], *lv denied* 19 NY3d 807 [2012] [same]). There is similarly an issue of fact as to whether BNY's delay in consenting to an extension of the closing of the subject transaction was reasonable under the circumstances. Damages are reasonably inferred from the allegations (*see CAE Indus. v KPMG Peat Marwick*, 193 AD2d 470, 472-473 [1st Dept 1993]).

Nor did BNY properly offset against plaintiff's share of the proceeds from the subject transaction the amount it claimed was owed it for indemnification of its past and future expenses, including those incurred in defending this action. The Indemnity Agreement, which appears limited to claims by third parties and may exclude this action based on other language, when strictly

construed, did not, under the circumstances, unmistakably and clearly entitle BNY to indemnity from plaintiff (*see Hooper Assoc. v AGS Computers*, 74 NY2d 487, 492 [1989]; *Gotham Partners, L.P. v High Riv. Ltd. Partnership*, 76 AD3d 203, 207 [1st Dept 2010], *lv denied* 17 NY3d 713 [2011]).

The conversion cause of action against BNY was properly dismissed as merely duplicative of the contract claim, rendering it unnecessary to determine whether the cause of action was otherwise sufficiently stated (*see Melcher v Apollo Med. Fund Mgt. L.L.C.*, 25 AD3d 482, 483 [1st Dept 2006]).

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

ENTERED: APRIL 29, 2014

CLERK

Gonzalez, P.J., Sweeny, Moskowitz, Richter, Clark, JJ.

12342 In re Suleman Akhtar, Index 100430/13
Petitioner,

-against-

Barbara J. Fiala, etc., et al.,
Respondents.

_____

Martin A. Kron & Associates, LLP, New York (Daniel L. Kron of counsel), for petitioner.

Eric T. Schneiderman, Attorney General, New York (Valerie Figueredo of counsel), for respondents.

_____

Determination of respondent New York State Department of Motor Vehicles, dated December 24, 2012, suspending petitioner's driver's license for 180 days, 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 [Carol E. Huff, J.], entered August 9, 2013), dismissed, without costs.

The determination that petitioner violated Traffic Rules and Regulations of the City of New York (34 RCNY) § 4-03(a)(1)(i) by failing to yield the right of way at an intersection, which led to a pedestrian fatality, is supported by substantial evidence and has a rational basis in the record (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181 [1978]).

Petitioner's contention that the administrative law judge misconstrued and misapplied the traffic rule is without merit. The rule provides that a driver facing a green light "shall yield the right of way to other vehicles . . . lawfully within the intersection or an adjacent crosswalk at the time such signal is exhibited" (34 RCNY 4-03[a][1][i]). It does not conflict with Vehicle and Traffic Law § 1141, which requires left-turning drivers to "yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close as to constitute an immediate hazard."

We have considered petitioner's remaining contentions and find them without merit.

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

ENTERED: APRIL 29, 2014

CLERK

Gonzalez, P.J., Sweeny, Moskowitz, Richter, Clark, JJ.

12343 The People of the State of New York, Respondent, Ind. 3504/09

-against-

Devine Sweeper, Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Andrew Fine of counsel), and Kirkland & Ellis LLP, New York (Geoffrey A. David of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Eric C. Washer of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Alvin Yearwood, J.), rendered February 18, 2011, convicting defendant, after a jury trial, of robbery in the second and third degrees and petit larceny, and sentencing him to an aggregate term of four years, unanimously affirmed.

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 jury's determinations concerning credibility and identification, including its evaluations of any inconsistencies in testimony.

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

ENTERED: APRIL 29, 2014

CLERK

Gonzalez, P.J., Sweeny, Moskowitz, Richter, Clark, JJ.

12344 The People of the State of New York, SCI 3664/01
Respondent,

-against-

Luis Rodriguez,
Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, Bronx County (John P. Collins, J.), entered on or about February 12, 2010, which denied defendant's CPL 440.46 motion for resentencing, unanimously affirmed.

The court properly exercised its discretion in determining that substantial justice dictated denial of the motion (*see e.g. People v Gonzalez*, 29 AD3d 400 [1st Dept 2006], *lv denied* 7 NY3d 867 [2006]). Resentencing is not automatic, and courts may deny the applications of persons who "have shown by their conduct that they do not deserve relief from their sentences" (*People v Paulin*, 17 NY3d 238, 244 [2011]). Defendant has demonstrated a

"chronic inability to control his behavior while at liberty" (*People v Correa*, 83 AD3d 555, 556 [1st Dept 2011], *lv denied* 17 NY3d 80 [2011]). In addition to having an extensive criminal record before the underlying conviction, defendant subsequently committed numerous crimes and repeatedly violated his parole.

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

ENTERED: APRIL 29, 2014

CLERK

Gonzalez, P.J., Sweeny, Moskowitz, Richter, Clark, JJ.

12345 Stephen Serra, et al., Ind. 109032/10
Plaintiffs-Respondents,

-against-

The Goldman Sachs Group, Inc., et al.,
Defendants-Appellants.

_____

O'Connor Reed LLP, Port Chester (Amy L. Fenno of counsel), for appellants.

Arye, Lustig & Sassower, P.C., New York (Mitchell J. Sassower of counsel), for respondents.

_____

Order, Supreme Court, New York County (Shlomo S. Hagler, J.), entered June 4, 2013, which, to the extent appealed from as limited by the briefs, granted plaintiffs' motion for partial summary judgment on the issue of defendants' liability under Labor Law § 240(1), denied so much of defendants' cross motion for summary judgment as sought dismissal of plaintiff Stephen Serra's (plaintiff) Labor Law §§ 240(1) and 241(6) claims, denied defendants' motion to compel plaintiff to provide authorizations allowing defendants to obtain all medical records pertaining to his psychological condition and treatment, and granted, upon a search of the record, summary judgment in plaintiff's favor on his Labor Law § 241(6) claim, unanimously affirmed, without costs.

