SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 7, 2015

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Tom, Renwick, Gische, JJ.

13443-
13444 Switzerland Green,
Plaintiff-Respondent,

Index 400725/12

-against-

Metropolitan Transportation
Authority Bus Company, et al.,
Defendants-Appellants,

Tyese Laws, et al.,
Defendants-Respondents.

_____

Morris Duffy Alonso & Faley, New York (Arjay G. Yao and Gail S. Karan of counsel), for appellants.

Laurence M. Savedoff, PLLC, Bronx (Jill Savedoff of counsel), for Switzerland Green, respondent.

Stillman & Stillman, P.C., Bronx (Robert A. Birnbaum of counsel), for Tyese Laws, respondent.

Law Offices of James J. Toomey, New York (Evy Kazansky of counsel), for Tyese Laws and Samantha Santiago, respondents.

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Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered March 7, 2014, which, to the extent appealed from, denied defendants Metropolitan Transportation Authority Bus Company and Isael Reyes's (the MTA defendants) motion to renew, granted their motion to reargue their cross motion for summary judgment, and,

upon reargument, adhered to its prior order, same court and Justice, entered October 8, 2013, granting the motion of defendants Tyese Laws and Samantha Santiago dismissing plaintiff's causes of action against them and denying the MTA defendants' cross motion, modified, on the law, to grant upon reargument the MTA defendants' motion for summary judgment, and otherwise affirmed, without costs. The Clerk is directed to enter judgment accordingly. Appeal from the October 8, 2013 order, dismissed, without costs, as academic.

In this action arising from an accident involving an MTA bus, the motion court improperly denied the MTA defendants' motion for summary judgment. Plaintiff was a passenger on the bus when it came into contact with a vehicle operated by defendant Laws. Defendant Reyes, the operator of the bus, stated in an affidavit that he was suddenly cut off by a red van while proceeding north on the Bruckner Expressway, causing him to veer left and collide with the Oldsmobile sedan driven by Laws and owned by defendant Santiago. The MTA defendants moved for summary judgment, arguing that, as a matter of law, the emergency doctrine precludes any liability on their part. Upon denial of their motion, the MTA defendants moved to reargue and renew. In support of the motion, the MTA defendants provided a second affidavit by Reyes reiterating his testimony that he reacted by

entering into the left lane after being cut off by a red van that suddenly jumped a barrier in order to enter the expressway.

The emergency doctrine applies in situations where an actor is confronted with a sudden or unexpected circumstance, not of the actor's own making, that leaves little or no time for thought, deliberation, or consideration to weigh alternative courses of conduct (Caristo v Sanzone, 96 NY2d 172 [2001]). The existence of an emergency and the reasonableness of a party's response to it ordinarily present questions of fact warranting the denial of summary judgment (*Cahoon v Frechette*, 86 AD3d 774 [3d Dept 2011], *Bello v Transit Auth. New York City*, 12 AD3d 58 [2d Dept 2004]). Where, however, a driver presents sufficient evidence that he or she did not contribute to the creation of the emergency situation, that his or her actions were reasonable under the circumstances, and that there is otherwise no opposing evidentiary showing sufficient to raise a legitimate question of fact, summary judgment may be granted (*Patterson v Central NY Regional Transp. Auth.* [CNYRTA], 94 AD3d 1565 [4th Dept 2012], lv denied 19 NY3d 815 [2012]). Speculation concerning the possible accident-avoidance measures of a defendant faced with an emergency is not sufficient to defeat summary judgment (*Cruz v MTLR Corp.*, 111 AD3d 568, 568 [1st Dept 2013]).

The MTA made a prima facie showing of entitlement to

judgment as a matter of law based on the emergency doctrine defense (*Edwards v New York City Tr. Auth.*, 37 AD3d 157 [1st Dept 2007]). Reyes stated that he was traveling north in the right lane on the Bruckner Expressway at a rate of speed of approximately 15-20 miles per hour. Although there was a service lane to his right, it was separated from the main expressway by a guard barrier. He indicated that when a red van suddenly jumped the guard barrier and entered the expressway, he immediately reacted by moving the bus into the left lane in order to avoid a collision with the van.

No alternate factual account of the accident is presented in opposition. Plaintiff, who was asleep at the time of impact, does not provide a differing version of events. Laws was rendered unconscious as a result of the collision and testified at his 50h hearing that he did not recall anything pertaining to the actual accident.

Nor is the motion premature, even though the deposition of Reyes has not yet been held. CPLR 3212(f) permits the party opposing summary judgment to have further discovery when it appears facts supporting its position exist but cannot be stated (*Terranova v Emil*, 20 NY2d 493, 497 [1987]). Where facts essential to oppose a motion for summary judgment are exclusively within the knowledge and control of the movant, summary judgment

may be denied (*Global Mins. & Metals Corp v Holme*, 35 AD3d 93, 103 [1st Dept 2006], *lv denied* 8 NY3d 804 [2007]). Even under such circumstance, the party invoking CPLR 3212(f) must show some evidentiary basis supporting its need for further discovery. Although Reyes's account of the accident is uncorroborated, neither plaintiff nor co-defendant Laws presents a scintilla of evidence calling the veracity of his account into question, which would have shown further discovery is required to develop their opposition to summary judgment. Contrary to the view of the dissent, Reyes's second affidavit, although more detailed, is neither contradictory nor inconsistent with his first affidavit, and plaintiffs do not raise that argument as a basis for denying summary judgment.

The motion court correctly granted summary judgment to defendants Laws and Santiago. Laws did not create the emergency and there is no factual opposition to his claim that before the accident, he was traveling at a safe rate of speed.

We have considered the parties' remaining arguments and find them unavailing.

All concur except Tom J. who dissents in a memorandum as follows:

TOM, J. (dissenting)

This dispute over the traffic accident at issue does not warrant application of the emergency doctrine. Even if the doctrine were applicable, questions of fact exist with respect to both the circumstances of the accident and the propriety of the bus driver's actions. Since no discovery has been conducted and essential facts within the knowledge of the movant are unavailable to the other parties, summary disposition in favor of defendants Metropolitan Transportation Authority (MTA) and its driver is inappropriate (CPLR 3211[d]).

The MTA bus was being operated in the right lane on the northbound side of the Bruckner Expressway in the Bronx. The driver, defendant Isael Reyes, stated that he was traveling at about 15 to 20 miles an hour in an area where the right lane of the two-lane expressway is separated from the entrance lane to the immediate right by a rubber curb affixed to the roadway, from which plastic poles protrude upright. Reyes alleges that a red van suddenly jumped this curb and entered into his lane of travel, prompting him to swerve to the left to avoid a collision.

Defendant Tyese Laws was operating a 2000 Oldsmobile owned by defendant Samantha Santiago in the left lane of the roadway when defendant's bus swerved into his lane, pinning his vehicle between the bus and the concrete barrier that separates

northbound and southbound traffic. Laws lost consciousness and awoke in the hospital.

Plaintiff was asleep in the last row of the bus and was awakened by the impact of the collision, which threw her into the seat in front of her. On the side of the bus where she was sitting, she observed a car trapped between the bus and the center divider. She sustained injury to her knees and ankles.

The MTA's report of the incident indicates damage was sustained to the left-side cargo area at the center of the bus. It further discloses damage to both sides of the Oldsmobile driven by Laws and recounts that the fire department had to cut off the roof of the vehicle to remove the driver, who testified at his 50-h hearing that he was still unconscious when transported to the hospital.

Laws and Santiago (Laws defendants) moved and the Authority and its driver (MTA defendants) cross-moved for summary judgment on the issue of liability. Plaintiff opposed both motions. Supreme Court granted the Laws defendants' motion and denied the MTA defendants' cross motion. Upon a motion to renew and reargue by the MTA defendants, which included the supplemental affidavit of Isael Reyes, the court denied renewal and, upon reargument, adhered to its previous decision.

Renewal was properly denied. The Reyes affidavit contains

no facts that could not have been included in the original moving papers and sets forth no excuse for failure to supply them on the original application (CPLR 2221[e][2]).