The court properly granted plaintiffs' motion for partial summary judgment as to liability on plaintiff's Labor Law § 240(1) claim, since plaintiffs submitted uncontradicted deposition testimony that the unsecured extended ladder upon which plaintiff was working slipped and fell out from underneath him (*see Estrella v GIT Indus., Inc.*, 105 AD3d 555, 555 [1st Dept 2013]; *Dwyer v Central Park Studios, Inc.*, 98 AD3d 882, 883 [1st Dept 2012]). Plaintiff's actions were not the sole proximate cause of his accident, since the deposition testimony established that his coworker, unbeknownst to plaintiff and in departure from their normal procedure, stopped footing the base of the ladder while plaintiff was still climbing it, thereby allowing it to slip out from underneath plaintiff (*see Gallagher v New York Post*, 14 NY3d 83, 88-89 [2010]).

Since we are affirming the grant of partial summary judgment to plaintiff on his Labor Law § 240(1) claim, we need not address his Labor Law § 241(6) claim (*see Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 12 [1st Dept 2011]).

The court providently exercised its discretion in denying defendants' motion to compel, since plaintiff did not seek to recover damages for emotional or psychological injury, or aggravation of a preexisting emotional or mental condition (*see Churchill v Malek*, 84 AD3d 446, 446 [1st Dept 2011]).

Plaintiff's bill of particulars alleged damages for specific physical injuries in his lower back, and his inclusion of general allegations of "anxiety and mental anguish" resulting from his back injuries did not place his entire mental health history into contention (*see Schiavone v Keyspan Energy Delivery NYC*, 89 AD3d 916, 916-917 [2d Dept 2011]).

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

ENTERED: APRIL 29, 2014

CLERK

Gonzalez, P.J., Sweeny, Moskowitz, Richter, Clark, JJ.

12346 In re Robert Sanders, Ind. 932/12
[M-1240] Petitioner, 319/13

-against-

Hon. Ethan Greenberg, et al.,
Respondents.

_____

Robert Sanders, petitioner, pro se.

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

Robert T. Johnson, District Attorney, Bronx (Eric C. Washer of counsel), for Robert T. Johnson, 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.

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

ENTERED: APRIL 29, 2014

CLERK

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

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

-against-

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

_____

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

Annette G. Hasapidis, South Salem, for respondent.

_____

Order, Supreme Court, New York County (Paul Wooten, J.), entered October 3, 2011, which, to the extent appealed from, upon the parties' motions and cross motions, declared that defendant's answer was stricken by operation of an October 2006 order and that trial of this action shall be limited to the issue of damages, unanimously affirmed, without costs.

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

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

The Workers' Compensation Board (WCB) panel decision dated August 28, 2009, which affirmed a WCB judge's decision finding that plaintiff had no accident-related disability subsequent to September 5, 2008, is not entitled to preclusive effect (*see Auqui v Seven Thirty One Ltd. Partnership*, 22 NY3d 246 [2013]).

The Decision and Order of this Court entered herein on April 9, 2013 is hereby recalled and vacated (*see* M-6643 decided simultaneously herewith).

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

ENTERED: APRIL 29, 2014

CLERK

Tom, J.P., Friedman, Acosta, Andrias, Richter, JJ.

11863-
11864-
11865-
11866-
11867 1414 Holdings, LLC,
Plaintiff-Appellant,

—against—

BMS-PSO, LLC,
Defendant-Respondent.

- - - - -

1414 Holdings, LLC,
Plaintiff-Respondent,

—against—

BMS-PSO, LLC,
Defendant-Appellant.

- - - - -

1414 Holdings, LLC,
Plaintiff-Appellant,

—against—

BMS-PSO, LLC,
Defendant-Respondent.

Index 652290/12

Meister Seelig & Fein LLP, New York (Stephen B. Meister of counsel), for 1414 Holdings, LLC, appellant/respondent.

David Rozenholc & Associates, New York (David Rozenholc of counsel), for BMS-PSO, LLC, respondent/appellant.

Order, Supreme Court, New York County (Ellen M. Coin, J.), entered May 30, 2013, which denied plaintiff's motion for a preliminary injunction, and granted defendant's motion for a preliminary injunction enjoining plaintiff from closing access to

its building and withholding utility services from defendant's leased premises, unanimously modified, on the law and the facts and in the exercise of discretion, to modify the injunction granted to defendant so as to allow plaintiff to enter defendant's premises to perform work on one of the building's elevator shafts to accommodate an elevator cab compliant with the Americans with Disabilities Act (ADA), and otherwise affirmed, without costs. Order, same court and Justice, entered June 17, 2013, which, to the extent appealed from, set the amount of the undertaking for defendant's preliminary injunction in the amount of $162,208.84, plus monthly use and occupancy of $16,320.84, and, in the event it is determined that defendant was not entitled to the injunction, all damages and costs which may be sustained by reason of the injunction, unanimously reversed, on the law, without costs, and the matter remanded for proceedings consistent herewith. Appeal from order, same court and Justice, entered June 4, 2013, which denied plaintiff's motion to modify the temporary restraining order, unanimously dismissed, without costs, as academic. Order, same court and Justice, entered September 7, 2012, which, to the extent appealed from, denied defendant's motion to renew the parties' motions for preliminary injunctions, unanimously affirmed, without costs. Order and judgment (one paper), same court and Justice, entered September

4, 2013, which, to the extent appealed from, granted defendant's motion for summary judgment dismissing plaintiff's first and second causes of action and for summary judgment on defendant's first counterclaim, and declared that "plaintiff is not entitled to engage in a self-help eviction of defendant absent court order," unanimously affirmed, without costs.

In 1996, defendant BMS-PSO, LLC (the tenant) entered into a commercial lease for the 19th floor of an office building located at 1414 Avenue of the Americas. The initial lease term was 15 years and 6 days, and the tenant had the option to extend the lease for two additional 5-year terms. The tenant, which operates an endodontic practice at the premises, exercised its first option and extended the lease to 2016, and intends to exercise the second option extending the lease to 2021.

In or about January 2011, plaintiff 1414 Holdings, LLC (the owner) purchased the building for the purpose of converting it into a hotel. Several days after acquiring the property, the owner provided the tenant with a notice of cancellation effective July 31, 2012, pursuant to article 86 of the lease. Article 86 grants the owner the right to cancel the lease if it intends to apply to the New York City Department of Buildings (DOB) for a permit to demolish "all or substantially all" of the building, and provides that if the owner cancels the lease and thereafter

fails to obtain such DOB permit before the effective date of the cancellation, then the cancellation is void.

Approximately a month before the noticed lease cancellation date, the owner commenced this action seeking, inter alia, a preliminary injunction compelling the tenant to remove patient records from its premises. In its complaint, the owner indicated that, after the cancellation date, it intended to cut off public access to the building and withhold utilities from the tenant's premises in order to perform the conversion work. The tenant moved for a preliminary injunction to stop the owner from using self-help to evict the tenant, and the motion court granted a temporary restraining order pending an evidentiary hearing. After the hearing, the court denied the owner's motion and granted the tenant's motion.

The motion court did not improvidently exercise its discretion in granting the tenant's motion for a preliminary injunction. Based on the evidence presented at the hearing, the court correctly concluded, at this early stage of the litigation, that the tenant would likely succeed in establishing that the owner did not obtain a DOB permit to demolish "all or substantially all" of the building before the effective date of the cancellation, which would render the cancellation notice void. The court also properly found that the remaining criteria

for injunctive relief were satisfied (*see Concourse Rehabilitation & Nursing Ctr., Inc. v Gracon Assoc.*, 64 AD3d 405 [1st Dept 2009]; *A1 Entertainment LLC v 27th St. Prop. LLC*, 60 AD3d 516 [1st Dept 2009]; *Classic Bookshops [Intl.] Ltd. v 48th Ams. Co.*, 140 AD2d 201 [1st Dept 1988]).

The court, however, should have modified the injunction so as to allow the owner to enter the tenant's premises to perform work on one of the building's elevator shafts to accommodate an elevator cab compliant with the ADA. The lease allows the owner to change the arrangement of the elevators in the building, and the elevator plans call for a de minimis encroachment 2 feet 4 inches wide by 7 feet 2 inches long, which constitutes only .44% of the tenant's leased space (*see generally Cut-Outs, Inc. v Man Yun Real Estate Corp.*, 286 AD2d 258 [1st Dept 2001], *lv denied* 100 NY2d 507 [2003]). In modifying the injunction, we conclude that the balance of the equities on this issue lies with the owner.[1]

The motion court properly granted the tenant's motion for summary judgment seeking a declaration that the owner is not entitled to evict the tenant by self-help. A landlord may, under

[1] In light of our determination, the appeal from the court's denial of the owner's motion to modify the temporary restraining order is dismissed as academic.

certain circumstances, use self-help to peaceably re-enter commercial premises and regain possession (*see North Main St. Bagel Corp. v Duncan*, 6 AD3d 590, 591 [2d Dept 2004]; *Sol De Ibiza, LLC v Panjo Realty, Inc.*, 29 Misc 3d 72 (App Term, 1st Dept 2010]). This common-law right to re-enter, however, can only be exercised if the lease expressly reserves that right (*Michaels v Fishel*, 169 NY 381, 389 [1902]; *see Arthur at the Westchester, Inc. v Westchester Mall, LLC*, 104 AD3d 471, 472 [1st Dept 2013]). Here, the parties' lease does not contain any specific provision allowing the owner to use self-help to evict the tenant. Contrary to the owner's argument, the language in article 18 of the lease is not an express reservation of the right to re-enter.

The undertaking set by the motion court on the tenant's preliminary injunction — in the amount of the tenant's arrears and continuing use and occupancy — was not "rationally related to the potential damages recoverable if the preliminary injunction is later determined to have been unwarranted" (*Matter of Witham v Finance Invs., Inc.*, 52 AD3d 403, 404 [1st Dept 2008]; CPLR 6312[b]). The tenant would be required to pay these amounts independent of any preliminary injunction. Although the court's order also provided that the tenant would be responsible for "all damages and costs which may be sustained by reason of [the]

injunction," it failed to set an undertaking to cover those potential damages.

We note that the posture of this litigation has changed since the motion court initially set the undertaking. By this decision, we have modified the injunction to permit the owner to enter the tenant's space to work on the elevator, and we have affirmed the motion court's judgment declaring that the owner is not entitled to engage in a self-help eviction. Accordingly, we remand the matter to determine what undertaking, if any, should be set on the tenant's preliminary injunction. The court should also determine whether, pursuant to CPLR 6314, the owner should be required to post an undertaking as a result of our modification of the injunction.

Contrary to the tenant's argument, the owner's acceptance of a single rent check does not establish that the owner intended to relinquish its right to cancel the lease (*see Metropolitan Ins. &*

Annuity Co. v Hartman, 11 Misc 3d 140[A], 2006 NY Slip Op 50665[U] [App Term, 1st Dept 2006]).

We have considered the owner's remaining requests for affirmative relief and find them unavailing.

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

ENTERED: APRIL 29, 2014

CLERK

Friedman, J.P., Renwick, Moskowitz, Richter, Feinman, JJ.

12089 The People of the State of New York, Respondent, Ind. 4155/11

-against-

John A. Flores, Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Emily L. Auletta of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J. at plea; Ronald A. Zweibel, J. at sentencing), rendered August 9, 2012, convicting defendant of attempted assault in the first degree, and sentencing him to a term of nine years, unanimously modified, on the law, to the extent of vacating the sentence and remanding for resentencing.

The Court of Appeals has determined that CPL 720.20(1) requires "that there be a youthful offender determination in every case where the defendant is eligible, even where the defendant fails to request it, or agrees to forego it as part of a plea bargain" (*People v Rudolph*, 21 NY3d 497, 501 [2013]). Although defendant was convicted of an armed felony, he still could have received a youthful offender adjudication if the court had made the applicable findings under CPL 720.10(3). As the

Court noted in *Rudolph*, there may be "cases in which the interests of the community demand that youthful offender treatment be denied, and that the young offender be sentenced like any other criminal; . . . but the court must make the decision in every case" (21 NY3d at 501). Thus, because defendant was eligible for youthful offender consideration, if any of the factors in CPL 720.10(3) were found to exist, the court had to make a determination even though defendant did not request it. In reaching this decision, we respectfully disagree with the opinion of the Third Department in *People v Woullard* (__AD3d__, 2014 NY Slip Op 01637 [3d Dept 2014]), which reached the opposite conclusion.

Although it may be, as the People argue, that the facts of the case do not warrant youthful offender treatment, that is for the trial court to determine. Since we are ordering a new sentencing proceeding, we find it unnecessary to address defendant's other arguments.

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

ENTERED: APRIL 29, 2014

CLERK

Mazzarelli, J.P., Sweeny, Andrias, Manzanet-Daniels, Kapnick, JJ.