Upon reargument, the court properly adhered to its prior decision. The moving party bears the initial burden of making a prima facie showing of entitlement to summary judgment by demonstrating "the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The MTA defendants seek to absolve themselves of liability on the ground that the bus driver was confronted with "a sudden unforeseeable occurrence not of his ... own making" (*Herbert v Morgan Drive-A-Way*, 202 AD2d 886, 888 [3d Dept 1994] [Yesawich Jr., J., dissenting], *revd for reasons stated by dissent* 85 NY2d 895 [1995]). They contend that the circumstances afforded no opportunity for "weighing alternative courses of conduct" (*Rivera v New York City Tr. Auth.*, 77 NY2d 322, 327 [1991]) and that the driver should not be cast in negligence because "the actions taken are reasonable and prudent in the emergency context" (*id.*).

The MTA defendants failed to meet their burden for summary judgment. The two affidavits submitted by Reyes are contradictory and inconsistent with the evidence, and they raise factual issues as to whether his actions were reasonably prudent under the circumstances. Reyes described the roadway as

consisting of two travel lanes, with "a service lane" to the right, and "a guard barrier" between the right travel lane and the service lane. The motion court described the service lane as a "merging lane." Reyes later stated that a red van jumped the guard barrier, entered the expressway, approaching perpendicular to and directly in front of the bus. Knowing that there were vehicles traveling in the lane to the left of the bus, Reyes nevertheless swerved his vehicle to the left causing the collision. In its initial decision denying the MTA defendants' motion for summary judgment, the motion court posed the salient question: If there were moving cars to the left and a service lane to the right, why did Reyes move left?

In his supplemental affidavit submitted with the motion to reargue, Reyes advanced the new claim that there was construction on the roadway (failing to specify the location) and that there were "several sections of guard barriers which consisted of yellow delineators" presumably to the right of the lane in which the bus was traveling; thus, there was no "merge lane" for him to safely pull into. Even accepting the additional facts, the same question must still be posed: With knowledge that there were moving vehicles in the lane to the left of the bus, would it not have been more prudent to move the bus to the right where there was no moving traffic but merely yellow delineators with rubber

poles and temporary guard barriers, thereby avoiding any risk of colliding with vehicles in the left travel lane?

Further, in the supplemental affidavit, Reyes states that the red van came across the merge lane "from the intersecting street, Edgewater, which forms a T-intersection with the Expressway." This statement raises an inconsistency with Reyes' previous affidavit, in which he claimed that there was a service lane to the right of his travel lane and "suddenly and unexpectedly a red van jumped the guard barrier to enter the expressway." In the supplemental affidavit, Reyes states that the van came out of Edgewater Street, crossed the merge lane and jumped the guard barriers to enter the expressway. It should be noted that the MTA investigator's drawing indicates that there are two merge lanes to the right of the expressway and not just one merge lane as Reyes described. The two merge lanes separate the Bruckner Expressway and the beginning of Edgewater Street. Reyes's observation that the van came from Edgewater Street, some distance away, which is the logical inference to be drawn from his supplemental affidavit, negates the inference that there was an emergency situation. A factual issue is raised as to whether Reyes could have taken other precautions, such as slowing down the bus, to avoid a collision. Based on his supplemental affidavit, Reyes would have observed the van come out of

Edgewater Street, cross two merge lanes, and plow through several sections of guard barriers and yellow delineators with rubber poles before entering the expressway. This scenario, which does not constitute an emergency situation, is inconsistent with Reyes's assertion in his first affidavit that "suddenly and unexpectedly, a red van jumped the guard banner in order to enter the expressway" and negates the majority's conclusion that Reyes's two affidavits were "neither contradictory nor inconsistent."

Additionally, summary judgment should not be granted where facts essential to oppose the motion are exclusively within the knowledge of the moving party and they might well be disclosed by an examination before trial (*Magee v County of Suffolk*, 14 AD3d 664 [2d Dept 2005], *lv dimissed* 7 NY3d 771 [2006]; *Finkelstien v Cornell Univ. Med. Coll.*, 269 AD2d 114, 117 [1st Dept 2000]). In opposing the MTA defendants' motion, plaintiff and the Laws defendants assert that Reyes's credibility concerning the "phantom" red van is in issue and that the circumstances of the accident, as described by Reyes, are highly suspect or even impossible. Thus, they maintain that they should be afforded an opportunity to depose Reyes. It is an injustice to grant the MTA defendants summary judgment based on Reyes's self-serving and inconsistent affidavits when no discovery has been conducted and

Reyes, the only witness to the accident, has not been deposed.

Summary judgment should also not have been granted to the Laws defendants. At the §50-h hearing, Laws testified that he had no memory of the accident or recollection of the events immediately leading up to the accident after being rendered unconscious by the collision. Laws's subsequently tailored affidavit, which states he was going slow before the accident, is inconsistent with his § 50-h testimony and insufficient to support summary disposition.

Accordingly, I would modify the order entered October 8, 2013, solely to deny the motion of the Laws defendants and would otherwise affirm.

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

ENTERED: APRIL 7, 2015

CLERK

Gonzalez, P.J., Renwick, DeGrasse, Manzanet-Daniels, Gische, JJ.

14000 Mark Maheras, et al., Index 114296/11
Plaintiffs-Respondents,

-against-

Ayaz Awan, et al.,
Defendants-Appellants,

High Rise Development Enterprises, et al.,
Defendants.

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Wade Clark Mulcahy, New York (Gabriel E. Darwick of counsel), for appellants.

LaRocca Hornik Rosen Greenberg & Blaha LLP, New York (Eric P. Blaha of counsel), for respondents.

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Order, Supreme Court, New York County (Donna M. Mills, J.), entered January 23, 2014, which, insofar as appealed from as limited by the briefs, denied defendants Ayaz Awan and New York Best Development, Inc.'s motion to dismiss plaintiffs Mark Maheras and Dana Whittle's claims, unanimously affirmed, without costs.

In 2007, plaintiffs Maheras and Whittle, husband and wife, purchased a brownstone located in Manhattan for $2.3 million. They hired defendants Ayaz Awan and his construction company, New York Best Development, Inc. (NYB), to perform a gut renovation of the brownstone.

In October 2008, in connection with the renovation, Awan

loaned plaintiffs $73,850 pursuant to a promissory note. After making $12,000 in payments to Awan on the note, plaintiffs refused to make further payments. Awan then sued them to recover on the note and moved for summary judgment in lieu of a complaint. In opposition, plaintiffs argued that they were not required to make any further payments because defendants negligently performed the work and because Awan engaged in fraud in inducing plaintiffs to contract with NYB.

In September 2010, Supreme Court granted Awan summary judgment and ordered plaintiffs to pay the outstanding amount owed under the note. On December 6, 2010, plaintiffs filed for bankruptcy protection for the United States Bankruptcy Court in the Southern District of New York. They did not identify any legal claim against defendants in connection with the renovation project as an asset in their bankruptcy filings. Plaintiffs were discharged from bankruptcy in March 2011, and the proceeding was closed in July 2011.

In December 2011, plaintiffs commenced this action, alleging negligence, breach of contract, tortious conduct, fraud, and deceit in connection with the renovation of the brownstone, and seeking damages of not less than $1,000,000. In their answer to the complaint, defendants asserted the affirmative defense that plaintiffs lack standing and capacity to maintain the claims

because they were not listed as assets of the bankruptcy estate.

On September 6, 2013, defendants moved to dismiss the complaint for lack of standing. On October 1, 2013, plaintiffs moved to reopen the bankruptcy proceeding to amend the schedule of assets to include their claims in the instant action, noting that they learned in August 2013 that the claims were not listed on the schedules and, as a result, remained property of the bankruptcy estate. On October 23, 2013, the bankruptcy court granted the motion and amended the schedule, and on October 31, 2013, the trustee in bankruptcy submitted a notice of its intent to abandon the claims. On December 30, 2013, the bankruptcy court issued an order ruling that the bankruptcy estate's interest in the claims were abandoned to plaintiffs.

Supreme Court denied defendants' motion to dismiss plaintiffs' claims for lack of standing, finding that in light of the bankruptcy court order granting the trustee's notice of abandonment of the claims, "the asset reverts and re-vests to [plaintiffs] as if the trustee never held ownership of the asset." On appeal, defendants argue that Supreme Court erred in failing to dismiss the complaint, contending that the subsequent reversion of the claims to plaintiffs upon the trustee's abandonment did not cure plaintiffs's lack of standing at the time the claims were asserted. We disagree.