12110 The People of the State of New York, Ind. 1232/09
Respondent,

-against-

Michael Rutledge,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Ruth Pickholz, J. at hearing; Laura A. Ward, J. at plea and sentencing), rendered September 7, 2010, convicting defendant of manslaughter in the first degree, and sentencing him, as a second felony offender, to a term of 17 years, unanimously affirmed.

Defendant's purported waiver of his right to appeal was invalid for the same reasons found in *People v Braithwaite* (73 AD3d 656 [1st Dept 2010], *lv denied* 15 NY3d 849 [2010]).

The Supreme Court properly denied defendant's motion to suppress statements made to the police since the totality of the circumstances demonstrates that the People met their burden of establishing the voluntariness of the statements (*see United States v Anderson*, 929 F2d 96, 99 [2d Cir 1991]; *People v Anderson*, 42 NY2d 35, 38 [1977]). The detective who spoke to

defendant at the precinct after his arrest candidly testified at the suppression hearing that, prior to administering *Miranda* warnings, for a period of approximately 20 minutes, he urged defendant to talk to the police and "gave him several reasons why he should." The detective properly conveyed to defendant that he knew defendant was involved in the crime, stating "point blank" that the evidence against defendant was strong, including videotape and eyewitness evidence. He urged defendant to take advantage of "your chance" to speak before the other suspects implicated him (*see People v Vasquez*,235 ad2D 322 [1st Dept 1997], *affd* 90 NY2d 972 [1997]; *People v Tarleton*, 184 AD2d 463 [1st Dept 1992], *lv denied* 80 NY2d 910 [1992]; *People v May*, 100 AD3d 1411 [4th Dept 2012], *lv denied* 20 NY3d 1063 [2013]). The detective also told defendant that cooperation could be beneficial and that the detective would "call the D.A." once defendant "put down" his story. After defendant indicated that he wanted to talk, he was read his *Miranda* rights, waived them, and proceeded to make several written statement and one videotaped statement.

There is nothing in the record to indicate that defendant's will was overborne or that the detective's preliminary remarks tricked, cajoled or threatened him into waiving his *Miranda* rights. Defendant was no novice to the criminal justice system

(*see United States v Anderson*, 929 F2d at 99). Indeed, defendant's initial statement denied any involvement in the crime. His subsequent statements, made after again being properly given his *Miranda* rights, were voluntarily made (*People v Vazquez*, 235 AD2d at 322).

People v Thomas (22 NY3d 629, 2014 NY Slip Op 1208 [2013]) does not compel a different result. *Thomas* involved a defendant who was interrogated for a total of approximately 9 1/2 hours, broken into two segments of 2 and 7 1/2 hours, all of which were videotaped. At the end of the interrogation, defendant demonstrated to police how he threw the infant victim from over his head to a low-lying mattress. This videotape was the only evidence that defendant had caused his son's death.

During this interrogation, the police told defendant a number of quasi and outright falsehoods. For example, he was told at least 21 times that his son was still alive and that by telling the police how he was injured it would assist the treating physicians in providing care to the infant. Defendant was also told that if he continued to deny responsibility for his son's injuries, the police would arrest his wife. Finally, defendant was told 67 times the incident could be viewed as merely an accident and that if he made full disclosure, he would

not be arrested (14 times) and would be permitted to go home (8 times).

The Court of Appeals found that "the set of highly coercive deceptions" utilized by the police "were of a kind sufficiently potent to nullify individual judgment in any ordinarily resolute person and were manifestly lethal to self-determination when deployed against defendant, an unsophisticated individual without experience in the criminal justice system" (2014 NY Slip Op 1208 at *7).

None of those factors are present in this case. As noted, defendant was experienced in the criminal justice system. His will and judgment were clearly not overborne by the detective's initial self-described "spiel" about the evidence in the case and the potential benefits to defendant of cooperation. There is no indication in this record that the detective's characterization of the evidence, including the representation that defendant was one of a group of individuals identified on a surveillance video,

and that on that video he was holding a cane that witnesses to the crime said was used in the assault on the victim, was inaccurate or fabricated. His motion to suppress these statements was therefore properly denied.

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

ENTERED: APRIL 29, 2014

CLERK

Tom, J.P., Acosta, Saxe, DeGrasse, Freedman, JJ.

12139-
12140 Index 301410/12

Highrise Hoisting & Scaffolding, Inc.,
Plaintiff-Respondent,

-against-

Liberty Insurance Underwriters, Inc.,
et al.,
Defendants,

RSUI Indemnity Company,
Defendant-Appellant,

Jamilah Duvall, et al.,
Defendants-Respondents.

_____

Hardin, Kundla, McKeon & Poletto, P.A., New York (George R. Hardin of counsel), for appellant.

Montfort, Healy, McGuire & Salley, Garden City (Michael A. Baranowicz of counsel), for Highrise Hoisting & Scaffolding, Inc., respondent.

Clark, Gagliardi & Miller, P.C., White Plains (Lucille A. Fontana of counsel), for Jamilah Duvall, respondent.

Jacoby & Meyers, LLP, Newburgh (George A Kohl, 2nd, of counsel), for Ian Walcott, respondent.

Richard J. O'Keeffe, Larchmont, for Morales respondents.

_____

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered April 11, 2013, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for summary judgment declaring that defendant RSUI Indemnity Co. was obliged to indemnify Highrise in the

underlying actions, and denied RSUI's cross motion for summary judgment, unanimously affirmed, with costs. Appeal from decision, same court and Justice, dated January 14, 2013, directing the parties to settle order, unanimously dismissed, without costs, as taken from a nonappealable paper.

Since the insuring agreement of the primary insurance policy issued by defendant Liberty Insurance Underwriters, Inc. broadly provides coverage for all "occurrences," which are defined as "accidents," the underlying actions, which resulted from an automobile accident, would fall within the Liberty policy's broad coverage grant (*see Sixty Sutton Corp. v Illinois Union Ins. Co.*, 34 AD3d 386, 388 [1st Dept 2006]). It is undisputed, however, that the Liberty policy contains an automobile exclusion, and if a claim falls within the scope of the policy's insuring agreement, an insurer must issue a timely disclaimer pursuant to Insurance Law § 3420(d) to deny coverage based upon an exclusion (*see Matter of Worcester Ins. Co. v Bettenhauser*, 95 NY2d 185, 189-190 [2000]; *Zappone v Home Ins. Co.*, 55 NY2d 131, 136-137 [1982]). The RSUI excess policy follows the form of the Liberty primary policy because it incorporates, by reference, the terms of the underlying policy and is designed to match the coverage provided by the underlying policy (*see Tishman Constr. Corp. of N.Y. v Great Am. Ins. Co.*, 96 AD3d 494 [1st Dept 2012]).

Excess insurers have an obligation to disclaim pursuant to Insurance Law § 3420(d); accordingly, where RSUI disclaimed coverage more than seven months after receiving notice of claim, and failed to offer any explanation for its delay, RSUI's attempted disclaimer failed to comply with Insurance Law § 3420[d] as a matter of law (*see Grow-Kiewit-MK-Maclean Grove v Lexington Ins. Co.*, 232 AD2d 329, 329 [1st Dept 1996]).

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

ENTERED: APRIL 29, 2014

CLERK

Sweeny, J.P., Saxe, Moskowitz, Gische, Clark, JJ.

10240-
10240A-
10241

Index 603742/09
650754/09

New Media Holding Company, LLC,
Plaintiff-Respondent,

-against-

Konstantin Kagalovsky, et al.,
Defendants-Appellants,

Aspida Ventures, Ltd., et al.,
Defendants.

- - - - -

Konstantin Kagalovsky, et al.,
Counterclaim Plaintiffs-Appellants,

-against-

Vladimir Gusinski, et al.,
Counterclaim Defendants-Respondents.

- - - - -

New Media Distribution Company Ltd.,
Plaintiff-Respondent,

-against-

Iota Ventures, LLP, et al.,
Defendants-Appellants.

_____

Hoguet Newman Regal & Kenney, LLP, New York (Fredric S. Newman of counsel), for appellants.

Covington & Burling LLP, New York (C. William Phillips of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Charles E. Ramos, J.), entered September 20, 2012 (Action 1), affirmed, without costs. Judgment, same court and Justice, entered September 20, 2012 (Action 2), modified, on the law, to vacate the award as against Kagalovsky, and otherwise affirmed, without costs. Appeal from decision, same court and Justice, entered August 16,

2012, dismissed, without costs, as taken from a nonappealable paper.

Opinion by Moskowitz, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

John W. Sweeny, Jr., J.P.
David B. Saxe
Karla Moskowitz
Judith J. Gische
Darcel D. Clark, JJ.

10240-10240A-10241
Index 603742/09
650754/09

_____x

New Media Holding Company, LLC,
Plaintiff-Respondent,

-against-

Konstantin Kagalovsky, et al.,
Defendants-Appellants,

Aspida Ventures, Ltd., et al.,
Defendants.

- - - - -

Konstantin Kagalovsky, et al.,
Counterclaim Plaintiffs-Appellants,

-against-

Vladimir Gusinski, et al.,
Counterclaim Defendants-Respondents.

- - - - -

New Media Distribution Company Ltd.,
Plaintiff-Respondent,

-against-

Iota Ventures, LLP, et al.,
Defendants-Appellants.

_____x

Defendants Konstantin Kagalovsky and Iota LP appeal from a judgment of the Supreme Court, New York County (Charles E. Ramos, J.), entered September 20, 2012, awarding plaintiff New Media Holding Company, LLC the total sum of $31,732,541.85 as against them (Action 1), and from a decision, same court and justice, entered August 16, 2012. Defendants Iota ventures, LLP, Iota LP and Kagalousky appeal from a judgment, same court and Justice, entered September 20, 2012, awarding plaintiff New Media Distribution Company (NMDC) the total sum of $4,571,059.54 as against defendants Kagalovsky and Iota Ventures LLP (Action 2), and from the aforesaid decision.

Hoguet Newman Regal & Kenney, LLP, New York (Fredric S. Newman, Joshua D. Rievman, Jeffrey a. Miller and Damian R. Cavaleri of counsel), for appellants.

Covington & Burling LLP, New York (C. William Phillips and Christopher Y.L., Yeung of counsel), for respondents.

MOSKOWITZ, J.

This appeal arises from a business transaction between Konstantin Kagalovsky and Vladimir Gusinski, both of whom are successful businesspeople. Before becoming involved in the media venture at issue in this case - Iota Ventures LLP (the partnership) a partnership formed for the purpose of owning, developing and operating a Ukranian television network called TVi - Gusinski developed and operated Russian-language media businesses, founding what eventually became one of the top three private television networks in Russia. For his part, Kagalovsky, who has a PhD in economics, served as Russia's representative on the Board of the International Monetary Fund, and also served, among other positions, as Deputy Chairman for a leading privately owned Russian oil company.

In early 2007, Gusinski decided to create a television channel in Ukraine, as he believed that the country had a promising television market. He shared his intention with Kagalovsky, whom he knew socially, and Kagalovsky expressed a desire to join Gusinski in the new venture. Over the next several months, the two men discussed the project.

In late 2007, continuing in 2008, Gusinski and Kagalovsky had a series of meetings in Gusinski's offices in Manhattan and London. Kagalovsky toured Gusinski's television studios in

Manhattan and met in New York with personnel from Gusinski's television companies to learn about the business. Further, Kagalovsky came to New York to negotiate the terms of licensing agreements for programming to be aired on TVi. In fact, in December 2007, Kagalovsky signed an agreement for a security pass for Gusinski's Manhattan offices; the pass would have allowed Kagalovsky unfettered access to those offices, from which TVi was broadcast in the first months of its operation.

During the series of 2007 and 2008 meetings, Gusinski and Kagalovsky negotiated the formation of the partnership. On April 14, 2008, Gusinski and Kagalovsky executed a partnership agreement (the agreement), and, according to the terms of that agreement, were to own and control TVi equally. Kagalovsky, however, took primary responsibility for the financial oversight and the establishment of the structure for the television network -- an endeavor that included organizing the legal and financial structure of the partnership.

Acting on instructions from Kagalovsky, Grant Brown, who managed Kagalovsky's trusts and business entities, and Alexis Maitland Hudson, Kagalovsky's attorney, worked to establish an ownership structure for TVi. Because Ukranian law required TVi to be owned by a Ukranian company, the partnership ultimately held TVi through subsidiaries organized in Cyprus and Ukraine. A

series of these subsidiaries owned TeleRadioSvit LLC (TRS), a Ukranian entity; TRS, in turn, operated as TVi.