We reject defendants' assertion that plaintiffs' premature filing of their complaint is a bar to their continuation of the present action. When the trustee abandons estate property, the property stands as if no bankruptcy had been filed and the debtor enjoys the same claim to it as he held before the filing of the bankruptcy (*In re Ira Haupt & Co.*, 398 F2d 607, 613 [2d Cir 1968]; *Wallace v Lawrence Warehouse Co.*, 338 F2d 392, 394 n. 1 [9th Cir 1964]; *Rosenblum v Dingfelder*, 111 F2d 406, 409 (2d Cir 1940]). To hold otherwise would create the inequitable result of extinguishing plaintiffs' claims even though the trustee does not intend to pursue them.

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

ENTERED: APRIL 7, 2015

CLERK

Mazzarelli, J.P., DeGrasse, Richter, Feinman, JJ.

14565-
14566 Index 651813/11

Fleming and Associates, CPA, PC, et al.,
Plaintiffs-Respondents,

-against-

Murray & Josephson, CPAs, LLC, et al.,
Defendants-Appellants.

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Doron Zanani Law Office, New York (Doron Zanani of counsel), for appellants.

Bamundo, Zwal, & Schermerhorn, LLP, New York (James M. Caffrey of counsel), for respondents.

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Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered on or about May 28, 2014, which denied defendants' motion for summary judgment dismissing the cause of action for breach of fiduciary duty, unanimously affirmed, without costs. Order, same court and Justice, entered on or about May 28, 2014, which denied defendants' motions for partial summary judgment, unanimously affirmed, without costs.

As we have held, "Successive motions for summary judgment should not be entertained without a showing of newly discovered evidence or other sufficient justification" (*Jones v 636 Holding Corp.*, 73 AD3d 409, 409 [1st Dept 2010]). These appeals are from orders denying defendants' second and third motions for summary

judgment. Their first motion for the same relief was denied by Supreme Court's order entered on July 23, 2013. These motions are not based upon newly discovered evidence and our decision on a prior appeal (108 AD3d 447 [1st Dept 2013]) does not otherwise warrant their consideration (*see e.g. Amill v Lawrence Ruben Co., Inc.*, 117 AD3d 433, 434 [1st Dept 2014]).

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

ENTERED: APRIL 7, 2015

CLERK

Tom, J.P., Renwick, DeGrasse, Manzanet-Daniels, Clark, JJ.

14606-
14607 Index 652287/12

Stonehill Capital Management, LLC, et al.,
Plaintiffs-Respondents,

-against-

Bank of the West,
Defendant-Appellant,

Mission Capital Advisors, LLC,
Defendant.

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Katten Muchin Rosenman LLP, New York (David A. Crichlow of counsel), for appellant.

Law Offices of Martin Eisenberg, New York (Martin Eisenberg of counsel), for respondents.

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Judgment, Supreme Court, New York County (O. Peter Sherwood, J.), entered June 4, 2014, in favor of plaintiffs as against defendant bank, pursuant to an order, same court and Justice, entered March 25, 2014, which granted plaintiffs' motion for summary judgment on its breach of contract cause of action and denied defendant bank's cross motion for summary judgment dismissing the amended complaint, unanimously reversed, on the law, without costs, the motion denied, the cross motion granted, and the complaint dismissed as against defendant bank. The Clerk is directed to enter judgment accordingly. Appeal from the aforesaid order, unanimously dismissed, without costs, as

subsumed in the appeal from the judgment.

Defendant auctioneer had apparent authority to acknowledge plaintiffs' winning bid on the loan at issue and to state on defendant bank's behalf that the sale of the loan would go through subject to a final, executed agreement. Defendant bank was aware of the auctioneer's statements and the bank's counsel acted as if the statements were true (*see Hallock v State of New York*, 64 NY2d 224, 231-232 [1984]). However, the bank made explicit statements that it was not to be bound absent an executed writing. Although it agreed to the use of a standard industry form to represent the prospective agreement, when it was discovered that the nature of the loan did not permit use of the form, the parties entered into negotiations regarding the necessary modifications to its language. Before any writing was executed, defendant exercised its right under the offering memorandum to withdraw the loan asset in question from the auction process and refused to go forward with the transaction.

For a court to enforce a purported contract, the proponent must establish, in the first instance, that the parties intended to be mutually bound by an agreement, together with all material terms of the agreement, factors that implicate the doctrine of definiteness (see *Cobble Hill Nursing Home v Henry & Warren Corp.*, 74 NY2d 475, 482 [1989], *cert denied* 498 US 816 [1990]).

That the bank may have agreed to most of the material terms and remained silent when presented with changes proposed by plaintiffs does not fulfill the condition requiring a written agreement and tender of a deposit equal to 10% of the purchase price. These conditions comprising a valid acceptance under the agreement were not fulfilled. Thus, even if all of the material terms were agreed upon, as plaintiffs contend, plaintiffs have not established that acceptance was "clear, unambiguous and unequivocal" so as to render such terms enforceable (*King v King*, 208 AD2d 1143, 1144 [3d Dept 1994]).

We have considered the bank's remaining contentions for affirmative relief and find them unavailing.

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

ENTERED: APRIL 7, 2015

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Feinman, Gische, JJ.

14711 Roberta Rappaport,
Plaintiff,

Index 105442/10
590633/10

-against-

The DS & D Land Company, L.L.C., et al.,
Defendants,

Manhattan Skyline Management Corp., et al.,
Defendants-Appellants,

Torpedo Iron Works,
Defendant-Respondent.

[And a Third-Party Action]

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Mauro Lilling Naparty LLP, Woodbury (Anthony F. DeStefano of counsel), for appellants.

Gannon, Rosenfarb & Drossman, New York (Lisa L. Gokhulsingh of counsel), for respondent.

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Order, Supreme Court, New York County (Richard F. Braun, J.), entered September 4, 2014, which granted the motion of defendant Torpedo Iron Works (Torpedo) for summary judgment dismissing the amended complaint as against it, unanimously affirmed, without costs.

Plaintiff was injured when, while descending an exterior staircase, she tripped over a protruding metal bracket located at the base of the stairs' right handrail. Defendant the DS & D Land Company, L.L.C. owned the subject premises, defendants-

appellants Manhattan Skyline Management Corp. and MHM Realty LLC managed the premises, and Torpedo was hired by defendants on occasion to perform welding work at the premises.

The record establishes that Torpedo did not owe a duty of care to plaintiff (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]). Although Torpedo was hired to stabilize the handrails some five months prior to plaintiff's fall, the work did not involve the metal bracket at the base of the handrail. Appellants argue that Torpedo failed to exercise reasonable care in the performance of its duties, and thereby launched a force or instrument of harm, causing plaintiff's injury. Appellants, however, provide no evidence to raise a triable issue of fact as to whether Torpedo negligently performed the work for which it was hired (*see Agosto v 30th Place Holding, LLC*, 73 AD3d 492 [1st Dept 2010]; *Perez v Morse Diesel*, 258 AD2d 428 [1st Dept 1999]).

Appellants' argument that Torpedo owed them a duty to warn of the potential hazard of the protruding metal bracket, is unpersuasive. "In the absence of a contract for routine or systematic maintenance, an independent repairer/contractor has no duty to install safety devices or to inspect or warn of any purported defects" (*Daniels v Kromo Lenox Assoc.*, 16 AD3d 111, 112 [1st Dept 2005]). We note that the metal bracket was visible to appellants' own employees who regularly inspected the building

and the work performed by Torpedo on the handrail.

Although appellants also seek reinstatement of cross claims for common-law indemnification and contribution, their answer, dated November 9, 2011, asserted no such cross claims. Accordingly, we decline to address the issue.

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

ENTERED: APRIL 7, 2015

CLERK

Friedman, J.P., Acosta, Moskowitz, Richter, Kapnick, JJ.

14718 The People of the State of New York, Ind. 2442/13
Respondent,

-against-

Darryl Brooks,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Jared Wolkowitz 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 (Gregory Carro, J.), rendered on or about September 5 2013,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTERED: APRIL 7, 2015

CLERK

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

Friedman, J.P., Moskowitz, Richter, Kapnick, JJ.

14719-
14719A Michael Wesley Harris, etc.,
Plaintiff-Appellant,

-against-

The Union Theological Seminary
in the City of New York,
Defendant-Respondent.

Index 153405/12

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Michael W. Harris, appellant pro se.