On April 14, 2008, the same day as the signing of the partnership agreement, plaintiff New Media Holding Company, LLC (New Media), Gusinski's nominee, acquired a 50 percent interest in the partnership; Kagalovsky's nominee, Iota LP, owned the other 50 percent interest.[1] Thus, through their nominees' equal ownership interests, Gusinski and Kagalovsky owned and controlled 100 percent of TVi. Over 2008 and much of 2009, the parties contributed around $24 million – roughly $12 million each – to develop and operate TVi.

The partnership agreement was to be governed by the law of New York State, but also expressly incorporated rights and obligations provided under the Delaware Revised Uniform Partnership Act (DRUPA). For example, the partnership agreement provided that "[e]xcept as otherwise provided herein, all rights, liabilities and obligations of the Partners, both as between themselves and as to persons not parties to this Agreement, shall be as provided in [DRUPA]."

The partnership agreement designated Brown as manager of the

[1] Kagalovsky's initial nominee to the partnership, Petal Capital Holdings, Ltd., was the 50 percent owner before Iota LP, but Kagalovsky later replaced Petal with Iota LP. Kagalovsky is the settlor and the beneficiary of the trusts that own Petal.

partnership's day-to-day operations, but the partners retained joint management and decision making authority. To that end, the partnership agreement incorporated the joint management and consent provisions of DRUPA, which stated in relevant part that (i) "[e]ach partner has equal rights in the management and conduct of the partnership business and affairs"; (ii) "[a] difference arising as to a matter in the ordinary course of business of a partnership may be decided by a majority of the partners"; and (iii) "[a]n act outside the ordinary course of business of a partnership may be undertaken only with the consent of all of the partners" (Del Code Ann title 6, § 15-40l [f], [j]). Although Brown had not spoken with Gusinski before the parties executed the partnership agreement, he understood that he "had a duty to be honest" to both partners of the partnership.

In summer 2009, Gusinski and Kagalovsky began to have disputes over TVi, and on September 6, 2009, the two met at Kagalovsky's house in London to discuss their differences. During that meeting, Gusinski offered to buy Kagalovsky's 50% interest, but Kagalovsky refused the offer.[2]

[2] At trial, when asked, "[I]n fact, [Gusinski] proposed to buy you out, didn't he?" Kagalovsky responded, "Probably." In light of Kagalovsky's general lack of candor at trial, we interpret this equivocal response to mean that Gusinski did, in fact, offer to buy Kagalovsky's 50 percent of the partnership.

After the partners failed to resolve their disputes, Kagalovsky decided to force Gusinski's ouster by secretly diluting Gusinski's ownership interest.[3] Through a series of allegedly clandestine transactions, Kagalovsky eventually transferred more than 99 percent of TVi's equity to companies that his family trusts owned; as a result of these transactions, nonappealing defendants Aspida Ventures, Ltd. and Seragill Holdings, Ltd. now own 99 percent of TVi. Kagalovsky, who paid only $68,000 for the transfers, is the ultimate beneficiary of both Aspida and Seragill and he completely dominates and controls both companies.

Gusinski did not know about the transactions at the time Kagalovsky made them. Moreover, after Kagalovsky and his representatives had diluted the partnership's (and therefore Gusinski's) interest in TVi, Gusinski contributed another $850,000 to the partnership.

In addition to diluting the partnership's ownership of TVi, Kagalovsky stopped payment on fees for programming that TVi was licensing from New Media Distribution Company (NMDC), an entity

[3] For their part on this appeal, Kagalovsky and Iota LP blandly characterize this method as "recapitalization" that incidentally had the "ultimate effect of diluting the partnership's ownership of TVi."

of which Gusinski held an 85 percent share.[4] Indeed, past due licensing fees to NMDC accounted for almost half of the $850,000 that Gusinski transferred to the partnership after his interest had been diluted, but Brown never paid the fees due.

In late September 2009, Kagalovsky consolidated control of TVi through his representatives and ousted Gusinski's representative at the network. The dilution was complete by around the beginning of October 2009. Brown received records concerning the dilution, but did not inform either New Media or Gusinski. Further, on October 14, 2009, Brown executed an assignment deed; that deed transferred certain TVi trademark rights from the partnership to TRS, which by that time was 99 percent owned by Kagalovsky's trusts. As with the dilution, no one informed New Media or Gusinski about the transfer of trademark rights.

Throughout October and November 2009, defendants continued to act as though the partnership still owned TVi. For example, on October 16, 2009, Kagalovsky's attorney, Maitland Hudson, wrote a letter to Gusinski's counsel in New York, stating (falsely, by that time) that the partnership had "a single potential asset . . . namely its indirect shareholding" in TVi.

[4] Non-party AIG Investments, a private investment firm, owns 13.5 percent of the remaining interest in NMDC.

In his letter, Maitland Hudson also described the partners as "equal participant[s]" in the "TVi business." Similarly, even after the dilution and transfer of trademark rights, Brown continued to request funding from New Media, making a request for $2.1 million in operating expenses through January 2010.

On November 24, 2009, Gusinski's representatives learned of the dilution and the transfer, and Gusinski confronted Brown to determine what had happened. Although Brown was aware of the relevant events, and in fact had been apprised of the dilution at the time it was occurring and immediately afterward, he denied that he knew about any transfer of TVi shares. To further his deception, Brown created an email chain feigning ignorance of the transfers and purporting to make further inquiries about them.

In October 2009, NMDC sued the partnership in the United States District Court for the Southern District of New York, demanding that the partnership pay the outstanding licensing fees. Around one month later, in November 2009, Iota LP sued New Media and Gusinski, also in the Southern District of New York, alleging breach of fiduciary duties in connection with the partnership.