Ward Greenberg Heller & Reidy LLP, Rochester (Tony R. Sears of counsel), for respondent.

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Order, Supreme Court, New York County (Ellen M. Coin, J.), entered March 12, 2013, which, inter alia, granted defendant's motion to dismiss the cause of action for a declaratory judgment as to plaintiff's rights under a housing agreement and related relief, unanimously affirmed, without costs. Order, same court and Justice, entered August 5, 2013, which, upon reargument, granted defendant's motion to dismiss the remaining claims, unanimously affirmed, without costs.

Plaintiff, a formerly tenured professor, seeks declaratory and injunctive relief against his former employer with respect to his rights to employment and faculty housing under three agreements entered into in December 1998. Plaintiff's right to occupy "Knox 4W," an on-campus apartment, was finally determined

by an order, same court (Lewis Bart Stone, J.), entered January 23, 2004, in a prior action brought by plaintiff against defendant. The court found that defendant's reassignment of plaintiff's faculty housing was not arbitrary and capricious and was rationally based upon duly adopted guidelines. Plaintiff is collaterally estopped from relitigating that issue (*see D'Arata v New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659, 664 [1990]).

Plaintiff's challenge to the January 2006 termination of his employment should have been brought as a CPLR article 78 proceeding, which is governed by a four-month statute of limitations (*Maas v Cornell Univ.*, 94 NY2d 87, 92 [1999]; CPLR 217[1]). Conversion of this action to an article 78 proceeding is not warranted since plaintiff's challenge to the termination of his employment and revocation of his tenure is time-barred (see CPLR 103; *Gertler v Goodgold*, 107 AD2d 481, 487 [1st Dept 1985], *affd* 66 NY2d 946 [1985]). Plaintiff's post-termination communications with defendant did "not toll or recommence the statutory period" (*Benson v Trustees of Columbia Univ. in City of*

N.Y., 215 AD2d 255, 256 [1st Dept 1995], *lv denied* 87 NY2d 808 [1996]).

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 7, 2015

CLERK

Friedman, J.P., Acosta, Moskowitz, Richter, Kapnick, JJ.

14720 In re Kiano R.,

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.

Zachary W. Carter, Corporation Counsel, New York (Drake A. Colley of counsel), for presentment agency.

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Order of disposition, Family Court, New York County (Mary E. Bednar, J.), entered on or about October 22, 2013, which adjudicated appellant a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would constitute the crime of sexual abuse in the first degree, and placed him on probation for a period of 18 months, unanimously affirmed, without costs.

Probation was the least restrictive dispositional alternative consistent with appellant's needs and the community's need for protection (*see Matter of Katherine W.*, 62 NY2d 947 [1984]), given the seriousness of the underlying sex crime against a very young child. Furthermore, the court properly

concluded that appellant was in need of a treatment program that could not be completed within the duration of an adjournment in contemplation of dismissal (*see e.g. Matter of Jose P.*, 115 AD3d 420 [1st Dept 2014]).

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

ENTERED: APRIL 7, 2015

CLERK

Friedman, J.P., Acosta, Moskowitz, Kapnick, JJ.

14721-
14722 Wendy Kaufman,
Plaintiff-Appellant,

-against-

BWD Group LLC,
Defendant-Respondent.

Index 111120/10

_____

Hirschel Law Firm, P.C., Garden City (Daniel Hirschel of counsel), for appellant.

Catalano Gallardo & Petropoulos, LLP, Jericho (Gary Petropoulos of counsel), for respondent.

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Judgment, Supreme Court, New York County (Barbara Jaffe, J.), entered February 19, 2014, to the extent appealed from as limited by the briefs, dismissing plaintiff's complaint pursuant to an order, same court and Justice, entered on or about November 14, 2013, which granted defendant's motion for summary judgment, unanimously affirmed, without costs. Appeal from the aforesaid order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

In this action for breach of contract and negligence, plaintiff insured alleges that defendant insurance brokerage company failed to procure sufficient insurance coverage to fully compensate her for her loss of personal property after a fire damaged her Massachusetts home in June 2009.

Defendant made a prima facie showing of its entitlement to judgment as a matter of law by submitting evidence that plaintiff never specifically requested that it obtain a certain level of contents coverage for the home and that there was no special relationship between the parties requiring it to obtain appropriate coverage (*see 46th St. Dev., LLC v Marsh USA, Inc.*, 100 AD3d 455 [1st Dept 2012]). The record demonstrates that plaintiff did nothing to change the contents coverage in the six months before the fire, even though defendant had informed her in January 2009 of the amount of the coverage and that it was at its lowest available limit (*see Murphy v Kuhn*, 90 NY2d 266, 271 [1997]; *see also Nicholas J. Masterpol, Inc. v Travelers Ins. Cos.*, 273 AD2d 817, 818 [4th Dept 2000]).

In opposition, plaintiff failed to raise a triable issue of fact. The record does not support plaintiff's contention that she specifically asked defendant to procure sufficient contents coverage to fully compensate her in the event of a covered loss (*see Hoffend & Sons, Inc. v Rose & Kiernan, Inc.*, 7 NY3d 152, 157-158 [2006]). That plaintiff's husband, who was not an insured, believed that the policy provided full compensation is of no moment, given that defendant's employee had informed plaintiff in January 2009 of the amount of coverage. Further, it is undisputed that plaintiff never paid for an evaluation of the

home's contents and that defendant never agreed to conduct such an evaluation (*compare Stevens v Hickey-Finn & Co.*, 261 AD2d 300, 301 [1st Dept 1999] [issue of fact raised where broker, in response to the plaintiff's request, undertook to estimate the replacement value of the property]). Moreover, there is no evidence that defendant told plaintiff that she would be completely compensated for any damaged personal property should an insurable loss occur (*see generally Voss v Netherlands Ins. Co.*, 22 NY3d 728, 735 [2014]).

Although plaintiff had been purchasing insurance from defendant for over 20 years, this alone does not raise an issue of fact as to a special relationship, especially since the evidence shows that plaintiff chose the coverage amounts and did not rely on defendant for any advice as to the appropriate amounts (*see Hoffend*, 7 NY3d at 158; *see also Murphy*, 90 NY2d at 271-273).

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

ENTERED: APRIL 7, 2015

CLERK

Friedman, J.P., Acosta, Moskowitz, Richter, Kapnick, JJ.

14723 The People of the State of New York, Respondent, Ind. 2186/08

-against-

Jesus Alejandro, Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Martin J. Foncello of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered November 28, 2011, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 23 years to life, unanimously affirmed.

Defendant's challenge to the court's jury instruction concerning the requirement of unanimity is unpreserved. We do not find any mode-of-proceedings error exempt from preservation requirements (*see People v Thomas*, 50 NY2d 467, 472 [1980]), and we decline to review this unpreserved claim in the interest of justice. As an alternative holding, we find no basis for reversal, because the court, which followed the Criminal Jury Instructions, sufficiently conveyed to the jury the principle that unanimity was required in order to reject defendant's extreme emotional disturbance defense. The absence of an

exception to the charge did not deprive defendant of effective assistance of counsel, since nothing in the instruction caused defendant any prejudice in light of the charge as a whole (*see People v Parra*, 58 AD3d 479 [1st Dept 2009], *lv denied* 12 NY3d 820 [2009]).

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

ENTERED: APRIL 7, 2015

CLERK

Friedman, J.P., Acosta, Moskowitz, Richter, Kapnick, JJ.

14725 Louis Sims, Index 111504/09
Plaintiff-Respondent,

-against-

New York City Housing Authority,
Defendant-Appellant.
- - - - -
New York City Housing Authority,
Third-Party Plaintiff-Appellant,

-against-

Lend Lease (US) Construction
LMB, Inc., formerly known as
Bovis Lend Lease LMB, Inc.,
Third-Party Defendant.
- - - - -
[And a Second Third-Party Action]

_____

Herzfeld & Rubin, P.C., New York (Linda M. Brown of counsel), for appellant.

Faber & Troy, Woodbury, (Salvatore V. Agosta of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered September 16, 2014, which denied defendant-third-party plaintiff, New York City Housing Authority's (NYCHA) motion to vacate an order, same court and Justice, entered July 2, 2014, inter alia, severing, sua sponte, the third-party and second-third-party actions, unanimously reversed, on the law, the facts and in the exercise of discretion, without costs, the motion granted, the July 2, 2014 order vacated, and the matter remanded

for further proceedings, including a determination of the motion by Lend Lease (US) Construction LMB, Inc., formerly Bovis Lend Lease LMB, Inc. (Lend Lease), for an additional deposition of the plaintiff.