On November 30, 2009, Kagalovsky and Iota LP's then-counsel wrote to New Media's counsel, noting that New Media's Jersey (Channel Islands) counsel had contacted Brown and threatened to

sue him in a Jersey court. Kagalovsky and Iota's counsel took the position that any litigation involving New Media "should be commenced in New York" rather than in the courts of Jersey, Channel Islands, where both Iota and the partnership had their principal places of business. Counsel further noted that NMDC had tried to start litigation in Kiev even though it had already commenced litigation in New York. Counsel stated his belief that the various litigations involving NMHC, the partnership, and Brown "may require the intervention of New York's courts" and inquired "whether your clients wish to resolve the various issues raised to date in the courts of New York, where you filed first, or all over Europe as well."

On December 14, 2009, New Media sued Kagalovsky, Iota LP, Aspida and Seragill in New York state court, asserting, among other things, claims for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, breach of contract and tortious interference with contract [Action 1]. A few days later, after voluntarily dismissing its federal action, NMDC refiled its federal claims in state court, this time including Kagalovsky and Iota LP as defendants with the partnership, and adding an unjust enrichment claim as against Kagalovsky [Action 2]. Kagalovsky and Iota LP filed counterclaims in Action 1, adding NMDC and Gusinski as counterclaim defendants, and filed

nearly identical counterclaims against NMDC in Action 2.

Kagalovsky and Iota successfully moved to consolidate the actions for discovery, and then twice moved to consolidate the actions for trial. The trial ultimately took place over 24 days between December 7, 2011 and April 26, 2012.

Kagalovsky and Iota LP, both non-domiciliaries of New York State, argue that the record shows no basis for long-arm jurisdiction under CPLR 302. Thus, they conclude, the trial court erred when it precluded them from presenting evidence on the question of jurisdiction.

To begin, this court has already found, on a prior appeal, that the trial court properly exercised jurisdiction over nonparty defendants Aspida Ventures, Ltd. and Seragill Holdings, Inc. (97 AD3d 463 [1st Dept 2012]). Our determination was based upon a finding that those two entities were Kagalovsky's agents. As we noted, Kagalovsky's "negotiation of the partnership agreement in New York and . . . Iota LP's subsequent actions in New York, including its commencement of an action in federal court in New York based on the partnership agreement, are sufficient to show that [Aspida and Seragill], 'through an agent,' transacted 'any business within' the state" under CPLR 302(a)(1) (97 AD3d at 464).

This framework has not changed since this case was last

before us on appeal. Kagalovsky and Iota LP admit, as they must, that Kagalovsky visited New York several times, and met during those visits with Gusinski or Gusinski's representatives. However, Kagalovsky and Iota LP adamantly denied at trial (and continue to deny on appeal) that any of the New York meetings involved TVi or discussions about the partnership agreement. Rather, they insist, Kagalovsky and Gusinski had already agreed to all the essential terms of the partnership by the time Kagalovsky visited New York on December 18, 2007. The trial court understandably found these protestations to be incredible and determined that, in fact, it had jurisdiction over defendants. We find no basis in the record to disturb the trial court's credibility determinations (*Matter of Metropolitan Transp. Auth.*, 86 AD3d 314, 320 [1st Dept 2011]). At any rate, despite defendants' arguments to the contrary, the testimony in the record supports that conclusion; although Gusinski did not recall the details of the first meeting that he had with Kagalovsky, he did recall that later negotiations regarding the partnership took place in New York. Similarly, Gusinski's counsel testified that negotiations over forming the partnership took place in New York City and London beginning in late 2007 into 2008.

Nor does maintenance of this action in New York "offend

traditional notions of fair play and substantial justice," as Kagalovsky and Iota LP maintain; in fact, this theory contradicts their previous position in this litigation. As noted above, Kagalovsky and Iota LP's then-counsel took issue with commencing litigation in Jersey, stating that litigation should be commenced in New York Courts rather than courts in Jersey or Kiev. Having stated through their counsel that they not only submitted to jurisdiction here, but insisted on it, Kagalovsky and Iota LP cannot now be heard to complain that jurisdiction by a New York court offends notions of substantial justice.

Similarly, Kagalovsky and Iota LP waived the right to challenge personal jurisdiction by freely using the protections of the New York courts when pursuing rights related to the partnership. For example, as noted above, Iota LP filed the first lawsuit against New Media in the Southern District of New York (*see Bernstein v 1995 Assoc.*, 211 AD2d 560 [1st Dept 1995]; *Biener v Hystron Fibers, Inc.*, 78 AD2d 162, 166 [1st Dept 1980]).

Further, the waiver resulting from that voluntary submission to New York's jurisdiction is attributable to Kagalovsky as Iota LP's alter ego. Contrary to defendants' contention, this Court's determination on the prior appeal that defendants Aspida Ventures and Seragill Holdings and defendants Kagalovsky and Iota LP were alter egos (97 AD3d at 464) is law of the case, foreclosing re-

examination of this issue and precluding the need for additional evidence (*see Board of Mgrs. of the 25 Charles St. Condominium v Seligson*, 106 AD3d 130, 135 [1st Dept 2013]).

We turn now to the breach of contract and breach of fiduciary duty claims.[5] The existence of the partnership agreement supports the trial court's finding of both breach of contract and breach of fiduciary duty (*see Garber v Stevens*, 94 AD3d 426 [1st Dept 2012]; *Andersen v Weinroth*, 48 AD3d 121, 136 [1st Dept 2007]). Indeed, the partnership agreement expressly rendered the parties subject to the fiduciary obligations set forth in DRUPA (*see Schuss v Penfield Partners, L.P.*, _ A2d _, 2008 WL 2433842, *10, 2008 Del Ch LEXIS 73, *34 [Del Ch 2008]; *RJ Assocs. Inc. v Health Payors' Org. Ltd. Partnership HPA, Inc.*, No. 16873, 1999 WL 550350, *10, 1999 Del Ch LEXIS 161 [Del Ch July 16, 1999]; *Mandelblatt v Devon Stores*, 132 AD2d 162, 167-68 [1st Dept 1987]).

Here, the trial court found that the acts of defendants Kagalovsky and Iota LP "frustrated the entire purpose of the Partnership Agreement, and injured and destroyed [New Media's]

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[5] Defendants argue that the trial court improperly considered Delaware law, rather than New York law, in determining this issue. However, there is very little difference between the two states' laws on the issue; therefore, even assuming for the sake of argument that the trial court committed error, that error would not change our analysis.

right to receive the fruits of the Partnership Agreement, all in breach of the implied covenant of good faith and fair dealing," and it cannot be said that the trial court's "determination could not have been reached under any fair interpretation of the evidence" (*Matter of Metropolitan Transp. Auth.*, 86 AD3d 314, 320 [1st Dept 2011] [internal quotation marks omitted]).