The court improvidently exercised its discretion by refusing to vacate the severance order, where the actions had a common nucleus of facts, no party had been seeking severance at the time, and no party had opposed NYHCA's motion to vacate the *sua sponte* grant of severance. Nor had any party argued that they would be prejudiced by a joint trial of the main and third-party actions, or that such trial would result in substantial delay (*see Shanley v Callanan Indus.*, 54 NY2d 52, 57 [1981]; *Vecciarelli v King Pharms., Inc.*, 71 AD3d 595, 596 [1st Dept 2010]; *Sichel v Community Synagogue*, 256 AD2d 276 [1st Dept 1998]).

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

ENTERED: APRIL 7, 2015

CLERK

Friedman, J.P., Acosta, Moskowitz, Richter, Kapnick, JJ.

14726-
14726A John P. Bostany,
Plaintiff-Appellant,

-against-

Trump Organization LLC, et al.,
Defendants-Respondents.

Index 602627/08

_____

Profeta & Eisenstein, New York (Fred R. Profeta, Jr., of counsel), for appellant.

Newman Ferrara LLP, New York (Jonathan H. Newman of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Milton A. Tingling, J.), entered August 1, 2014, awarding defendants the total sum of $587,915.47, unanimously affirmed, without costs. Order, same court and Justice, entered on or about December 10, 2013, after a bench trial, to the extent it awarded attorneys' fees to defendants and referred the issue to a referee, unanimously reversed, without costs, on the law, and the award of attorneys' fees vacated.

The trial court correctly concluded that plaintiff failed to prove his damages. Plaintiff's testimony was refuted in part by defendants' log of visitors to the premises, and otherwise failed to establish that plaintiff was "'substantially and materially deprive[d] ... of the beneficial use and enjoyment of the

premises'" (*Pacific Coast Silks, LLC v 247 Realty*, LLC, 76 AD3d 167, 172 [1st Dept 2010], quoting *Barash v Pennsylvania Term. Real Estate Corp.*, 26 NY2d 77, 83 [1970]).

Furthermore, in calculating damages, the court properly rejected the testimony of plaintiff's witness regarding any diminution in the value of the premises, particularly as to sublessees, since he had never visited the premises, had limited experience in commercial real estate, and admitted that he was not qualified to value the space for purposes of subleasing, which plaintiff maintained was 79% of the space. The remaining evidence did not suffice to prove the diminution in value.

While the court did not separately address the claim of partial constructive eviction, plaintiff sought the same damages for partial constructive eviction as for breach of the covenant of quiet enjoyment. Thus, any separate damages award would have been duplicative (*see Phoenix Garden Rest. v Chu*, 245 AD2d 164, 166 [1st Dept 1997]). Indeed, plaintiff acknowledges that on these facts the same damages calculation applies to both claims (*see Bostany v Trump Org. LLC*, 88 AD3d 553 [1st Dept 2011]).

The court erred in awarding defendants attorneys' fees. The lease and rider allow for defendants to recover attorneys' fees but not for defending against their failure to make repairs. Moreover, defendants were not the prevailing party. Although

they largely prevailed in obtaining unpaid rent, they did not obtain the judgment of eviction they sought, and the court found them liable on all plaintiff's claims, and awarded abatements to plaintiff on two of his claims (*see Sykes v RFD Third Ave. I Assoc., LLC*, 39 AD3d 279 [1st Dept 2007]; *Mosesson v 288/98 W. End Tenant's Corp.*, 294 AD2d 283, 284 [1st Dept 2002]).

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

ENTERED: APRIL 7, 2015

CLERK

Friedman, J.P., Acosta, Moskowitz, Richter, Kapnick, JJ.

14727-
14727A-
14727B The People of the State of New York,
Respondent,

-against-

Ceferino Perez,
Defendant-Appellant.

Ind. 1541/11
1542/11
3209/11

_____

Jeremy Gutman, New York, for appellant.

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

_____

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered February 29, 2012, convicting defendant, upon his plea of guilty, of operating as a major trafficker and conspiracy in the second degree, and sentencing him, as a second felony offender, to an aggregate term of 20 years to life, unanimously affirmed. Judgments, same court and Justice, rendered March 13, 2012, convicting defendant, upon his pleas of guilty, of two counts of criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to concurrent terms of 10 years, unanimously reversed, on the law, and the matter remanded for further proceedings.

Since defendant did not move to withdraw his plea, he did

not preserve his claim that the court coerced his plea to operating as a major trafficker and conspiracy (*see People v Ali*, 96 NY2d 840 [2001]), and this claim does not come within the narrow exception to the preservation requirement (*see People v Peque*, 22 NY3d 168, 182 [2013]). We decline to review the claim in the interest of justice. As an alternate holding, we find that the plea was knowing, intelligent and voluntary, and was made in exchange for a favorable sentence. The court's statement that defendant "[could] not expect" concurrent sentences if he were convicted after trial was accurate under the circumstances of the case and was not coercive.

The People concede that the March 13, 2012 judgments should be reversed because the court did not advise defendant that his sentences would include postrelease supervision (*see People v Catu*, 4 NY3d 242 [2005]).

We have considered all other claims raised and find them to be unavailing.

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

ENTERED: APRIL 7, 2015

CLERK

Friedman, Acosta, Moskowitz, Richter, Kapnick, JJ.

14729 The People of the State of New York, Respondent, Ind. 1341/12

-against-

Keiyana S. Washington, Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Bonnie B. Goldburg of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Larry Stephen, J.), rendered on or about September 19, 2012, unanimously affirmed.

Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant'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 7, 2015

CLERK

Friedman, J.P., Acosta, Moskowitz, Richter, Kapnick, JJ.

14730 Ethel Corcoran, Index 106688/10
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent.

_____

Joseph A. Maria, P.C., White Plains (Edward A. Frey of counsel), for appellant.

Willkie Farr & Gallagher LLP, New York (Jill K. Grant of counsel), for respondent.

_____

Order, Supreme Court, New York County (Paul Wooten, J.), entered December 13, 2013, granting defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The court properly found that plaintiff could not demonstrate that she could satisfy the requirements of Administrative Code § 7-201(c)(2), a precondition to suit, which must be pleaded and proved by plaintiff (*see Sandler v New York City Tr. Auth.*, 188 AD2d 335, 336 [1st Dept 1992]). The complaint and plaintiff's bill of particulars allege only that defendant caused or created the dangerous condition that resulted in her injuries. However, there is no evidence in the record that the condition was the result of defendant's affirmative negligence that immediately resulted in the condition (*see Oboler*

v City of New York, 8 NY3d 888, 889 [2007]).

Plaintiff failed to raise a triable issue of fact concerning prior notice or acknowledgment of the defect by defendant. Her assertion that 14 work orders for the area could not be located is insufficient since it is speculative that these work orders would have shown that defendant's work immediately resulted in the dangerous condition, especially because the documents that were produced indicated that all repairs to the bluestone slabs in the Park were completed prior to her fall.

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

ENTERED: APRIL 7, 2015

CLERK

Friedman, J.P., Acosta, Moskowitz, Richter, Kapnick, JJ.

14731 John Brummer, Index 652565/12
Plaintiff-Appellant-Respondent,

-against-

Red Rabbit, LLC, et al.,
Defendants-Respondents-Appellants.

_____

Balestriere Fariello, New York (Jillian McNeil of counsel), for appellant-respondent.

Thomas M. Lancia, PLLC, New York (Thomas M. Lancia of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered on or about July 28, 2014, which granted defendants' motion for summary judgment dismissing the complaint and plaintiff's cross motion for summary judgment dismissing the counterclaim, unanimously affirmed, without costs.

The complaint alleges that defendant Rhys Powell was a patient of plaintiff John Brummer, a podiatrist. In 2005, Powell formed defendant Red Rabbit, LLC to provide healthy lunches to New York City preschools. Powell used his own funds and those of other investors, including a total of $25,000 from Brummer at the inception of the business, giving Brummer a 7% interest.