As for the amount of damages, we reject defendants' contention that the trial court erred in calculating the awarded amount. First of all, it was defendants, not New Media, that sought, mid-trial, to include expert evidence and to change the way the court examined damages. Indeed, the court granted defendants' motion to advance a change in theory because defendants wanted to introduce expert testimony; plaintiffs actually objected to the change. New Media then moved its own valuation expert's testimony and report into evidence with no objection from defendants. Defendants accepted this report even though it set forth the theory of damages to which they now object. Quite to the contrary, defendants did not raise an objection issue until they filed a post-trial -- indeed, a post-loss -- brief (*see Horton v Smith*, 51 NY2d 798 [1980]; *Miano v Westchster Gulf Serv. Sta.*, 90 AD2d 477 [1st Dept 1982]). As a result, defendants have waived their objections on this issue.

Defendants further argue that the court's acceptance of two

valuations – the valuation of AIG and the valuation of plaintiffs' trial expert – prevents reasonable certainty in assessing damages. We reject this argument. First of all, the record provides no basis to support defendants' claim that TVi was worth absolutely nothing at the time of the dilution.[6] We also note that defendants went to great lengths surreptitiously to acquire assets they now insist are worthless; this conclusion holds true even if one believes, as defendants have insisted on appeal, that all their actions were completely above board.

Even putting aside the fact that defendants' protestations on appeal make little sense in light of their own actions -- none of which defendants seriously dispute -- the evidence presented at trial could reasonably have allowed the court to conclude that, given the lengths that defendants traveled to remove TVi from plaintiff's control, funding for the network would have continued. Likewise, Kagalovsky himself has paid many millions of dollars to finance TVi since he acquired it. The trial court also could have concluded, based on a reasonable interpretation of the evidence, that given the value of NMDC's interest in TVi, NMDC would have continued to provide programming to TVi at reasonable prices and that TVi would have achieved greater

[6] TVi is apparently still broadcasting as of this writing (*see* http://tvi.ua [accessed March 13, 2014]).

distribution of its audience and its market share. Defendants' expert did not disagree with many of these conclusions, and even agreed with some of them – for example, that a hypothetical network similar to TVi would be able to expand its broadcasting.

Defendants' remaining arguments on the damages issue, which essentially challenge the court's credibility assessments, are unavailing (*see Matter of Metropolitan Transp. Auth.*, 86 AD3d at 320).

Defendants next assert that the trial court improperly struck their jury demand in Action 1. This argument has no merit. Because defendants' demand for the equitable remedy of rescission in Action 2 was not "incidental" to that action, and their demand for rescission was not "incidental" to their counterclaims in Action 1, defendants effectively waived their right to a jury trial by joining those demands with claims for legal relief (*see Phoenix Garden Rest. v Chu*, 234 AD2d 233, 234 [1st Dept 1996]; *O'Rorke v Carpenter*, 125 AD2d 223 [1st Dept 1986]). In addition, defendants argued that rescission of the partnership's license agreements with NMDC was "the core" of their claims in both actions, and defendants all asserted, as part of their Action 1 counterclaims, that they had "no adequate remedy at law."

With respect to the tortious interference claim, we find in

defendants' favor. As we have already noted, because Kagalovsky completely dominated and controlled Iota LP, and because he used that domination and control to commit wrongdoing – that is, to dilute the partnership's ownership of TVi – Iota LP is Kagalovsky's alter ego (*see Matter of Morris v New York State Dept. of Taxation and Fin.*, 82 NY2d 135, 141 [1993]). Thus, defendants are correct in concluding that they cannot be simultaneously alter egos and tortious intervenors (*see UBS Sec. LLC v Highland Capital Mgt., L.P.*, 86 AD3d 469, 476-477 [1st Dept 2011]). Accordingly, we dismiss the claim for tortious interference.

Defendants dispute the trial court's finding of joint and several liability on the unjust enrichment claim against Kagalovsky. This argument also has merit, and we find in defendants' favor on this claim. The existence of the license agreements precludes a claim for unjust enrichment against Kagalovsky because the subject matter of the claim is covered by those agreements (*see Feigen v Advance Capital Mgt. Corp.*, 150 AD2d 281, 283 [1st Dept 1989], *lv dismissed in part, denied in part* 74 NY2d 874 [1989]). Furthermore, Kagalovsky was not a defendant in Action 2 at trial, as the trial court had already dismissed NMDC's only claim against him for tortious interference, leaving only the partnership as a defendant in that

action (*New Media Distribution Co. Ltd v Iota Ventures LLP, et al.*, No. 650754/2009 [filed on or about August 5, 2011]). The trial court also granted summary judgment dismissing a similar unjust enrichment claim as against Kagalovsky and Iota LP with respect to the partnership agreement (*New Media Co LLC v Kagalovsky, et al.*, No. 603742/2009 [filed July 22, 2011]). As there is no other finding of liability against Kagalovsky in Action 2, we modify the judgment in that Action to vacate the award of money damages as against him.

Finally, the trial court flatly rejected defendants' argument that NMDC agreed to defer payments due under the license agreements upon its finding that the testimony of the only witness with any knowledge of the alleged deferrals was not credible. Defendants offer no reason to disturb that finding, which is entitled to deference (*see Matter of Metropolitan Transp. Auth.*, 86 AD3d at 320).

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

Accordingly, the judgment of the Supreme Court, New York County (Charles E. Ramos, J.), entered September 20, 2012, awarding plaintiff New Media Holding Company, LLC the total sum of $31,732,541.85 as against defendants Konstantin Kagalovsky and Iota LP (Action 1), should be affirmed, without costs; the

judgment, same court and Justice, entered September 20, 2012, awarding plaintiff New Media Distribution Company (NMDC) the total sum of $4,571,059.54 as against defendants Kagalovsky and Iota Ventures LLP (Action 2), should be modified, on the law, to vacate the award as against Kagalovsky, and otherwise affirmed, without costs; the appeal from the decision, same court and Justice, entered August 16, 2012, should be dismissed, without costs, as taken from a nonappealable paper.

All concur.

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

ENTERED: APRIL 29, 2014

CLERK