In the summer of 2010, Powell approached Brummer and offered him $40,000 for 6% of the company (leaving Brummer with 1%), but without disclosing that he had been in negotiations for a large

investment in Red Rabbit by two investors. Powell allegedly based his valuation of Brummer's interest on a percentage of Red Rabbit's average income for the past year and the next year as projected, and, in September 2010, Brummer accepted the $40,000.

The evidence of plaintiff's long-held desire to sell back his interest in defendant Red Rabbit, LLC demonstrates that the alleged false representations regarding the company's value and alleged concealment of impending investments from additional investors were neither relied upon nor material to plaintiff's decision to sell. Accordingly, dismissal of both the fraud and breach of fiduciary duty claims was warranted (*see generally Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 421 [1996]). Absent an allegation of actual loss by plaintiff, his unjust enrichment claim is also deficient (*see Edelman v Starwood Capital Group, LLC*, 70 AD3d 246, 250-251 [1st Dept 2009], *lv denied* 14 NY3d 706 [2010]).

The counterclaim failed to allege the breach of any duty found in defendant Red Rabbit's operating agreement. Accordingly, it was properly dismissed.

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

ENTERED: APRIL 7, 2015

CLERK

Friedman, J.P., Acosta, Moskowitz, Richter, Kapnick, JJ.

14732 In re Evelyn Ramos, Index 104148/12
Petitioner-Respondent,

-against-

The City of New York, etc., et al.,
Respondents-Appellants.

_____

Zachary W. Carter, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for appellant.

Law Offices of Leonard A. Shrier, New York (Leonard A. Shrier of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Margaret A. Chan, J.), entered October 23, 2013, to the extent appealed from as limited by the briefs, granting the petition brought pursuant to CPLR article 78 to the extent of annulling respondent Police Commissioner's determination, dated June 27, 2012, which imposed a penalty of 51 days' forfeiture, deemed already served while on pretrial suspension, unanimously reversed, on the law, without costs, and the penalty reinstated.

Petitioner, an employee of the New York City Police Department (NYPD), was found guilty of multiple specifications stemming from a variety of circumstances, including accessing police computer information for personal purposes, supplying a resident address different from that of her actual address to obtain more favorable insurance rates, and patronizing an

unlicensed establishment that served alcohol. Her record at the NYPD reflected two prior disciplinary matters, one of which stemmed from a DWI arrest and resulted in a penalty of, among other things, one year on dismissal probation.

Under the circumstances, the penalty imposed was not so disproportionate to petitioner's offenses as to be shocking to one's sense of fairness. Accordingly, there was no basis to disturb the penalty (*see Matter of Kelly v Safir*, 96 NY2d 32, 38 [2001]).

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

ENTERED: APRIL 7, 2015

CLERK

Friedman, J.P., Acosta, Moskowitz, Richter, Kapnick, JJ.

14733 The People of the State of New York, Respondent, Ind. 3720/10

-against-

Dawud McKelvin, Defendant-Appellant.

_____

The Bronx Defenders, Bronx (Ilona B. Coleman of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Ramandeep Singh of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Megan Tallmer, J.), entered on or about March 28, 2013, which adjudicated defendant a level three sexual offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously modified, on the law and as a matter of discretion in the interest of justice, to the extent of reducing the adjudication to that of a level two offender, and otherwise affirmed, without costs.

Initially, we note that defendant's correct point score is 95, supporting a presumptive level two adjudication. To the extent that the People and defendant are arguing, respectively, that points should be added or subtracted, we find those arguments to be unavailing.

The court erred in finding that defendant's mental retardation warranted an upward departure to level three. The

essence of the court's reasoning was that defendant lacked the ability to appreciate the inappropriateness of his actions, or could not control his impulsive behavior. A departure from the presumptive risk level is warranted "where there exists an aggravating or mitigating factor of a kind, or to a degree, that is otherwise not adequately taken into account by the guidelines" (*People v Johnson*, 11 NY3d 416, 421 [2008]). The guidelines clearly provide for an automatic override to a presumptive level three designation where there has been a clinical assessment that the offender has a psychological, physical, or organic abnormality that decreases his ability to control impulsive sexual behavior. Here, no such clinical assessment has been made, and thus an upward departure on this basis was improper (*see People v Chandler*, 48 AD3d 770 [2d Dept 2008]). To the extent the upward departure was based on factors other than defendant's mental retardation, those factors were adequately taken into account by the guidelines, or were not established by

clear and convincing evidence. In any event, the upward departure was an improvident exercise of discretion.

We perceive no basis for a downward departure to level one (*see People v Gillotti*, 23 NY3d 841 [2014]).

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

ENTERED: APRIL 7, 2015

CLERK

Friedman, J.P., Acosta, Moskowitz, Richter, Kapnick, JJ.

14734 Richard Argentina, et al., Index 110447/09
Plaintiffs-Appellants,

-against-

681 Fifth Avenue LLC, et al.,
Defendants-Respondents.

Sacks & Sacks, LLP, New York (Scott N. Singer of counsel), for appellants.

Law Office of James J. Toomey, New York (Eric P. Tosca of counsel), for 681 Fifth Avenue LLC respondent.

Cartafalsa, Slattery, Turpin & Lenoff, New York (Patricia G. Zincke of counsel), for Skyline Windows, LLC respondent.

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered September 27, 2013, which, to the extent appealed from as limited by the briefs, granted defendant Skyline Windows, LLC's motion for summary judgment dismissing the complaint as to it, and all cross claims, unanimously reversed, on the law, without costs, the motion denied, and the complaint as against Skyline, and all cross claims, reinstated.

Plaintiff Richard Argentina and his wife, suing derivatively, commenced this action for injuries that plaintiff, a laborer on a construction projct, received while attempting to dispose of an old window that had been removed. Employees of defendant Skyline Windows, LLC had cut the windows with a

reciprocating saw to remove them from the wall, and a shard of glass dislodged from a cut window as plaintiff was carrying it, injuring him.

Questions of fact exist as to whether Skyline's alleged failure to tape the glass on the windows before cutting and removing them was negligent. In support of its assertion that its contract with building owner 681 Fifth Avenue LLC created no duty to plaintiff to tape the windows, Skyline relies on inapposite authority holding that a contractor has no duty to perform work beyond the scope of its contract, to detect unrelated defects (*see Kleinberg v City of New York*, 27 AD3d 317 [1st Dept 2006]; *Quinones v City of New York*, 105 AD3d 932, 933-934 [2d Dept 2013]). That is not the case here, where the allegations against Skyline arise from its purportedly negligent performance of work it did perform. It had a duty to perform its work in a safe manner that did not unreasonably expose others to danger (*Vega v S.S.A. Props., Inc.*, 13 AD3d 298, 302 [1st Dept 2004]). While Skyline owed no contractual duty to plaintiffs regarding the performance of its work, it may nevertheless be liable to them in tort to the extent that its negligent performance of the duties that it performed, pursuant to its contract with defendant building owner, created a dangerous condition that injured plaintiff (*id.*; *Espinal v Melville Snow*

Contrs., 98 NY2d 136, 140 [2002]).

Skyline's cross claim for common law and/or contractual indemnification was dismissed solely as a consequence of the dismissal of plaintiff's complaint, and not on the merits. As such, we reject 681 Fifth Avenue LLC's request that Skyline's cross claim against it be dismissed, even if the complaint is reinstated.

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

ENTERED: APRIL 7, 2015

CLERK

Friedman, J.P., Acosta, Moskowitz, Richter, Kapnick, JJ.

14736 Estate of Lorette Jolles Shefner, etc., et al.,
Plaintiffs-Respondents,

-against-

Galerie Jacques De La Beraudiere, et al.,
Defendants,

Yves Bouvier,
Defendant-Appellant.

Index 112525/11

_____

Storch Amini & Munves PC, New York (John W. Brewer of counsel), for appellant.

Alston & Bird LLP, New York (Steven L. Penaso of counsel), for respondents.

_____

Order, Supreme Court, New York County (Donna M. Mills, J.), entered November 14, 2013, which, to the extent appealed from, denied defendant Bouvier's motion to dismiss the first amended complaint as against him, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the first amended complaint as against Bouvier.

In this action, plaintiffs assert that defendant Bouvier assisted with the fraudulent transfer of a piece of artwork (the de Kooning Piece), which included falsely claiming ownership of the painting, in order to deprive plaintiffs of monies to which

they are entitled pursuant to a federal default judgment. The first amended complaint alleges that Bouvier's claims to ownership are false and that he "has never owned the de Kooning Piece, and presently has no ownership interest in the de Kooning Piece."

The primary issue on this appeal is whether the first amended complaint fails to state a claim against Bouvier. Providing assistance to an alleged transferee does not state a claim sounding in fraudulent conveyance and, under New York law, there is no claim for aiding and abetting a fraudulent conveyance (*Federal Deposit Ins. Corp. v Porco*, 75 NY2d 840 [1990]). It cannot be said that the facts alleged in the first amended complaint, even when given the benefit of every favorable inference, have asserted that Bouvier had "dominion or control" over the de Kooning Piece, or that he "benefitted in any way from the conveyance," which is necessary to state a claim under a fraudulent transfer theory (*id.* at 842).

Additionally, plaintiffs are estopped from asserting the theory that Bouvier is currently the beneficial owner of the de Kooning Piece, as they previously assumed a directly contrary position in this proceeding in order to effect an attachment.

"[A] party who assumes a certain position in a legal proceeding may not thereafter, simply because his interests have changed, assume a contrary position" (*Karasick v Bird*, 104 AD2d 758, 758-759 [1st Dept 1984]).

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

ENTERED: APRIL 7, 2015

CLERK

Friedman, J.P., Acosta, Moskowitz, Richter, Kapnick, JJ.

14737 The People of the State of New York, Respondent, Ind. 5487/11

-against-

Russell Partin, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered September 26, 2012, convicting defendant, upon his plea of guilty, of burglary in the first degree, and sentencing him to a term of six years, unanimously affirmed.

Defendant did not preserve his challenge to his plea allocution, and we find that this claim does not come within the narrow exception to the preservation requirement (*see People v Peque*, 22 NY3d 168, 182 [2013]; *see also People v Toxey*, 86 NY2d 725 [1995]). We decline to review the claim in the interest of justice. As an alternate holding, we find that the plea was knowing, intelligent and voluntary, and that the plea allocution,

when viewed as a whole and in the context of the factual allegations against defendant, did not cast doubt on defendant's guilt of burglary.

We perceive no basis for reducing the sentence.

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

ENTERED: APRIL 7, 2015

CLERK

Friedman, J.P., Acosta, Moskowitz, Richter, Kapnick, JJ.

14740-
14741-
14742N

Index 401477/09
Claim 1R101191
File I12978

In re Liquidation of The Insurance Corporation of New York.

- - - - -

First Financial Insurance Company,
Claimant-Appellant,

-against-

Insurance Corporation of New York,
Defendant-Respondent.

_____

Ford Marrin Esposito Witmeyer & Gleser, LLP, New York (John A. Mattoon of counsel), for appellant.

Melito & Adolfsen PC, New York (Ignatius John Melito of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered November 12, 2013, which denied claimant's motion to reject the referee's report, granted defendant's cross motion to confirm the referee's report, and dismissed the complaint, unanimously affirmed, with costs. Appeals from orders, same court and Justice, entered February 27, 2014, and March 11, 2014, which denied claimant's motions to renew or reargue its prior motion, unanimously dismissed, without costs.

Claimant, First Financial, a judgment creditor of defendant Insurance Corporation of New York's (Inscorp) insured, a now defunct contractor, cannot avoid the requirements of the

insurance policy simply because it is filing a claim pursuant to Insurance Law § 3420(b). It has no greater rights than the insured under the policy (*see Lang v Hanover Ins. Co.*, 3 NY3d 350 [2004]), and Inscorp's 2005 disclaimer of liability for coverage was proper based on the fact that First Financial's insureds were not named as additional insureds under the Inscorp policy and also on the ground that its notice of claim was untimely (*see Aetna Cas. & Sur. Co. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 251 AD2d 216 [1st Dept 1998]).

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

ENTERED: APRIL 7, 2015

CLERK

Sweeny, J.P., DeGrasse, Manzanet-Daniels, Feinman, Gische, JJ.

13711 Lee & Amtzis, LLP, et al., Index 653050/11
Plaintiffs-Respondents,

-against-

American Guarantee and Liability
Insurance Company,
Defendant-Appellant,

Jane Kurtin,
Defendant.

_____

Coughlin Duffy LLP, New York (Adam M. Smith of counsel), for appellant.

Schwartz & Ponterio, PLLC, New York (Matthew F. Schwartz of counsel), for respondents.

_____

Order and judgment (one paper), Supreme Court, New York County (Ellen M. Coin, J.), entered January 8, 2013, reversed, on the law, without costs, plaintiffs' motion denied, the declaration in favor of plaintiffs vacated, and summary judgment granted to defendant American Guarantee and Liability Insurance company (AGLIC) to the extent of declaring that AGLIC is not obligated to defend plaintiffs in the underlying New Jersey action.

Opinion by Gische, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

John W. Sweeny, Jr., J.P.
Leland G. DeGrasse
Sallie Manzanet-Daniels
Paul G. Feinman
Judith J. Gische, JJ.

13711
Index 653050/11

_____x

Lee & Amtzis, LLP, et al.,
Plaintiffs-Respondents,

-against-

American Guarantee and Liability Insurance Company,
Defendant-Appellant,

Jane Kurtin,
Defendant.

_____x

Defendant American Guarantee and Liability Insurance Company (AGLIC) appeals from the order and judgment (one paper) of the Supreme Court, New York County (Ellen M. Coin, J.), entered January 8, 2013, which granted plaintiffs' motion for summary judgment to the extent of declaring that AGLIC is obligated to defend plaintiffs (its insureds) in an underlying action pending in New Jersey, and denied AGLIC's cross motion for summary judgment, without prejudice to renewal.

Coughlin Duffy LLP, New York (Adam M. Smith and Steven D. Cantarutti of counsel), for appellant.

Schwartz & Ponterio, PLLC, New York (Matthew F. Schwartz of counsel), for respondents.

GISCHE, J.

This declaratory judgment action involves the issue of whether certain transactions among the plaintiffs and nominal defendant Jane Kurtin fall within the "insured's status" and "business enterprise" exclusions to coverage in plaintiffs lawyers' professional liability insurance policy (policy) issued by defendant American Guarantee and Liability Insurance Company (AGLIC). Broadly stated, these exclusions apply where a lawyer is sued for malpractice and the claim also arises in whole or in part from the lawyer's status as the manager of a business enterprise in which the lawyer has a controlling interest.

Kurtin was a client of plaintiff Lee & Amtzis, LLP (law firm). She commenced an action in the Superior Court of New Jersey against the law firm, both partners individually, and Astoria Station, LLP (*Kurtin v R. Randy Lee, Esq., et al.*, Super Ct, Somerset County, docket No. SOM-L-1098-10) (New Jersey action). In the New Jersey action, Kurtin asserted claims for breach of contract, non-payment of two promissory notes which she held and were made, respectively, in 2006 and 2010, and unjust enrichment based upon the non-payment of those notes. Kurtin also asserted claims for legal malpractice/negligence against the law firm and each of its named partners. In connection with her malpractice/negligence claims, Kurtin alleged that when she

entered into these loans, Lee was not only the "managing member" of Astoria Station, he was also a practicing attorney and partner of the law firm, which had the same address as Astoria Station. Kurtin claimed that the attorneys had induced her to proceed with certain financial transactions in which they had a financial interest; they failed to recommend that she obtain independent legal counsel; they had allowed their legal services to her to be influenced by their own business ventures outside the practice of law; and the attorneys knew their interests and Kurtin's interests were adverse.

Following motion practice in the New Jersey action, Kurtin prevailed on her promissory note claims, and in its decision dated and filed October 27, 2011, the court directed entry of a money judgment against Astoria Station and Lee in the amount of $1,332,739.25 on the 2006 note and a money judgment against Lee in the amount of $125,043.65 on the 2010 note (*Kurtin v. R. Randy Lee, Esq.*, Super Ct, Somerset County, Oct. 23, 2011, Coyle, Jr., J.). Lee had signed the 2006 note on behalf of Astoria Station and also personally guaranteed its payment. In relevant part, the 2006 note states that it is a "replacement of all prior debts due to Jane Kurtin, together with accrued interest, from Leewood-

Edgemere, LLC[1], R. Randy Lee and related entities, all of which are considered to be paid in full." The 2006 note also refers to a condominium project underway "at the Astoria Station project in Queens," stating that "pay down will be TWENTY FIVE THOUSAND DOLLARS ($25,000.00) at each unit closing." The 2010 note represents a loan made by Kurtin to Lee personally.

The law firm and partners moved to dismiss the remaining malpractice/negligence claims in the New Jersey action, but that motion was denied. Subsequently the parties in the New Jersey action stipulated to stay the malpractice/negligence claims pending resolution of this declaratory judgment action.

In this action, plaintiffs seek a declaration that AGLIC has a contractual duty to defend them against the malpractice/negligence claims asserted by Kurtin in the New Jersey action. Plaintiffs were successful in their motion for summary judgment before Supreme Court, largely due to the motion court's reliance on a prior decision by this Court in *K2 Inv. Group, LLC v American Guar. & Liab. Ins. Co.* (91 AD3d 401 [1st Dept 2012]), which construed the identical policy language at issue here. Our decision, however, has since been reversed by

[1]This is another real estate concern that Lee is apparently affiliated with.

the Court of Appeals[2] (*K2 Inv. Group, LLC v American Guar. & Liab. Ins. Co.*, 22 NY3d 578 [2014]) (*K2*). The Court of Appeals' decision in *K2* likewise requires a reversal of the motion court's order and judgment (one paper) in plaintiffs' favor and a judgment in favor of AGLIC, declaring that it does not have a duty to defend plaintiffs in the New Jersey action.

Section I (B) of the policy (Defense and Investigation), provides that AGLIC has a "duty to defend any Claim based on an act or omission in the Insured's rendering or failing to render Legal Services for others, seeking Damages that are covered by this policy . . . even if any of the allegations of the Claim are groundless, false or fraudulent" (boldface omitted). The policy defines "Legal Services" as "those services performed by an Insured as a licensed lawyer in good standing . . . but only where the act or omission was in the rendition of services ordinarily performed as a lawyer" (boldface omitted).

Section III of the policy (Exclusions) provides as follows:

> "This policy shall not apply to any Claim based upon or arising out of, in whole or in part: . . .

[2] *K2 Inv. Group, LLC v American Guar. & Liab. Ins. Co.*, 21 NY3d 384 [2013] (*K2-1*) affirmed 91 AD3d 401 [1st Dept 2012]. *K2-1* was, however, vacated by *K2* following reargument (21 NY3d 1049 [2013]).

"D[3]. the Insured's capacity or status as:

1. an officer, director, partner, trustee, shareholder, manager or employee of a business enterprise . . .

"E[4]. the alleged acts or omissions by any Insured, with or without any compensation, for any business enterprise . . . in which any Insured has a Controlling Interest" (boldface omitted).

In interpreting this identical policy language, the Court of Appeals found that these exclusions would apply to hybrid malpractice claims that arise partly out of an attorney's law practice and partly out of a business enterprise in which the attorney has a controlling interest (22 NY3d at 587-588). In *K2*, the attorney was sued for legal malpractice and AGLIC refused to provide him with a defense (*id.* at 584). After the clients in the malpractice action obtained a default judgment, the attorney assigned his claim against AGLIC to the clients. The claimed malpractice in *K2* was that Daniels, an attorney, failed to record mortgages he prepared on behalf of his clients, who were the lenders (*id.* at 587). Daniels was also a principal in Goldan, the entity that had borrowed the funds. In the declaratory

[3]Section III (D) of the policy is hereinafter referred to as the Insured Status Exclusion.

[4]Section III (E) of the policy is hereinafter referred to as the Business Enterprise Exclusion.

judgment action at issue in *K2*, the motion court granted summary judgment to the clients which stood in the shoes of, Daniels, the insured. That decision was affirmed by this Court on appeal (91 AD3d 401). In *K2*, however, this Court's decision was reversed. In reversing, but denying AGLIC summary judgment, the Court of Appeals found there were issues of fact about whether the policy exclusions precluded coverage, given the undeveloped record before it:

> "The Appellate Division majority's rationale for granting summary judgment was, essentially, that a case arising out of the alleged attorney-client relationship between plaintiffs and Daniels could not also arise out of Daniels's managerial status with, or acts or omissions for, Goldan. But the claims could arise out of both. Because the malpractice case was resolved on default, the record tells us little about the substance of the claims; it is at least possible, however, that the alleged malpractice occurred because Daniels was serving two masters - plaintiffs, his clients, and Goldan, the company of which he was a principal. If that is the case, it can fairly be said that the malpractice claims arose partly out of Daniels's law practice and partly out of his status with or activity for Goldan - precisely the situation that the insured's status and business enterprise exclusions seem to contemplate" (*K2*, 22 NY3d at 587-588).

Here, we have a well developed record showing that plaintiffs' activities on Kurtin's behalf are of a hybrid nature and, therefore, excluded from coverage. It is undisputed that plaintiffs prepared the legal documents necessary to effectuate the loans, including the promissory notes. It is also undisputed

that Lee was the managing member of Astoria Station and the obligor on the 2006 note which Lee also personally guaranteed. Lee, personally, was the borrower on the 2010 note. The proceeds from these financial transactions were used in connection with Astoria Station's real estate development projects, indirectly which benefitted Lee, the managing member of that enterprise. Kurtin prevailed in the New Jersey action and obtained a money judgment for the nonpayment of the promissory notes. Her remaining claims of legal malpractice and negligence do not seek damages that are any different than the relief she already obtained in the New Jersey action. Applying New York law, as the New Jersey court has already found applies, Kurtin's allegations, that she was not advised to get her own attorney, or that she should have had certain investment properties independently appraised, are generic claims that are insufficient to sustain a claim for legal malpractice (*Schwartz v Olshan Grundman Frome & Rosenzweig*, 302 AD2d 193 [1st Dept 2003]). Kurtin has not alleged any losses, other than the nonpayment of the notes, and those notes have now been reduced to judgments in her favor.

Lee was simultaneously serving two masters, Kurtin, his client, and a company of which he was a principal. This is precisely the situation that the policy's Insured Status and Business Enterprise Exclusions exclude from coverage. Since

Kurtin's claims partly arise from the legal services the attorneys provided her with, but also from Lee's status or activity for his company, Astoria Station, they are of a hybrid nature, and are not covered, meaning that AGLIC has no duty to defend plaintiffs in the New Jersey action.

This result obtains notwithstanding that the issue in this case is whether AGLIC has a duty to defend plaintiffs, not whether it must indemnify its insured, as was the issue in *K2*. Although the duty to defend is broader than the duty to indemnify, where the facts alleged plainly do not bring the underlying claim within the coverage of the policy, there is no obligation to defend (*see American Guar. and Liability Ins. Co. v Hoffmann*, 61 AD3d 410 [1st Dept 2009]).

Arguments by Amtzis and the law firm, that the exclusions to coverage do not apply to him or the firm because neither he nor the law firm had any interest in Astoria Station, focus solely on the Insured Status Exclusion (Section III [D]) and ignore the Business Enterprise Exclusion (Section III [E]) which excludes from coverage "the alleged acts or omissions by any Insured, with or without any compensation, for any business enterprise . . . in which any Insured has a Controlling Interest" (boldface omitted). Since Lee was a partner in the law firm, by assuming dual roles of providing legal advice to a client, while simultaneously

pursuing his own business interests, Lee placed himself, his law partner and the law firm firmly within the exclusions in the professional policy plaintiffs seek protection under. Consequently, under the Business Enterprise Exclusion, it is immaterial that Amtzis did not have an interest in Astoria Station; AGLIC still has no duty to provide him with a defense in the New Jersey action.

Accordingly, the order and judgment (one paper) of the Supreme Court, New York County (Ellen M. Coin, J.), entered January 8, 2013, which granted plaintiffs' motion for summary judgment to the extent of declaring that AGLIC is obligated to defend plaintiffs (its insureds) in an underlying action pending in New Jersey, and denied AGLIC's cross motion for summary judgment, without prejudice to renewal, should be reversed, on the law, without costs, plaintiffs' motion denied, the declaration in favor of plaintiffs vacated, and summary judgment

granted to AGLIC the extent of declaring that it is not obligated to defend plaintiffs in the underlying New Jersey action.

All concur.

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

ENTERED: APRIL 7, 2015

CLERK